The Role of the Tribunal in Controlling Arbitral Costs

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Articles

The Role of the Tribunal in Controlling Arbitral Costs

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Samantha J. Rowe[*]

1. Introduction

While arbitration has long held itself out as a more efficient alternative to litigation—in terms of both financial cost and expeditiousness—the fact is that "[a]rbitration can cost just as much or as little as the parties wish it to cost".[1] Today, parties frequently complain that arbitration often costs significantly *more* than they wish it to cost. While all stakeholders have a role to play in remedying this situation, users believe that arbitral tribunals, together with institutions, should be taking the lead.[2] Arbitrators (and sometimes institutions) like to point out that the parties' own legal fees account for the majority of their total arbitration costs. While that statement is true, it ultimately misses the point. The single largest determinant of the parties' legal fees is the manner in which the arbitration is conducted. As this article demonstrates, arbitral tribunals bear the responsibility for final determination of the arbitration procedures.

This article focuses on what arbitral tribunals can and should be doing to respond to this challenge; it proceeds in three parts. First, we analyse the authority granted to arbitral tribunals to control costs under the current institutional rules, and conclude that arbitrators today have broad powers to manage cases proactively and, if necessary, aggressively, in order to prevent excessive duration and costs. Secondly, we discuss why it is important that tribunals use their authority under these rules proactively to fulfil their duties to the parties and to the system and often to save parties from themselves. Thirdly, we offer practical examples that can be utilised by arbitrators seeking to manage proceedings before them, even in the face of resistance from the parties. Finally, we provide a few concluding thoughts.

2. Tribunals' Authority to Control Costs

Arbitration rules have changed markedly in recent years to make clear that the tribunal, not the parties, has control over the conduct of the arbitration. The long-running debate whether tribunals had to accept procedures agreed by the parties—which the authors always felt should be answered in the negative—is over. The revised rules adopted by most institutions

[*] The authors gratefully recognise the valuable assistance of Debevoise international associates Alexandra von Wobeser and Julia M. Loret de Mola in the preparation of this article.

[1] See Chartered Institution of Arbitrators, *CIArb Costs of International Arbitration Survey* (London: CIArb, 2011), p.16 (quotation attributed to Roland Burrows, 1930) (*CIArb Survey*).

[2] White & Case and Queen Mary, University of London, *2010 International Arbitration Survey: Choices in International Arbitration* (London: School of International Arbitration, Queen Mary, University of London, 2010), p.3 ("According to respondents, parties contribute most to the length of the proceedings, but it is the tribunal and the arbitration institution that should exert control over them to keep the arbitral process moving quickly") (*2010 White & Case Survey*).

and UNCITRAL vest final authority in the tribunal, whether or not the parties have agreed on procedure, to conduct arbitral proceedings as they see fit.[3]

The new rules also provide other mechanisms to promote the efficient resolution of disputes. First, arbitrators are increasingly being required to provide a statement of *availability* prior to appointment (together with the classic criteria of independence and impartiality). Secondly, the rules provide for an explicit *duty* that the tribunal should conduct the case with diligence and avoid unnecessary expense and delay. Thirdly, the rules contain more detailed guidance, especially at the ICC. We provide below a survey of the rules adopted by the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR), the Singapore International Arbitration Centre (SIAC) and the Hong Kong International Arbitration Centre (HKIAC). (It should be noted, however, that other institutional rules likewise reflect these trends.)

UNCITRAL

The UNCITRAL Rules remain among the least detailed in terms of promoting efficient case management, but they nevertheless make clear that the tribunal is in charge. The Rules do not reference "availability" as a requirement for prospective arbitrators, although the "Model statements of independence" include an optional additional paragraph, which the parties may adopt, in the following terms:

> "I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules."[4]

This statement, appearing in the Annex to the Rules, first appeared in the 2010 revisions.

Article 17(1) of the UNCITRAL Rules provides the tribunal with broad powers to control the conduct of the arbitration before it:

> "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. *The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*."[5]

This article makes clear it is up to the tribunal to decide how to "conduct the arbitration" as "appropriate". The highlighted sentence, added to the 2010 version of the Rules and continued in the 2013 version, requires tribunals to adopt creative procedures that can "avoid unnecessary delay and expense", even where the parties are in agreement. The Rules provide no further guidance as to the procedures that could be adopted, although they do provide for an initial procedural conference "as soon as practicable" after the tribunal is constituted—a further revision to the Rules adopted in 2010.[6]

ICC

The ICC has taken great strides to render arbitration more efficient, particularly through revisions to the 2012 Rules. In 2007, the ICC Commission published a report entitled

[3] See, e.g. UNCITRAL Rules art.17(1) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case").

[4] UNCITRAL Rules Annex.

[5] UNCITRAL Rules art.17(1) (emphasis added).

[6] UNCITRAL Rules art.17(2).

Controlling Time and Costs in Arbitration, one of the earliest institutional efforts specifically to set out various techniques designed to minimise cost and delay in the arbitration process.[7] This report informed a number of the amendments adopted in the 2012 version of the ICC Rules, which represent an excellent example of an institution providing clear directions towards effective case management. The emphasis on efficiency can be seen throughout the revised Rules; for example, arbitrators are now required to sign a "statement of acceptance, *availability*, impartiality and independence".[8] In other words, the availability of the arbitrator to conduct the arbitration has acquired importance similar to the key qualities of independence and impartiality.

