

Efficiency – Today’s Challenge in Arbitration Proceedings

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I. Introduction

Arbitration is a continuous success story for various reasons: Due to the New York Convention, arbitration provides the parties with the certainty that the final award will be recognised and enforceable in their home jurisdictions. This benefit is particularly relevant for parties to international arbitral proceedings. Furthermore, arbitration gives the parties the opportunity to nominate arbitrators for reasons of specific qualities and qualifications. Additionally, arbitration is an alternative to often inefficient, long, inflexible and expensive court proceedings.

In a nutshell, the overall benefit one is expecting from arbitration is enforceability, flexibility as well as time- and cost efficiency.¹⁾ Unfortunately, in practice, the latter are not always found to be true.²⁾ Some people even go so far as to say that, unless the parties agree otherwise, a well-known automatism called “International Arbitration Practice” steps in. Evidently, this “monster” seems to be like a ponderous, big elephant that may – due to its age – be highly experienced, but on the other hand sometimes seems to lack flexibility, awareness for improvements and, after all, may not have caught up with modern trends.

Is this really true? Are the good days of arbitration really over? If one listens to long lectures at international arbitration conferences, one might get the impression that proceedings are, as a general rule, neither time-efficient nor cost-saving.

This however, is something that one should not really put up with.

The question how to provide a remedy is closely linked to the question: who is to blame? Or, to put it in positive words: how can the different people involved in arbitration proceedings help to improve the *status quo*, thus turning the slow-marching elephant into a sleek tiger?

Some authors have taken the strict view that only parties and their represen-

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¹⁾ JENS-PETER LACHMANN, *HANDBUCH FÜR DIE SCHIEDSGERICHTSBARKEIT* (2008) 45 *et seq.*

²⁾ Ulrike Gantenberg, *Methods of Reducing Costs in International Commercial Arbitration*, *SCHIEDSVZ*, Vol. 1 2012 17.

tatives are the cause of inefficient practices in arbitral proceedings.³⁾ Yet, more recently the general position among those involved in arbitration has favoured the view that parties, their representatives and arbitrators alike are all responsible for efficient proceedings.⁴⁾ As this article aims to show, it is not only the parties and their representatives who cause inefficiency, but all those involved in arbitration can contribute to their share. For even the arbitrators and the respective institution can do quite a lot to make arbitration more efficient.

It is for good reasons that the topic “efficiency in arbitration” is currently being widely discussed in the arbitration community.⁵⁾ Arbitration institutions have also recognized the necessity to make arbitration more efficient. In Austria, for instance, the Vienna International Arbitral Centre (VIAC) has reacted to the issue and has made a vital step towards more efficient arbitration procedures by amending the Vienna Rules and by creating the opportunity to perform an expedited procedure.⁶⁾ Moreover, the recently amended Vienna Rules have, in their new Articles 14 and 15, further enhanced this trend by providing for specific new regulations concerning joinder of third parties and consolidation of proceedings.

Such attempts show that inefficiency in arbitration proceedings is not an inevitable fact. The key to efficiency lies in the flexibility of arbitration proceedings. By avoiding common errors and by openly discussing time- and cost efficiency in the arbitral tribunal and with the parties, it is possible to satisfy the expectations imposed on arbitration proceedings.

This article does not argue that by following a couple of simple rules in the form of a “cooking recipe”, one can guarantee a perfectly efficient arbitration procedure. Instead, it provides ideas on how to react to certain situations for the sake of efficiency and – certainly – a more satisfactory outcome for the parties.

By reflecting on arbitration in practice, and providing suggestions on how parties, their representatives and arbitrators can influence the efficiency of arbitration proceedings, this article aims to also provide an account of the *status quo* in international arbitration, and answer the question: What can one really do in order to make the arbitral proceedings more efficient?

II. Factual Finding

It cannot be disclaimed that the in practice desired ideal of having fast and economical proceedings which nonetheless provide high quality awards, may

³⁾ See Jörg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, Presentation during the Vienna Arbitration Days 2013.

⁴⁾ See Gantenberg, *supra* 18.

⁵⁾ Conferences such as the recent IBA or the Vienna Arbitration Days have devoted whole panels to this issue.

⁶⁾ See the new Vienna Rules as of July 1, 2013: www.viac.eu/en/arbitration/arbitration-rules-vienna.

seem somewhat unreachable. However, speed, cost efficiency and the quality of the award must not always be incongruous to one another.

In practice, many things can go wrong that could have been easily avoided had the lawyers paid attention early enough, or had the parties consulted lawyers even before the actual proceedings started: Inefficiency often starts with an arbitration clause, which is – in the best case – simply not suitable for the specific arbitration procedure. This might for instance apply to situations where rather low amounts in dispute are to be expected and parties nevertheless agree on an arbitral tribunal instead of a sole arbitrator, which leads inevitably to higher costs, less flexibility and evitable loss of time.

