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The relevance of the Terms of Reference

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(1)

I Introduction

The Terms of Reference contain the scope and limitations of an activity. ((*1)) They define the structure of a project in which people have agreed to work together to accomplish a shared goal. In contrast with a charter which only defines high-level requirements, the Terms of Reference are more detailed. They show how the project in question is defined and how it will be developed and verified. They also define success factors. Detailed Terms of Reference define the objectives and deliverables and the role and responsibility of each participant in the project, the resources, the budget and funding, and the time schedule for the deliverables.

Whereas the Terms of Reference may have become common practice in national and international commercial arbitration, we will demonstrate that it is not a simple formality that parties fulfil before commencing formal proceedings. Instead, the Terms of Reference play an important role in the conduct of the proceedings and their outcome, not the least with regard to the purpose to come to an enforceable decision which ends a dispute in a way that respects the rights of the parties all along the proceedings, and which parties had declared from the outset to accept as a final and binding outcome to their dispute.

The notion Terms of Reference is somewhat imperfect. 'Terms' are conditions, provisions, requisites, stipulations. 'Reference' suggests that the parties have agreed that the detailed terms will serve as a point of reference, a guide. However, in practice, the concept means much more than that. They are binding specifications that parties and the arbitral tribunal must respect throughout the project. Parties agree to refer a dispute to an arbitral tribunal for resolution under the agreed specifications. The French 'Acte de Mission' and the Dutch 'Akte van Opdracht' or 'Opdrachtsakte' much more reveal that the Terms of Reference are there to define the role of the arbitral tribunal and the goal that the tribunal is expected to achieve within a certain time frame.

That is what we will discuss in more detail below. We will see that Terms of Reference are meant to enhance efficiency and effectiveness in arbitration proceedings.

P 258

II The Terms of Reference at first glance

The Terms of Reference refer to the document which is drawn up by – or at least prepared under the leadership of – the arbitral tribunal and which includes particular provisions. It is signed by the parties and the arbitral tribunal and it is meant to freeze the claims by the parties ((*2)) and to confirm essential elements such as the place of the arbitration and the power conferred upon the arbitral tribunal. ((*3))

In practice, parties participate in the drafting of the Terms of Reference. It is the ultimate moment at which they can materialise the framework of the arbitration proceedings and the task of the arbitral tribunal. It is also the document that parties will refer to if problems arise regarding the arbitral tribunal's performance. It is the contract that reflects the agreement that the parties enter into with the arbitral tribunal.

Being a contract, the Terms of Reference are typically drafted in a structured way, starting with the identification of the parties and the arbitral tribunal, the history of the case, the summary of the parties' positions, and their claims and supporting arguments. Certain sections are usually drafted by the parties' respective counsel. Last minute additions made preceding the execution of the document, are usually incomplete and need to be fine-tuned later on during the proceedings through the different briefs or submissions exchanged with each other and the arbitral tribunal. Also, the execution (signature) of the document does not mean that the parties agree with the views and positions of the other party or parties. At that time of the proceedings, the contract is only a picture, a status, aimed at explaining the parties' reasons for entering into the contract. ((*4)) Other clauses are binding and only revocable subject to a joint agreement of the parties. The respective claims are generally included in those other clauses and can only be amended in accordance with the terms of the agreement and are often subject to the approval by the arbitral tribunal.

P 259

Parties have an interest in making a clear distinction between the history, issues, arguments, etc. and their claims. Whereas a complete set of detailed information may be the best approach for the former, a more general and provisional formulation may be

appropriate for the claims. The reason is that, in institutional arbitration and unless provided otherwise, claims cannot be added without the authorisation of the arbitral tribunal after the execution of the Terms of Reference. Indeed, most arbitral institutions assign broad discretionary powers to the arbitral tribunal in allowing claims that are not included in the Terms of Reference. *E.g.*, the CEPANI Rules provide that the Arbitral Tribunal may refuse to examine new claims if 'it considers that they might delay the examination of, or the ruling on, the original claim, or that they are beyond the limits of the Terms of Reference. It may also consider any other relevant circumstances.' ((*5)) Similarly, the ICC Rules set forth that '[a]fter the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorised to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.' ((*6)) This flexibility is less evident in *ad hoc* arbitration or before institutions with more rigid rules. In these proceedings, parties have an interest in carefully formulating their respective claims at an early stage of the proceedings and in analysing the applicable rules and specific provisions with respect to their claims.

