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Table of Contents

I. List of Abbreviations.....	5
II. Introduction	6
III. ICC Experience	8
IV. Methods suggested by ICC to decrease time and costs	10
1. Keeping Clauses Simple.....	10
2. Use of the ICC model clause	15
3. Selection and appointment of arbitrators.....	18
4. Fast-track procedure	21
5. Time limits for rendering the final award	25
6. More detailed arbitration agreement after the dispute has arisen.....	27
7. Counsel with experience	28
8. Counsel with time.....	34
9. Use of a sole arbitrator	35
10. Arbitrators with time	37
11. Selection and appointment by the ICC.....	40
12. Avoiding objections	41
13. Selecting arbitrators with strong case management skills.....	45
14. Complying with the Rules.....	46
15. Setting out a detailed statement of case.....	48
16. Submitting additional information	51
17. Determination of the language by the arbitral tribunal	53
18. Proceedings involving two or more languages.....	57
19. Compliance with the procedural timetable.....	58
20. Need for a hearing	62
21. Documentary evidence	65
22. Correspondence	70

V. What methods can be applied to increase the efficiency level of arbitration proceedings?	72
1. Limitation on submissions' volumes	72
2. Settlement offered by the Arbitral Tribunal.....	73
3. Witness Statements	76
4. The issue of document production	77
5. Cost Sanction for delaying the Proceedings	79
VI. Conclusion.....	81
VII. Bibliography.....	82
a. Primary sources.....	82
b. Secondary sources.....	87
Abstract	89
Abstrakt	90

I. List of Abbreviations

AAA: American Arbitration Association

Court: ICC Court of Arbitration

DB: Dispute Board

DIS: Deutsches Institut für Schiedsgerichtsbarkeit

HKIAC: Hong Kong International Arbitration Centre

IBA: International Bar Association

ICC: International Chamber of Commerce

ICC Techniques: Techniques for Controlling Time and Costs in Arbitration

LCIA: London Court of International Arbitration

PCA: Permanent Court of Arbitration

Rules: ICC Rules of Arbitration

SIAC: Singapore International Arbitration Center

II. Introduction

Arbitration is defined to be an alternative method of dispute resolution in which the parties select the individual(s) who will decide the matters in dispute, following a process agreed upon by the parties, with no or a limited extent of court intervention. Arbitration is therefore based on part-autonomy and parties have a great control over arbitration proceedings.

Arbitration is a very popular trend amongst the businesses for solving the disputes, especially when it comes to international businesses. Arbitration initially found its popularity because of the advantages it offered to the parties, in comparison with the traditional court litigations.

Arbitration offers diverse advantages: amongst other things, parties can choose who the arbitrators will be (*e.g.* lawyers or experts, when the technical circumstances of a case require so), whereas judges in traditional litigation systems sometimes lack the technical competence to judge a case.

Besides, generally speaking, arbitrators can – and often do – spend more time on cases compared to judges, which might lead to a better and more efficient decisions making mechanism. It has to be noted that arbitrators are also usually more accessible and more easily available than judges are and they usually have more power to control the overall process of the arbitration. Different arbitration rules are designated to better suit the needs of the parties and their cases.

Confidentiality is another important factor for the parties when deciding to refer their case to arbitration. Arbitration offers a limit on the documents to be discovered and even when discovered, they are kept confidential and only for the use of that arbitration proceeding. Therefore, arbitration blocks the public precedent.

Last but not least, it is not farfetched to say that many parties decide to include an arbitration clause in their agreements to diminish time and costs incorporated with the litigations, should any disputes arise in relation or out of their agreements.

However, nowadays the frustrating duration and the significance of costs incorporated with arbitration have been identified as the “*future tombstones of international arbitration*”.¹ The reason why such term was identified is that many of the mid-sized arbitrations are mostly concluded within four years or longer.² Costs of international arbitration are rising, making it almost unaffordable for small-sized arbitrations.

But who is responsible for these arising costs? Some suggest that it is the parties themselves and their attorneys who are responsible for this deplorable development, namely that arbitrations have become lengthy and expensive; not responsible are the arbitral institutions, the arbitration rules or the arbitrators.³

Parties usually insist on full rounds of submissions, document productions and witness statements, lengthy arbitration hearings followed by post-hearing notes. A deviation from this ‘standard procedure’ does not appear to be an option for the parties, the reason for this reluctance might be the fear that if the case is ultimately lost, there will be complaints that not everything has been tried to win the case at hand. The resulting insistence on a full-fledged arbitration is understandable because the amounts in dispute are usually significant, and there is no way to appeal against an unfavorable award.⁴

Parties should either follow the traditional ‘route’ of arbitration proceedings, or they should accept certain limitation to be applied to their arbitration proceedings in order to accelerate the same.

¹ Siegfried Elsing, 9 Ger. Arb. J. 114, 115 (2011); Thomas Stipanowich, *Arbitration: The ‘New Litigation’*, 2010 U. Ill. L. Rev. 1, 5; Patrick Bourke, *Financial Aspects of Dispute Resolution*, IBA Arbitration Committee Newsletter, Mar. 2009, p. 9; *Knocking Heads Together*, The Economist, 1 Feb. 2007.

² Queen Mary University of London, *2006 International Arbitration Study: Corporate Attitudes and Practices*, p. 7; Queen Mary University of London, *International Arbitration: Corporate attitudes and practices 2008*, p. 12; Chartered Institute of Arbitrators, *Costs of International Arbitration Survey 2011*, p. 12.

³ William W. Park, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 2013 Journal of Intl. Arb. Vol. 29 issue3, 453.

⁴ William W. Park, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 2013 Journal of Intl. Arb. Vol. 29 issue3, 454.