Much worse than only unsuitable arbitration clauses are those that are phrased in such an unclear manner that the arbitral tribunal might waste months of its time to decide upon the question of jurisdiction and parties spend thousands of Euros trying to prove the arbitral tribunal's competence, *or* the opposite, its lack of jurisdiction. In case of dispute, an unclear, defective or even invalid arbitration clause can cost parties literally thousands of Euros. This is specifically true in *ad hoc* arbitration, where we can regularly see tribunals charging hourly rates and consuming more hours on the question of jurisdiction and validity of the arbitration clause than on the substance of the case.

Inefficiency continues with the sometimes very time-consuming undertaking of setting up an arbitral tribunal, as the nominating of arbitrators is not always done in a prudent manner. Challenging the other party's arbitrator for strategic reasons may seem a kind of guerrilla tactic, but often calls for a rebuttal of some form and may lead to months of dispute on the personal composition of the tribunal before even starting an exchange of submissions on the merits.

Once the arbitral tribunal has been constituted, parties often start submitting over-lengthy briefs containing bundles of documents that are supposed to contain crucial information. For the tribunal, the screening of these bundles can be compared to the famous search for a needle in a haystack. Arbitrators are forced to spend hours on looking for those few relevant documents in a bundle of a thousand pages. In case of institutional arbitration this practice delays the whole proceedings significantly. In case of *ad hoc* arbitration it might, in addition, lead to an explosion of costs, especially when arbitrators are working on basis of hourly rates.

Sometimes arbitrators try to anticipate this problem by requesting a "common bundle"⁷⁾ submitted by both parties in which the documents are organised in a particular way, most frequently according to date. They may sometimes additionally request all documents to be of a specific format, for example A5. The mammoth task of transforming all documents can take an entire team of secretaries a number of days to complete. Frequently, it is then discovered that, having

⁷⁾ See Irene Welser & Susanne Wurzer, *Formality in International Arbitration*, in *Austrian Arbitration Yearbook 2008* 226 (Klausegger et al. eds., 2008).

received all documentation in A5 format, some documents are no longer legible.⁸⁾

Submissions, sometimes hundreds of pages long and congested with footnotes with no deeper meaning, make it hardly surprising that as a result, the arbitral tribunal, who wishes to go through the submissions in a thorough and succinct manner, requires additional time which in practice exceeds the initially proposed procedural time-table and produces additional costs.

Even written witness statements, originally designed to speed up proceedings, sometimes can negatively influence the efficiency of arbitration. Especially if written witness statements are poorly drafted, which leads to the necessity of additional oral hearings and as a result to slower, inefficient and costly proceedings.

In cases where hearings are poorly organised and fail to adopt the cross- and re-cross-examination structure of questioning this results in unnecessary repetition, or the tribunal having to supplement the written information with verbal witness statements. Historically, the pendulum swung clearly in favour of written witness statements on the pretence that this would provide relief, cost-benefits and more efficiency.⁹⁾ Today, it appears that in many cases, the use of such written statements has not achieved this desired effect, but has instead resulted in doubling or even tripling evidence on one and the same question.

Also the traditional Anglo-American practice, the so-called “document production”, often seen as the “little sister” of the more extensive “discovery and inspection” procedure, leads to ample, and frequently new, submissions yet the outcome unfortunately bears no proportion to the time and money spent.

Potentially simple steps like organising the procedural time-table can turn out to be much more complicated than expected: Some parties or their representatives request weeks, even months in order to construct their written statements. It is very rare that one or two opportunities to bring submissions are considered enough, as parties’ priority always is to react to the statement of their opponent. This bears the risk of a never-ending replication. As we all know, time limits are very important in any arbitration¹⁰⁾: Cut-off dates can be a useful tool, but are not a universal remedy, as there are often ground for permitting late submissions, for instance, if there is a potential threat of claims for violation of the right to be heard being raised.¹¹⁾ Notwithstanding this, such leniencies frequently harm efficiency.

⁸⁾ See Irene Welser, *Effizienz in internationalen Schiedsverfahren – Wunsch oder Wirklichkeit?* in Festschrift für Hellwig Torggler 2013 1280.

⁹⁾ See Michael Molitoris & Amelie Abt, *Oral Hearings and the Taking of Evidence in International Arbitration*, in *Austrian Arbitration Yearbook 2009* 175 (Klausegger et al. eds., 2013); Irene Welser & Giovanni De Berti, *Best Practices in Arbitration*, in *Austrian Yearbook on International Arbitration 2010* 79 *et seq.* (Klausegger et al. eds., 2010).

¹⁰⁾ Franz T. Schwarz & Christian W. Konrad, *The Vienna Rules – A Commentary on International Arbitration in Austria 2009* 274.