Further, the Terms of Reference are the ultimate place to confirm essential points of procedure, such as the place of arbitration, the language of the arbitration, the applicable law on the merits, the applicable rules of procedure and methods for the taking of evidence. Terms of Reference are the best place to avoid future discussions on fees and costs, the method of calculation and the criteria to share the advancements among the parties and the ultimate responsibility between them at the time the award will be rendered. Finally, the contract reflecting the Terms of Reference is the document in which parties may agree with the arbitral tribunal on the use and the role of a secretary, and the payment of the secretary's costs and fees, although such agreement may be formalised at a later moment in a procedural order, for example, following the first meeting with the arbitral tribunal.

III A matchless step in dispute resolution

Terms of Reference are not mandatory in the Belgian Law on Arbitration but they are required in ICC arbitrations ((*7)) and CEPANI arbitrations ((*8)) and it is common practice
P 260 ● to draft them. ((*9)) Terms of Reference are not required in ICC arbitrations to which the Expedited Procedure Provisions apply ((*10)) , nor in CEPANI arbitrations under the rules for disputes of limited financial importance. ((*11))

The document is inexistent in proceedings before normal courts in which the parties are expected to draw the essentials of the case in the claimant's writ of summons and briefs and in the defendant's briefs, respectively. In Belgian Court proceedings, the parties' last submitted briefs must reflect the latest and full version of the issues at stake, their respective claims, positions, and arguments. Procedural aspects are governed by a somewhat rigid legal framework that is not adapted to the particulars of each individual case. The procedural roadmap is entirely outlined in the Judicial Code.

In arbitration proceedings, the procedural roadmap is offered by the Terms of Reference. At each step in the proceedings, the arbitral tribunal and the parties will assess whether a request or procedural order respects the agreed-upon terms.

IV A distinct step in dispute resolution

Also, the step is made only once in arbitration proceedings. There is no other comparable point in time in the proceedings when parties and the arbitral tribunal can discuss, draft and execute the fundamentals of the arbitration project. At most, the arbitral tribunal may issue procedural orders in which it lays down intermediary decisions of a procedural nature, such as the number of briefs that the parties may produce, the timing and deadlines for submitting these, the decision whether or not to hold witness and/or expert hearings, a final hearing, post-hearing briefs, the use of court reporters and the advance payments to finance this additional cost of the proceedings, etc.

Procedural orders will be distinct from the Terms of Reference by their scope (which will be limited), nature (immediately binding upon all parties, without any exit possibility) and character (the arbitral tribunal decides, *e.g.* on the number and timing of submissions to be submitted, without the need for a consent by the parties, although they may have been consulted and asked for their views beforehand).

Parties may ultimately agree on new or alternative provisions to the Terms of Re-ference but the more the proceedings will have advanced, the lower the likelihood the parties may come to such agreement. The more such provisions may impact the merits of the case and the respective position of the parties (affecting their equal and balanced right of defence in the proceedings), the lower the chance that parties may agree upon them. Reversely, new or alternative provisions that leave the parties' procedural posi-tion unaffected (un-weakened for one and un-strengthened for the other), the higher the likelihood that parties may agree on such new or alternative provisions.

P 261 ●

V Not simply another arbitration agreement on top of a clause or another

agreement

The Terms of Reference cannot be compared to an additional contract that parties execute to formalise the arbitration clause or the arbitration agreement that they have entered into earlier. Strictly speaking, such additional formal agreement or contract is not required. And, as mentioned before, the Belgian Law on Arbitration does not require it. However, practice has shown and leading arbitration centres have learned that these agreements play an important role in the smooth conduct and progress of the arbitration proceedings.

Arbitration clauses are more frequent than arbitration agreements that are usually drawn up after the dispute has emerged. When drawing up an arbitration clause, parties have an imperfect view of what a future dispute may look like. That is why it is generally recommended to allow for sufficient flexibility in the arbitration clause. Adding unnecessary complexity or including all too rigid conditions into an arbitration clause may make the clause unworkable and generate purely procedural disputes. It is preferable to agree on the procedural aspects of an arbitration when the dispute occurs. In addition, the involvement of an arbitral tribunal in drawing up the Terms of Reference can have a mediating effect.

