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Striking the Right Balance: The Roles of Arbitral Institutions, Parties and Tribunals in Achieving Efficiency in International Arbitration

Anne Véronique Schläpfer & Marily Paralika*

ABSTRACT

Users often complain about the lack of efficiency and the costs of international arbitration. Parties, arbitral tribunals, institutions all agree that measures should be taken to make arbitration less expensive and more efficient. Who is responsible for this? Who is in a position to resolve these difficulties? Trying to find scapegoats is not useful; parties, arbitral tribunals and institutions all have their share of responsibility. They also have remedies to enhance the quality of the process and make it more cost-effective and less time consuming. The authors will try to identify measures which could be undertaken at various stages of the proceedings to achieve this goal, bearing in mind that there cannot be one single solution fit for every arbitration.

1 INTRODUCTION

Efficiency has become one of the major concerns in international arbitration. Although everyone—parties, counsel, arbitrators, and institutions—agrees that arbitration proceedings should be less costly, faster, and less burdensome, this broad consensus tends to melt like snow in springtime when it comes to identifying remedies.

This is not surprising. While there are common features present in all arbitrations, the fact remains that the parties’ expectations and the arbitrators’ understanding as to how to conduct proceedings may vary significantly. These differences are inherent to international arbitration. Uniformity is incompatible with international arbitration and, as a result, there cannot be just one solution or one answer to the preoccupation with efficiency expressed by users in various forums. For example,

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the 2015 International Arbitration Survey highlighted the users’ criticisms of the system, including the costs, the lack of speed, the lack “of effective sanctions during the arbitral process,” and the lack “of insight into arbitrators’ efficiency.”\footnote{2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, Queen Mary University of London and White & Case LLP [hereinafter 2015 International Arbitration Survey].} Fast does not always mean less expensive, and a quickly rendered, defective award is seldom desirable. Experience shows that once the award is issued, the bold assertion that parties prefer a fast decision, even if it is incorrect, remains true only for the winning party.

Against this background, this article aims at identifying some of the tools available to institutions, arbitrators, and parties to improve efficiency, bearing in mind that none of these tools is a perfect solution nor should they be used blindly, \textit{i.e.}, without considering the particular circumstances of a given case.

2 THE ROLE OF ARBITRAL INSTITUTIONS IN ACHIEVING EFFICIENCY

Arbitral institutions have in recent years recognized the need to address concerns regarding efficiency. The 2012 International Chamber of Commerce (“ICC”) Rules of Arbitration are an example of this trend,\footnote{See Elisabeth Leimbacher, \textit{Efficiency under the New ICC Rules of Arbitration of 2012: First Glimpse at the New Practice}, 31(2) ASA BULL. 298 (2013); ICC Commission on Arbitration and ADR, \textit{Report on Techniques for Controlling Time and Costs in Arbitration} (2d ed. 2012), available at \url{http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-on-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration (last visited Nov 9, 2015)} [hereinafter ICC Report].} as well as the 2014 London Court of International Arbitration (“LCIA”) Rules,\footnote{See 2014 LCIA Rules.} the 2013 Vienna International Arbitration Centre (“VIAC”) Rules,\footnote{See 2013 VIAC Rules.} the 2013 Hong Kong International Arbitration Centre (“HKIAC”) Rules,\footnote{See 2013 HKIAC Rules.} and the 2014 International Centre for Dispute Resolution (“ICDR”) Rules.\footnote{See 2014 ICDR Rules, arts. 1(4) and E-1 to E-10.} Most of the provisions of the various arbitration rules dealing with time and cost efficiency address issues such as joinder of third parties and consolidation of arbitration proceedings. But some institutions have gone further, proposing specific rules tailored for faster proceedings. This is the case, for example, of the ICDR,\footnote{See 2014 ICDR International Dispute Resolution Procedures; 2015 AAA Accounting and Related Service Arbitration Rules.} the VIAC, which provides for fast-track proceedings with strict time limits and limitation of procedural steps,\footnote{See 2013 VIAC Rules, art. 45.} and the 2012 Swiss Rules of International Arbitration, which
provide for an expedited procedure that applies to all cases when the amount in dispute is less than one million Swiss francs or when the parties choose it.⁹