¹¹⁾ The infringement of the right to be heard is a reason for the annulment of an arbitral award according to Section 611 (2) no 2 ACCP. Furthermore, it is a reason for non-enforcement according to Article V (1) b of the New York Convention; see also Nikolaus Pitkowicz, *Die Aufhebung von Schiedssprüchen*, margin number 183 *et seq.*

Even the language used in the arbitral proceedings can – unbelievably – also become an issue of efficiency: It is not uncommon to have the documentation of the case in a different language to that used in the arbitral proceeding. It has become common practice for arbitral proceedings which are not conducted in English, to nonetheless allow English documents to be submitted. Obviously, the accepted standards assume that all arbitrators are able to understand these documents. Still, sometimes the parties do not. This leads to the necessity of a private translator sitting beside the respective party in order to ensure that it can follow the course of the proceedings. Often, it would be more simple to conduct the arbitration in the native language of this party. Furthermore, parties sign English contracts or provide respective documentation notwithstanding the fact that they may not be proficient in the English language.¹²⁾ This may end up in misunderstandings, misinterpretation, general unclearness and, thus, additional delay and costs.

Not only the lack of knowledge of a certain language can make arbitration proceedings more complicated and less efficient. Also choosing arbitrators who are not familiar with the applicable law causes additional costs and prolongs the proceedings.

A well-known guest and – at first glance – popular “relief” for the arbitral tribunal in oral hearings is the court reporter. In practice, however, protocols written by a court reporter can become more of a hindrance than a benefit. This is particularly the case when every word is taken down in such detail that even incomplete sentences are included in the report. Such minute detail makes the final report often unpleasant to read and hard to follow. It is not uncommon to receive at the end of each day of arbitral proceedings between 300 and 500 pages of word-for-word reported statements. Going through these detailed protocols takes hours and is anything but efficient.

A further point relates to the expectation placed on arbitral tribunals to encourage a settlement. Where the cultural background allows for the tribunal to act as dispute facilitator, it is not uncommon that the parties, eager to hear the tribunal’s preliminary opinion, encourage the tribunal to start settlement talks even though they are not really interested in such a settlement at all. Half a day or even more may be invested in this procedure, to in the end turn out frustrated. Therefore, if there is a situation in which definitely – for whatever reason – no settlement is possible and parties are aware of that fact, it is desirable that this is, from outset, made clear to the tribunal to ensure the procedures are carried out in an efficient manner without time being wasted trying to encourage settlement.

This list could be continued, but evidently, it is not necessary to describe the above-mentioned “elephant” in more detail. Every arbitration practitioner certainly knows these problems, has faced them before, and has – sometimes more successfully, sometimes less – tried to avoid such inefficiencies.

¹²⁾ See Welser, *supra* 1282.

The truth is that everyone involved in an arbitration procedure can potentially cause a certain kind of inefficiency because, in the short term, interests can differ a lot. But except for the case in which one party torpedoes the arbitration procedure, everyone is interested in efficient proceedings. For this reason, potential obstacles to efficiency must, where possible, be identified, openly discussed and finally be put out of the way by the party/the party representative/the arbitral tribunal/the arbitration institution responsible for them. So let us now turn to the question of how to turn the “elephant” into a tiger.

III. An Institutional Approach – The Expedited Procedure

The newly re-mastered “Vienna Rules”, in their Article 45, contain legal provisions for an expedited procedure. This expedited procedure will not apply automatically, but only in cases where the parties have explicitly included it in the arbitration agreement or subsequently agree on its application. Such agreement must not be made later than in the answer to the statement of claim. Thus, the Vienna Rules provide for an “opt-in provision” in cases where time turns out to be of the essence.

Fast-track proceedings have been a hot topic of discussion for a long time,¹³⁾ and many institutions have decided to distinguish themselves from the ICC Rules which only provide for an emergency arbitrator,¹⁴⁾ *i.e.* a person granting urgent interim or conservatory measures that cannot await the construction of an arbitral tribunal. The Vienna Rules have taken the opposite approach by modelling a small and efficient set of rules specifically aimed at making proceedings more efficient.

The newly modelled Article 45 provides for a well balanced set of rules for fast-track proceedings without reducing the quality of the proceedings and the full right to be heard. The key factors are strict time limits, limitation of procedural steps, the use of modern means of communications and the guarantee that there are no problems with regard to the applicability of the New York Convention. In particular, in order to avoid the argument that within the expedited procedure, a party was unable to present its case,¹⁵⁾ Article 45 subsection 8 clarifies that the short time limit of six months for rendering the final award may be extended by the Secretary General, and that exceeding the time limit for the award will not render the arbitration agreement invalid or deprive the arbitral tribunal of its jurisdiction.

¹³⁾ See for example Irene Welser & Christian Klaussegger, *Fast-track Arbitration: Just fast or something different?* in *Austrian Arbitration Yearbook 2009* 259 (Klaussegger et al. eds., 2009); further Rudolf Fiebinger & Christian Gregorich, *Arbitration on Acid*, in *Austrian Arbitration Yearbook 2009* 237 (Klaussegger et al. eds., 2009).

¹⁴⁾ See Article 9 and Appendix V of the ICC Arbitration and ADR Rules.

¹⁵⁾ See Article V (1b) of the New York Convention.

Now, what are the main provisions of the newly created expedited procedure?

First of all, there are shorter time limits for payment of the advance on costs. Thus, it is ensured that proceedings start quickly so that the parties do not lose unnecessary time in the preliminary face. Instead of the regular 30 days, the time limits for payment shall be reduced to 15 days.