VI The Terms of Reference as a sign of trust

The Terms of Reference do not need to expressly cover items that are regulated in the *lex arbitri* and/or in the applicable rules of the centre administrating the arbitration.

Rather, they are meant to have the parties, their counsel and the arbitration tribunal agree on essential practical arrangements of the arbitration proceedings, matters that are really important to one of them or both, leaving untouched inconsequential parts that are or may be well handled by the arbitral tribunal or the rules of the centre.

VII A particular agreement for a very special reason

The essence of the existence of the Terms of Reference is to be found in the fact that the arbitral tribunal becomes an additional party to the relationship that the parties already have established. Whereas an arbitration clause or agreement was entered into by the parties only, the arbitral tribunal is indispensable to the Terms of Reference. It is a quintessential party thereto.

By executing the Terms of Reference with the parties, the arbitral tribunal accepts a mission and agrees to be bound by the terms of the document that is reflecting the agreement with the parties. The tribunal is entirely free to accept or refuse the mission
P 262 and its terms. This freedom of the tribunal is also a reason why all too rigid arbitration clauses and arbitration agreements must be avoided.

VIII The Terms of Reference as a solemn and formal expression of a call for a significant resolution

The parties have specific expectations and the arbitral tribunal accepts to accomplish an important task: to rule. He or she must not attempt to reconcile or settle. ((*12)) Rather, the arbitral tribunal is asked to make an end to a disagreement between the parties. They disagree about facts, about respective rights or about the application of the law to the facts. The arbitral tribunal must bring clarity to the relationship and the claimed rights with a view to becoming an effective and efficient outcome; a useful and operative way that parties allow to part from the very reason that brought them into this multi-party relationship: their disagreement. The parties agreed to have the arbitral tribunal make an end to their disagreement through an effective and efficient decision.

IX Expectations that are not expressed in the Terms of Reference

The arbitral tribunal must conduct the proceedings in accordance with some basic principles of legal proceedings, the most important one of these being due process. The arbitral tribunal acts in compliance with due process when it allows parties to present their case fully. At no point during the proceedings may a party be disallowed to produce its views and arguments in support thereof.

The arbitral tribunal is expected to find a balance when it takes case management decisions such as when it determines the number of submissions, grants extensions of time, allows the introduction of new claims or defences or refreshed evidence, reschedules oral hearings when requests were made last minute, etc.

The arbitral tribunal makes rulings acceptable by adopting reasoned decisions. ((*13)) Parties must be able to understand why the arbitral tribunal has decided in a certain direction and realise that the arbitral tribunal has considered all the arguments of both parties. Arbitration awards are therefore very extensively motivated – both in fact and in law. They are usually more comprehensive than the decisions by judges who would judge the same dispute. Parties to an arbitration will generally be able to recognise their position better in an arbitral award than in a court judgement.

P 263

Respect for the right of defence and the right to be heard need not be expressed in the Terms of Reference. These due process rights form part of international procedural public policy. ((*14))

The above may be quite evident to many and therefore unnecessary to specify in the Terms of Reference. But it is important for arbitrators to remind themselves of these elementary expectations, although they need not be reiterated in the Terms of Reference. Quite often, institutional arbitration rules explicitly require compliance with these fundamental procedural rules. ((*15)) The CEPANI Rules are no exception. They make clear that an arbitral tribunal will not be discharged from conforming to rules of due process, should a party refuse to sign the Terms of Reference (or to participate in the arbitration altogether). ((*16))

X The Terms of Reference are a test for the arbitral tribunal

In a recent ICC arbitration, I was pleasantly surprised by the speed at which the arbitral tribunal had prepared draft Terms of Reference and by the quality of the document. This was even more impressive as the arbitral tribunal (composed of a sole arbitrator) had not been nominated by the parties which adds to the expectation to be served almost instantly and continuously. The ability to engage with the arbitral tribunal almost instantly and to agree on the course of proceedings makes a notable difference with court litigation.

This kind of confirmed and repeated service is the only way to make arbitration become the new normal in commercial dispute resolution.