III. ICC Experience

Statistics provided by the ICC International Court of Arbitration based on ICC cases that went to a final award in 2003 and 2004 illustrate that the costs incurred by the parties in presenting their cases constituted the largest part of the total cost of ICC arbitration proceedings.⁵

On average, the costs in these ICC arbitration cases were as follows:

- Costs borne by the parties to present their cases: 82% (including, as the case may be, lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration other than those set forth below);
- Arbitrators' fees and expenses: 16%; and
- Administrative expenses of ICC: 2%.⁶

The increasing and sometimes the unnecessary complications involved with the proceedings with unfocused requests for disclosure of documents and unnecessary factual witness and expert statements seem to be the main explanation for the long duration and high cost of many international arbitration proceedings. The longer the proceedings, the more expensive they will be. The 2012 ICC Rules of Arbitration have expressly addressed these concerns.

Costs can also be unnecessarily increased when counsel from different legal backgrounds use procedures familiar to them in a manner that leads to unnecessary duplication.⁷

ICC Techniques for Controlling Time and Costs in Arbitration, published for the first time in 2007, are designed to assist arbitral tribunals, parties and their counsel in this regard.

These Techniques provide guidance to the parties and their counsel on certain procedures that they may be able to agree upon for the efficient management of their arbitration proceedings.

These Techniques may also assist the arbitral tribunal in adopting procedures that they consider appropriate, taking into account their obligation under Article 25(1) of the ICC

⁵ ICC Techniques for Controlling Time and Costs in Arbitration (Second Edition), 1 November 2015, Doc. No: 861-1 ENG, available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/>

⁶ CMS Guide to Arbitration, Vol II, Appendix 4.3.

⁷ CMS Guide to Arbitration, Vol II, Appendix 4.3.

Rules,⁸ to establish the facts of the case within as short a time as possible, whilst ensuring that each party has a reasonable opportunity to present its case.

However, it shall be noted that ICC Techniques recommend that in all instances, it is for the parties and the arbitral tribunal to select the procedures that are best suited for the case.

These Techniques embody two underlying principles. First, wherever possible, the parties and the arbitral tribunal should make a conscious and deliberate choice early in the proceedings as to the specific procedures suitable for their case. Second, the arbitral tribunal should work proactively with the parties to manage the procedure from the outset of the case.⁹

⁸ Article 25 (1) ICC Rules: “*The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means*”.

⁹ ICC Techniques for Controlling Time and Costs in Arbitration (First Edition).

IV. Methods suggested by ICC to decrease time and costs

1. Keeping Clauses Simple

The first method suggested by ICC relates to the arbitration clauses and reads as follows:

“Simple, clearly drafted arbitration clauses will avoid uncertainty and disputes over their meaning and effect. They will minimize the risk of time and costs being spent on disputes regarding, for example, the jurisdiction of the arbitral tribunal or the process of appointing arbitrators. In all cases, ensure that the arbitration clause conforms with any relevant applicable laws”.

Firstly, an important point to consider – when drafting the arbitration clauses – is that the definition of arbitration is sometimes contested by the parties and/or the national courts.

In general, the definition of arbitration contains a number of elements, all of which are essential to characterize a particular dispute resolution process as ‘arbitration’. In particular, arbitration requires (i) a consensual agreement (ii) to submit disputes to (iii) a non-governmental decision-maker, chosen by or for them, to (iv) render a binding resolution of that dispute, (v) in accordance with adjudicatory procedures affording the parties an opportunity to be heard. Each of the various elements of this definition of arbitration is important and warrants elaboration.¹⁰

Drafting clear, unambiguous clauses contributes to the efficiency of the arbitration proceedings. For example, arbitration agreements require a clear intent to arbitrate. It is not sufficient to state that ‘disputes arising under the agreement shall be settled by arbitration’ as it leaves many issues unresolved. Issues such as when, where, how and before whom a dispute will be arbitrated are subject to disagreement once a controversy has arisen,¹¹ all of which contribute to the increasing waste of time and thus increasing costs.

¹⁰ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 250.

¹¹ Drafting Dispute Resolution Clauses, A Practical Guide, Published by American Arbitration Association, available at www.icdr.org.

The American Arbitration Association has published a guideline on drafting the arbitration clauses which can be very helpful to parties when drafting such clauses. Amongst other things, this guideline introduces the following considerations:

- I. *“The clause might cover all disputes that may arise, or only certain types;*
- II. *It could specify only arbitration – which yields a binding decision – or also provide an opportunity for non-binding negotiation or mediation;*
- III. *The arbitration clause should be signed by as many potential parties to a future dispute as possible;*
- IV. *It is normally a good idea to state whether a panel of one or three arbitrator(s) is to be selected, and to include the place where the arbitration will occur; and*
- V. *If the contract includes a general choice of law clause, it may govern the arbitration proceeding. The consequences should be considered.”¹²*

Another helpful guideline for the parties to consider is the ‘IBA Guideline for Drafting International Arbitration Clauses’, which can serve as an important tool for the parties and their counsel when drafting the arbitration agreements.

Amongst other things, this guideline suggests the following:

- I. *“The parties should decide between institutional and ad hoc arbitration;*
- II. *The parties should select a set of arbitration rules and use the model clause recommended for these arbitration rules as a starting point;*
- III. *Absent special circumstances, the parties should not attempt to limit the scope of disputes subject to arbitration and should define this scope broadly;*
- IV. *The parties should select the place of arbitration. This selection should be based on both practical and juridical considerations;*
- V. *The parties should specify the number of arbitrators;*

¹² Drafting Dispute Resolution Clauses, A Practical Guide, Published by American Arbitration Association, p. 7, available at www.icdr.org.