Counterclaims or set-offs are admissible only until the time limit for submission of the answer to the statement of claim, for which the general 30 days' time limit as foreseen in ordinary proceedings remains in force. Thus, it is ensured that the parties may not argue that they are deprived of basic rights to present their case, or that the proceedings or an award would be contrary to public policy.¹⁶⁾ Expedited proceedings shall be conducted by a sole arbitrator unless the parties have agreed on a panel of arbitrators. The sole arbitrator is to be jointly nominated by the parties, failing such joint nomination, he will be nominated by the Board of the VIAC. Again, there is a 15 day time limit for the appointment of the arbitrator.

As mentioned before, the time limit for rendering the final award is six months from transmission of the file, but the Secretary General may extend this time limit pursuant to request from the arbitral tribunal or due to his own decision.

Furthermore, there are additional provisions to ensure that the arbitration shall be administered in a time- and cost-effective manner: Unless the arbitral tribunal determines otherwise, there is only one round of submissions, all factual arguments must be made in these submissions and all written evidence, including potential witness statements, must be attached to the written submissions. As a rule there shall be only one single oral hearing, if necessary at all, in which all oral evidence is taken and all legal issues are addressed, and there are no time- and cost-consuming post hearing briefs.

All in all, the expedited procedure has, without any doubt, been eagerly awaited. A lot of discipline is expected both from the parties and the arbitrator, who is expected to write a fully reasoned award, not a short award like under expedited procedure rules of other arbitration institutions.

It must be stressed that this expedited procedure can be applied for any value in question, as long as the parties have agreed upon it. Taking into consideration the fact that, after a dispute has arisen, it is frequently the case that Respondent is not really interested in quick proceedings, here comes our first hint to shape arbitration into the form of a sleek tiger: Agree on the new expedited procedure, by simply adding the following clause to your arbitration agreement on the Vienna Rules: "*The provisions on expedited proceedings are applicable.*"

¹⁶⁾ See Article V (2b) of the New York Convention.

IV. Recommendations for the Parties and Party Representatives

Of course, not only arbitration institutions can make substantive contributions to efficiency in arbitration proceedings. They only provide for a framework and for efficient and experienced secretaries, board members and other bodies of arbitral institutions. In the end, it is, however, in most cases up to the parties, their representatives and the arbitrators to profit from this framework and to actually shape their proceedings in an efficient, economic and satisfactory way.

As already mentioned, the interests and priorities of the claimant and the respondent can differ significantly. The actual effect of the recommendations provided below therefore depends on whether both parties as well as all members of the arbitral tribunal have an interest in efficient and economic proceedings. By creating a common spirit in favour of arbitration as such, this goal should easily be reached.

A. Before the Proceedings

Without a valid arbitration clause there can be no arbitration. When drafting contracts, parties should always remember that the main reason for inserting an arbitration clause is to ensure that, when disputes arise, neither party is able to escape arbitration.¹⁷⁾ As anyone who is slightly familiar with the arbitration community will be aware, more than 50 percent of all *ad-hoc* arbitrations are still plagued with ill-adapted, poorly drafted and sometimes even pathological clauses.¹⁸⁾ Such clauses do not only shed an adverse light on arbitration as such, but also discourage inexperienced parties from agreeing to arbitration in the future. Anyone who has spent weeks or even months arguing on whether or not the respective arbitration clause is clear and valid will agree that such clauses are the first “show-stopper” to hinder the efficiency of arbitral proceedings and consequently result in mounting procedural costs.

Where parties are tempted to draft their own, individual arbitration clauses, this experiment often has fatal effects, especially, as few arbitration clauses are

¹⁷⁾ Paul A. Gelinas, *Arbitration Clauses, Achieving Effectiveness*, in *IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 47* (van den Berg ed., 1999), available at: www.kluwerarbitration.com/document.aspx?id=ipn17571

¹⁸⁾ Benjamin G. Davis, Presentation at the International Bar Association's 23rd Biennial Conference, September 19–23, 1990, New York; F. Eisemann, *La clause d'arbitrage pathologique*, in *COMMERCIAL ARBITRATION. ESSAYS IN MEMORIAM EUGENIO MINOLI (U.T.E.T. 1974)*; H. Scalbert and L. Marville, *Les Clauses Compromissaires Pathologiques*, *REV. ARB. NO. 1* 1988 117; Théodore Klein, *Note de synthèse de la jurisprudence et de la doctrine sur les clauses compromissaires “pathologiques”*, unpublished manuscript; see Gelinas, *supra*.

drafted with the necessary expertise. Still, there may be cases where a tailor-made clause is sought for.