Arbitral tribunals take different views in drawing up *their* Terms of Reference. ((*17)) The level of party involvement will much depend on the arbitral tribunal and/or institution in question. Some tend to regulate as much as possible during the early stages of proceedings, whereas others prefer to retain maximum flexibility. The latter tends to work with procedural orders, rather than through a full-fletched negotiated agreement.

P 264 This approach has the advantage of being less time consuming (at least during the early stages of proceedings). Irrespective of a tribunal's personal preference, arbitral tribunals should be wary of the parties' procedural autonomy being needlessly curtailed. By engaging in an open discussion on the Terms of Reference, the arbitral tribunal will much better understand the parties' mutual expectations at an early stage.

The arbitral tribunal's ability to have its Terms of Reference accepted and signed by both parties without unnecessary delays often serves as a benchmark for the smooth operation during the remainder of the proceedings.

XI The Terms of Reference are a test for the parties to an arbitration

A party's willingness to participate in drawing up the Terms of Reference can also be a benchmark for that party's conduct and level of cooperation during the arbitral proceedings. Even though institutional rules may provide that the parties *must* sign the Terms of Reference ((*18)) , an individual party cannot be forced to sign a document. Unsurprisingly, arbitral institutions have foreseen this situation.

Under the CEPANI Rules, the proceedings shall continue after an additional time period and the arbitration shall be deemed to conform to rules of due process. ((*19)) The Terms of Reference remain valid between the arbitral tribunal and the party (or parties) that signed them.

Under the ICC Rules, the International Court of Arbitration of the ICC must approve the Terms of Reference even if any of the parties refuse to take part in the drawing up of the Terms of Reference or to sign them. Upon approval by the Court, the arbitration shall proceed. ((*20)) The Court's approval is not intended to substitute for the defaulting party's signature in the sense that it could bind that party to the provisions of the Terms of Reference. It merely allows the arbitration to proceed. Following the Court's approval, the parties can no longer make additional claims falling outside the scope of the Terms of Reference without the arbitral tribunal's authorisation. ((*21)) The applicable law and the circumstances could possibly lead to further effects following from the Court's approval of the Terms of Reference. In any event, the Court will thoroughly scrutinise the Terms of Reference before approval in order to safeguard the interests of the non-signing party or parties. The Court will check whether the requirements of the ICC Rules are met and that the Terms of Reference do not contain agreements between the parties that have not already been acknowledged elsewhere. ((*22))

P 265

Although a party may have its reasons not to agree to specific Terms of Reference, a collaborative approach will usually lead to a better and more efficient resolution of the dispute. A frank discussion between the parties about the rules that will govern the arbitration proceedings can bring the parties closer and make the proceedings less confrontational.

It may be useful to include in the Terms of Reference a list of issues to be determined by

the arbitral tribunal. The list of issues defines what the dispute is about and what the arbitral tribunal has to decide. It is primarily intended to identify questions of fact and law which, at the time of drafting the Terms of Reference, appear to be relevant to determining the parties' claims. ((*23)) Drawing up a list of issues may help the parties in understanding the structure and dynamics behind their dispute. In some cases, this exercise can make a party understand that its position or claim is unrealistic and/or bring parties closer to a settlement.

XII The Terms of Reference are a reference document during and beyond proceedings

The Terms of Reference will also help the arbitral tribunal in carrying out its mandate. Especially when the claims and the list of issues are well identified in the Terms of Reference, the arbitral tribunal will understand the scope of its mandate more easily. The Terms of Reference then serve as a reference document and checklist, preventing the arbitral tribunal to rule *infra petita* or *ultra petita*. Institutions that scrutinise draft awards will also refer to the Terms of Reference as a checklist. ((*24)) Finally, also courts of law may refer to the Terms of Reference when asked to rule on an application to enforce an award or to set it aside. ((*25))

XIII The Terms of Reference are not meant to include all possible issues

Drawing up a list of issues can be time-consuming and complex. Also, it is not always appropriate to define the issues to be determined at the early stages of the proceedings. When drafting the Terms of Reference, both the arbitral tribunal and the parties have an
P 266 incomplete view of the dispute. ((*26)) At that time, the arbitral tribunal only has the ● Request for Arbitration and the Answer at its disposal. The issues presented during the proceedings may be impacted by new arguments raised in support of a claim, evidence that was not previously disclosed, the retroactive or retrospective effect of new laws, changing circumstances, etc. Therefore, while there is great value in drawing up a list of issues for streamlining and focusing the proceedings, it is recommended to retain a sufficient level of flexibility to amend the list of issues.