- VI. *The parties should specify the method of selection and replacement of arbitrators and, when ad hoc arbitration is chosen, should select an appointing authority;*
- VII. *The parties should specify the language of arbitration; and*
- VIII. *The parties should ordinarily specify the rules of law governing the contract and any subsequent disputes”.*¹³

The above mentioned points are the ‘basic guidelines’, whereas the following are optional elements which can also be additionally taken into consideration:

- I. *“The authority of the arbitral tribunal and of the courts with respect to provisional and conservatory measures;*
- II. *Document production;*
- III. *Confidentiality issues;*
- IV. *Allocation of costs and fees;*
- V. *Qualifications required of arbitrators;*
- VI. *Time limits; and*
- VII. *Finality of arbitration”.*¹⁴

The above mentioned items, while they might seem simple, are of great importance to control the costs and time of the arbitration proceedings.

It is important to ensure that the wording adopted in an arbitration agreement is adequate to fulfil the intentions of the parties. Usually, when parties agree to resolve any disputes between them by arbitration, they intend such recourse to arbitration to be mandatory, rather than optional. Therefore, the arbitration clause should be drafted so as to make clear that resolving disputes by arbitration is not only the parties' right, but also their obligation.¹⁵

¹³ IBA Guidelines for Drafting International Arbitration Clauses Adopted by a resolution of the IBA Council 7 October 2010 International Bar Association, p. 3.

¹⁴ IBA Guidelines for Drafting International Arbitration Clauses Adopted by a resolution of the IBA Council 7 October 2010 International Bar Association, p. 4.

¹⁵ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 2.65.

As it can be understood from the guidelines mentioned above, the arbitration clause should be drafted in broad, inclusionary terms, rather than referring only certain categories of dispute to arbitration and leaving others to the jurisdiction of national courts.¹⁶

As discussed above, based on the best practice in international arbitration, an arbitration clause should address a number of important issues, including: (a) the seat of the arbitration; (b) the institutional or other rules applicable to the arbitration; (c) number and method of appointment of the arbitrators; (d) the language of the arbitration; and (e) the law applicable to the merits of the parties' dispute.

This is generally based on the model arbitration clauses recommended by most arbitral institutions¹⁷ and of clauses prepared by high-profile companies or legal counsel.¹⁸

Nonetheless, parties frequently agree to less detailed – and sometimes much more confusing – arbitration clauses. Indeed, it is surprising how frequently parties purport to enter into gravely defective or 'pathological' arbitration clauses.¹⁹ For instance, in a study of 237 cases submitted to the ICC in 1987, only 1 clause adopted the precise language of the ICC model clause, while 16 clauses (or 7% of all clauses) contained very serious defects.²⁰

¹⁶ See also A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), paras. 2.71 *et seq.*

¹⁷ See also Molfa, *Pathological Arbitration Clauses and the Conflict of Laws*, 37 Hong Kong L.J. 161 (2007); Pengelley, *Conflicting Dispute Resolution Clauses: The Rule in Paul Smith Revisited*, in R. Kalyani (ed.), *Arbitration Awards: Demystifying the Myth* 96 (2009); Tan, *Between Competing Jurisdiction Clauses: A Pro-Arbitration Bias*, 2011 Lloyd's Mar. & Comm. L.Q. 15.

¹⁸ G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Appendix C (4th edn. 2013).

¹⁹ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), FN 768, citing The appellation "pathological" was apparently first coined by an early proponent of international arbitration. Eisemann, *La Clause d'arbitrage pathologique*, in *Commercial Arbitration: Essays in Memoriam Eugenio Minoli* 129 (1974). See also Beffa, *Decision 4A_246/2011 or the Leniency of the Swiss Federal Tribunal Towards Pathological Clauses*, 30 ASA Bull. 169 (2012); Davis, *Pathological Clauses: Frederic Eisemann's Still Vital Criteria*, 7 Arb. Int'l 365 (1991); Karrer, *Pathological Arbitration Clauses, Malpractice, Diagnosis and Theories*, in P. Vogt, *The International Practice of Law, Liber Amicorum for Thomas Baer and Robert Karrer* 109 (1998); Note, *Germany: Validity of Agreements to Arbitrate – Positive Interpretation of Pathological Arbitration Clauses*, 11(2) Int. Arb. L. Rev. N25 (2008); Schmitthoff, *Defective Arbitration Clauses*, 1975 J. Bus. L. 9.

²⁰ Bond, *How to Draft An Arbitration Clause*, 6(2) J. Int'l Arb. 65 (1989). See also Jolivet, *La clause d'arbitrage pathologique*, 2010 Paris J. Int'l Arb. 81.

Parties may produce such pathological results out of urgency, lack of attention, inability to reach agreement on anything else, or simple ignorance, avoiding of which will result in a more efficient, less time-consuming and less expensive arbitration proceedings.²¹

There are various types of pathological arbitration clauses. It has been argued that most frequently, the defect relates to the lack of meeting the requirements under the law applicable to the arbitration clause. Arbitration clauses are also pathological when the subject of the dispute cannot be subject to the arbitration, or the arbitration clause is practically inefficient.²²

Omissions or drafting errors in the specification of the arbitral seat, institutional rules, means of selection of arbitrators and other aspects of the agreement to arbitrate often give rise to claims that particular international arbitration clauses are unenforceably indefinite.

Thus, it is sometimes said that, in drafting arbitration agreements, “equivocation [is] the cardinal sin.” That is true, and such drafting mistakes are to be avoided; nonetheless, it is also true that these errors are very often sins that are forgiven.²³

²¹ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 771.