Article 22 of the Rules—introduced for the first time in 2012—is entitled "Conduct of the Arbitration", and places emphasis on both expeditiousness and cost-effectiveness:

> "The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.
>
> In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."[9]

This duty is combined with the tribunal's traditional obligation to "act fairly and impartially and ensure that each party has a reasonable opportunity to present its case".[10] While the ICC Rules, unlike those of other institutions, state that the tribunal may not adopt a procedural measure that is "contrary to any agreement of the parties", the Rules require that the parties "undertake to comply with any order made by the arbitral tribunal".[11] This explicit obligation was included in the Rules for the first time in 2012.

Prior to 2012, the ICC Rules had simply required the tribunal to set a "provisional timetable" at the outset of the arbitration, following "consultation" with the parties.[12]Article 24 in the revised Rules, on the other hand, makes mandatory an initial procedural conference between parties and tribunal (and renames it a "case management conference"), and is particularly noteworthy. It provides that:

> "When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.
>
> During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties."[13]

Appendix IV of the Rules—a further 2012 innovation—lists case management techniques in relation to eight different phases of the arbitration "that can be used by the arbitral tribunal and the parties for controlling time and cost". These include "rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case", "avoiding requests for document production when appropriate in

[7] ICC Commission, *Controlling Time and Costs in Arbitration* (Paris: ICC, 2007). See also ICC Commission, *Controlling Time and Costs in Arbitration*, 2nd edn (Paris: ICC, 2012), p.4 ("the tailor-making of the arbitral procedure referred to in the preface to the first edition of the Report has become a formal requirement in the 2012 Rules, accomplished through the case management conference") (*2012 ICC Report*).
[8] ICC Arbitration Rules (2012) art.11(2).
[9] ICC Arbitration Rules (2012) art.22(1) and (2).
[10] ICC Arbitration Rules (2012) art.22(4).
[11] ICC Arbitration Rules (2012) art.22(5).
[12] ICC Arbitration Rules (1998) art.18(4).
[13] ICC Arbitration Rules (2012) art.24(1) and (2).

order to control time and cost" and "[o]rganizing a pre-hearing conference" at which "the arbitral tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing".[14]

The revised Rules also make clear for the first time that effective case management is a *continuing* duty for the tribunal:

> "To *ensure continued effective case management*, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable."[15]

These conferences may be scheduled as a personal meeting, or by videoconference or telephone. Notably, the tribunal is explicitly authorised to "request the attendance at any case management conference of the parties in person or through an internal representative".[16]

Finally, in a move that should prove particularly beneficial to the efficient resolution of ICC arbitrations, the revised Rules provide the ICC with real teeth to ensure the proper administration of arbitrations by the tribunal. Article 30 of the Rules maintains the six-month time limit found in the 1998 version: the tribunal must render its final award within six months of signature of the Terms of Reference, or within a different (or extended) time limit established by the ICC Court.[17]Article 27 of the Rules—which is new—provides that as soon as possible after the last hearing or submissions concerning matters to be decided in an award, the tribunal must "declare the proceedings closed with respect to the matters to be decided in the award" and "inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 33".[18] The new provisions in Annex III of the Rules then provide for costs penalties for those tribunals that fail to submit the draft award in a timely fashion, or that otherwise fail to conduct the proceedings in an efficient manner:

> "In setting the arbitrator's fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 37(2) of the Rules), at a figure higher or lower than those limits."[19]

In sum, the 2012 revised ICC Rules contain numerous new provisions designed to ensure that the tribunal—and, where necessary, the institution—take responsibility for the efficient and expeditious resolution of disputes submitted to it.

LCIA

The most recent version of the LCIA Arbitration Rules, adopted in October 2014, likewise contains important revisions aimed at establishing the tribunal's responsibility for ensuring efficient dispute resolution. As is the case with the ICC Rules, arbitrators appointed to an LCIA tribunal must now sign a written declaration stating "whether the candidate is ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration".[20]

[14] ICC Arbitration Rules (2012) Appendix IV. See further *2012 ICC Report*, p.4 ("[T]his edition of the Report should be seen as an adjunct to the 2012 Rules. It can be used to enhance the tailormaking process required by the Rules. In this edition the techniques set out in Appendix IV to the Rules are further discussed and explained. Additional techniques beyond those in Appendix IV are also presented").

[15] ICC Arbitration Rules (2012) art.24(3) (emphasis added).

[16] ICC Arbitration Rules (2012) art.24(4).

[17] ICC Arbitration Rules (2012) art.30.

[18] ICC Arbitration Rules (2012) art.27.

[19] ICC Arbitration Rules (2012) Annex III, art.2(2). Article 37(2) provides that "[t]he Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case".

[20] LCIA Arbitration Rules (2014) art.5.4.

