

CHAPTER 7

TAILORING INTERNATIONAL ARBITRATION FOR EFFICIENCY

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I INTRODUCTION

Nothing is so unproductive as the law. It is expensive whether you win or lose.

Gilbert Parker

Wash my fur but don't get me wet.

(German proverb)

Businesses in international commerce want their disputes to be resolved efficiently and fairly.¹ While there may be tension between efficiency, due process, and obtaining a correct result, the flexibility of international arbitration facilitates achieving a viable balance.² In practice, however, users of international arbitration perennially complain that proceedings cost too much and take too long.³

Parties, counsel, arbitrators, arbitral institutions, arbitral associations, and states can play roles in reducing costs and time to judgment in arbitration proceedings.

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1 'Efficiency' is used in this article to collectively refer to the costs and duration of arbitral proceedings.

2 For fuller consideration of the tension between efficiency, due process, and correct results see, eg, William W Park "Arbitrators and Accuracy" (2010) 1 *Journal of International Dispute Settlement* 25-53; Jennifer Kirby "Efficiency in International Arbitration: Whose Duty Is It?" (2015) 32 *Journal of International Arbitration* 689-696.

3 In a survey of various stakeholders published in 2015, 90% responded that international arbitration is their preferred dispute resolution mechanism. They identified 'cost' as its overall worst feature with 68% naming cost as one of its three worst features and 36% naming the 'lack of speed' as one of its three worst features. Queen Mary School of International Arbitration and White & Case, "2015 International Arbitration Survey: Improvement and Innovations in International Arbitration" (2015) 5, 7 <www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2015_0.pdf>.

Improvements need not be systemic but can flow from an aggregation of small measures. This article presents a survey of rules, procedures, guidelines, and proposals to promote efficiency in international arbitration.⁴

Despite its focus on details, the exposition confirms three broad prescriptions for efficient proceedings. Firstly, parties should establish procedures that promote efficiency in their arbitration agreements at the time when their interests align. Secondly, procedures should subsequently be tailored to individual disputes when they arise. Thirdly, procedures should be monitored and adapted to eliminate waste as the proceedings advance and the dispositive issues come into focus. The article suggests that primary responsibility for the latter two prescriptions should be on arbitrators since efficiency may no longer be a shared value between parties once an arbitration is underway.

II PREPARING FOR DISPUTES

Business enterprises can promote efficiencies in international arbitration by adopting policies that anticipate disputes before they occur. While this subject goes beyond the scope of this survey, it should be underscored at the outset given the impact that effective planning can have on dispute management. Common tools include adopting document retention and destruction policies, establishing effective internal communication systems to identify and address disputes, and adopting early case assessment procedures.⁵

III COMPLIMENTS TO ARBITRATION

The surest way to avoid an inefficient arbitration is to avoid arbitration. Dispute management methods such as negotiation and mediation can resolve disputes more efficiently than adversarial proceedings while preserving relations between the parties. Expert determination or dispute boards can be used in some cases to reach binding decisions more quickly than arbitration, particularly for disputes concerning valuation, certification, or technical assessment. Multi-tiered dispute resolution clauses can obligate parties to attempt such measures before recourse to arbitration is possible.

While these options are well known, they can be used to greater effect to compliment to arbitration. If mediation cannot resolve all claims, it might nonetheless be used to settle some and remove them from the scope of arbitration.

4 For less conventional suggestions, see, eg, Joerg Risse "Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings" (2013) 29 *Arbitration International*, *The Journal of the London Court of International Arbitration* 453-466.

5 See, eg, Michael McIlwrath and John Savage *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010) 134-142.

Some arbitral institutions have recognized the benefits of providing alternatives to arbitration, and a number have made it easier to move between mediation and arbitration.⁶ Otherwise, the parties can continue to mediate during the arbitration or possibly combine the two more formally. Empirical evidence suggests that, while infrequent, this approach leads to cost savings.⁷

Failed attempts can likewise be revived later in the arbitration proceedings. The exchange of early written submissions may reveal that a dispute is primarily technical in nature and can be more efficiently resolved by expert determination. Likewise, submissions might encourage another attempt at negotiation or mediation by clarifying the strengths and weaknesses of the parties' positions.

IV ARBITRATION AGREEMENTS

Businesses may not be inspired to haggle over the details of arbitration procedures when they negotiate their commercial contracts. They are understandably focused on the success of their joint enterprise, and undue attention to arbitration may seem unnecessary and even foreboding. Parties may likewise resist binding themselves or limiting their options in the face of the unknown.

Yet the spirit of common purpose during successful contract negotiations can be leveraged to secure commitments to efficient arbitral procedures in arbitration agreements. At this point in time, the parties have a shared interest in their business venture and may place a premium on avoiding unnecessary costs. The specter of arbitration is remote, and the parties usually do not know who would be the claimant and who would be the respondent in the event of a dispute.

Such collaboration about efficient dispute resolution may be impossible once a dispute has arisen and the parties' interests have diverged. At that point, the viability of their business venture and future relations may be uncertain, and there may be little incentive for the respondent to cooperate with the claimant to maximize the efficiency of the proceedings against it.⁸

6 For example, the International Centre for Dispute Resolution ('ICDR'), the International Chamber of Commerce ('ICC') and the Hong Kong International Arbitration Centre ('HKIAC'), to name a few, support the use of mediation as an antecedent to arbitration and during the arbitral process.

7 See Dilyara Nigmatullina, "The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study" (2016) 33 *Journal of International Arbitration* 70-72.

8 See, eg, Veijo Heiskanen "Key to Efficiency in International Arbitration" on Kluwer Arbitration Blog (29 May 2015) <<http://kluwerarbitrationblog.com/2015/05/29/key-to-efficiency-in-international-arbitration>>.

On this basis, a number of procedural issues can be usefully addressed in arbitration agreements to provide an efficient framework for arbitration. While one may question whether parties will be inclined to negotiate details of arbitral procedure at this stage, it is certain that their spirit of common purpose may not be easy to replicate once they are faced with a controversy.