Arbitral institutions have a role to play at each step of the arbitration process. Their involvement is particularly critical at the outset of the arbitration proceedings when the arbitral tribunal has not yet been constituted. Until the arbitral tribunal is constituted, the parties’ only interlocutor is the institution. Once the arbitral tribunal is in place, the institution’s role is more limited as it is not in charge of conducting the arbitration proceedings. Attempts made in recent years to increase the involvement of institutions during the proceedings have not been well received, and probably rightly so. Nevertheless, institutions may contribute to the efficiency of the process by being attentive to party concerns and reactive should difficulties arise, such as challenges of arbitrators.

At the end of the proceedings, if the applicable rules provide for scrutiny of the award (like the 2012 ICC Rules), the role of the institution becomes more significant. Scrutiny of awards is an important task and often very useful. It may, however, also be the source of further delay (caused by the institution’s workload or by arbitral tribunals’ submission of poor-quality draft awards).

Prior to the commencement of the arbitration, interim measures may be necessary. Several institutions have adopted over the last few years provisions that allow parties to seek urgent interim or conservatory measures prior to the constitution of an arbitral tribunal. Such provisions allow the institutions to satisfy the parties’ needs promptly and efficiently, and the parties appear to have started embracing this new opportunity. Furthermore, arbitral institutions and emergency arbitrators are using the procedures in an efficient manner, despite the tight time limits.¹³

Even if some questions remain unanswered—such as the application of emergency relief to third parties, the exact standard to be applied in determining

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⁹ See 2012 Swiss Rules, art. 42.
¹⁰ For example, the HKIAC has recently created a system whereby participants in cases can rate its proceedings and provide confidential feedback on arbitrator performance. See HKIAC, Arbitration Evaluation Forms, http://www.hkiac.org/en/arbitration/529 (last visited Nov. 9, 2015). The HKIAC’s Secretary General has confirmed that the feedback will allow the Centre to identify areas for improvement, including potential areas where arbitrators may need to be trained, and it may also have an impact on the HKIAC’s decision whether to renew an arbitrators’ term on its panel and list of arbitrators. See Kyriaki Karadelis, Rate your Hong Kong arbitration, GLOBAL A RB. REV. (July 24, 2015).
the urgency and the need for protection, or the lack of certainty regarding the possibility of enforcing interim relief\textsuperscript{14}—they do not appear, at least so far, as major obstacles undermining the efficiency of this relatively new system. On the contrary, recent experience shows that interim measures ordered by arbitrators are often complied with without coercion.\textsuperscript{15} Moreover, emergency arbitrators’ orders can be a powerful incentive for parties to settle their dispute.\textsuperscript{16}

2.1 Setting the Arbitration in Motion: The Key Role of the Institution

Prior to discussing what role institutions play in setting the arbitration in motion, it is worth noting that this period covers all actions by an institution, from the receipt of a request for arbitration until the transfer of the file to the arbitral tribunal. For the purposes of this article, we will focus on the institution’s role in two main areas, which, if not tackled properly at the outset, risk causing delays down the line: multi-party arbitrations and the appointment of arbitrators.\textsuperscript{17}

Prior to turning to each of these issues, it is important to note that the role of the institution during this phase is key because the institution is the only authority that the parties can address and the only body capable of taking the necessary steps to transfer the case to the tribunal.\textsuperscript{18}

2.1[a] Taming the Multi-Party “Beast”: Joinder and Consolidation

Several authors have recognized that the multi-party character of international business transactions makes it increasingly likely that international commercial disputes are also multi-party in nature and involve a number of parties to a variety of related contracts, based in different jurisdictions.\textsuperscript{19} The increasing number of multi-party arbitrations has created a multi-party “beast”\textsuperscript{20} that parties and arbitral institutions have tried to tame over the years. In an effort to address such issues at