It is not an easy task to explain how to draft the “perfect” arbitration clause.¹⁹⁾ A general recommendation is that parties should strive to ensure that, as far as possible, a clear and unambiguous arbitration clause is used, preferably resembling the standard clauses and avoiding experimenting. That this – apparently simple recommendation – is by far not always followed, can be approved by collectors of pathological arbitration clauses: Incorrect designation of arbitration institutions is unfortunately not a rarity. Therefore, the next advice for parties is: *Normally, rely on model arbitration clauses. In the rare case of the necessity of a tailor-made clause: Consult arbitration experts beforehand.*

Another issue, arising even before an actual conflict, is the question whether a sole arbitrator or an arbitral tribunal should be nominated to deal with the conflict. The tendency in the past was to adopt three arbitrators, so that each party had, at least in theory, the possibility to nominate someone in their confidence.²⁰⁾ The choice of an arbitral tribunal instead of a sole arbitrator is not always the best decision. When relatively small dispute values are determined by a tribunal of three arbitrators, even with moderate hourly fees, the cost of the time spent in negotiations, advising and studying the files will not be much less than € 1.000,- per hour. It has to be considered whether, based on the disputed value, the cost of three arbitrators is worth going through proceedings and finally ending up paying an amount of money to the party representatives and the arbitral tribunal which is higher than the amount at stake. In case no institutional arbitration is relied upon, it might be a good idea to identify a fee schedule already in the arbitration agreement. Upon accepting the mandate under the arbitration clause given, the arbitrator also accepts the fee arrangement.

To sum it up: *Be cost-sensitive when determining the number of arbitrators and line out the relevant fee arrangement in advance.*

All in all, ad hoc arbitration turns out to be very often much more expensive, and at least not as cost-efficient as institutional arbitration.²¹⁾ The fact that the cost of ad hoc arbitration does not necessarily depend on the amount in dispute is in many cases not an advantage for the parties. To the contrary – in ad hoc arbitration it is often a tricky task to find an agreement with the arbitrators on the arbitrators’ fees and even on the advance on costs. The necessity of dealing with the question of the remuneration of the arbitrators definitely does not make the arbitration proceedings more efficient, but further prolongs them. In case no agreement is reached, the arbitrators can request an “appropriate remuneration” which

¹⁹⁾ For detailed hints see, e.g. W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION³ (2000) 127.

²⁰⁾ Stefan Riegler & Alexander Petsche, *Die Bildung des Schiedsgerichts, in* SCHIEDSVERFAHRENSRECHT 408 (Liebscher, Oberhammer & Rechberger eds., 2012).

²¹⁾ See KLAUS LIONNET, HANDBUCH DER INTERNAIONALEN UND NATIONALEN SCHIEDSGERICHTSBARKEIT (2001) 154 *et seq.*

might often be even higher than an allegedly expensive hourly fee and as a result much more expensive than institutional arbitration.²²⁾

What parties definitely often do not think about when drafting an agreement, is the language of potential proceedings and the language of the contract itself. Attempting to conduct an arbitration in multiple languages can be a very burdensome exercise,²³⁾ therefore, the agreement on one language is very important. As the language used in the international business community is English, it is common that parties choose this as the procedural language. It is remarkable how many contracts are drafted in English even though the parties to the contract have a common language other than English.²⁴⁾ In such contracts, the arbitration clause often determines English as language of the arbitration proceedings. When it finally comes to these proceedings, it turns out that the parties who signed the contract have poor language skills and sometimes those who drafted the contract cannot coherently explain how a specific clause is to be understood. It is no surprise that language-related issues frequently arise at the stage of document review.²⁵⁾ Therefore: *Parties should stick to their common mother tongue also for arbitration proceedings.*

Not only language skills contribute to more efficiency in arbitration. Legal expertise is also a very important issue, in particular when choosing the arbitrators. The choice of arbitrator can easily influence the cost of proceedings. When arbitrators who are not familiar with the applicable law are chosen, it is necessary to have additional legal experts. Often special expertise on the subject to arbitration can also be a reason for choosing a specific arbitrator and a way to reach greater time- and cost efficiency. It goes without saying that artificially creating the requirement of additional (legal) expertise where avoidable, is certainly not a way of efficiently handling arbitration proceedings. The conclusion is: *Choose arbitrators who are familiar with the substantive law.*

B. During the Proceedings

A lot of inefficiency results from the inflexibility of parties and their representatives when it comes to finding possible dates for oral hearings. Unlike in court proceedings, in arbitration proceedings parties tend to be very complicated with regard to scheduling their meetings. The reason for this is obvious: In court

²²⁾ See Hans Fasching, *Kostenvorschüsse zur Einleitung schiedsgerichtlicher Verfahren*, JBl 1993, 45; OGH July 7, 1981, docket no. 5 Ob 633/81.

²³⁾ YVES DERAÏNS & ERIC A. SCHWARTZ, *A GUIDE TO THE ICC RULES OF ARBITRATION* 2005 232.