Interestingly, the 2014 version of the LCIA Rules *deleted* the provision that "[t]he parties may agree on the conduct of their arbitral proceedings", so they place procedural obligations squarely on the tribunal.[21] The tribunal's "general *duties at all times* during the arbitration" remain the same and include both "a duty 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 "a *duty 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".[22]Article 14 of the Rules proceeds to make clear that:

> "The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, *including the Arbitral Tribunal's discharge of its general duties*."[23]

In other words, an LCIA tribunal has clear power to adopt procedures in the face of party resistance. Again, this represents a significant change to the previous version of the Rules, which had prefaced this provision with the words "[u]nless otherwise agreed by the parties"—allowing the parties to contract out of this arbitral discretion to set procedure—and did not contain the language highlighted in the quoted passage.[24]

Notably, the LCIA Rules also encourage the parties and the tribunal to make contact "as soon as practicable but no later than 21 days from … formation of the Arbitral Tribunal". The parties may "agree on *joint proposals* for the conduct of their arbitration for *consideration by the Arbitral Tribunal*. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties."[25] Again, this marks a substantial departure from the 1998 Rules pursuant to which the parties could "agree" on the conduct of the proceedings as opposed to submitting joint proposals for the tribunal's consideration.[26] In sum, the revisions to the LCIA Rules make it abundantly clear that it is the arbitrators, and not the parties, who decide the appropriate procedure.

ICDR

The revised ICDR Rules, also adopted in 2014, oblige both the parties and the administrator to consider a prospective arbitrator's availability prior to appointment, a new requirement added in 2014.[27] The Rules also provide for a broad grant of procedural discretion to the arbitral tribunal. Article 20(1) provides that, subject to the Rules

> "the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case".[28]

In exercising this discretion, the tribunal is obliged to "conduct the proceedings with a view to expediting the resolution of the dispute",[29] which has been an obligation on ICDR tribunals since the last version of the Rules was adopted in 2009.[30] However, the 2014 version makes

[21] LCIA Arbitration Rules (1998) art.14.1.
[22] LCIA Arbitration Rules (2014) art.14.4 (emphasis added).
[23] LCIA Arbitration Rules (2014) art.14.5 (emphasis added).
[24] LCIA Arbitration Rules (1998) art.14.2.
[25] LCIA Arbitration Rules (2014) art.14.2 (emphasis added).
[26] LCIA Arbitration Rules (1998) art.14.1.
[27] ICDR International Arbitration Rules (2014) art.12(1) and (4).
[28] ICDR International Arbitration Rules (2014) art.20(1).
[29] ICDR International Arbitration Rules (2014) art.20(2).
[30] See ICDR International Arbitration Rules (2009) art.16(2).

clear that the tribunal and the parties "may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings".[31]

The ICDR Rules also provide some more specific direction on case management techniques that a tribunal may adopt. For example, they provide that the tribunal "may conduct a preparatory conference" for the purposes of agreeing procedures to "expedite the subsequent proceedings",[32] and may also

> *"decide preliminary issues*, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case".[33]

The highlighted language was added in 2014.

Notably, in a new provision added to the Rules in 2014, the *parties* are also under an obligation to "make every effort to avoid unnecessary delay and expense in the arbitration". The tribunal has authority to sanction parties that do not comply with this obligation, and may "take such additional steps as are necessary to protect the efficiency and integrity of the arbitration".[34]

SIAC

The revised Rules adopted by SIAC in 2013 follow the same trend described above. None of the provisions discussed here were present in the 2007 version of the Rules (although they were included in the previous 2010 version). As is the case with the other institutional rules, the SIAC must consider "whether the arbitrator has sufficient availability to determine the case in a prompt and efficient manner appropriate to the nature of the arbitration" as part of the appointment process.[35]

SIAC tribunals are granted broad discretion to conduct the proceedings in the manner they see fit:

> "The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final determination of the dispute."[36]

As soon as practicable after the constitution of the tribunal, it is mandated to "conduct a preliminary meeting with the parties, in person or by any other means, to discuss the procedures that will be most appropriate and efficient for the case".[37] The Rules continue to provide further guidance on the conduct of arbitrations in art.16.4, pursuant to which a tribunal

> "may in its discretion direct the order of proceedings, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case".[38]

This is a significant departure from the 2007 version of the Rules, which provided that "[t]he parties may agree on the arbitral procedure"—a provision that has now been deleted—and that the tribunal could determine how the arbitration should be conducted *only* in the absence of such agreement.[39]

[31] ICDR International Arbitration Rules (2014) art.20(2).
[32] ICDR International Arbitration Rules (2014) art.20(2).
[33] ICDR International Arbitration Rules (2014) art.20(3) (emphasis added).
[34] ICDR International Arbitration Rules (2014) art.20(7).
[35] SIAC Rules (2013) art.10.3.
[36] SIAC Rules (2013) art.16.1.
[37] SIAC Rules (2013) art.16.3.
[38] SIAC Rules (2013) art.16.4.
[39] SIAC Rules (2007) art.15.

HKIAC

The HKIAC's revised Rules—adopted in 2013—contain provisions similar to those discussed in relation to the other arbitral institutions above. A prospective arbitrator must "sign a statement confirming his or her availability to decide the dispute" as well as independence and impartiality.[40] Notably, an arbitrator may be subject to challenge if for any reason he or she "fails to act without undue delay".[41] Neither of these provisions was present in the 2008 version of the Rules.