²² Francisco Malaga, *Defective Arbitration Clauses*, Kluwer Arb. Blog, 14 February 2015. As an example, an arbitration Clause containing the following is pathological: “Any dispute shall be settled by amicable negotiation between [the] two Parties. In case both Parties fail to reach [an] amicable agreement, all dispute [sic] out of in connection with the contract shall be settled by the Arbitration Committee at Singapore under the rules of The International Chamber of Commerce [the ICC Rules] of which awards shall be final and binding [on] both parties . . .”. See *HKL Group Co Ltd v Rizq International Holdings Pte Ltd* available at <https://hsfnnotes.com/arbitration/2013/02/22/recent-singapore-high-court-decision-on-arbitration-clause-controversial-in-light-of-2012-icc-rule/>

²³ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 771. In a case before the Swiss Supreme Federal Court, “The arbitration clause contained in the Settlement Agreement stated that the “Agreement” “shall be interpreted in accordance with, and governed in all respect by the provisions and statute of the International Chamber of Commerce in Zürich, Switzerland and subsidiary by the laws of Germany”. The arbitral tribunal held that pursuant to Art. 178 para. 2 of the Private International Law Act, the substantive validity of the arbitration clause had to be examined either under German law (the law applicable to the subject matter of the dispute) or Swiss law. However, under both laws, a true and common intent to arbitrate is required and the arbitration clause could, in the view of the arbitral tribunal, not be interpreted in this way; rather, a reasonable party would likely read it as a choice-of-law clause addressing the applicable law only.” Available at <https://globalarbitrationnews.com/swiss-federal-supreme-court-rules-on-pathological-arbitration-clause-20151/>

2. Use of the ICC model clause

The second method recommended by ICC is the “use of the ICC model Clause”, which provides as follows:

*“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules”.*²⁴

ICC suggests that modifications to the standard clause can result in unintended and undesirable consequences and therefore should be made only with great care and for specific purposes. It further recommends the parties to be cautious about adding to this clause further provisions relating to the procedure for the arbitration.²⁵

However, the standard clause can be modified in order to:

- I. *Take the requirements of national laws and any other special that the parties may have requirements into account. In particular, parties should always check for any*

²⁴ See Standard ICC Arbitration Clauses, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/>. See also e.g. Stockholm Chamber of Commerce (SCC) model clause as follows: “Any dispute, controversy or claim arising out of or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration in accordance with the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce. Recommended additions: The arbitral tribunal shall be composed of three arbitrators/a sole arbitrator.

The seat of arbitration shall be [...].

The language to be used in the arbitral proceedings shall be [...].

This contract shall be governed by the substantive law of [...].” Available at

<http://www.sccinstitute.com/dispute-resolution/model-clauses/english/>. See also London Court of Arbitration (LCIA) model clause:

“For contracting parties who wish to have future disputes referred to arbitration under the LCIA Rules, the following clause is recommended. Words/spaces in square brackets should be deleted/completed as appropriate.

“Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

The governing law of the contract shall be the substantive law of [].” Available at http://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx

²⁵ Techniques for Controlling Time and Costs in Arbitration (Second Edition).

mandatory requirements at the place of arbitration and potential place(s) of enforcement; and

II. Make special arrangements where the contract or transaction involves more than two parties.

III. Combine several ICC dispute resolution services. Combined and multi-tiered dispute resolution clauses may help to facilitate dispute management and reduce time and costs.²⁶

Arbitration can also be combined with:

- Pre-arbitral referee procedure;
- Mediation;
- Expertise;
- Dispute Board; and

virtually any other form of ADR.

The ICC's pre-arbitral referee procedure is intended to operate as a 'third way', independent of court and arbitral tribunal, to enable the parties to have rapid recourse to a person empowered to make an order to meet an urgent problem.²⁷

The rationale behind such an order is that it may provide a temporary resolution to a dispute and lay the foundations for its final settlement. The referee procedure can only be used where there is express agreement to it, in addition to an arbitration provision.²⁸

Dispute Boards (DBs) are normally set up at the outset of a contract and remain in place and are remunerated throughout its duration.²⁹

²⁶ See Standard ICC Arbitration Clauses, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/>

²⁷ See ICC Rules for a Pre-arbitral Referee Procedure, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/pre-arbitral-referee/rules-for-a-pre-arbitral-referee-procedure/>

²⁸ Ibid.

²⁹ See ICC Dispute Board Rules, available at <http://www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/dispute-board-rules/>

Comprising one or three members thoroughly acquainted with the contract and its performance, the DB informally assists the parties, if they so desire, in resolving disagreements arising in the course of the contract and it makes recommendations or decisions regarding disputes referred to it by any of the parties. DBs have become a standard dispute resolution mechanism for contractual disputes arising in the course of mid- or long-term contracts.³⁰

The ICC Rules allow any party in need of urgent or conservatory measures – which cannot wait for the constitution of an arbitral tribunal – to make an application to the ICC International Court of Arbitration for the appointment of an emergency arbitrator to decide upon the request for such measures.³¹

The parties should consider whether the Emergency Arbitrator Provisions as set out in Article 29 and Appendix V of the Rules are desirable in their particular situation.

It shall be noted that if the parties do not want the Emergency Arbitrator Provisions to apply, they must agree to opt out of those provisions and may do so by using the following model clause:

*“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The Emergency Arbitrator Provisions shall not apply”.*³²

³⁰ See ICC Dispute Board Rules, available at <http://webcache.googleusercontent.com/search?q=cache:3iRFS1tFBhgJ:www.iccwbo.org/products-and-services/arbitration-and-adr/dispute-boards/dispute-board-rules/+&cd=1&hl=de&ct=clnk&gl=at>

³¹ See Article 29 and Appendix V ICC Rules.