4.1 *Agreeing to a Sole Arbitrator*

Selecting one arbitrator instead of a tribunal of three arbitrators evidently favors efficiency. Meetings are easier to schedule, the parties pay one person instead of three, decisions do not require coordination and agreement among members, and the award will not be delayed by protracted deliberations. Parties may prefer to have three arbitrators to militate against error or for strategic reasons, but the added expense may not be warranted, particularly for modest disputes.

4.2 *Limits on the Duration of Proceedings*

There are a variety of ways that parties can impose deadlines on the arbitral proceedings in their arbitration agreements. They can focus on their own conduct by agreeing that the hearing will be held within a determined time from the filing of the request for arbitration. Otherwise, they can stipulate that the award will be rendered within a determined time from the constitution of the tribunal, or a determined time from the last hearing or the filing of the last written submission. Reasonable deadlines should not jeopardize an award, and the consequences of non-compliance can be circumscribed in the arbitration agreement. Parties might agree, for instance, that the tribunal will take any delays into account when assessing costs.

4.3 *Expedited and Value-Based Arbitration Rules*

The appropriate balance between achieving the correct result and the desire for efficient resolution will tilt towards efficiency in cases where claimed damages are modest.⁹ There is plainly no reason to employ the same resources, time, and procedures to a dispute over USD 1 million as a dispute over USD 100 million.

Recognizing the benefits of tailored proceedings, some institutions provide expedited procedural rules that parties can choose to simplify and speed up the arbitral process.¹⁰ The Arbitration Institute of the Stockholm Chamber of

9 In the 2015 Queen Mary Survey, 92% of respondents reported that they would favor the inclusion of simplified procedures in institutional rules for claims under a certain value with 33% reporting they would have this be a mandatory feature and 59% reporting that they would have it be an optional feature. Queen Mary Survey, above n 3, 26.

10 For example, the Australian Centre for International Commercial Arbitration, the German Institution of Arbitration, the ICDR, the Istanbul Arbitration Centre, the Mumbai Centre for International Arbitration, the ICC, the Arbitration Institute of the Stockholm Chamber of

Commerce, for example, has published expedited rules and model clauses for expedited proceedings, expedited proceedings for disputes of a determined value, and expedited proceedings as a default subject to SCC determination that the regular arbitration rules will apply.¹¹

Parties can alternatively tailor procedures to the amount in dispute in their arbitration agreements on an *ad hoc* basis, which may permit more flexibility and may better account for their preferences and the nature of their business. They might stipulate, for example, three arbitration tracks, each corresponding to a different range of claimed damages: for disputes over USD 10 million there might be no restrictions; for disputes between USD 1 million and USD 10 million, they might agree to a sole arbitrator, limited document disclosure, and tribunal-appointed experts; for disputes under USD 1 million, they might stipulate a sole arbitrator, one round of submissions, no document production, and no hearing unless the tribunal determines that a hearing is necessary.¹²

4.4 Limits on Submissions

It goes without saying that longer written submissions are not always better. Businesses may complain about the cost, and arbitrators may complain that they cannot reasonably be expected to read and process hundreds or thousands of pages of submissions and evidence filed by overreaching counsel. Limits on the number of exchanges of written memorials and the number of pages of each submission included in an arbitration agreement can cut costs and time and may even facilitate better understanding of the dispute by the tribunal. Parties may likewise exclude post-hearing memorials or limit them, for example, to addressing witness testimony or tribunal questions at the hearing.

4.5 Limits on Document Production

It is axiomatic that unrestrained document production adds significant costs and time to arbitration proceedings. Parties can commit in their arbitration agreement to exclude document production altogether or to limit its scope of in a variety of ways. Restrictions might include limiting requests to specific documents rather than categories of documents, limiting the time frames that can be the subject of requests, and limiting the subject matter of requests. The parties might otherwise limit

Commerce ('SCC'), the Singapore International Arbitration Centre ('SIAC'), and the Swiss Chambers of Commerce have published sets of expedited procedural rules.

11 SCC Model Clauses <www.sccinstitute.com/dispute-resolution/model-clauses/english>.

12 Heiskanen, above n 8.

production by keyword searches or email-account custodians for electronic documents.

More generally, parties might agree that document production will be governed by the prominent International Bar Association Rules on the Taking of Evidence in International Arbitration ('IBA Rules'), which provide a framework for document production procedure and, arguably, limit its excesses.¹³ While these rules have undoubtedly harmonized procedure and expectations, they permit requests of categories of documents and may thus enable substantial disclosure.

4.6 *Limits on Hearings*

Hearings are normally the most expensive part of arbitral proceedings. Parties can limit the costs by fixing reasonable limits on the scope or duration of hearings in their arbitration agreements. Such restrictions may encourage the parties to present the witnesses and evidence most important to the resolution of the dispute. Going further, they might agree that their disputes will be decided on the basis of documents alone. This provision could be moderated by stipulating that the tribunal can determine after consultation with the parties that a hearing would be appropriate.

4.7 *Selecting a Single Language of Arbitration*

In some arbitrations, considerable resources and time are spent contending with evidence and testimony in more than one language. This includes the costs of translation, interpretation, expert and fact witness testimony, file management, printing, and other language-support services. Where parties have not agreed on the language of the arbitration, there may also be costly disputes about the language or languages of the proceedings.

Parties should choose a single language of arbitration if possible in their arbitration agreements. If this is not possible, they might agree to limits on the use of more than one language. They might stipulate, for instance, that expert testimony will be in one language. If counsel and the tribunal can read documents in a language relevant to the arbitration, they might agree that documents in that language either do not need to be translated into the language of the proceedings or that only relevant parts of those documents need to be translated.