The HKIAC Rules place responsibility for the conduct of the arbitration squarely on the tribunal. Notably, this provision was included in the 2008 version of the Rules, with just the highlighted language added in 2013[42]:

> *"Subject to these Rules*, the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense, *having regard to the complexity of the issues and the amount in dispute, and* provided that such procedures ensure equal treatment of the parties and afford the parties a reasonable opportunity to present their case."[43]

While the Rules do not mandate a preliminary conference, or set out more specific guidance on efficient case management, they do require both the tribunal and the parties to "do everything necessary to ensure the fair and efficient conduct of the arbitration".[44] Again, this provision was included in the 2008 Rules.[45]

3. Why Should Tribunals Take a Proactive Approach to Controlling Costs?

As this survey of rules demonstrates, arbitrators possess the power under the revised versions of the major institutional rules to take a proactive approach to case management. The next question is whether they should use that power, or simply adopt a *reactive* role in response to procedures proposed or agreed by the parties. If the parties to an arbitration, a creature of agreement, wish to spend millions of dollars on a dispute worth six figures, why should the tribunal care? We believe the tribunal must take control of the procedure, both to preserve the institution of international arbitration as a general matter, and more specifically to promote the interests of the parties to any given dispute.

As noted at the outset, there has been much discussion recently of a "crisis" in international arbitration. In particular, the users of the system—the corporations and governments which are most often claimant and defendant—have complained about the cost and length of the proceedings.[46] The perception, and often the reality, is that the length and cost of cases has grown considerably, leading some parties to question the value of arbitration as an efficient dispute resolution mechanism. While, unsurprisingly, the most common reason for users' disappointment with arbitrators is the result of the arbitration, users ranked "excessive flexibility or failure to control the process" and causing delays as second and third (and they would have topped the list if grouped together).[47] These concerns

[40] HKIAC Rules (2013) art.11.4.
[41] HKIAC Rules (2013) art.11.6.
[42] HKIAC Rules (2008) art.14.1.
[43] HKIAC Rules (2014) art.13.1 (emphasis added).
[44] HKIAC Rules (2014) art.13.5.
[45] HKIAC Rules (2008) art.14.7.
[46] See *CIArb Survey*, p.i ("[I]n recent years there has been significant complaint by users of international arbitration that it is costing too much"); D. Brown, "What Steps Should Arbitrators Take to Limit the Cost of Arbitration?" (2014) 31 Int'l Arb. 499, 499 (noting the "increasingly vociferous concern on the part of users that international commercial arbitration proceedings take too long and cost too much").
[47] *2010 White & Case Survey*, p.26 (20% of respondents who reported that they had been disappointed by the performance of an arbitration gave "bad decision or outcome" as the reason for their disappointment, while 12% said "excessive flexibility or failure to control the process" and 11% complained that the arbitrator caused delay).

are only becoming more pressing. A two-year proceeding and excessive legal and arbitration fees are unacceptable in this era of the 24-hour news cycle and tightened belts. Resolution, closure and certainty are the order of the day.

In the face of this increasingly negative perception of the spiralling costs of arbitration, one school of thought simply throws its hands in the air and claims that there is nothing to be done. Arbitral tribunals are a creature of agreement and they have no legitimacy to dictate procedure to the parties. This view is outdated. In fact, arbitrators who simply sit back and let the parties control the agenda are letting those same parties down. Moreover, they are letting the system down. Indeed, as set out in detail above in s.2, the consensus today, as reflected in the institutional rules, is that the tribunal, and not the parties, has not only the ability but also the duty to ensure the efficient conduct of the arbitration.

In fact, it is clear that parties *want* active intervention. They want an arbitrator to save the parties from themselves, or sometimes from their external counsel. Parties and their counsel may request a lengthy timetable because of their own schedules. Or internal political considerations may lead them to play it safe by proposing extensive procedures or procedures they followed in past arbitrations. As the rules indicate, arbitrators have a duty to the parties—and to the system—to use their experience to determine the best and most expeditious procedures for that particular arbitration.

The *2010 International Arbitration Survey* noted that:

> "It was pervasive throughout the questionnaire results and the interviews that parties prefer pro-active arbitrators who take control of proceedings. This is seen as an effective mechanism to limit cost and delay and reduce the risks of later challenge."[48]

Likewise, a recent panel on innovation in international arbitration at GAR Live New York, held in September 2014, revealed that users and counsel would be in favour of adopting a variety of techniques to increase efficiency in arbitration, including expedited procedures, case management meetings to discuss the disclosure requests and other issues after the parties have filed initial submissions on the merits, preliminary opinions, the generation of lists of material issues and issues that are not in dispute early in the process, and pre-hearing conferences between the arbitrators. "Even if you don't get the result you want, at least you get it quickly … . There is nothing worse than waiting five years for a bad award."[49]

This is especially the case where there is a continuing relationship between the parties to the dispute; in such cases, proceedings that last for years (and cost a corresponding amount of money) when the dispute could be resolved more quickly are to nobody's benefit. However, often parties are their own worst enemies when it comes to agreeing procedures that most efficiently resolve the dispute. As already noted, external counsel have busy schedules that are often incompatible with speedy dispute resolution. In-house counsel have their own internal constituencies to whom they are answerable. They are often under pressure to ensure that every "t" is crossed and "i" is dotted; especially to protect themselves from criticism in the event that the final decision is against them. Neither party wants to make "concessions" to the other, even where a proposed procedure may seem both reasonable and efficient. It is easier for the parties to compromise, and to "sell" the idea of efficient procedures to their own constituents, when they come recommended from the tribunal that they have helped to appoint. In this respect, it is desirable for arbitrators to "save parties from themselves" by taking a proactive approach to establishing an efficient process to resolve the dispute.