³² Any agreement to opt out of the Emergency Arbitrator Provisions must be explicit and any agreement upon another pre-arbitral procedure must be unambiguous. See Andrea Carlevaris and José Ricardo Feris, *Running in the ICC Emergency Arbitrator Rules: The First Ten Cases*, ICC International Court of Arbitration Bulletin Vol. 25 No. 1, chapter (iii) Concurrent state court and emergency arbitrator proceedings.

3. Selection and appointment of arbitrators

The third recommendation of ICC in relation to controlling time and costs is to control the selection and appointment of arbitrators. Complex and high-value contracts can give rise to small disputes for which a three-member tribunal may be too expensive.³³

In an international arbitration, there should be an uneven number of arbitrators, and it is suggested that, in general, maximum three arbitrators will be sufficient. The system of appointing only two arbitrators, with an ‘umpire’ or ‘referee’ to adjudicate between them if they cannot agree, may be appropriate for arbitrations within a defined trade or commodity association, but is impracticable for the generality of international arbitrations.³⁴

The establishment of an arbitral tribunal involves many considerations. First and most important is the question of number of arbitrators: will a sole arbitrator suffice, or is there a three member tribunal needed?

The laws of some countries sensibly provide that the number of arbitrators must be uneven and this should be borne in mind by the drafters of arbitration clauses.

Arbitration clauses which provide for two arbitrators and an ‘umpire’, used principally (but not exclusively) in shipping and commodities disputes, are unsuitable for modern international arbitration. Tribunals of five (or more) arbitrators are best reserved for arbitrations between states. Thus an important consideration in the drafting of an arbitration clause or a submission agreement is the number of arbitrators to be appointed. In commercial cases, the choice, in practice, is between one and three.³⁵

Although parties may already designate the number of arbitrators in their arbitration clauses, ICC suggests that consideration should be given to staying with the standard ICC arbitration clause and providing for one or more arbitrators, to enable ICC to appoint, or the parties to agree on, a sole arbitrator where the specific nature of any subsequent dispute does not warrant a three-member tribunal.³⁶

³³ See also J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), para. 10-1 *et seq.*

³⁴ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 2.77.

³⁵ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 4.22.

³⁶ See ICC Rules, Article 12(2).

In cases when the parties wish the ICC to select and appoint all members of the arbitral tribunal the following wording can be used:

*"All arbitrators shall be selected and appointed by the ICC International Court of Arbitration."*³⁷

Adding special requirements regarding the expertise and qualifications of the arbitrators to be appointed will reduce the pool of available arbitrators and may increase the time taken to select a tribunal.³⁸

When it comes to choosing between a sole arbitrator and a three member arbitral tribunal, the advantages of referring a dispute to a sole arbitrator are self-evident. Appointments for meetings or hearings can be more easily arranged with a sole arbitrator than with a tribunal of three arbitrators. The interests of economy are also served, since the parties will have to bear the fees and expenses of only one arbitrator rather than three.

Moreover, the arbitral proceedings should be completed more quickly, since a sole arbitrator does not need to 'deliberate' with colleagues in an attempt to arrive at an agreed, or majority, determination of the matters in dispute. If the parties to an international arbitration are able to agree upon the appointment of a sole arbitrator in whom they both have confidence, it makes sense for them to do so.³⁹

It shall be noted that it is not uncommon for arbitration agreements to impose contractual requirements of various types regarding the arbitrators' qualifications, either directly or through incorporation of institutional rules containing such provisions.

When they exist, contractual requirements regarding the arbitrators' qualifications typically concern nationality, language proficiency, legal training (*e.g.*, either requiring or prohibiting lawyers), or background (*e.g.*, experience in a particular commercial field, formal accreditations).⁴⁰

³⁷ Techniques for Controlling Time and Costs in Arbitration (Second Edition).

³⁸ Ibid.

³⁹ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 4.25.

⁴⁰ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 1750

Depending on the parties' agreement, these requirements can apply to either all arbitrators or only the sole or presiding arbitrator. In practice, contractual limitations have much greater practical importance for the arbitral process than restrictions imposed by national law.⁴¹

As mentioned above, the more detailed an arbitration agreement in relation to qualifications of the arbitrators is drafted, the less time it takes – in particular for the arbitral institutions – to spot the desirable arbitrator, resulting in a better control of costs and time.

In deciding how many arbitrators to select, parties consider cost, diversity, speed, expertise, consistency and decisiveness. With respect to expense, three arbitrators cost roughly three times as much as a single arbitrator; there are some ministerial tasks which need be performed only once even with three arbitrators, but many efforts and costs are tripled.⁴²

With respect to speed, there are inevitably greater difficulties in scheduling hearings with three arbitrators, where multiple busy calendars must be coordinated (sometimes to accommodate hearings of several weeks or more). It is also often said that a sole arbitrator is likely to be more decisive than a three-person tribunal where deliberations, editing of awards and compromises may require additional time.⁴³

To illustrate this issue better, the average total costs in an arbitration with a sole arbitrator with the claim amounting USD 5 million in year 2017 will be approximately USD 132,000, whereas the same arbitration proceedings with three arbitrators will cost approximately USD 307,000.⁴⁴

⁴¹ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 1750.

⁴² Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 1675.

⁴³ Ibid.

⁴⁴ See the ICC Costs Calculator available at <https://iccwbo.org/content/themes/icc/assets/cost-calculator/cost-calculator.html>

4. Fast-track procedure

Another recommendation of ICC is for parties to use fast track procedures in the arbitration clause.