\textsuperscript{14} Id.
\textsuperscript{15} Jason Fry, \textit{The Emergency Arbitrator – Flawed Fashion or Sensible Solution?}, DISP. RES. INT’L 179, 196 (2013).
\textsuperscript{16} Carlevaris & Feris, supra note 12, at 38.
\textsuperscript{17} Steps such as the notification of the request for arbitration and the answer to the parties and fixing the place of arbitration fall within most institutions’ responsibilities under the relevant rules, but do not typically raise any issues as to the efficiency of the proceedings, hence they are not discussed in this article. It is of course crucial that such actions be taken promptly and without any delay, but they do not, in themselves introduce any major difficulties.
\textsuperscript{18} In this regard, see also, Anne Veronique Schläpfer, \textit{The Role of the Institution at the Commencement of the Proceedings}, ARBITRAL INSTITUTIONS UNDER SCRUTINY 55, ASA Special Series No. 40 (2013).
\textsuperscript{19} See, e.g., Gary Born, \textit{Consolidation, Joinder and Intervention in International Arbitration}, in Gary Born, II INTERNATIONAL COMMERCIAL ARBITRATION 2564–2613 (2d. ed. 2014).
\textsuperscript{20} One author mentions that one third of all ICC arbitrations are now involving multiple parties. See \textit{id.} at 2566.
the beginning of the arbitration, provisions on consolidation of arbitration proceedings and joinder of third parties have been included in several arbitration rules, such as the 2012 ICC Rules, the 2014 LCIA Arbitration Rules, the 2010 Stockholm Chamber of Commerce (“SCC”) Arbitration Rules, the 2015 China International Economic and Trade Arbitration Commission (“CIETAC”) Arbitration Rules, the 2013 Singapore International Arbitration Centre (“SIAC”) Rules, the 2013 HKIAC Arbitration Rules, and the 2012 Swiss Rules.

Article 10 of the 2012 ICC Rules, for example, provides that the ICC Court has authority, at the request of a party, to consolidate related ICC arbitrations into a single arbitration. In order for the ICC Court to consolidate arbitral proceedings, (a) the parties must have agreed to consolidation, or (b) all the claims in the arbitrations must be made under the same arbitration agreement, or (c) if the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations must be between the same parties, the disputes must arise in connection with the same legal relationship, and the ICC court must find the (various) arbitration agreements “compatible.”

Article 7 of the 2012 ICC Rules allows a party to join an additional party to an ICC arbitration before the appointment of an arbitrator, provided that the additional party is bound by the arbitration agreement. In practice, the ICC Secretariat fixes a short time limit prior to the constitution of the arbitral tribunal, and during this time the parties have a final chance to file a submission of a “Request for Joinder.” By fixing a cut-off date for the request to join additional parties early on, the process of joinder of additional parties is more efficient. As with consolidation, other arbitration rules provide slightly varying procedures that allow the joinder of additional parties.

The possibility for an institution to order consolidation or joinder is in practice limited since it is not possible to consolidate arbitrations that would not take place under the auspices of the same institution. Notably, the 2012 Swiss Rules do not require that the parties to both proceedings be identical and bound by the same arbitration clause; in practice, however, it seems difficult to imagine that the institution would consolidate proceedings or join a third party if not all

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21 In order to avoid issues with the constitution of the arbitral tribunal in multi-party cases, such matters need to be addressed prior to the constitution of the arbitral tribunal and hence, by the institutions.
22 See 2012 ICC Rules, arts. 7.1 and 10.
23 See 2014 LCIA Rules, arts. 22.1(viii), 22.1(ix) and 22.1(x).
24 See 2010 SCC Rules, art. 11 (consolidation only).
25 See 2015 CIETAC Rules, arts. 18 and 19.
26 See 2013 SIAC Rules, art. 24(b) (joinder only).
27 See 2013 HKIAC Rules, arts. 27 and 28.1.
28 See 2012 Swiss Rules, art. 4.
the parties have agreed to the same arbitration clause, unless all parties consent to it. Moreover, multi-party arbitrations are not easy to manage and can lead to increasing complexity. For example, if two parties ask to cross-examine a witness, which party should start? However, it is often more effective and cost efficient to have all concerned parties in the same arbitration rather than in several proceedings.29

2.1[b] Appointment of Independent, Impartial, and Available Arbitrators

The choice of arbitrators is one of the most, if not the most, important decision parties and/or the institution have to make. Efficiency is increased if the chosen arbitrator is independent and impartial (i.e., not potentially subject to a reasonable challenge) and has the necessary availability and competence to handle the arbitration.