It is not only desirable but also *legitimate* for arbitrators to exercise these powers, even in the face of resistance from the parties. First, it is legitimate because the parties agreed to arbitrate under rules that provide arbitrators with those powers. As we have seen above in

[48] *2010 White & Case Survey*, p.32.

[49] K. Karadelis, "Smart-arbitrating", *Global Arbitration Review*, October 27, 2014, *http://globalarbitrationreview.com/news/article/33094/%20smart-arbitrating/* [Accessed February 27, 2015].

s.2, arbitral institutions today accord broad case management powers to tribunals, including the overarching duty to ensure that the proceedings are expeditious and cost-effective.[50] Secondly, usually arbitrators do not need to rely on rules or legal formality to achieve the adoption of efficient procedures, because they have great *persuasive* power vis-à-vis the parties, not least because they are ultimately tasked with issuing a binding decision to resolve the dispute. Because the parties must persuade the arbitrators to rule in their favour, their proposals as to how best to present the issues in dispute are accorded overriding weight and usually agreed when proposed. Indeed, users have noted that "soft skills can have a positive impact on the efficiency (and hence cost) and the overall experience of conducting an arbitration".[51] Arbitrators can also draw on their experience to educate and inform the parties about cost-effective procedures.

For this reason, the *Debevoise & Plimpton Protocol to Promote Efficiency in International Arbitration* provides that we will bring our client's in-house counsel to all procedural conferences with the arbitrators and try to insist that the other party's in-house counsel also participate.[52] This gives the tribunal the opportunity to speak directly to the parties, in order to propose and to encourage more efficient procedures that are more suitable for that arbitration.

4. Suggested Approaches to Controlling Costs

Thus, arbitrators should not hesitate to use their powers to persuade parties to adopt (and, in some extreme scenarios, to impose) procedures that resolve the dispute in the most efficient manner possible (with due regard to each party's due process rights). In this section, we provide some examples of approaches that arbitrators may adopt to avoid excessive costs and delay in the proceedings before them.

Before setting out some specific procedural suggestions, we provide two "real-life" examples in which the tribunal's decision not simply to defer to the parties' agreed schedule had a positive impact on the efficient resolution of the dispute. In one ICC arbitration, the parties agreed and proposed a schedule of document production and written submissions that would last for 18 months before a hearing. However, it was clear from their pleadings that the joint venture that had given rise to the dispute was essentially paralysed as a result of the dispute. The tribunal asked the parties to describe the dispute in greater detail, and then sent them out of the room to meet separately and then together to develop a list of the half-dozen most important issues, including particular contract interpretation issues, that if resolved quickly could help to resolve the broader dispute. The parties returned with such a list after a couple of hours, and the tribunal scheduled a hearing in three months, with prior submissions on only those issues. At the hearing, only evidence related to the enumerated issues was heard, and the tribunal issued a partial award on those issues. The parties then settled the remainder of the dispute.

In the second case, the parties had agreed on a schedule with the hearing to occur in two years. The tribunal was unconvinced that such a schedule was necessary to resolve the dispute, and asked the parties to devise a revised schedule that would see a hearing take place within a year. The parties did so. They received the same procedures they had originally

[50] See, e.g. G. Born, *International Commercial Arbitration*, 2nd edn (Alphen aan den Rijn: Kluwer Law International, 2014), p.2135 ("In agreeing to arbitrate in accordance with a particular set of institutional rules, the parties consent to the procedural and substantive provisions of those rules, including delegation of some procedural decisions to the arbitral tribunal"); see also ICC Arbitration Rules art.6(1) ("Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement"); ICDR Arbitration Rules art.1(1) ("Where parties have agreed in writing to arbitrate disputes under these International Arbitration Rules … the arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing").

[51] Born, *International Commercial Arbitration* (2014), p.2135.

[52] Debevoise & Plimpton LLP, *Protocol to Promote Efficiency in International Arbitration* (2010) (Debevoise Protocol), s.8, *http://www.debevoise.com/* [Accessed February 27, 2015].

proposed, but in a shorter time period, without any loss of efficacy. The hearing was held in one year, and the parties then settled before the tribunal issued its award.