4.8 *Place of Arbitration, Case Administration, and Applicable Laws*

The place of arbitration, case administration (institutional or *ad hoc*), and applicable laws bear on the speed and cost of arbitral proceedings for reasons that are well known. The place of arbitration may implicate national courts with varying

¹³ IBA Rules art 3.

degrees of intervention and judicial efficiency. Institutions charge fees for their services, but their arbitral rules may otherwise provide procedural mechanisms to achieve efficiency and secretariat staff that can act to keep proceedings on track. The choice of a substantive law foreign to the parties may require additional counsel, legal experts, and translation. Although these choices will be made on the basis of a range of considerations that go beyond costs, counsel should ensure that their clients are well aware of the implications of their choices on the efficiency of the proceedings.

V ARBITRAL PROCEEDINGS

Once the arbitral proceedings are underway, there will be myriad opportunities for the parties and tribunal to build efficiencies into the process. The nature of the dispute will be known, and written submissions, the taking of evidence, and hearings can be tailored to ensure that the available time is spent on issues that are directly relevant to its resolution.

5.1 Commencing an Arbitration

There are several foundational choices that a claimant must make as it prepares to commence an arbitration that will have a significant impact on costs and time. These include, for example, which respondent or respondents to pursue, whether to consolidate the arbitration with any existing arbitration, and whether to initiate proceedings under expedited rules.

The level of detail in the request for arbitration and the evidentiary support filed with the request are particularly relevant to efficiency. A summary request may be preferred to begin proceedings quickly or to avoid overexposure at a moment when the facts are not fully known or understood. Significant time and costs can be saved, however, if the claimant submits a fully-developed request with all necessary supporting evidence. Although this will take more time to prepare, it could eliminate the need for a round of written memorials, encourage settlement, and assist the parties and tribunal to isolate the important issues, set an appropriate timetable, and select procedures that are well adapted to efficient resolution.

5.2 The Authority of Arbitrators

With the initial the exchange of submissions (request and response), the parties will be in a good position to identify the measures that will be needed to resolve their dispute. Provided that they can work together, they should be able to customize procedures to promote efficiencies. In many cases, however, the respondent will have no interest in cooperating with the claimant to make the proceedings as fast and painless as possible.

In these circumstances, the role of the tribunal in assuring procedural efficiency is amplified.¹⁴ By proposing efficient procedures, discouraging inefficiencies, and promptly identifying issues raised by the parties that are relevant and not relevant to the resolution of their dispute, the tribunal can seek to avoid the 'moral hazard' posed by the parties' diverging interests.¹⁵ Recommendations by the tribunal, as the ultimate judge of their dispute, should be persuasive, and arbitral rules tend to support the authority of tribunals to make the final decisions about which procedures are appropriate.¹⁶

Arbitrators should feel confident in communicating what they will need, and will not need, to resolve the dispute. Concern about due process is often misplaced.¹⁷ Due process requires only that parties be able to present their cases on the issues material to the outcome of the dispute and not on every issue that could conceivably be relevant.

5.3 Arbitrator Challenges

Arbitrator challenges, both legitimate and strategic, have become a regular feature of international arbitration.¹⁸ Whether or not a challenge succeeds, it will disrupt and may even derail the arbitral proceedings. As part of the vetting process, parties should carefully consider whether the relationships, engagements, and experience of their arbitrator candidates could elicit challenges.

5.4 Arbitral Secretaries

Tribunals may work more efficiently with the assistance of a tribunal secretaries. Secretaries reduce the hourly rate for administrative tasks where arbitrators are paid by the hour, and they may free up time for the tribunal to focus on more substantive

14 For more on the role that arbitrators should play in promoting efficiency, see, eg, David W Rivkin and Samantha J Rowe "The Role of the Tribunal in Controlling Arbitral Costs" (2015) 81 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 116–130.

15 Heiskanen, above n 8.

16 See, eg, ICC Rules of Arbitration 2012 art 22.2; HKIAC Administered Rules 2013 art 13.1; SIAC Arbitration Rules 2016 r 19.1; The United Nations Commission on International Trade Law ('UNCITRAL') Arbitration Rules 2010 art 17.1. See also Rivkin, above n 14, 124.

17 See, eg, Klaus Peter and Berger J Ole Jensen "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators" (2016) 32 *Arbitration International* 415–435.

18 See, eg, Brian King "Party Autonomy, the 'Right' to Appoint, and the Rise of Strategic Challenges" in Franco Ferrari (ed) *Limits to Party Autonomy in International Commercial Arbitration* (Juris Net, 2016) 37–82.

aspects of the dispute.¹⁹ While parties may have concerns about the delegation of arbitrator duties to a secretary, a number of institutions have introduced guidelines to clearly circumscribe their appointment, duties, and compensation.²⁰ A few institutions also train and accredit would-be secretaries.²¹

5.5 *Customization of Procedures*

The flexibility of international arbitration is one of its most valuable attributes. In the 2015 White & Case Survey, stakeholders ranked flexibility as more important than the ability to select arbitrators in the proceedings.²² While harmonization of arbitration procedures may offer some benefits, such as predictability, it risks building inefficiencies into the process and squandering one of the key advantages of arbitration over court litigation.

Writing about efficiency, David Rivkin has observed that it is useful to view each arbitration as a blank slate.²³ From this perspective, procedures that are necessary to resolve a dispute can be determined and those that are not necessary can be avoided. If a dispute turns on witness testimony, for example, parties might limit written pleadings and move quickly to a hearing. If a dispute turns on a legal issue or documents, then a hearing might not be needed at all. Such customization realizes the full potential of arbitration and can result in significant savings in costs and time.²⁴

5.6 *Organizational Meetings*

A meeting between the tribunal and parties at an early point in the proceedings is essential to establish the procedures that will comprise the arbitration.²⁵ Some of the

19 See, eg, Constantine Partasides, "Secretaries to Arbitral Tribunals" in Bernard Hanotiau and Alexis Mourre (eds.) *Dossier of the ICC Institute of World Business Law: Players' interaction in International Arbitration* (International Chamber of Commerce, 2012) 84-88.