Seasoned arbitration practitioners and institutions are well aware of the drawbacks of a list of issues and the need for flexibility. In 1998, the ICC changed its rules to give arbitral tribunals the discretionary power not to include a list of issues to be determined. ((*27)) Prior to 1998, some arbitrators avoided the list of issues by using wording along the following lines: 'The issues to be determined by the arbitrators are those which are contained in the pleadings of the parties and those which may arise in the course of the arbitral proceedings.' ((*28)) The better option may be to list the issues that are apparent at the time of drafting the Terms of Reference and to specify that additional issues may arise in the course of the proceedings.

XIV The Terms of Reference must ensure the necessary procedural flexibility

Procedural flexibility is a key feature of arbitration. Unlike courts of law, arbitral tribunals can adapt the proceedings to the particularities of the case and the parties' intentions. However, overly stringent and detailed Terms of Reference can curtail this advantage. If a clause in the Terms of Reference must be modified, all signatories must agree. Rigid Terms of Reference will make it more difficult to adapt the proceedings in light of developments and new elements that may emerge. That is why the CEPANI Rules require that the procedural timetable be taken up in a separate document, namely to allow that changes to the procedural timetable can be imposed via procedural order (*e.g.*, when a party deliberately obstructs the proceedings). ((*29))

The same goes for the examination of witnesses. The Terms of Reference may contain some ground rules regarding the need for written statements, their examination and possible cross-examination. However, issues pertaining to the sequestration of witnesses, hot tubbing, duration of witness statements, etc. are best addressed at a later stage of the proceedings, when parties and the arbitral tribunal have a clearer view on efficient ways to uncover the truth.

P 267 ●

XV The Terms of Reference are key in discussions on the liability of the arbitral tribunal

The Terms of Reference are a contract. The agreed upon clauses bind the parties and the arbitral tribunal. Hence, a failure to observe the contractual obligations under the Terms of Reference can give rise to a breach of contract, possibly resulting in the liability of the arbitral tribunal. The tribunal's liability is not limited to its adjudicative role. For instance, a breach of confidentiality undertakings may also give rise to liability for damages resulting from this breach. To understand the exact scope of the arbitral tribunal's undertakings, the Terms of Reference are key. They offer a useful tool to ensure that its signatories are aware of and respect their mutual obligations.

XVI Reasons we do not need Terms of Reference

As mentioned above, drawing up Terms of Reference can sometimes be a challenging and time-consuming task, especially when a party is trying to obstruct the proceedings or when claims have not been expressed clearly in the request for arbitration and the answer, respectively. There are situations where time is of the essence and where efforts are better put into finding expedited, albeit provisional, solutions than in discussing procedural issues and terms.

Arbitral institutions have responded to the need for expedited proceedings in two ways. First, they created the concept of emergency arbitrators. Second, institutions that, under their standard rules, require Terms of Reference have abolished this requirement for expedited proceedings.

Many institutions allow for an arbitral tribunal to take interim and conservatory measures. However, the constitution of an arbitral tribunal can be a source of delays. Given the importance of this step in the proceedings, it is understandable that parties and arbitration centres apply great care and do not take hasty decisions in their selection of suitable arbitrators. ((*30)) Absent a suitable alternative and pending the constitution of the arbitral tribunal, parties may have no choice but to request emergency measures before traditional courts, possibly in multiple jurisdictions when the measures that can be ordered in national courts are insufficient at an international level (*e.g.*, in multi-party disputes).

P 268

Since 2006, arbitral institutions have gradually been installing emergency arbitrators to handle urgent requests for interim and conservatory measures. ((*31)) These emergency arbitrators are appointed to grant urgent relief pending the constitution of an arbitral tribunal. Given the urgency and the provisional nature of the measures they may order, arbitral institutions do not require that Terms of Reference be drawn up in such instances.

Arbitral institutions increasingly adopt rules for expedited proceedings. ((*32)) Expedited proceedings are made available mainly for disputes of a lower monetary value, even though some centres allow for parties to opt-in irrespective of the amount in dispute. ((*33)) Under these expedited proceedings, no Terms of Reference are required with a view to accelerating the proceedings.