Both of these examples reflect a fundamental shift in position from the current status quo. Starting from a rote "Procedural Order No.1" template and simply switching in names and dates is almost guaranteed to produce inefficiency, and a procedure that bears no relation to the specific needs of the parties. Instead, the "Town Elder Model"—where the arbitrator starts the first procedural conference with a blank slate—should be adopted.[53] This model harks back to the days when arbitration was largely conducted by town elders. They would not start with a 20-page procedural order from an old case; instead, the town elder would first listen to the parties describe the dispute, and only then decide the best way to resolve it, i.e. which people he would need to hear from, and which documents he would need to review. Notably, the "Town Elder Model" increasingly reflects user expectations for the system; a "concern" expressed by users in the *2012 International Arbitration Survey* is that "arbitral procedure is gradually becoming too rigid and formulistic" and that

> "arbitrators should take parties' expectations more into consideration and tailor the procedure to the particularities of each case, rather than simply following general procedural templates".[54]

Applying the "Town Elder Model" to present-day arbitration, arbitrators should start, quite literally, with a blank piece of paper. Once they have understood the issues in dispute (from both parties' perspective), the tribunal should use its experience from past cases to devise a procedural order that makes sense for the particular dispute before them—and that reflects the minimum "procedure" necessary for a just resolution of the dispute. While the goal is thus to generate a specific procedure for the specific dispute, the examples set out below may provide a helpful starting point in similar situations. Similarly, the Debevoise Protocol provides 25 specified procedures that can be employed to make arbitrations more efficient—and that we have committed to explore with our clients in each case. The Protocol reflects the Town Elder Model outlined above,[55] and many of the procedures suggested below.

Constitution of the tribunal

For obvious reasons, it is easier for a sole arbitrator managing one calendar and one case-load to act more efficiently than a tribunal of three. For that reason, the Debevoise Protocol states that "[w]e will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators".[56] Nevertheless, there are still steps that a three-person tribunal can take at the outset of the arbitration to maximise efficiency. For example, before accepting an appointment, it makes sense for the presiding arbitrator not only to check his or her own availability, but also to compare calendars with the two party-appointed arbitrators, to ensure sufficient availability overlap. This takes the ICC's "availability" requirement one step further and applies it to the tribunal as a body, rather than to each arbitrator individually.

[53] See D.W. Rivkin, "Towards A New Paradigm in International Arbitration: The Town Elder Model Revisited" (2008) 24 Arb. Int'l 375.

[54] White & Case and Queen Mary, University of London, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* (London: School of International Arbitration, Queen Mary, University of London, 2012), p.11 ("appointment of a sole arbitrator" and "limiting or excluding document production" ranked second and third respectively) (*2012 White & Case Survey*).

[55] Debevoise Protocol. ("We will propose and encourage the arbitral tribunal to adopt procedures that are appropriate for the particular case and that are designed to lead to an efficient resolution. We will use our experience in crafting such procedures, and we will not simply adopt procedures that follow the format of prior cases").

[56] Debevoise Protocol s.3.

Procedural orders

Often the entire procedure for an arbitration remains that dictated by Procedural Order No.1, which is typically issued after preliminary pleadings by both parties. The first procedural conference of course is of vital importance, as it allows the parties to educate the tribunal about the issues in dispute, and the tribunal to discuss with the parties how those issues might be resolved most efficiently. Because this interaction is so important, the parties and the tribunal should meet in person if at all possible. Personal meetings ultimately save costs by allowing a more complete discussion of the procedural issues that may arise.[57] If the arbitrators have read the papers submitted by the parties (and if those papers present the parties' arguments in a more detailed fashion than is often the case at present),[58] and if all of the participants have given thought to defining the issues that will *really* matter to the final award, as well as the evidence required to prevail on each, the procedural conference is likely to be successful in setting an efficient initial schedule for the arbitration. Interestingly, in the 2012 *White & Case Survey*, users identified "identification by the tribunal of the issues to be determined as soon as possible after constitution" as "[t]he most effective method … of expediting arbitral proceedings".[59]

As noted above, it is also vitally important that the tribunal require the presence of in-house counsel, the real parties in interest, at this procedural conference, and at any other procedural meetings and conferences.[60] The parties must express their needs to the arbitrators directly and should be involved in setting procedures that work best for their business, and not just those that will work best for their outside counsel (or indeed the tribunal). In-house counsel will also be in the best position to know, and to communicate through their external counsel, what is and is not important for them in resolving the dispute. Winning every single point may not matter; successful strategies instead are often creative. Recent developments—including the launch of the ICC Commission on Arbitration and ADR's *Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration*—reflect the growing recognition that clients must be afforded a key role in determining strategy in their arbitrations.[61]

By the end of the conference, the tribunal and the parties (both external and in-house counsel) together should have arrived at a roadmap for the resolution of the dispute. This roadmap may identify an important preliminary issue that could dispose of the remainder of the case or render its settlement more likely; efficiency dictates that a hearing on that issue should be held in relatively short order (including both argument and evidence on that one limited point), rather than putting both parties to the expense of developing argument and evidence on the entirety of their claims or defences. In the event that the resolution of such preliminary issues does not end the dispute, the process that follows should in any event be more streamlined and focused. Decisions on such issues could be oral or written (or potentially oral, in the form of a "thumbs up or thumbs down", to be followed by a written decision). The roadmap would also reflect the need for written pleadings, witness

[57] Debevoise Protocol s.7.

[58] The Debevoise Protocol s.5 notes in this respect that "[w]here possible, we will include a detailed statement of claim with the request for arbitration, so that briefing can proceed promptly once the procedural conference is established".

[59] 2012 *White & Case Survey* p.10.