20 For example, the arbitration rules of the HKIAC, the ICC, and the SCC provide provisions on tribunal secretaries.

21 For example, the HKIAC and the London Court of International Arbitration ('LCIA') offer accreditation programs for tribunal secretaries. The Chartered Institute of Arbitrators ('CIArb'), a professional organization of alternative dispute resolution practitioners, also provides trainings.

22 2015 Queen Mary Survey, above n 3, 6.

23 David W Rivkin "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited" (2008) 24 *Arbitration International* 375. 'Blank slate' is a paraphrase.

24 Rivkin, above n 14, 127.

25 Many sets of institutional rules stipulate that tribunal and parties should meet at the beginning of the proceedings to determine arbitral procedures. Some also require claims to be fixed at an early point in the proceedings. See, eg, SIAC Arbitration Rules 2016 r 19.3; HKIAC Administered Rules 2013 art 13.3; and ICC Rules of Arbitration 2012 art 23.1(c).

main issues to be decided at the meeting or in procedural directions that follow include the nature of written submissions, evidence, and witness testimony; the applicable procedures; and the procedural schedule.

5.6.1 *Preparation*

The tribunal will be better prepared to determine the appropriate procedures if it reads the request and response attentively and considers the parties' procedural preferences before the meeting. To this end, it should ask the parties to confer about the procedures and identify areas of agreement and disagreement. This information will enable the tribunal to engage the parties about their preferences, identify possible inefficiencies, and speak with greater authority about the information needed to resolve the case.

5.6.2 *Commitment to Efficiency*

The organizational meeting may be the first time that the parties and tribunal meaningfully interact, and the tribunal can mark the occasion by expressing its commitment to efficient procedures that accord with the complexity of the case. In this spirit, the tribunal might take a firm position about deadlines, for example, by notifying the parties that requests for extensions of time for submissions and document production outside of the agreed schedule will be rejected unless real and convincing reasons for the delays can be provided. The tribunal might also advise the parties that costs will be assessed against them for wasteful practices.²⁶

5.6.3 *Participants*

The organizational meeting is of central importance to the arbitral process as it will yield a set of procedural directions that will shape the entire arbitration. While videoconferencing and teleconferencing are useful tools to control costs, the importance of this meeting should encourage the participants to meet in person.

In addition to counsel and the tribunal, party representatives (usually in-house counsel) should attend the meeting. This will enable the parties play a more direct role in setting procedures that are well adapted to the dispute and their budgets. Where the tribunal identifies perceived inefficiencies and cost-effective alternatives at the meeting, this may have more resonance with the parties present.

²⁶ Wasteful practices might include unjustified applications for interim relief, unfounded or excessive legal pleadings, exaggerated claims, unfounded or excessive document requests, unjustified failure to comply with orders and decisions, unjustified failure to comply with the procedural timetable, and dilatory tactics. For fuller consideration of cost allocations and efficiency see, eg, David W Brown, "What Steps Should Arbitrators Take to Limit the Cost of Arbitration?" (2014) 31 *Journal of International Arbitration* 500-501; ICC Commission Report, *Decisions on Costs in International Arbitration*, ICC Dispute Resolution Bulletin 2015-Issue 2.

5.6.4 *Procedural Calendar*

An important task at the organizational meeting is to set a schedule for the proceedings. One approach might be to determine only the initial stages of the proceedings and later, with the benefit of pleadings and evidence, determine any remaining steps that are necessary. While this would favor flexibility, the absence of a complete timetable with fixed deadlines may encourage abuse and engender scheduling conflicts later in the arbitration. It is normally more prudent to plan for all proceedings and make revisions as the case evolves.

5.6.5 *Delimiting Claims and Identifying Issues*

The tribunal and counsel should identify and fix the claims that will comprise the arbitration early in the proceedings. This will avoid argument on extraneous matters and discourage the parties from adding new claims out of time. Some arbitration rules empower tribunals to reject new claims that are added after an early point in the proceedings. The ICC Rules of Arbitration, for example, stipulate that a party cannot make new claims after the Terms of Reference for the case have been finalized unless authorized to do so by the tribunal.²⁷

The tribunal and counsel should also seek to identify the issues in dispute between the parties as early as possible.²⁸ Determining the issues at the start of the proceedings will have the benefit of focusing submissions, evidence, and witness testimony while reducing repetition and undue emphasis on side issues. Counsel might confer and provide a list of issues,²⁹ or the tribunal might communicate its own preliminary assessment of which issues are relevant based on the parties' early submissions. Some arbitrators may not welcome the idea of sharing their impressions before all of the pleadings and evidence have been submitted and analyzed, but this assessment need not be final. Counsel may appreciate the insight, and if they know what the tribunal considers to be relevant and necessary to resolve the case, they may be less likely to waste resources and overreach in future submissions.

27 ICC Rules of Arbitration 2012 art 23(4). The 'Terms of Reference' is a document that circumscribes the parties, claims, counterclaims, and issues early in the proceedings. See also, eg, World Intellectual Property Organization Arbitration Rules 2014 art 44.

28 The 2015 Queen Mary Survey identified narrowing the issues as the top thing that arbitration counsel could do better. See 2015 Queen Mary Survey, above n 3, 30.

29 In practice, the claimant could submit a table with its statement of claim listing the principal issues, as it sees them, with references to supporting evidence. The respondent could respond to each issue in a separate column with references to supporting evidence where needed. Commonly used in construction disputes, this procedure may clarify the issues in controversy and promote settlement on specific issues.

5.6.6 *Proceeding in Phases*

Arbitration proceedings can be divided into phases (eg, bifurcation, trifurcation) to isolate issues or claims for separate resolution. Phasing may encourage efficiency by settling key matters upfront and limiting the remaining issues for resolution. Disposing of a discrete issue or issues may otherwise resolve the dispute outright. Submissions on jurisdiction, merits, and costs are commonly considered separately, but any issue whose resolution could simplify or resolve the dispute might be usefully heard alone.