If independence and impartiality can be determined based on objective criteria, availability and competence are less easy to assess. For instance, some arbitrators are able to handle efficiently several proceedings at the same time whilst others will be quickly overwhelmed by work. One of the main concerns voiced by users of international arbitration is that arbitrators have relatively limited time to devote to their cases, which leads to unacceptably slow proceedings.30 The ICC has taken steps to deal with this concern and requires potential arbitrators (whether appointed by the institution or nominated by the parties) to confirm prior to their appointment that they will be able to devote sufficient time to the case and, in particular, to hold evidentiary hearings.31 This does not guarantee that

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29 For potential downsides caused by consolidation and joinder provisions, see Born, supra note 19, at 2568-69.
30 See Lucy Reed, More on Corporate Criticism of International Arbitration, KLUWER ARB. BLOG (July 16, 2010) (explaining that an informal 2010 survey of the Corporate Counsel International Arbitration Group (CCIAG) lists “the factors as contributing to the rising inefficiency of international arbitration,” at the top of the list of which is “100% of those surveyed identified arbitrator availability and excessive document disclosure”). See also Douglas Thomson, Rivkin Calls for “New Contract” for Arbitrators and Parties, GLOBAL ADR. REV. (Oct. 27, 2015) (noting that David Rivkin addressed this issue in a keynote speech opening HKIAC’s ADR in Asia conference: “[T]oo many arbitrators schedule themselves so fully that they move from hearing to hearing, week to week, and never leave themselves time to undertake their other responsibilities – reading the papers, deliberating and writing the award.”).
31 Only the ICC has taken a major step towards transparency concerning arbitrators’ availability. The Court of Arbitration for Sport (CAS) provides in its 2013 Procedural Rules that every arbitrator “shall be available as required to complete the arbitration expeditiously.” 2013 CAS Procedural Rule 33. The 2014 ICDR Rules provide that upon accepting appointment, an arbitrator shall sign the Notice of Appointment affirming the availability. See 2014 ICDR Rules, art. 13.2. There are a few other rules that include the “availability” criterion for appointing the arbitrator. See, e.g., 2014 ICDR Rules, art. 12.4; 2013 SIAC Rules, Rule 10.3.
arbitrators will remain available during the actual duration of the proceedings, which may take several years.\footnote{The ICC’s Statement of Acceptance, Availability and Independence invites arbitrators to confirm “on the basis of the information presently available to [them], that [they] can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules, subject to any extensions granted by the Court pursuant to Articles 18 and 24 of the Rules.” The prospective arbitrators are then invited to indicate their current professional engagements, as at the date of the signature of the Statement.}

Another tool institutions have at their disposal is to listen and react to parties’ concerns about slow arbitrators and to consider taking appropriate steps to replace arbitrators. Increasing the size and diversity in the pool of arbitrators considered by arbitral institutions may also help address concerns about arbitrator availability.\footnote{On this subject, see Elizabeth Oger-Gross, Gravitas: Persuasion and Legitimacy (or why calling on parties and their counsel to appoint more diverse arbitrators may be wishful thinking), in Dealing with Diversity in International Arbitration, 2015(4) TRANSNAT’S Disp. MGMT. (July 2015).} However, putting aside the difficulties already highlighted in appointing more diverse arbitrators,\footnote{See 2012 ICC Rules, arts. 14 and 15.} the number of arbitrators appointed by institutions is small compared to the number of arbitrators nominated or appointed by the parties. Diversifying the pool of arbitrators is not solely the task of the institutions but also of the parties.