Indeed, Article 38(1) of the ICC Rules enables the parties to shorten time limits provided for in the Rules, while Article 38(2) enables the Court to extend those shortened time limits when necessary.⁴⁵

Fast-track procedures are designed to enable an arbitration to proceed quickly, given the specific nature of the contract and the disputes that are likely to arise. However, ICC experience shows that in practice it is difficult at the time of drafting the clause to predict with a reasonable degree of certainty the nature of disputes and the procedures that will be suitable for those disputes.⁴⁶

Also, disagreements can arise later over the interpretation or application of fast-track clauses. ICC therefore suggests that careful thought should be given before such provisions are included in arbitration clauses. Once a dispute has arisen, the parties could at that time agree upon a fast-track procedure, if appropriate.

Parties sometimes agree to highly expedited or fast-track arbitrations, where the entire arbitral process is fit within an abbreviated time period. Some arbitral institutions have adopted rules specifically designed for such proceedings, particularly in recent years.⁴⁷ A number of institutions (including the LCIA, PCA and HKIAC) do not offer specific fast track procedures but parties are free to provide for expedition by agreement.⁴⁸

⁴⁵ Article 38 ICC Rules reads: “1) the parties may agree to shorten the various time limits set out in the Rules. Any such agreement entered into subsequent to the constitution of an arbitral tribunal shall become effective only upon the approval of the arbitral tribunal.”

2) The Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 38(1) if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.”

⁴⁶ ICC Techniques for Controlling Time and Costs in Arbitration.

⁴⁷ See 2012 Swiss Rules, Art. 42(d) (“The award shall be made within six months from the date on which the Secretariat transmitted the file to the arbitral tribunal.”); 2008 DIS Supplementary Rules for Expedited Proceedings (expedited rules designed to allow decision for six months for sole arbitrator, and nine months for three-person tribunal); 1999 SCC Rules for Expedited Arbitrations (expedited rules designed to allow a decision within three months).

⁴⁸ Beerbower, *International Arbitration: Can We Realise the Potential?*, 27 Arb. Int’l 75 (2011).

Fast-track arbitration is not a distinct kind of arbitration. Instead, it incorporates various forms of expedited procedures, and is not comprised of a fixed set of elements. However, there is a set of procedural possibilities which – in different combinations – form recognized elements of fast track arbitrations.⁴⁹

But what makes the fast-track arbitration a viable option? The reason why parties may be interested in an expeditious procedure is the advantage of a rapid decision allowing them to continue their business when – in a financial and strategic sense – every day counts. Parties who must continue working together in the future are more inclined to fully cooperate in order to achieve the goal of a speedy resolution.⁵⁰

The main characteristic of fast-track arbitration is strict time limits. Such time limits apply to the parties as well as to the arbitrators. The parties are regularly constrained by relatively short time limits for the nomination of their respective arbitrator, as well as for their submissions and preparation for the oral hearing.⁵¹

Meanwhile, the most important restriction for the arbitrator is a time limit for the issuance of the award. Such restrictions on the arbitrator are problematic as they may lead to a situation in which the losing party may contest the issuance of an award after the time limit has elapsed.

Therefore, in order for the parties to avoid unnecessary risk of a possible challenge to the award, it would be best for them to clarify this issue in advance.⁵²

Another important element in fast-track arbitration is the limitation of procedural steps. For this reason, most specific regulations on expedited proceedings contain restrictions on the number of written submissions as well as limitations regarding the hearing.⁵³

⁴⁹ Irene Welser and Christian Klausegger, *The Arbitrator and the Arbitration Procedure - Fast Track Arbitration: Just fast or something different?* in Gerold Zeiler, Irene Welser, et al. (eds), *Austrian Arbitration Yearbook 2009*, Austrian Yearbook on International Arbitration, Volume 2009 (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2009) p. 261.

⁵⁰ Mirèze Philippe, *Are Specific Fast-Track Arbitration Rules Necessary?* *Arbitration in Air, Space and Telecommunications Law* (1 January 2001) p. 255.

⁵¹ Mirèze Philippe, *Are Specific Fast-Track Arbitration Rules Necessary?* *Arbitration in Air, Space and Telecommunications Law* (1 January 2001) p. 255.

⁵² Ibid.

⁵³ Ibid.

As the drafting of the award itself may take some time in ordinary arbitral proceedings, most rules for expedited arbitrations also provide for expedited arbitral awards. For example, Section 7 of the German Institution of Arbitration's Complementary Rules for Expedited Proceedings provides that the Arbitral Tribunal may abstain from stating the facts of the case in the arbitral award.⁵⁴

Under Article 35 of the Arbitration Institute of the Stockholm Chamber of Commerce's Rules for Expedited Arbitrations, there is no obligation to include reasons for the award, unless expressly requested by one of the parties.⁵⁵ On the other hand, such “shortened” versions of the award carry the risk that the award may be subject to rescission more easily.

Furthermore, fast-track arbitration is not possible without modern means of communication.⁵⁶ Communication in the form of email, fax, telephone and video conferences, and any other appropriate means of avoiding unnecessary formality, is a key factor in the considerably shortened duration of the fast track arbitration proceedings.

An important advantage of fast-track proceedings is the lower costs to all parties involved. Fewer submissions, shorter time limits, shorter hearings and more efficiency in the procedure all contribute to the lower costs of the fast-track proceedings.⁵⁷

However, some authors argue that there are some hidden risks incorporated with fast-track proceedings. In fact, they argue that there is a chance that fast-track arbitration is not as cost-saving as it appears.⁵⁸

Amongst the risks that have been raised are the difficulty of finding experienced arbitrators, the risk of an unsatisfactory decision due to pressures of time, limits to work intensity (as

⁵⁴ See Annex to the DIS Arbitration Rules, available at http://www.dis-arb.de/scho/2008_SREP.html.

