

# Tear Up the Procedural Schedule: Reducing Time and Costs in International Commercial Arbitration

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## 1. INTRODUCTION

In 2010, in a time of global economic pressure, it may be time for arbitrators and counsel to rethink the approach taken by tribunals when timetabling an arbitration. Arbitrators are not constrained by fixed procedures in arbitration and they should capitalise upon this. The tribunal can and should start each arbitration with a blank piece of paper and adopt a procedure which not only is suitable for the circumstances of the dispute but also reflects the need for international arbitration to re-establish itself as a quick and flexible alternative to court proceedings.

It is time for arbitrators to take the lead on this issue, to promote themselves by demonstrating how quickly cases in which they were appointed were disposed of, to make themselves available early in the proceedings, to familiarise themselves with the dispute and to revert to a situation in which a prompt determination of the dispute is not known as an "expedited" procedure, but is the standard procedure for international commercial arbitrations.

## 2. PERCEIVED PROBLEMS WITH INTERNATIONAL ARBITRATION

The commercial consumers of arbitration—the parties—are increasingly expressing unhappiness with certain aspects of the arbitration process, particularly in relation to the level of costs incurred and time expended. The Corporate Counsel International Arbitration Group (CCIAG), which was launched in 2006 to be the "voice of the corporation in international arbitration",<sup>1</sup> has been recently voicing its concerns about the arbitral process. A member of CCIAG was recently quoted as saying that "no one he knows who uses arbitration regularly is happy with it".<sup>2</sup> CCIAG is apparently looking for "dramatic reform" of international arbitration.<sup>3</sup>

During the last decade, there has been a growing awareness that arbitration is no longer perceived to be a quicker and cheaper alternative to national court proceedings. The limited number of surveys available appear to bear this out. The 2007 *Fulbright & Jaworski Litigation Trends* survey found that only 9 per cent of respondents believed that international arbitration was cheaper than litigation (down from 26 per cent in 2006 and 32 per cent in 2005). The survey concluded that:

\* The views expressed in this article are the author's own and do not necessarily reflect the views of Fulbright & Jaworski LLP.

<sup>1</sup> "International Arb Group formed by Corporate Counsels" (2007) (May–July) *Dispute Resolution Journal*, available online at <http://www.highbeam.com/Dispute+Resolution+Journal/publications> [Accessed July 9, 2010].

<sup>2</sup> David Hechler, Corporate Counsel, "We can work it out" (February 1, 2010), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202437871408> [Accessed June 16, 2010]; [http://www.pwc.co.uk/pdf/PwC\\_International\\_Arbitration\\_2008.pdf](http://www.pwc.co.uk/pdf/PwC_International_Arbitration_2008.pdf) [Accessed June 16, 2010]; C. Bühring-Uhle, L. Kirchof and M. Scherer, *Arbitration and Mediation in International Business*, 2nd edn (Alphen aan der Rijn: Kluwer Law International, 2006), p.127, available at <http://www.kluwerarbitration.com> [Accessed June 15, 2010] asserts that "arbitration offers the best legal framework available for the resolution of international business disputes but suffers from high transaction costs and an inherent limitation in the capacity to bring about consensual solutions".

<sup>3</sup> D. Hechler, "We can work it out" (February 1, 2010), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202437871408> [Accessed June 16, 2010].

“[T]he overall trend among the survey respondents seems to be that international arbitration is not seen as offering significant cost benefits over litigation.”<sup>4</sup>

The survey also found that the percentage of respondents who believed that arbitration was quicker than litigation fell dramatically from 43 per cent in 2006 to 11 per cent in 2007. For their book Bühring-Uhle, Kirchof and Scherer<sup>5</sup> conducted an empirical study of the practice of international commercial dispute resolution. They concluded that:

“[A]rbitration offers the best legal framework available for the resolution of international business disputes but suffers from high transaction costs and an inherent limitation in the capacity to bring about consensual solutions.”<sup>6</sup>

The PricewaterhouseCoopers/Queen Mary School of International Arbitration’s 2006 study found that 65 per cent of respondents believed international arbitration to be more expensive than transnational litigation.<sup>7</sup>

The important point is that, although international commercial arbitration (certainly in large, complex cases) may not, in fact, ever have been quicker and cheaper than litigation, people clearly thought it was. And, arguably, those wishing to promote arbitration as a dispute resolution mechanism capitalised to a certain extent on this belief. However, does this (relatively recent) change in perception really mean that there is a “sense of crisis”<sup>8</sup> in international arbitration? And, if so, is there a need for the arbitration community to act to improve and streamline the arbitration process, to provide that “dramatic reform” corporate counsel are allegedly looking for?