The tribunal and parties should carefully consider whether there are issues ripe for separate determination and, importantly, how phasing of the proceedings will affect costs and time. If there is likely to be significant overlap of facts and law in the separate phases of the proceedings, phasing may be counterproductive.³⁰

5.7 *Revisions to the Procedures*

The early exchanges of submission between the parties often bring about changes in the focus of the case. Arguments may come and go, submissions will be refined and adapted, and in some instances the center of gravity of the entire case may shift. The parties and tribunal can achieve efficiencies by adjusting the proceedings to account for these changes.³¹ In this connection, it might be useful to hold an organizational meeting to reexamine the issues and procedures on the basis of developments in the case.³²

5.8 *Hearings*

Hearings may offer considerable insight into a dispute by introducing witnesses in person and enabling greater responsiveness, and possibly spontaneity, in exchanges between the tribunal and counsel. Because of their cost, special consideration must be given to how the available time can be used most productively.

5.8.1 *Number of Hearings*

Commonly, evidentiary hearings follow full written submissions by the parties. Hearings might be held on an *ad hoc* basis, however, to clarify issues or test

30 For additional observations about phasing and efficiency, see, eg, Lucy Greenwood, "Does Bifurcation Really Promote Efficiency?" (2011) 28 *Journal of International Arbitration* 105–111.

31 The arbitration rules of some institutions include express acknowledgement of this authority. See, eg, ICC Rules of Arbitration art 24(3).

32 *Ibid.*

evidence.³³ Despite the expense, this approach might meaningfully narrow or even resolve the dispute.

5.8.2 *Preparations*

A meeting between the parties and tribunal will normally be held before a hearing to plan the proceedings. The arbitrators should consider sharing their impressions about the issues, evidence, and witnesses with each other before that meeting. This will help them to determine the key issues that should be addressed at the hearing and the evidence that will be most useful for this purpose.³⁴ The tribunal can better advise the parties at the pre-hearing meeting from this perspective.

5.8.3 *Hearing Procedures*

A standard hearing schedule of opening statements, witness examinations, and closing statements may not be the best use of time at the hearing. Opening statements may add little to pleadings that have already been made in written submissions and may even discourage advance preparation by the arbitrators. An efficient hearing might instead proceed quickly to cross-examination of witnesses and tribunal questioning about matters that remain unclear. As with all procedures, the hearing will be more useful if it is tailored to provide the arbitrators with the information and evidence that they need to resolve the dispute.

5.8.4 *Witnesses*

Fact and expert witness testimony requires costly preparation and takes up considerable time at the hearing. It may be useful to exclude non-essential witnesses and avoid overlapping testimony. Videoconferencing may be particularly appropriate for secondary witnesses where travel costs to the hearing would be high. Otherwise, witness conferencing may encourage a dialogue between the witnesses that is conducive to clarifying points of disagreement quickly.³⁵

33 Some commentators advocate a hearing early in the proceedings to clarify and possibly limit the issues in dispute. See, eg, Neil Kaplan, "If It Ain't Broke, Don't Change It" (2014) 80 *Arbitration 2* Chartered Institute of Arbitrators 172-175.

34 Lucy Reed "The 2013 Hong Kong International Arbitration Centre Kaplan Lecture – Arbitral Decision-Making: Art, Science or Sport?" (2013) 30 *Journal of International Arbitration* 85-99.

35 In witness conferencing, witnesses appear together for tribunal questioning. See, eg, Wolfgang Peter "Witness Conferencing" (2002) 18 *Arbitration International* 47-58.

If expert testimony is needed, the most efficient option would be the appointment of an expert by the tribunal.³⁶ Where parties appoint their own adverse experts, as is common, costs can be reduced by identifying points of agreement and disagreement between them as early as possible. This would ideally occur before the experts draft their reports in order to focus their writings. Otherwise, the experts should discuss their opinions with each other before the hearing and identify areas of consensus in order to ensure that their testimony is not wasted on non-contentious matters.

5.8.5 Adjustments at the Hearing

As facts and legal issues are clarified over the course of a hearing, the tribunal will likely determine that it needs more information about some matters and less about others than anticipated. The proceedings should be adjusted, as far as possible, to take account of these changes.

In order to better align the party submissions and the tribunal's needs, the tribunal should advise the parties promptly when their pleadings are unclear, immaterial, or repetitive. Although counsel may not always welcome such interventions, the feedback will enable them to revise their submissions and provide the tribunal with relevant information. Arbitrators may feel more confident giving directions of this sort if they make time during the hearing to discuss their evolving impressions of the case and identify remaining questions.

5.9 Post-Hearing Memorials

Post-hearing memorials may add unnecessary costs to the proceedings, particularly if their scope is unrestricted. It might be possible to address lingering issues at the end of the hearing during closing statements, particularly where the tribunal has asked questions throughout the hearing and thus given counsel time to reflect on its concerns. If written submissions are necessary, they can be subjected to page limits and restrictions on content. As previously observed, the memorials might be limited to responding to witness testimony at the hearing or to answering outstanding tribunal questions.

5.10 Deliberations

At the end of the hearing, the arbitrators' minds will be focused on what they have learned and how it impacts their understanding of the dispute. They should take advantage of this immersion in the case details to begin deliberations immediately

³⁶ As a hybrid between party-appointed and tribunal-appointed experts, the tribunal might nominate an expert from a list of candidates chosen by the parties. See, eg, Klaus Sachs and Nils Schmidt-Ahrendts "Protocol on Expert Teaming: A New Approach to Expert Evidence" in Albert Jan van den Berg (ed) *Arbitration Advocacy in Changing Times* (Kluwer Law International, 2011) 135.

while they are still together. Given busy schedules, there may not be another opportunity to engage one another about the case with the benefit of the parties' submissions and witness testimony so fresh in their minds. Deliberations immediately after the hearing will also help the tribunal to determine the remaining information that it will need to decide the dispute. On this basis, it can ask any lingering questions to the parties and give them final procedural directions promptly.

VI INSTITUTIONAL SUPPORT

Arbitral institutions play an important supporting role in enabling expedient, cost-effective proceedings.