⁵⁵ See Arbitration Institute of the Stockholm Chamber of Commerce, Rules for Expedited Arbitrations, available at http://www.sccinstitute.com/_upload/shared/files/regler/2007_expedited_rules_eng.pdf.

⁵⁶ For more institutions that have adopted specific rules, see Rudolf Fiebinger & Christian Gregorich, *Arbitration on Acid*, in Austrian Arbitration Yearbook 2008 237 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2008), p. 250.

⁵⁷ Irene Welser and Christian Klauegger, *The Arbitrator and the Arbitration Procedure - Fast Track Arbitration: Just fast or something different?* in Gerold Zeiler, Irene Welser, et al. (eds), Austrian Arbitration Yearbook 2009, Austrian Yearbook on International Arbitration, Volume 2009 (Manz'sche Verlags- und Universitätsbuchhandlung; Manz'sche Verlags- und Universitätsbuchhandlung 2009) p. 272.

⁵⁸ Ibid.

lawyers may be able to add to manpower resources, but arbitrators are not), the risk of missing deadlines, and the risk of surprise for the respondent.⁵⁹

Besides, the unfair time-limits imposed on respondents for the preparation of their defense in the absence of a complete presentation of the claimant's case,⁶⁰ and the lack of responsiveness in the exchange of submissions between parties, are amongst the risks as well.⁶¹

Finally, it has to be noted that it is not recommendable to take the risk of testing fast-track proceedings, should neither the parties, their counsel, the arbitrators nor the arbitration institution have experience in expedited procedures – in particular when the dispute is complicated.

Fast-track proceeding is to be taken seriously. The losing party may feel that its counsel did not sufficiently argue an important point, and counsel is unlikely to attribute that to having had too little time to prepare for the hearing. The party must be satisfied that all arguments were duly put forward, however short the deadline.⁶²

Every participant must be able to provide the necessary input for the fast-track proceedings to be successful within the fixed time-limits.⁶³ Only when such requirements are met, fast-track proceedings are recommendable to save the time and costs incorporated with the arbitration proceedings.

⁵⁹ Pierre Yves Tschanz, *The Chamber of Commerce and Industry of Geneva's Arbitration Rules and their Expedited Procedure*, 10(4) J. INT'L A RB. p. 51 (1993).

⁶⁰ Stephen Bond, *Counsel's Responsibilities in Regard to the Speed of an International Arbitration*, in *Improving International Arbitration* – Libera Micorum and Michel Gaudet (ICC Publishing 1998), p. 113.

⁶¹ Mirèze Philippe, *Are Specific Fast-Track Arbitration Rules Necessary?* Arbitration in Air, Space and Telecommunications Law (1 January 2001) p. 256.

⁶² Mirèze Philippe, *Are Specific Fast-Track Arbitration Rules Necessary?* Arbitration in Air, Space and Telecommunications Law (1 January 2001) p. 256.

⁶³ Ibid.

5. Time limits for rendering the final award

The other method recommended by ICC is to set a time limit for the arbitral tribunals to render their awards.

One commonly used provision that can give rise to significant difficulties is the requirement that a final award be produced within a certain number of weeks or months from the commencement of the arbitration. Such specific time limits can create jurisdictional and enforcement problems if it turns out that the time limit specified is unrealistic or not clearly defined.⁶⁴

Most national arbitration laws contain no provisions in relation to the time limits for making an award.⁶⁵ This leads the timing of an award to be agreed upon within the parties' procedural autonomy or, in case there is no such agreement, the arbitrators' general procedural discretion.⁶⁶

On the other hand, a few arbitration acts prescribe time limits within which an arbitral tribunal, seated within national territory, must make its final award.⁶⁷ For example, the French Code of Civil Procedure states that a final award in a domestic arbitration must be made within six months of the constitution of the tribunal.⁶⁸

Some institutional rules prescribe deadlines for the making of an award.⁶⁹ Less frequently, the parties' arbitration agreements may prescribe a time limit for making an award. Most national arbitration legislation gives effect to such agreements as an element of the parties' more general procedural autonomy.⁷⁰

It has been suggested by some authors that financial incentive for the arbitral tribunal to render their awards faster is a way to control time and costs. Based on this suggestion, the parties agree with the arbitral tribunal that the arbitral tribunal receives a specific percentage

⁶⁴ ICC Techniques for Controlling Time and Costs in Arbitration.

⁶⁵ See *e.g.*, UNCITRAL Model Law; U.S. FAA; English Arbitration Act, 1996; Swiss Law on Private International Law.

⁶⁶ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 3062.

⁶⁷ *Ibid.*

⁶⁸ French Code of Civil Procedure, Art. 1463(1).

⁶⁹ See *e.g.*, 2012 ICC Rules, Art. 30(1) (six months, subject to extensions); 2012 LMAA Terms, Art. 20 (six weeks); 2010 SCC Rules, Art. 37; 2013 SIAC Rules, Art. 5(2)(d) (expedited procedure).

⁷⁰ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 3063.

on the arbitrators' fees otherwise applicable if the award is rendered within two months after receipt of the post-hearing submissions.⁷¹

If the award is rendered in a timeframe between two and three months after receipt of the post-hearing submissions, the standard fee is to be paid. If the award is rendered later than three months after receipt of the post-hearing submissions, the arbitrators accept a 'penalty' of specific percentage for delaying the service they contracted for, namely deciding the dispute.⁷²

Based on a survey of Queen Mary University of London, it is not rare today, especially in complex cases before famous and thus busy arbitrators, that the tribunal needs more than six months for rendering the final award.⁷³

In this regard, it shall be noted that although a case can be complex and while the submissions might be voluminous, such long timeframes can always be shortened by proper time management of the arbitral tribunal.