XVII Proceedings without Terms of Reference are a test for the arbitration centre

When no Terms of Reference are drawn up, the arbitral tribunal and the parties will need to fall back on what is available: the arbitration clause or agreement, the *lex arbitri*, and the rules of the arbitration centre. In *ad hoc* arbitrations, the latter rules are unavailable to the parties and thus, in our view, Terms of Reference should always be drawn up in *ad hoc* arbitrations to formalise the arbitral tribunal's acceptance of its mission and its terms. In institutional arbitration, the rules of the centre can fill in the gaps in parties' agreement to arbitrate and ensure smooth proceedings without Terms of Reference.

However, no agreement on the Terms of Reference will inevitably be a test for the rules of the arbitration centre. As these rules apply to all proceedings administered by the centre, they automatically offer less flexibility. They must offer a fall-back that fits all proceedings. As a result, they must be carefully balanced to offer a suitable 'catch all' solution when the circumstances require case management that is adapted to a specific case.

P 269

XVIII Conclusion

Only a few arbitral institutions formally require Terms of Reference. However, practice shows that many arbitrators will draw up Terms of Reference even if they are not required to do so. The reason is simple. Terms of Reference are incredibly useful. They help to ensure that arbitral proceedings start off on the right foot and they offer a roadmap throughout and beyond the proceedings. Arbitrators who manage to have parties collaborate well in the drawing up of the Terms of Reference, generally encounter fewer procedural difficulties during the remainder of the proceedings. It is often worth going the extra mile during the early stages of proceedings to reach the finish line more easily.

P 269

References

1) *Flip Petillion: Attorney-at-Law, Member of the Brussels bar*

(*1)) Oxford Dictionary.

(*2)) In ICC proceedings, pursuant to Article 8 of the ICC Rules, no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4) of the ICC Rules.

(*3)) According to Article 23 of the ICC Rules, the document shall include:

a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;

b) the addresses to which notifications and communications arising in the course of the arbitration may be made;

c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;

e) the names in full, address and other contact details of each of the arbitrators;

f) the place of the arbitration; and

g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as amiable compositeur or to decide *ex aequo et bono*.

Article 22 of the CEPANI Rules provides for a similar approach.

(*4)) It is recommended to include a clause in the Terms of Reference that explicitly confirms the non-binding nature of the parties' statement of positions. In this respect, the Model Terms of Reference of the ICC provide: "*No statement or omission in the summary of any Party is to be interpreted as a waiver or admission of any issue of fact or law. The summary neither reflects any fact finding by the Tribunal nor any admission by any other Party*." (Model of ICC Terms of Reference, https://iccwbo.org/publication/model-icc-terms-reference/).

(*5)) Article 23(8) of the CEPANI Rules.

(*6)) Article 23(4) of the ICC Rules.

(*7)) Article 23 of the ICC Rules.

(*8)) Article 22 of the CEPANI Rules.

(*9)) Maarten Draye, Article 1700 B.L.A., in Niuscha Bassiri & Maarten Draye (Eds), *Arbitration in Belgium. A Practitioner's Guide*, Kluwer, 2016, p. 291.

(*10)) ICC Rules, Appendix VI.

(*11)) CEPANI Arbitration Rules for disputes of limited financial importance (2013).

(*12)) The author is aware that hybrid forms of mediation-arbitration, such as med-arb and arb-med, exist. However, an arbitrator's primary task is to rule. When an arbitral tribunal is requested to adopt a dual role, the tribunal should apply great care to avoid that ethical issues or confidentiality considerations challenge the integrity of the process.

(*13)) Certain jurisdictions do not require that an award sets forth the reasons upon which it is based. Foreign awards rendered in those jurisdictions may be enforced in Belgium (Article 1721(1)(iv) Belgian Judicial Code, *a contrario*). However, reason-giving has become commonplace in international commercial arbitration.

(*14)) *See* IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report on the Public Policy Exception in the New York Convention*, October 2015, available at https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/pub....

(*15)) *E.g.*, Article 22(4) of the ICC Rules: "In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case". The LCIA imposes a general obligation upon the arbitral tribunal to "act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s)" and to "adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute" (Article 14.4 of the LCIA Rules).

(*16)) Article 22(2) of the CEPANI Rules.