6.1 Arbitration Rules

The arbitration rules of most institutions include provisions that facilitate efficient proceedings. Some rules impose deadlines on the parties and the tribunal for this purpose. Time limits might apply to party challenges to arbitrators, the completion of proceedings, or the rendering of awards.³⁷ A separate concern is how institutions should respond when the deadlines are not respected. The ICC, for example, reduces the fees of tribunals that unjustifiably delay submitting their awards for review by the Court of Arbitration.³⁸ While questions remain about this assessment, including how the Court of Arbitration determines that a delay is 'unjustifiable', the procedure is an innovation that should capture the attention of other arbitral institutions.

Beyond deadlines, some institutional rules place a general obligation on arbitrators to ensure that proceedings are expeditious and cost effective.³⁹ Other rules take up specific issues that bear on efficiency including provisions for expedited proceedings;⁴⁰ early dismissal of cases;⁴¹ sole arbitrators;⁴² electronic filings and

37 See, eg, SIAC Arbitration Rules 2016 r 15.1; HKIAC Administered Rules 2013 art 41.2(f); ICC Rules of Arbitration 2012 art 30.1. In this spirit, institutions might also consider requiring tribunals to provide the parties with a schedule for deliberations and the rendering of the final award at the close of the arbitral proceedings.

38 ICC, "ICC Court announces new policies to foster transparency and ensure greater efficiency" (News Release, 5 January 2016) <www.iccwbo.org/News/Articles/2016/ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency>. The ICC Court of Arbitration, which serves many of the functions of secretariats of other institutions, reviews all awards before they are issued to the parties.

39 See, eg, ICC Rules of Arbitration 2012 art 22.1; HKIAC Administered Rules 2013 art 13.1; and SIAC Arbitration Rules 2016 r 19.1.

40 See, above n 10.

41 See, eg, SIAC Arbitration Rules 2016 r 29; SCC Arbitration Rules 2017 art 39.

42 See, eg, ICC Rules of Arbitration 2012 art 12.2; SIAC Rules 2016 r 9.1.

communications;⁴³ consolidation and joinder;⁴⁴ multiple contracts;⁴⁵ interim measures;⁴⁶ and emergency arbitrators.⁴⁷

6.2 *Case Management*

Institutional staff offer a range of services that keep arbitral proceedings on track. Most institutions manage case funds, appoint arbitrators, and decide challenges to arbitrators. Some offer specialized services, such as the review of arbitral awards by the ICC and the SIAC, that may head off problems in the arbitration and beyond.

Institutions also assist parties to move confidently and efficiently through the arbitration process. The ICC, for instance, has published general notes on managing disputes as well as explanations of arbitration proceedings under its rules in multiple languages. Where parties or arbitrators have specific questions, the staff of institutions are available to provide answers and advice.⁴⁸ Parties can also leverage the institutions to manage delays or problems with arbitrators. The institutional secretariat may be in a better position to address complaints to the tribunal than the parties themselves and, possibly, to guard the anonymity of the source.⁴⁹

6.3 *Arbitrator Lists and Institutional Appointments*

To assist parties to identify arbitrators for appointment, many institutions maintain lists of vetted candidates. While the lists tend to be limited to names,

43 See, eg, LCIA Arbitration Rules 2014 art 1.2, 2.2, and 4.1.

44 See, eg, HKIAC Administered Rules 2013 art 27, 28; ICC Rules of Arbitration 2012 art 7, 10; LCIA Arbitration Rules 2014 art 22(viii), 22(ix); SCC Arbitration Rules 2017 13, 15.

45 See, eg, HKIAC Administered Rules 2013 art 29; ICC Rules of Arbitration 2012 art 9; and SIAC Rules 2016 r 6.

46 See, eg, HKIAC Administered Rules 2013 art 23; ICC Rules of Arbitration 2012 art 28; and SIAC Rules 2016 r 30.

47 See, eg, HKIAC Administered Rules 2013 sch 4; ICC Rules of Arbitration 2012 art 29; LCIA Arbitration Rules 2014 art 9B; and SIAC Rules 2016 sch 1.

48 ICC publications include the 2016 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration'; the 2015 'ICC Techniques for Controlling Time and Costs in Arbitration'; the 2015 'Effective Management of Arbitration - A Guide for In-House Counsel and Other Party Representatives'; the 2012 'ICC Arbitration Commission Report on Managing E-Document Production'; and the 2010 'ICC Issues Checklist for Arbitrators Drafting Awards'.

49 Some consider this to be among the main advantages of institutional arbitration. See Sophie Nappert "Ships Passing in the Night? International Arbitration and its Users: A Dialogue with Michael McIlwrath" (2015) 2 Bahrain Chamber for Dispute Resolution International Arbitration Review 27-28.

nationalities, and basic qualifications, the ICC publishes the identities of arbitrators sitting in cases and details about their appointments.⁵⁰

Additional information about arbitrators could be provided by the institutions that would help parties to identify efficient candidates. Arbitrator listings might include, for instance, the duration of past cases, the duration of time to render awards in past cases, and financial arrangements including the arbitrator's willingness to cap fees. The publication of this information should not concern arbitrators who work efficiently, and measures could be taken to avoid inaccurately attributing delays to the arbitrators.⁵¹

Institutions might also give greater priority to efficiency when appointing arbitrators. To this end, they could more thoroughly scrutinize a candidate's record of efficient management and availability before appointment. As a precondition to selection, for example, the institution might require the candidate to identify other cases in which they act as arbitrator and provide available dates for a hearing.