2.2 During the Arbitration: Challenges and Replacement of Arbitrators

It is unusual for an institution to intervene in arbitral proceedings. Intervention is almost exclusively reserved for examining a challenge by one of the parties and replacing arbitrators in the event that they can no longer perform their tasks.\footnote{See, e.g., 2014 ICDR Rules, art. 14; 2015 CIETAC Rules, art. 33; 2010 SCC Rules, art. 16.}

An arbitrator can be replaced for various reasons, including resignation, death, on the request of all the parties, or a successful challenge. In all these instances, the institution’s role in finding a replacement is critical in light of the disruption that the replacement will likely cause to the proceedings. The possibility that an institution intervenes and replaces an arbitrator due to repeated concerns regarding the arbitrator’s ability to fulfill his or her functions is significant. Several arbitral institutions’ rules contain a provision similar to Article 15(2) of the 2012 ICC Rules, which empowers the institution to replace the arbitrator, thereby preventing additional delays.\footnote{See, e.g., 2014 ICDR Rules, art. 14; 2015 CIETAC Rules, art. 33; 2010 SCC Rules, art. 16.}
2.3 REACHING THE END OF THE ARBITRATION: TIMELY ISSUANCE OF THE AWARD AND FIXING OF THE FEES

Pursuant to Article 27 of the 2012 ICC Rules, when the arbitral tribunal is satisfied that it can close the proceedings, it should do so promptly, notifying the Secretariat and the parties of the date by which they can expect to submit draft awards to the ICC Court for review.\(^{37}\) In addition, this provision allows the institution to prompt the tribunal to close the proceedings and to indicate the likely date for submitting the award, i.e. as soon as possible after the last hearing or the last submissions. It is difficult to know whether such an obligation improves efficiency, but it may put pressure on tribunals to render awards more promptly because tribunals must provide a concrete time limit that parties will expect to be respected.

Arbitrators are also encouraged to notify the Secretariat of any known obstacles or delays affecting timely submission of the award, as well as any change to the expected submission date. The timeliness of the draft award is a factor that the ICC Court is required to take into account when fixing arbitrators’ fees.\(^{38}\) This can be a very efficient tool to motivate arbitrators to be effective and not to delay the proceedings. Even in a case where, for example, the president of the tribunal is being slow with addressing the parties’ requests or with producing a draft award, the co-arbitrators can be sufficiently motivated to step in and ensure that no delays in the preparation of the award will occur.

3 THE PARTIES?

Users of international arbitration tend to complain more often about time constraints and cost efficiency with regards to arbitral institutions and/or arbitrators, but one should not disregard the role the parties themselves play in the process. One of the features distinguishing arbitration from litigation is that parties can control the arbitration process.\(^{39}\) Parties enjoy the flexibility to decide the

\(^{37}\) Article 27 of the 2012 ICC Rules provides in relevant part: “As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall: a) declare the proceedings closed with respect to the matters to be decided in the award; and b) 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.”

\(^{38}\) See Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* 286 (2012); 2012 ICC Rules, app. III, art. 2 (“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.”).

\(^{39}\) See Zaino, *supra* note 33, at 113.
arbitration procedure. Certain inefficiencies in the arbitration process often occur during the period leading up to the hearings (rather than between the hearing and the issuance of the final award). Parties tend to complain less about delays during this period (unless they are due to one party’s deliberate conduct or to the arbitral tribunal’s inefficient management of the proceedings), because they are active and therefore have a less acute sense of wasted time.

Moreover, it is not always easy to distinguish unnecessary delays and the time needed for parties to present their cases. Arbitration cases may be complex; determining the facts and gathering the supporting evidence takes time.

The 2015 International Arbitration Survey shows that improvement could be achieved in particular by narrowing issues and limiting document production.\textsuperscript{40} The phase devoted to document production is often very burdensome and time-consuming. Again, this is justified under certain circumstances, and it can even be a tool to shorten the proceedings since disclosure of certain documents may be an incentive for the parties to settle. It is essentially for the parties to assess to what extent document production is useful in their case.

To conclude, efficiency of the process can only be achieved if the parties, advised by their counsel, play their part.