It may well be that these perceived problems with international arbitration are slightly exaggerated. It is generally accepted that the longer an arbitration takes, the more it costs. The London Court of International Arbitration (LCIA) reports that the present average duration of an LCIA arbitration is 11 months, which, as an average figure, does not seem excessive.<sup>9</sup> Further, the conclusions of the PricewaterhouseCoopers/Queen Mary School of International Arbitration’s study in 2008 found that, in contrast to the sentiments expressed by CCIAG, 86 per cent of participating corporate counsel were “satisfied” with international arbitration, although the length of time taken and the cost of international arbitration were recognised as “disadvantages”.<sup>10</sup>

Certainly, the present state of arbitration appears extremely healthy. The statistics provided by the international arbitration institutions on the increase in matters being submitted to arbitration are impressive. For example, the International Chamber of Commerce (ICC) reported 337 new cases in 1992, in 2007 it was reporting 599 new cases.<sup>11</sup> The LCIA reported 243 new cases in 2009, compared to 163 disputes referred for arbitration in 2008, an increase of 40 per cent over the 12-month period.<sup>12</sup> However, is the reason for this increase only that, in the words of one corporate counsel, “the alternatives are so much worse”?<sup>13</sup> There have been arguments to the effect that the present economic climate has created a “perfect

<sup>4</sup> Available at <http://www.fulbright.com> [Accessed June 16, 2010].

<sup>5</sup> C. Bühring-Uhle, L. Kirchof and M. Scherer, *Arbitration and Mediation in International Business*, 2nd edn available at <http://www.kluwerarbitration.com> [Accessed June 16, 2010].

<sup>6</sup> Bühring-Uhle, Kirchof and Scherer, *Arbitration and Mediation in International Business*, 2nd edn, p.127, available at <http://www.kluwerarbitration.com> [Accessed June 16, 2010].

<sup>7</sup> PWC/Queen Mary School of International Arbitration, *International Arbitration: Corporate Attitudes and Practices* (2006); available at <http://www.pwc.com/arbitrationstudy> [Accessed June 16, 2010].

<sup>8</sup> Bühring-Uhle et al., *Arbitration and Mediation in International Business*, 2006, p.128. In December 2009, the former Lord Chief Justice of England and Wales, Lord Woolf, claimed that international arbitration had “lost its way”: <http://www.lawgazette.co.uk/news/woolf-calls-arbitration-overhaul-he-launches-new-guidance> [Accessed June 16, 2010].

<sup>9</sup> <http://www.lcia.org> [Accessed June 16, 2010].

<sup>10</sup> <http://www.pwc.com/arbitrationstudy> [Accessed June 16, 2010].

<sup>11</sup> (2008) 19(1) *ICC International Court of Arbitration Bulletin* 6.

<sup>12</sup> <http://www.lcia.org> [Accessed June 15, 2010].

<sup>13</sup> Michael McIlwrath, quoted in D. Hechler, “We can work it out” (February 1, 2010), available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202437871408> [Accessed June 16, 2010].

storm” within which mediation will thrive, presumably to the detriment of arbitration and litigation.<sup>14</sup> (In support of this assertion, it is interesting to note that the ICC reported a 100 per cent increase in its case load for mediations in 2009, compared with a 10–30 per cent increase in its case load for arbitrations.)<sup>15</sup>

Regardless of whether the recent criticisms of international arbitration are merited, or indeed whether the majority of users of arbitration share these concerns, there is an impetus within the international arbitration community to seek to streamline international arbitration and to revert to a more flexible, less formalistic format. For example, the ICC published a report in 2007<sup>16</sup> and the Centre for Effective Dispute Resolution (CEDR) released a report on settlement in international arbitration in November 2009 in which it made a number of recommendations intended to promote settlement rates in international arbitration.<sup>17</sup> CEDR also published a set of rules together with its *Report on Settlement in International Arbitration*. The rules are:

“[D]esigned to increase the prospects of parties in international arbitration proceedings being able to settle their disputes without the need to proceed through to the conclusion of those proceedings.”