[60] Debevoise Protocol s.8 ("We will request our clients and opposing clients to attend any procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures adopted and consider what is best for the parties at that time"). On this point, see also Born, *International Commercial Arbitration* (2014), p.2141 ("An arbitrator has the right, and arguably the obligation, to seek assertively to dissuade the parties from unreasonable or inefficient procedures, *including by requiring direct communications with the parties' officers (as distinguished from the parties' external counsel)*") (emphasis added); 2012 *ICC Report*, p.4 ("Ideally, party representatives will be present so that they can participate in the choice of appropriate procedures for the case").

[61] See ICC Commission on Arbitration and ADR, *Effective Management of Arbitration: Guide for In-House Counsel and Other Party Representatives* (September 2014), *http://www.icc.nl/docman-geschillen/docman-geschillen-arbitrage/60-icc-guide-to-effective-management-of-arbitration-1/file* [Accessed February 19, 2015].

statements and live testimony, document production and oral argument at the various procedural stages. Not every dispute requires all of these elements.

Identifying issues

This process of issue definition should not come to an end with the close of the first procedural conference. Instead, the arbitrators should communicate regularly about how they view the issues in dispute, involve themselves intimately in each procedural step, and keep the parties informed of the outcome of those discussions as often as appropriate, including through the issuance of interim case management orders, which may alter the initial "Procedural Order No.1". The tribunal might perhaps even issue preliminary opinions that indicate the tribunal's provisional thoughts on a particular issue. While some commentators have expressed concerns that tribunals run the risk of "prejudging" the dispute in this manner, and thus risk the enforceability of the award, we disagree. So long as the arbitrator keeps an open mind as to the final result, defining the issues and highlighting areas of concern should lead to a fuller elucidation of the issues, with each party informed of weaknesses in certain aspects of its case, or the need to develop further certain legal or factual issues. Such an approach allows the parties to shape best the presentation of argument and evidence to address the concerns of the tribunal on a continuing basis, and to focus on the issues that are most important to the deliberations and to the final award. Adopting this type of fluid process realises the flexibility inherent in arbitration to its full potential.

Of course, we are in no way advocating that the tribunal come to a conclusion on the final result at these preliminary stages, or that parties be prevented from presenting argument and evidence on issues that they believe to be important. The point is rather that procedural discussions should be substantive and meaningful and not the rote setting of deadlines based on the diaries of the tribunal and counsel. A thoughtful and careful arbitrator, who is reviewing submissions as they are submitted by the parties, will naturally begin to form an opinion about the important and less important aspects of each party's case. Any arbitrator who is not developing such opinions is, quite frankly, not doing his or her job. Keeping the parties apprised of these developments likewise allows them to focus their resources on the points that matter (or to "up their game" if the tribunal's directions reveal that they have failed to convince the tribunal that a given point is important or even dispositive).

Document production

If the active case management process advocated above is adopted, a tribunal can also introduce real efficiencies to the document production process, a frequent target for criticism. Indeed, in the 2012 *International Arbitration Survey*, "excluding or limiting document production" ranked third in users' list of "most effective methods of expediting arbitral proceedings".[62] Yet, while document production often represents the most costly aspect of an arbitration proceeding, users view it as a "worthwhile step in the arbitral process given its potential to affect the outcome of the case".[63] It is therefore also worthwhile for tribunals and parties to work together to render document production as cost effective as possible within the circumstances of each arbitration.

A proactive tribunal that is on top of the issues raised in the parties' submissions can better restrict requests to produce documents to those that are, in the words of the IBA Guidelines, "relevant to the case and material to its outcome".[64] The tribunal and parties should conduct a more detailed discussion of document production requests along these lines before they are ordered or rejected. Those discussions should also include cost

[62] 2012 *White & Case Survey* p.11.
[63] 2012 *White & Case Survey* p.23.
[64] International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (2010) art.3(10) (London: IBA, 2010) (*IBA Rules* (2010)).

implications for the party against which production is sought. Tribunals should also consider how best to limit the scope of potentially limitless searching of electronic documents, for example by requiring the parties to stipulate search terms and email account custodians.[65] In many instances, and as reflected in the Debevoise Protocol,[66] it may make sense to have the document production process unfold over a number of collaborative stages, rather than each party blindly searching a company's entire electronic records for any potentially relevant document. In general, a *proportionality* analysis should be employed; requests should not be allowed until they are as narrowly tailored to relevance as possible, bearing in mind the cost to the party tasked with searching, reviewing and producing.

Experts

Tribunals should also consider ordering pre-hearing conferences between the parties' experts; such meetings regularly reduce the scope of disagreement, and clarify the points of agreement, all of which aids the tribunal in determining how the parties can best focus the presentation of their respective cases at the hearing.[67] The *IBA Rules* propose that such meetings may even be held prior to the submission of reports.[68] Such meetings may prove even more useful than pre-hearing meetings, because the experts have not yet committed to their positions in writing. Parties and their experts may be alerted to certain positions they had planned to take that are in fact overstated or untenable as a result. Whenever this meeting is held, the list of points of agreement and disagreement will form a useful starting point for so-called witness "conferencing" or "hot tubbing" at the hearing, where the experts testify together. With both experts and fact witnesses, the tribunal should take a proactive role in the questioning process, to ensure that the testimony is focused on the issues it deems important.