The following discussion is a reflection of where parties could contribute towards an efficient and effective arbitral process in a world of complexity.

\section*{3.1 Selection and Challenges of Arbitrators}

In every arbitration process, parties play a role in selecting the arbitral tribunal. If parties are seeking a speedy process, they should not nominate over-burdened arbitrators.\textsuperscript{41} Selecting an individual who (still) has to prove his or her ability and competence as an arbitrator can be a wise choice.

\section*{3.2 Efficient Case Management}

The parties and their counsel should ensure they are able to meet the deadlines set in the timetable agreed upon by the parties and the tribunal. Postponing hearing dates is very disruptive and often can be avoided if the parties prepare their case sufficiently early. Parties often underestimate the time needed to gather evidence

\textsuperscript{40} See 2015 International Arbitration Survey, supra note 1, at 3, 24 & 30.

(witness and documentary evidence) and to select experts. For instance, it is nowadays difficult in a complex case to avoid quantum experts. Arbitral tribunals tend to be hesitant to grant the relief requested if the lost profits and the damages claimed are not supported by expert evidence. Preparing an expert report takes time. This is why parties would be well advised to bring experts on board at an early stage (this may also help the parties assess the strength, or lack thereof, of their claims). If the parties intend to increase the efficiency of the process, they should, to the extent possible, submit all their factual and legal arguments in their statement of claim/defense. This implies that parties should start preparing their case early—i.e., at the beginning of the arbitration and, if possible, even before commencing the proceedings. Experience shows, however, that it may be difficult for parties to mobilize key individuals at an early stage of the arbitration.

Tactics aiming at disclosing certain arguments or documents as late as possible to prevent the opposing party from responding are not only useless (and often the sign of inexperience) but also contribute to the inefficiency of the process. Similarly, unsolicited submissions and unnecessarily aggressive correspondence are of little help in improving the proceedings.

3.3 Parties’ conduct during the hearing

International arbitration hearings are conducted very differently from court hearings or even domestic arbitration hearings. Therefore, it is better to identify early the “rules of the game,” including clarification of how hearings will proceed.42

Hearings are time-consuming and costly. It is thus in the interest of all participants to organize hearings as efficiently as possible.43 For instance, it may be impractical to start the hearing by repeating what has been stated twice or three times in the memorials. Parties fear that the arbitrators’ knowledge of the case at the beginning of the hearing is insufficient and as a result they often prepare long opening statements. If arbitral tribunals are well-prepared, they may direct counsel to limit the duration of the opening statements.

Cross-examination is labor-intensive, but in the authors’ experience, it may be very effective and useful. Renouncing witness examination may be possible in some cases, but it should not become the rule.

4 THE ROLE OF THE ARBITRATORS: A BALANCE BETWEEN DISCIPLINE AND FLEXIBILITY

The arbitrators’ mission is to resolve efficiently the dispute between the parties, and parties expect arbitrators to master the factual record of the case, manage the proceedings effectively, and timely render an enforceable arbitral award. Arbitrators can prevent delays and increase efficiency in three main ways: by being transparent at the nomination/appointment stage about the time they can devote to each case; by applying various practices that can render the proceedings more procedurally efficient; and by not hesitating to exercise the authority granted by the parties and the applicable arbitration rules to prevent delays and sanction dilatory tactics.

4.1 Arbitrators’ availability

Arbitrator unavailability has been at the center of discussion in the arbitration community lately and is one of the main concerns that preoccupies users of international arbitration. Parties express concerns about arbitrators being unavailable to schedule hearings and taking too long to render awards. This directly contradicts one of the parties’ main expectations: that appointed arbitrators devote the required time to the case and issue a timely award.

The President of the International Bar Association, David W. Rivkin, noted that “the most important commitment that arbitrators should make to parties is to ensure that they have sufficient time to conduct their case efficiently. They have to commit that they will not schedule themselves so fully that they do not have time for the work to be done on the case.” And no one is better placed than arbitrators themselves to make sure that they have sufficient time to handle a case.