6.4 Arbitrator Challenges

As previously observed, tremendous time and resources are spent, and sometimes wasted, in attempts to disqualify arbitrators. In order to discourage misbehavior and manage party expectations, institutions should identify the grounds for successful disqualifications comprehensively. This could be better achieved by publishing notes that clearly identify circumstances leading to a successful challenge or by publishing redacted challenge decisions with reasoning. This information would assist the arbitrators to better understand the disqualification standards and the counsel to better predict the likely outcome of a possible challenge.⁵²

VII ARBITRAL ASSOCIATIONS

A wide variety of associations work to improve the international arbitration process. In addition to arbitral institutions, some of these groups include non-

50 See, above n 38. The details include arbitrator nationality, whether the arbitrator was appointed by the ICC or the parties, and which arbitrator is the presiding arbitrator in each case.

51 For example, listings could provide summary information about the causes of delays where appropriate and specify whether the arbitrator was presiding in each case.

52 The LCIA publishes digests of challenge decisions. See, eg, Thomas W Walsh and Ruth Teitelbaum "The LCIA Court Decisions on challenges to Arbitrators: An Introduction" (2011) *Arbitration International Special Edition on Arbitrator Challenges* 282, 284-285.

governmental organizations,⁵³ inter-governmental agencies,⁵⁴ professional associations,⁵⁵ discussion groups,⁵⁶ universities,⁵⁷ accrediting institutions,⁵⁸ and law firms.⁵⁹

In addition to giving voice to diverse perspectives on international arbitration, some of these groups have published guidelines, rules, and protocols that assist actors in arbitration proceedings to manage disputes more effectively.⁶⁰ The IBA Rules, for instance, contain a number of provisions that enable efficient proceedings. In the context of hearings, they recognize a tribunal's authority exclude the appearance of witnesses,⁶¹ to order that witness statements serve as direct testimony,⁶² to order witness conferencing,⁶³ and to exclude hearing testimony that is duplicative or burdensome.⁶⁴ While these powers might otherwise be derived from

53 For example, the International Council for Commercial Arbitration ('ICCA'), whose activities include convening conferences, sponsoring arbitration publications, and promoting the harmonization of rules, laws, procedures, and standards.

54 For example, the United Nations Commission on International Trade Law ('UNCITRAL'), whose activities include adopting conventions, rules, and model laws to promote harmonization and codification of effective international practices.

55 For example, the International Bar Association, whose activities include convening conferences and issuing codes and guidance on international legal practice.

56 For example, the OGEMID email list, which hosts lively discussion among arbitration practitioners, academics, and others interested in international dispute resolution.

57 For example, Queen Mary University, University of London, which performs research on arbitration and has published influential surveys about user attitudes towards arbitration.

58 For example, CIArb, a non-governmental organization whose activities include providing trainings for counsel, arbitrators, and tribunal secretaries.

59 For example, Debevoise & Plimpton LLP, which published a 'Protocol to Promote Efficiency in International Arbitration' in 2010.

60 Some examples of rules and guidelines that seek to improve dispute management procedures and promote efficiency include the International Institute for Conflict Prevention and Resolution ('CPR') Guidelines for Arbitrators Conducting Complex Arbitrations (2012); the UNCITRAL Notes on Organizing Arbitral Proceedings (2012); the JAMS Efficiency Guidelines for the Pre-Hearing Phase of International Arbitrations (2011); the CPR Guidelines for Early Disposition of Issues in Arbitral Proceedings (2011); the IBA Rules (2010); and the College of Commercial Arbitrators Protocols for Expedient, Cost-Effective Commercial Arbitration (2010). For an appeal to caution against possible overregulation of international arbitration by soft law norms, see, eg, Toby Landau and J Romesh Weeramantry "A Pause for Thought in International Arbitration: The Coming of a New Age?" (2013) 17 ICCA Congress Series 496-537.

61 2010 IBA Rules art 8.2.

62 Ibid.

63 Ibid, art 8.3(f).

64 Ibid, art 8.2.

general grants of authority in institutional rules, in the IBA Rules they find their full expression.⁶⁵

VIII STATES

States can create an environment that is conducive to international arbitration and efficiencies of scale. This is perhaps best demonstrated by the case of Singapore. In less than twenty years, the city-state has gone from being comparatively unknown for international arbitration to becoming one of international arbitration's global hubs thanks to a number of state-supported initiatives. The international arbitration legislation in Singapore has been modernized,⁶⁶ the judiciary adopts a supportive stance towards arbitration,⁶⁷ and measures have been taken to encourage the growth of the arbitration community. Singapore grants work-pass exemptions for non-residents providing arbitration services, for example, and tax incentives to firms and arbitrators carrying out international work.⁶⁸

As a result of these measures, parties seating their arbitrations or holding hearings in Singapore today have abundant resources. Domestic and international law firms have grown their international arbitration practices while foreign lawyers, law firms, and arbitrators have moved to Singapore or opened offices there.⁶⁹ Parties can hold hearings at Maxwell Chambers, a dispute-resolution complex with modern arbitration facilities that opened in 2010 with government support and that now plans to triple in size.⁷⁰ For administered proceedings, they can turn to SIAC, also

65 For consideration of how the IBA Rules may discourage efficiency, see, eg, Paola Sanchez, "Introducing Efficiency into the 2010 IBA Rules on Evidence: Does this Create a Back Door for Introducing Additional Inefficiencies into the System?" (2011) 1 International Commercial Arbitration Brief 3-4.

66 See, eg, An Act to Amend the International Arbitration Act (Chapter 143A of the 2002 Revised Edition) and to make related amendment to the Arbitration Act (Chapter 10 of the 2002 Revised Edition) Bill 2012; International Arbitration Act (Chapter 143A).

67 The Singapore Court of Appeal has observed that 'an unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore... More fundamentally, the need to respect party autonomy... has been accepted as the cornerstone underlying judicial non-intervention in arbitration'. *Tjong Very Sumito and Ors v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732.

68 Singapore Ministry of Law, 'Incentives and Exemption Schemes' <www.mlaw.gov.sg/content/minlaw/en/legal-industry/incentive-and-exemption-schemes.html>.

69 Singapore Ministry of Foreign Affairs, 'Straits Times; Entry of foreign law firms benefits S'pore: PM' (Media Centre, June 2012) <www.mfa.gov.sg/content/mfa/media_centre/singapore_headlines/2012/201206/news_20120611_01.html>.