Known as the CEDR Settlement Rules, the intention is that parties will incorporate them ad hoc in order to facilitate settlement discussions.<sup>18</sup> International law firms are also making efforts in this regard, with Debevoise & Plimpton LLP publishing a Protocol to Promote Efficiency in International Arbitration in April 2010, in which it promised that, as counsel, it would take steps to streamline the arbitral process by, for example, “front-loading” the arbitration by issuing a detailed statement of claim and by requesting fast-track schedules where appropriate.<sup>19</sup>

### 3. ARBITRATORS ARE UNIQUELY PLACED TO CHANGE THE PACE OF AN ARBITRATION

With the exception of the Debevoise Protocol, which places some of the burden of dealing with this issue on counsel, the focus of efforts to improve international arbitral procedure has generally been on the tribunal rather than parties, counsel or the arbitration institutions. This is a heavy burden for a tribunal to bear. Arbitrators need to issue a binding, enforceable award, to observe due process and often to maintain confidentiality. Adding a requirement to impose an expedited timetable on the parties may be unrealistic. Yet it is undeniable that the imposition of a robust timetable by a strong tribunal can make all the difference to the conduct of an arbitration.

A major selling point of arbitration is the fact that it is not constrained by procedural rules. In contrast, national court proceedings are governed by civil procedure rules which dictate how disputes are to be dealt with and, largely, cannot be dispensed with by the judge or the parties. Subject to the mandatory laws of the seat of the arbitration (of which there are generally few), and absent party agreement, the arbitral tribunal may conduct the proceedings in such manner as it considers appropriate.

<sup>14</sup> [http://www.mediate.com/articles/a\\_perfect\\_storm\\_is\\_gathering.cfm](http://www.mediate.com/articles/a_perfect_storm_is_gathering.cfm) [Accessed June 15, 2010].

<sup>15</sup> See the post by Michael McIlwrath, “ICC Mediation, Interesting Data” on Young Ogemid forum, March 23, 2010: <http://www.transnational-dispute-management.com/young-ogemid/> [Accessed June 15, 2010].

<sup>16</sup> ICC Report on Techniques for Controlling Time and Costs in Arbitration (2007). Available at [http://www.iccwbo.org/uploadedFiles/TimeCost\\_E.pdf](http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf) [Accessed June 15, 2010].

<sup>17</sup> CEDR, *Commission on Settlement in International Arbitration, Final Report* (November 2009), available at <http://www.cedr.com> [Accessed June 15, 2010].

<sup>18</sup> [http://www.cedr.com/about\\_us/arbitration\\_commission/Rules.pdf](http://www.cedr.com/about_us/arbitration_commission/Rules.pdf) [Accessed June 15, 2010].

<sup>19</sup> Debevoise & Plimpton LLP, Protocol to Promote Efficiency in International Arbitration (April 2010) set out and discussed in Michael McIlwrath, “Faster, Cheaper: Global Initiatives to Promote Efficiency in International Arbitration” (above at 558ff).

Due to the inherent flexibility of arbitral procedure, the tribunal is uniquely placed to change the pace of an arbitration and, in the face of the current criticism in relation to the time taken by arbitrations, should default to the imposition of a short timetable. Only in situations in which the parties can show that there is a clear, overriding reason for a longer timetable should the tribunal consider deviating from this approach.

In a 2006 article<sup>20</sup> Arthur Marriott QC focused on streamlining the arbitral procedure. His approach also relied heavily on arbitrators taking the initiative:

“Judges and arbitrators must manage cases efficiently, be prepared to impose time limits and stick to them, refuse to accept evidence and submissions which are irrelevant or only of secondary or tertiary importance and, above all, be active and not passive.”

The ICC report<sup>21</sup> echoed these sentiments when it highlighted the need for arbitrators with “strong case management skills” who are “proactive”. The report emphasised the utility of a tribunal holding an early case management conference, recognising that:

“[T]he more information the arbitral tribunal has about the issues in the case prior to such conference, the better able it will be to assist the parties to devise a procedure that will deal with the dispute as efficiently as possible.”<sup>22</sup>

Legal fees (together with in-house counsel and management time) make up the vast majority of the costs of pursuing an international arbitration, and the length of time an arbitration takes correlates directly with the amount of legal fees incurred. Jan Paulsson<sup>23</sup> wrote in 2006:

“It is a curiosity of the legal process, and particularly so in its arbitral manifestation, that work tends to expand to exceed available time. This is what the timely arbitrator must prevent.”