²⁴⁾ For statistics on language in arbitration proceedings see, e.g. MICHAEL W. BÜHLER & THOMAS H. WEBSTER, *HANDBOOK OF ICC ARBITRATION* (2008) 225 *et seq.*

²⁵⁾ Joseph Tirado & Sherina Petit et al., *Chapter 23: Factual Evidence*, in *ARBITRATION IN ENGLAND* 483 *et seq.* (Julian D. M. Lew, Harris Bor, et al. eds., 2013), available at www.kluwerarbitration.com/CommonUI/document.aspx?id=KLI-KA-Lew-Ch23&query=AND%2&content:%22language%22,content:%22efficiency%22%29#match2.

proceedings it is the judge who determines the hearing date and exceptions are made only for a number of specific reasons. Whereas in arbitration proceedings, the parties' appointments are taken into consideration when determining a hearing date, the discipline when it comes to clearing the personal schedule is not the same. Consequently, it is often very difficult to find a hearing date everyone involved is satisfied with. In order to avoid unnecessary long unoccupied times it is important that the parties are reminded of the fact that it is mainly in their own interest to be more flexible when it comes to scheduling meetings and hearings. The advice to speed up arbitral proceedings is: *Do not unnecessarily decline possible hearing dates.*

A topic that concerns rather the party representatives than the parties themselves is written submissions. They should be clear, concise and well structured. The offer of evidence should be highlighted and concise to make it easier for the arbitral tribunal to understand the correlated documents and witness statements. Frequently this simple rule (which also applies to court proceedings) is ignored in arbitration proceedings. Incomplete and not well-structured submissions make it more difficult for the arbitrators to comprehend the arguments. This might "only" lead to an additional effort and an expenditure of resources. But it might also lead to the necessity of additional (written) explanation by the parties. Long yet inconcise writs which consequently not only result in substantial increases in the preparation time required, but also impact the entire process due to continued interruption in order for clarifications to be requested. The time spent in clarifying and ordering the submission such as to enable the arbitration tribunal to properly study the submissions negatively influences how time effective arbitral procedures are. The rule is very simple: *Keep it short.*

A clear order of the documents which the parties submit with their writs also contributes to efficiency. Parties should avoid being overly excessive in the submission of documents and in particular avoid duplicate copies of the same document. Where parties, under the assumption that the arbitral tribunal will search for the relevant material, feel obliged to submit extensive files, this leads (in most cases) to excessive and unnecessary additional expenditure.

It is an understandable fact that parties aim at taking each single opportunity to convince the arbitrators of their standpoint. Often parties will submit, on the assumption that more is better, extremely extensive case files (for example including full sets of accounting documentation) and written pleadings which can be sometimes hundreds of pages long. This tendency raises the question whether the parties or their representatives are writing for their own prestige or for the benefit of the tribunal. Such acts lead in most cases to unnecessary and excessive expense for the parties and therefore should be avoided at all costs. Similarly parties sometimes have the tendency to submit evidential documents in such volume that even the most motivated arbitrators lose oversight. *Therefore, select documents carefully and sort the wheat from the chaff.*

What about post-hearing briefs? More than one hundred page closing statements definitely do not contribute to the efficiency or speed of the proceedings,

and often do not even have an impact on the arbitrators' decision that has carefully been built during the whole course of the proceedings. In this respect however, it is recognised that many parties will nonetheless avoid adopting a more efficient approach due to their individual interests and concerns. Notwithstanding this, it should be stressed, that even where such delaying tactics are adopted, in the end the parties are the ones who are paying for the uneconomical procedures.²⁶⁾ Remember: *Post-hearing briefs are not always necessary.*

V. Best Practices for Arbitrators

There is, similarly as for the parties, also a list of best practices and recommendations which arbitrators should take into consideration in order to improve the efficiency and effectiveness of arbitral proceedings.²⁷⁾ Some of the points which have already been discussed in relation to the Parties also apply in respect of arbitrators, for example, the question of availability of the arbitrator: Should the arbitrator be aware that in the coming year he will be unable to set aside much time for new arbitration proceedings, then in accordance with the rules of fairness, it is only correct, that on nomination, the arbitrator should inform the parties of his restricted availability.²⁸⁾ *Thus, be open about your other time commitments.*

Once an arbitrator has been nominated or once an arbitral tribunal has been constituted, it is of great relevance to the arbitral procedure and at the same time a very difficult task to ensure that the correct balance between discipline and flexibility is reached. On the one hand it is not desirable, when discussing the efficiency of arbitral proceedings, for the arbitrator to grant each party the possibility to make use of a third, fourth or fifth opportunity to bring submissions in the form of statements in rejoinder or reply, rather than fixing concrete cut-off dates. Yet on the other hand, the jurisdiction of the arbitral tribunal, which is always subject to the "individual touch", also impacts the effectiveness, flexibility and adaptability. It is therefore clear that the degree of willingness shown by the arbitrator to comply with every wish and suggestion of the parties, can contribute to the efficiency of the arbitral proceedings and influence the number of procedural steps required. Still: *Think about reducing rounds of submissions and fix a clear cut-off-date.*

It goes without saying that, the arbitrators have the task of preliminarily identifying the fundamental issues which form the issue of the dispute between the parties, be it in the form of formal "terms of reference", or informally.²⁹⁾ It is

²⁶⁾ See Gantenberg, *supra*, at 18 and 19.