70 Maxwell Chambers provides hearing rooms and facilities for arbitration proceedings. It also houses the local offices of arbitrators, international arbitration practitioners, and alternative dispute resolution institutions. Concerning expansion, see Ministry of Justice (Press Release, 5 January 2017) <www.mlaw.gov.sg/content/minlaw/en/news/press-releases/maxwell-chambers-expands--to-boost-singapores-status-as-dispute-.html>.

supported by the Singapore government, which has emerged as a leading global institution.⁷¹ Should the parties prefer to mediate, they can benefit from hybrid services between the SIAC and the Singapore International Mediation Centre ('SIMC').⁷² By supporting such efforts, the Singapore government has achieved success that might not otherwise have been possible and that almost certainly would not have come so quickly.

IX COLLABORATION AMONG STAKEHOLDERS

In addition to the individual roles that stakeholders can play in promoting efficiency, greater gains can flow from cooperation. This is evident from the case of Singapore and is readily observable in current practice. Arbitral institutions, for instance, tend to collaborate with users and the arbitration community more than before to positive effect. Institutions now employ leading arbitration specialists in management, executive, and advisory roles, and they increasingly involve the arbitration community in institutional decisions including revisions to arbitral rules.⁷³ At the end of arbitrations, some institutions seek feedback from the parties, which can assist in revisions of case-management procedures and arbitrator lists.

Despite such collaborations, there is greater scope to work together. Institutions could share more information among themselves about internal procedures and tribunal mechanisms for controlling costs and time. This could be a subject of discussion for meetings between institutional leaders, and the information gained could improve internal procedures and educate staff who administer cases across the institutions.⁷⁴ Despite competition between the institutions, such an exchange would be of shared interest given the importance that users of their services attribute to efficiency.

71 In the 2015 Queen Mary Survey, respondents ranked Singapore the fourth preferred seat in the world ranking higher than Geneva and New York. Queen Mary Survey, above n 3, 12.

72 See, eg, the SIAC and SIMC Arb-Med-Arb Protocol, which facilitates recording mediated settlements as consent awards to aid their enforcement.

73 SIAC, for example, comprises a 'Court of Arbitration' that oversees the appointment of arbitrators and administrative functions as well as a 'Users Council' to provide feedback on rules and process that are staffed with leading arbitrators and arbitration counsel from around the world.

74 As a possible model for a meeting, the Swiss Arbitration Association hosts an annual 'Arbitration Practice Seminar' in which experienced members of the international arbitration community discuss legal and practical issues that arise in successive stages of an arbitration. The participants use examples from real cases and debate the appropriate procedures and tribunal responses.

X CONCLUSION

Some commentators in the past claimed that international arbitration held a *de facto* monopoly on resolving transnational commercial disputes.⁷⁵ Today, even as some institutions report record numbers of cases,⁷⁶ this characterization would be difficult to maintain. The use of alternatives to arbitration, including mediation and dispute adjudication boards, is on the rise.⁷⁷ New international commercial courts have been established,⁷⁸ and progress has been made towards facilitating the enforcement of foreign court judgments.⁷⁹ The fluidity with which arbitration rules are revised by institutions reflects their responsiveness but also the increased competition for cases.

In this environment, user complaints about efficiency must be taken seriously to assure the continued success of the system.⁸⁰ This article has surveyed some of the ways that costs and time can be managed in arbitration proceedings as well as the shared, and sometimes shifting, responsibility of stakeholders to achieve greater efficiency.

Business consultant Peter Drucker famously wrote, '(t)here is surely nothing quite so useless as doing with great efficiency what should not be done at all'.⁸¹ Flexibility,

75 See, eg, Jan Paulsson "International Arbitration Is Not Arbitration" (2009) *Stockholm International Arbitration Review* 2; Jean Francois Poudret and Sebastien Besson *Comparative Law of International Arbitration* (Sweet and Maxwell, 2007) 2.

76 See, eg, "ICC announces record new cases in 2016" *Global Arbitration Review* (18 January 2017).

77 See, eg, "2016 International Mediation & ADR Survey, Census of Conflict Management Stakeholders and Trends" International Mediation Institute; Andy Hewitt *Construction Claims and Responses: Effective Writing and Presentation* (John Wiley & Sons, 2016) 25-26.

78 For example, the Singapore International Commercial Court was established in 2015 and the Dubai International Financial Centre Courts was established in 2006. For commentary on the relationship between international commercial courts and international arbitration, see, eg, Dalma Demeter and Kayleigh M Smith "The Implications of International Commercial Courts on Arbitration" (2016) 33 *Journal of International Arbitration* 441-470; Johannes Landbrecht, "The Singapore International Commercial Court (SICC) – an Alternative to International Arbitration?" (2016) 34 *ASA Bulletin* 112-125.

79 For discussion of means of enforcing foreign court judgments, see, eg, "The Hague Convention on Choice of Court Agreements: A Rival to the New York Convention and a "Game-Changer" for International Disputes?" on *Kluwer Arbitration Blog* (23 September 2016) <<http://kluwerarbitrationblog.com/2016/09/23/the-hague-convention-on-choice-of-court-agreements-a-rival-to-the-new-york-convention-and-a-game-changer-for-international-disputes>>; Micheal Hwang "Commercial courts and international arbitration—competitors or partners?" 31 *Arbitration International* (2015) 200-201; Council of Bars and Law Societies of Europe, "Position Paper on the Judgments Project concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" (Position Paper, 2016).

80 2015 Queen Mary Survey, above nn 3, 5 and 7.

81 Peter Drucker "Managing for Business Effectiveness" (May 1963) *Harvard Business Review* 53.

including the capacity to avoid inefficiency, is one of international arbitration's most valued attributes.⁸² The willingness or failure of the international arbitration community to capitalize on this feature may play an important role in determining whether the process continues to thrive in future.

⁸² 2015 Queen Mary Survey, above n 3, 6.