Hearing

Consistent with this approach, the procedure for the hearing, and the substance covered in oral argument and witness testimony, should reflect the issues that the tribunal views as important, having carefully reviewed the written submissions of the parties, the accompanying witness and expert testimony, and the exhibits and legal authorities. In this regard, it is advisable for tribunals to consider the "Reed Retreat": namely, setting aside a day before the pre-hearing conference with the parties to talk about the case and, in a preliminary manner, how the oral hearing might proceed. This allows the pre-hearing conference to represent a real back-and-forth between parties and tribunal, rather than the parties simply dictating an agreed procedure to the tribunal and arguing those points on which they failed to agree. It also allows the tribunal to provide guidance to the parties on the issues that it views as important—a point of vital importance for the advocates appearing before it. How often have counsel arrived at a hearing having spent hours preparing oral argument on a particular issue to discover that the tribunal considered it irrelevant to their decision, or had come to a view on how it should be decided on the basis of the written pleadings alone? Valuable time could be spent instead addressing issues that the tribunal finds thorny or under-developed after the written submissions.

During the hearing itself, it is important that the tribunal continue to provide this guidance to the parties, through its questions and directions. If the parties are choosing to focus on

[65] See *IBA Rules* (2010) art.3(3)(a) ("in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner").

[66] Debevoise Protocol s.12 ("We will *work with opposing counsel* to determine the most cost-effective means of dealing with electronic documents") (emphasis added).

[67] 2012 *White & Case Survey* p.31 (noting a "disconnect between the 'current' and 'preferred' practices, suggesting that arbitrators should direct expert witnesses to confer in advance of the hearing more often than is currently done").

[68] *IBA Rules* (2010) art.5(4); see also Debevoise Protocol s.16.

issues that the tribunal finds unimportant, then the tribunal should intervene and let them know. This is not a question of the tribunal preventing the parties from making the oral submissions they wish to make. Advocates would prefer to know if the tribunal has questions or concerns about an aspect of the case and to be able to address them promptly. It is particularly important that the tribunal adopt this proactive role where the parties' submissions seem to be "ships passing in the night". The tribunal must aim to find common ground for the parties, for example by providing a list of issues that can even take the form of a decision tree, whether to be addressed at the hearing or in post-hearing briefs.

Post-hearing briefs

An easy and very effective way for tribunals to control costs is to avoid or at least limit the use of post-hearing briefs. This step is directly in the control of the tribunal. However, too often tribunals request full post-hearing briefs, despite extensive pre-hearing briefing. In many cases, it would appear that the tribunal is requesting such briefing in order to provide a template for its award.

If the tribunal has carefully read the pre-hearing written submissions and paid close attention during the hearing, by its close the arbitrators must have come to some conclusions about the issues in the case. One could argue that they are not doing their job if that were not so. Moreover, parties have had a full opportunity to present their case. They have no procedural right to another attempt to persuade the tribunal.

As a result, tribunals should only order post-hearing briefs if they remain genuinely undecided about the case. If so, the briefing would be much more efficient if the tribunal held some preliminary deliberation and asked the parties to brief only those issues that it found were necessary to reach its final award.

The Debevoise Protocol reflects an appropriate approach to post-hearing briefing:

> "When post-hearing briefs are appropriate, we will ask the arbitral tribunal to identify the issues on which it may benefit from further exposition, and then seek to limit the briefing to such issues."[69]

The award

While technically not a cause of additional costs, tribunals' delays in issuing their award cost the parties substantial time and cause them to question the efficacy of international arbitration. Indeed, delayed awards often cause the parties costs in their businesses because of the lack of a decision. The timing of the award is entirely within the tribunal's control. By the end of the hearing and any post-hearing briefing, the parties have done their job, and it is time for the tribunal to do its job.

As the ICC Rules require, the tribunal should inform the parties of an expected date to issue the award and stick to it. The Debevoise Protocol asks tribunals to issue the award within three months. In this day and age, it should no longer be acceptable for tribunals to wait six months, a year or longer to issue their award. After all, parties will have taken less time to prepare their written submissions. This is even true in more complex investment treaty cases. If tribunal members are too busy to issue their awards in such a timely manner, they should not accept the appointment.

5. Conclusion

Over half a century ago, Professor Carlston wrote in the context of state-to-state arbitration that:

[69] Debevoise Protocol s.21.

> "Only through a conscious and careful adaptation of procedural rules to the requirements of each arbitration as it arises will the procedural ills of international arbitration be minimized and its utility as a means for the settlement of disputes … be fostered."[70]

The same remains true today, especially in the face of widespread dissatisfaction among users with regard to both the length and cost of international arbitration proceedings. International arbitration depends upon its market: consumers willing to entrust their disputes to the system. If it does not meet the needs and respond to the criticisms of those consumers, the system will be in serious trouble.

Clearly, parties, internal and external counsel and institutions all have a role to play when it comes to managing the cost and length of arbitral proceedings. However, the ultimate responsibility for maintaining arbitration's reputation as a cost-efficient dispute settlement mechanism depends in large part on how arbitrators approach their case management powers. No other participant in the system has the same incentive or power to control costs in individual proceedings. Arbitrators must diligently seize this responsibility if arbitration is to retain its popularity.

[70] K. Carlston, "Procedural Problems in International Arbitration" (1945) 39 Am. J. Int'l L. 426, 448.