²⁷⁾ See ICC Publication no. 843, Techniques for Controlling Time and Costs in Arbitration.

²⁸⁾ See Welser, *supra* 1288.

²⁹⁾ See Art. 25 of the 2012 ICC Arbitration Rules; Art. 23 of the 2012 ICC Arbitration Rules requires the arbitrator to draw up the Terms of Reference. This includes a summary of the respective claims of the parties.

therefore the primary duty of every arbitrator to ensure he has a comprehensive understanding of the entire file content, thus ensuring he is properly prepared for the first hearing. An extensive consideration with the counter documents and legal issues from the outset of the proceedings guarantees that not only the process itself but those leading the process can adopt a clear direction without spending time dealing with irrelevant issues. Still, we have, unfortunately, sometimes seen ill-prepared arbitral tribunals who start to browse through the file in the hearing and have to interrupt it if questions are discussed in more detail. In light of these comments it is recommended to keep in mind: *Be well prepared!*

Once the arbitrator has familiarised himself with the case file and established the most important clarifying questions, it is up to him to draft the orders in a clear and plain wording. A clear and unambiguous procedural order is the cornerstone of an efficient arbitral process.³⁰⁾ Ideally, the parties should, in the procedural orders, be restricted to a narrow margin of interpretation. Of course, it would not be honest to presume that each and every Procedural Order No. 1 will be drafted nearly from the scratch. There are established best practices and there are existing boiler plates. Still, arbitral tribunals should be encouraged to take a fresh approach to such templates and to critically review whether the provisions are really clear, easy to understand, and whether they are sensible and necessary for the specific case. For example, provisions that deal with the necessity to provide case law and legal doctrine as attached evidence may be sensible if the matter is judged according to a foreign law, with which the arbitrators are not familiar. They are, however, senseless if all three arbitrators come from the same jurisdiction as that relevant for the case at hand.

Therefore, revise former P.O.s No. 1, adapt them to the specific case and delete all unnecessary or unclear provisions.

If, from outset it is made clear that cut-off dates apply and that each party is restricted in the number of submissions, in this manner parties are stimulated to put more effort in ensuring that their arguments are clearly identifiable and that strategic but irrelevant details are left out. Consequently such action provides relief for the tribunal from a relatively early stage in the process. *Stick to these cut-off-dates.*

Restricting the number of pages of which a submission may consist, or to restrict the cumulative number of pages of all submissions might appear to be a solution.³¹⁾ This recommendation may, in some cases appear however, to be counterproductive. On the one hand, one can assume that the parties can be very creative, for example tweaking margins and font size, in order to ensure that their pleadings fit the required number of pages.³²⁾ On the other hand it may negatively

³⁰⁾ See Welser, *supra* 1289.

³¹⁾ Christoph Stipl & Gunnar Pickl, *Limiting Costs of Arbitration*, in AUSTRIAN ARBITRATION YEARBOOK 2009 233 (Klausegger et al., eds. 2009).

³²⁾ Irene Welser, *Effizienz in internationalen Schiedsverfahren – Wunsch oder Wirklichkeit?* in Festschrift für Hellwig Torggler 2013 1291.

impact the rights of the parties within the proceedings. For example, such measures may prevent a party from being able to answer important questions which are being exchanged because they have surpassed the page threshold. Furthermore, imposed page restrictions for submissions clearly ignore burden of proof rules and may therefore, in single cases, even be unfair.

Another recommendation which is connected to the question of submissions is how such submissions shall be brought in. At first glance it may appear that parallel or simultaneous rather than consecutive drafting is desirable.³³⁾ Although it may look like such submissions are more time efficient, in reality this is unfortunately not always the case. It is almost a given that parallel submissions result in both parties, having received the oppositions pleadings, encountering information which they wish to respond to.³⁴⁾ It is difficult in such situations for the arbitrator to refuse such a response. In light of this, it is recommended that in most cases, in the interest of improving the efficiency of proceedings, consecutive pleadings should be used. Even with consecutive submissions, it is nonetheless paramount that, in the interest of procedural efficiency, the parties are clearly restricted in the number of responses. *Therefore, choose the submission mode cleverly.*

The benefit of pre-sorting the important arguments and enquiries by the arbitral tribunal is from outset ambiguous in nature, and has both pros and cons. Such pre-sorting has the benefit of providing, in a relatively short space of time, an overview of the dispute. In addition it avoids unhelpful and time-consuming deliberations by the parties on immaterial or minor issues. However, when determining whether something is relevant or not, the temptation to define a preliminary decision is relatively high. A tribunal should bear this in mind when it involves for the parties a pre-selection of certain answered questions which involve a further judgement. It might be beneficial in such circumstances for arbitrators to critically analyse their agreed questions for imbalances and impartiality. *In case of tendencies of imbalance, counteract them.*

Another way of tightening arbitration proceedings is to restrict the number of witnesses. Of course, the tribunal is free to refuse witnesses when they are obviously of no relevance to the proceedings. Likewise, the tribunal can opt to adopt chess-clock arbitration, such that the parties are each provided with an equal amount of time to question witnesses.³⁵⁾