Peter Morton made a similar point<sup>24</sup>:

“[T]he longer a process takes, the more it is likely to cost. It is a regrettable fact of life that if, for example, counsel are given two weeks from the close of the hearing to prepare written closing submissions, they will fill (or largely fill) that time completing the task. If they had only been given two days, they would in most cases be able to produce submissions making substantially the same points, even if not with the same level of flair or aplomb.”

Were a party to be given a choice, it is likely that the vast majority of arbitration consumers would trade a little “flair or aplomb” in their submissions for the chance of an award being rendered more quickly.<sup>25</sup>

<sup>20</sup> Arthur Marriott, “Breaking the Deadlock” (2006) 22 *Arbitration International* 411.

<sup>21</sup> ICC, *Report on Techniques for Controlling Time and Costs in Arbitration* (2007). Available at [http://www.iccwbo.org/uploadedFiles/TimeCost\\_E.pdf](http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf) [Accessed June 15, 2010].

<sup>22</sup> ICC, *Report on Techniques for Controlling Time and Costs in Arbitration* (2007), para.32. Available at [http://www.iccwbo.org/uploadedFiles/TimeCost\\_E.pdf](http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf) [Accessed June 16, 2010].

<sup>23</sup> Jan Paulsson, “The Timely Arbitrator: Reflections on the Böckstiegel Method” (2006) 22 *Arbitration International* 19.

<sup>24</sup> Peter Morton, “Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?” (2010) 26 *Arbitration International* 103.

<sup>25</sup> In his article “Can a World Exist Where Expedited Arbitration Becomes the Default Procedure?” (2010) 26 *Arbitration International* 103, Peter Morton also states “the cynic might point to the fact that it is in the interests of counsel, and often of the tribunal, to have a timetable involving numerous procedural steps, stretching over an extended period of time, in cases where their charges are based on the billable hour”. It is rarely, if ever, in the interests of the parties to have such a timetable for their arbitration.

#### 4. TEAR UP THE PROCEDURAL SCHEDULE

Occasionally, arbitrators are criticised for having a “one size fits all” procedural order to hand for every arbitration. Whilst this may not be a wholly fair accusation, there is a tendency for tribunals to revert to the comfort and security of the “standard” international procedure, which is generally two rounds of submissions, an extended period for disclosure, pre- and post-hearing briefs, cross-examination of witnesses, provision for expert reports and often no commitment on the timing of the publication of the award. Counsel often concur with this approach out of habit and on the basis of preconceptions about the necessary procedural steps required in an international commercial arbitration.

A different approach (and one used by some arbitrators already) is to take out a blank piece of paper at the first procedural conference and to start with a consideration of what needs to be achieved between the procedural hearing and the publication of the award.

Ideally, the tribunal should take the publication of the award and work backwards from it. For example, the tribunal could say to the parties that it commits to render an award in month *x*.<sup>26</sup> It should then consider what it needs from the parties in order to be in a position to render that award by the deadline it has imposed. Taking this approach could lead a tribunal to decide that it needs only one round of submissions from the parties, or that it can best inform itself about the issues if it uses less traditional techniques during the hearing, such as witness conferencing. It may decide that it would like an oral briefing from counsel in place of post-hearing submissions; alternatively it may dispense with post-hearing submissions entirely.

A flexible procedure is the one tool available in international arbitration that can radically alter people’s perception of arbitrations. Innovative use of the unique flexibility of arbitration procedure could and should become a unique selling point for arbitrators. Arbitrators should become known for their ability and willingness to take a creative approach to timetabling, rather than reaching for the security of a well-tried and tested procedural order. Arbitrators should be promoting their speed in publishing the award post hearing, and those appointing the arbitrators should be factoring this information into their decision to appoint the individual in question. In the small world that is international arbitration, it would not take long for arbitrators to become individually known for adopting a different approach during the procedural conference.

Perhaps unfairly, arbitrators already bear a heavy responsibility for case management, but adopting more creative approaches to timetabling the arbitration, not just in unusual disputes, or when requested by the parties, but as standard practice, would go a long way towards silencing the critics of international arbitration.

<sup>26</sup> And to radically change existing procedure, *x* would need to be month six or less.