(*17)) Institutions that attach great importance to Terms of Reference make clear that the arbitral tribunal has the task of drawing up a document defining *its* Terms of Reference (*see* Article 22(1) of the CEPANI Rules: "Prior to the examination of the file, the Arbitral Tribunal shall, on the basis of documents received or in the presence of the parties and on the basis of their latest statements, draw-up a document defining its Terms of Reference."; *see also* Article 23(1) of the ICC Rules: "As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. [...]").

(*18)) *See* Article 22(2) of the CEPANI Rules; Article 23(2) of the ICC Rules.

(*19)) Article 22(2) of the CEPANI Rules.

(*20)) Article 23(3) of the ICC Rules.

(*21)) Article 23(4) of the ICC Rules.

(*22)) J. Fry, S. Greenberg; F. Mazza with the assistance of B. Moss, *The Secretariat's Guide to ICC Arbitration*, ICC Publication No. 729E, 2012, 3-860, 3-886, 888, and 889.

(*23)) J. Fry, S. Greenberg; F. Mazza with the assistance of B. Moss, *The Secretariat's Guide to ICC Arbitration*, ICC Publication No. 729E, 2012, 3-849.

(*24)) *See* Article 27 of the ICC Rules.

(*25)) S. Lazareff, "Terms of Reference", *ICC International Court of Arbitration Bulletin Vol. 17 No. 1*, 21.

(*26)) For a critical appraisal of the list of issues and the usefulness of Terms of Reference in general, *see* P. Sanders, "The Terms of Reference in ICC Arbitration" in Gerald Aksen (Ed.), *Liber Amicorum in Honour of Robert Briner – Global Reflections on International Law, Commerce and Dispute Resolution*, 2005 ICC Publishing No. 693, pp. 693 et seqq.; A. Kassis, "Réflexions sur le Règlement d'arbitrage de la Chambre de commerce international", *LGDJ*, 1988 at 269. Part IV, pp. 225-269.

(*27)) *Compare* Article 13(1) of the ICC Rules in force as from 1 January 1988 *with* Article 18(1) of the ICC Rules in force as from 1 January 1998; Article 22(1) of the CEPANI Rules gives Arbitral Tribunals the same discretionary power not to include a list of issues to be determined.

(*28)) W.L. Craig, W.W. Park & J. Paulsson, *Annotated Guide to the 1998 ICC Arbitration Rules* (Oceana, 1998), 117; A. Reiner, "Le Règlement d'arbitrage de la CCI, version 1998", *Rev. arb.* 1998/25, 19; Y. Derains & E. Schwartz, *A Guide to the New ICC Rules of Arbitration*, Kluwer Law International 1998, 234, n. 517.

(*29)) *See* CEPANI FAQs, available at http://www.cepani.be/en/node/37.

(*30)) For an analysis on the importance of the selection of arbitrators, *see* F. Petillion, "The constitution of the arbitral tribunal – De Samenstelling van het Scheidsgerecht" in *Liber Amicorum Professor Michel Flamée – Schuim op de branding*, die Keure 2016, 381.

(*31)) Primitive forms of emergency arbitrator proceedings existed under the ICC Rules for Pre-Arbitral Referee Procedure in 1990, the American Arbitration Association's Optional Rules for Emergency Measures of Protection in 1999 and the Netherlands Arbitration Institute Summary Arbitral Proceedings Rules in 2001. As far as we are aware, the ICDR was the first institution to introduce the concept of emergency arbitrators in 2006. It was followed by the International Institute for Conflict Prevention and Resolution (CPR) in 2009, the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC) in 2010, the Australian Centre for International Commercial Arbitration (ACICA) in 2011, the ICC and the Swiss Chambers' Arbitration Institution in 2012, CEPANI and the Hong Kong International Arbitration Centre (HKIAC) in 2013, the LCIA, WIPO and the Japan Commercial Arbitration Association (JCAA) in 2014, and the China International Economic and Trade Arbitration Commission (CIETAC) in 2015.

(*32)) *See e.g.*, CEPANI Arbitration Rules for disputes of limited financial importance; Article 30 and Appendix VI of the ICC Rules; WIPO Expedited Arbitration Rules; ICDR Arbitration Rules, International Expedited Procedures.

(*33)) *See* Article 30(2) of the ICC Rules.