Written witness statements can form a valuable aid in increasing the procedural efficiency, but only when they are comprehensive. In some cases, however, traditional oral proceedings should be considered as the more economical alternative. During the questioning of witnesses, the arbitral tribunal should look out for and restrict questions which do not really relate to the proceedings or which have already been answered in the written witness statements. In this way, the arbitrator can avoid repetitions and unnecessary questions, which hinder the effi-

³³⁾ See, Stippl & Pickl, *supra* 233

³⁴⁾ See, Stippl & Pickl, *supra* 233

³⁵⁾ See Welser, *supra* 1291.

ciency of proceedings. *Keep in mind that it is the arbitrator's role to guide parties and witnesses through the hearing and to sometimes also restrain them and to identify boundaries on inefficient behaviour.*

Some considerations for arbitrators relate to communication: It is beneficial to consider in advance which form of communication is most practical. In practice, often information is duplicated and parties are obliged to submit every single document as hard copy and additionally via email. The benefit from this is rather questionable. *In this regard, better be pragmatic: Let email be sufficient.*

Another important contribution to time and cost efficiency in arbitral proceedings can arise in connection to the actual execution of the arbitral proceeding. For example, the use of a premium location at exorbitant costs can be easily avoided by constructively searching for a location. *Don't be complicated in the choice of venue and accept parties' representatives' offers to hold hearings at their premises.*

In order to avoid inefficient proceedings sometimes financial penalties are used.³⁶⁾ Through the use of such sanctions, the arbitral tribunal can “punish” parties who adopt obvious inefficient procedures. A “classic” would be for the tribunal to alter the way costs are determined in order to punish the party for inefficient behaviour.³⁷⁾ It is important to recognise that these sanctions can also apply to inefficient arbitrators.³⁸⁾ In this case the relevant arbitral institution can impose such sanctions over the arbitral tribunal and might, for instance, reduce the arbitrator's fees. These sanctions can however be easily avoided by adopting a clear time schedule and applying good case management. *Financial penalties should be the exception. However, if necessary, don't be afraid of imposing them.*

Similarly to punishing inefficient behaviour, it might be beneficial to reward efficient conduct of proceedings by the arbitrators. Although, in the interest of costs such a reward mechanism by the respective arbitral institution would have to be restricted (so as not to undermine the entire intention of reducing procedural costs), it could play a vital role in stimulating arbitrators to undertake the additional work and time-management recommended above.³⁹⁾

³⁶⁾ See, Gantenberg, *supra* 20.

³⁷⁾ Jenny Power & Christian Konrad, *Costs in International Commercial Arbitration – A Comparative Overview of Civil and Common Law Doctrines*, in *Austrian Arbitration Yearbook 2007* 209 *et seq.* (Klausegger et al., eds. 2007); Jenny Power, *The Termination of Costs in ICSID Arbitration*, in *Austrian Yearbook on International Arbitration 2010* 337 (Klausegger et al., eds., 2010); Jenny Power, *Summaries of ICSID Awards on Costs*, in *Austrian Yearbook on International Arbitration 2010* 353 (Klausegger et al., eds., 2010).

³⁸⁾ Under Art. 22.1 of the 2012 ICC Arbitration Rules, both the arbitrators and the parties are responsible for “(...) every effort to conduct the arbitration in an expeditious and cost-effective manner (...)”.

³⁹⁾ See Gantenberg, *supra* 20.

VI. Conclusion

Efficiency in arbitration is – in the long run – not only important to the parties seeking relief from the arbitration proceedings, but it is also in the interest of the arbitrators themselves, not least because they benefit from the attractiveness of arbitration.

Over the years some developments have given rise to the question: Is arbitration really the more time- and cost-efficient alternative to court proceedings? Which then provokes the question: Why, if not for reasons of enforcement, should one choose arbitration?

Not all criticism concerning arbitration can be easily denied. No doubt – there are examples of arbitration proceedings that can definitely not be considered “best practice”. However, it is important to understand that time- and cost efficiency in arbitration depends on the parties, their representatives and the arbitrators themselves. Arbitration *is not* expensive or inefficient, but only the behaviour and decisions of the individuals involved can make arbitration expensive and inefficient.

Institutions have attempted to give the arbitrators and the parties various tools to choose from,⁴⁰⁾ as to enable them to adopt them to their arbitration proceedings. In this way, it is up to the parties in cooperation with the arbitrators to decide which tools to use, and which ones not.

The best outcome and highest efficiency can only be reached if the parties, their representatives and the arbitrators truly aim at conducting efficient proceedings. The people involved shape the arbitration procedure to a ponderous elephant or a sleek tiger – therefore, the flexibility in arbitration can be blessing or curse.

⁴⁰⁾ For instance the Paris Rules, see Isabelle Hautot, *The Paris Arbitration Rules: A New Generation of Rules?* 2013, available at <http://kluwerarbitrationblog.com/blog/2013/04/26/the-paris-arbitration-rules-a-new-generation-of-rules/>.