Although arbitrator availability is an important issue, arbitrators are not the only ones to blame for lengthy proceedings. Parties often take years to file their submissions, and as a result, they should refrain from criticizing arbitrators who have not rendered awards within a few months. Arbitrators may commit to being available during a certain period of time, but they cannot commit forever. If hearings are suddenly postponed, the parties should not be surprised if it is difficult to reschedule them.

Parties and the tribunal should agree on a realistic timetable at the outset of the arbitration. The key dates, i.e., the hearing dates, should not be changed unless

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44 See Thomson, supra note 30.
45 See id.
46 See 2015 International Arbitration Survey, supra note 1, at 24-25.
47 Thomson, supra note 30.
circumstances require it, which is seldom the case. Arbitral tribunals should be firm and resist a party’s attempt to unnecessarily amend the timetable. Arbitral tribunals may also be tempted to amend the timetable out of convenience or for other reasons, even if the parties do not ask for a change; this is seldom a good idea.

As indicated above, delays in issuing awards are often criticized. Arbitral tribunals must be aware of this concern and try to reduce the time period between the last submissions (post-hearing briefs) and the rendering of the award.

Parties also have slightly contradictory expectations: arbitrators should, on the one hand, master complex and voluminous files and, on the other hand, promptly issue the final award. Similarly, the losing parties’ tendency to look for possible defects in an award in order to challenge it before state courts also slows down the process because arbitrators must take this factor into account when drafting their decision.

In any event, taking the time to deliberate immediately after the evidentiary hearing or promptly after having received the parties’ last submissions is often a good step towards more efficiency. As time passes, the arbitrators’ recollection of the hearing may become less precise, which negatively impacts the proceedings. First, arbitrators will need to spend more time to prepare for deliberations, thus delaying further the issuance of the award. Second, the impact on the parties is often very negative. Parties are aware of the time wasted and are under the impression that the evidentiary hearing, which took place long ago, served no real purpose. Given the time, money, energy, and emotions invested by the parties in the evidentiary hearing, such a feeling of waste may prove ominous.

4.2 PROCEDURAL PRACTICES

There are ways in which arbitrators can improve efficiency and effectiveness during the proceedings. For example, arbitrators can encourage parties to reduce the number of rounds of submissions and fix a clear cutoff date after which written submissions will not be admitted.

Arbitrators should also master the facts and the evidence before them and be able to identify the fundamental issues of the dispute. This is particularly relevant prior to attending hearings.

4.3 ARBITRATORS SHOULD USE THE POWERS GRANTED TO THEM TO MANAGE THE PROCEEDINGS EFFICIENTLY

Despite the parties’ expectations that tribunals guide them and sometimes even restrain them and impose boundaries on inefficient behavior, arbitrators appear reluctant to act decisively in certain situations for fear of the award being
challenged on the basis of a party not having had the chance to present its case fully.48

Arbitration rules provide tools to arbitrators that empower them to act efficiently and to resist parties’ delay tactics. Article 22(1) of the ICC Rules, for example, imposes an obligation on the arbitrators and the parties to “make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity of the dispute.” Article 22(2) also allows the tribunal to take “such procedural measures as it considers appropriate” in order to ensure effective management of the case. In practice, determining in each case whether a party’s request is justified is a difficult task, which may delay the proceedings.

The arbitrators may sanction a party whose conduct caused unnecessary costs or was inefficient by requiring that party to bear all or parts of the costs. Article 37(5) of the ICC Rules gives “teeth” to the ICC provisions on time and cost efficiency, and arbitrators should be encouraged to make good use of it.49 In making decisions as to costs, arbitrators should be encouraged to take into account the parties’ conduct during the proceedings.

5 CONCLUSION

There is no miraculous recipe for increasing efficiency, and, in any case, arbitration cannot be more efficient than the parties want it to be. However, arbitral tribunals, parties, and, to a lesser extent, institutions have various means to enhance the quality of the process and make it more cost-effective and less time-consuming. This quest for efficiency is certainly legitimate and useful; it should, however, not result in excessive and undesired uniformity of the arbitration proceedings.

49 As mentioned above, such sanctions can also be applied to arbitrators by institutions.