Therefore such proposals and imposing time limits on arbitral tribunals to render their awards within a specific time limit provide for an incentive to speed up the flow of the arbitration at a relatively moderate increase in costs, if any.

If the arbitrators know beforehand that their fees will be cut if an award is not rendered quickly, the arbitral tribunal will allocate sufficient time immediately after receipt of the post-hearing briefs for deliberating and writing the award.⁷⁴

⁷¹ William W. Park, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 2013 Journal of Intl. Arb. Vol. 29 issue3, 464.

⁷² Ibid.

⁷³ Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, p. 32; Anke Sessler, Nathalie Voser, 10 Ger. Arb. J. 120, 123 (2012).

⁷⁴ William W. Park, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 2013 Journal of Intl. Arb. Vol. 29 issue3, 464.

6. More detailed arbitration agreement after the dispute has arisen

The next recommendation of ICC is to prepare a more detailed arbitration agreement after the dispute has arisen:

*“If the parties agree to submit a dispute to ICC arbitration after the dispute has arisen, they can consider specifying in some detail the procedure for the arbitration, taking into account the nature of the dispute in question. This procedure may include some of the suggestions to control time and costs.”*⁷⁵

LCIA also recommends the following arbitration clause for the existing disputes:

“If a dispute has arisen, but there is no agreement between the parties to arbitrate, or if the parties wish to vary a dispute resolution clause to provide for LCIA arbitration, the following clause is recommended. Words/spaces in square brackets should be deleted/completed as appropriate.

"A dispute having arisen between the parties concerning [], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules.

The number of arbitrators shall be [one/three].

The seat, or legal place, of arbitration shall be [City and/or Country].

The language to be used in the arbitral proceedings shall be [].

*The governing law of the contract [is/shall be] the substantive law of [].”*⁷⁶

Similar to the cases where an arbitration clause is drafted for the future disputes, here the logic for the above mentioned model clauses is to help parties prevent drafting pathological arbitration clauses which will further hinder the proceedings and hence add to the time and costs.

⁷⁵ ICC Techniques for Controlling Time and Costs in Arbitration, p. 7.

⁷⁶ LCIA Recommended Clauses, available at

http://www.lcia.org/dispute_resolution_services/lcia_recommended_clauses.aspx

7. Counsel with experience

Amongst the recommendations of ICC, perhaps this is the easiest to approach:

“Consider appointing counsel with the skills necessary for handling the arbitration at hand and who are sensitive to the need for appropriate time and cost efficiency. Such counsel are more likely to be able to work with the arbitral tribunal and the other party’s counsel to devise an efficient procedure for the case.”

Some institutional rules either expressly or impliedly provide for the possibility of representation by non-lawyers as well as lawyers.⁷⁷ The 2010 UNCITRAL Rules is a classic example: *“each party may be represented or assisted by persons chosen by it”*.⁷⁸ The LCIA Rules are even more precise in this regard: *“Any party may be represented by legal practitioners or any other representatives”*.⁷⁹

In some cases, parties to arbitration proceedings are not represented by lawyers or legally-trained representatives. Rather, parties either represent themselves or are represented by non-lawyers, including corporate officers and technical advisers such as engineers and accountants.⁸⁰

Non-lawyer representatives are ordinarily confined solely to specialized trade arbitrations, where technical issues and usages are predominant and legal issues are perceived to be minor or irrelevant. Classic examples include commodities arbitrations (where disputes over quality are resolved in summary proceedings), smaller construction matters (where specialized construction advisers are frequently) and some financial/accounting matters. Even in these contexts, however, parties frequently retain lawyers in an advisory capacity, at least in larger matters.⁸¹

⁷⁷ See e.g., 2010 UNCITRAL Rules, Art. 5; 2012 ICC Rules, Art. 26(4); ICDR Rules, Art. 12; LCIA Rules, Art. 18(1); WIPO Rules, Art. 13(a).

⁷⁸ Article 5 of 2010 UNCITRAL Rules.

⁷⁹ LCIA Rules, Art. 18(1) (emphasis added). See also 2012 CIETAC Rules, Art. 20 (“A party may be represented by its authorized Chinese and/or foreign representative(s) in handling matters relating to the arbitration.”); WIPO Rules, Art. 13(a) (“The parties may be represented by persons of their choice, irrespective of, in particular, nationality or professional qualification.”)

⁸⁰ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2847.

⁸¹ Ibid.

Although and as mentioned above, it is possible for parties to be represented by non-lawyers; this is unusual in all but the smallest or most specialized commercial arbitrations. Instead, parties virtually always retain legal counsel, often seeking specialized international arbitration counsel.⁸²

This is in large part because international arbitration almost always involves the application of law to an evidentiary record in the context of an adjudicatory procedure that is similar in important respects to national court proceedings.⁸³

Although non-lawyers may play crucial roles on a party's team in an international arbitration (*e.g.*, as technical, financial, or industry counsel), there are not many cases where lawyers are not included in, and responsible for directing, the team and presenting the party's case to the arbitral tribunal. This is generally because the representation by lawyers is more time and cost efficient and more reliable than representation by non-lawyers.

There are a variety of possible choices for legal representatives in international arbitrations. Some parties instinctively prefer lawyers from their own jurisdiction, because of trust, language and familiarity with the party's needs and culture, business and expectations. These items are often good reasons to include such counsel on a legal team.

Depending on the nature of the disputed issues and the identities of the arbitrators, parties sometimes choose to include local counsel on their legal teams. That is particularly true where local court proceedings are foreseen or where there is a tribunal whose members may attach value to the participation of local counsel.⁸⁴ This leaves considerable impacts on saving the time.

In the majority of cases, however, parties seek to retain specialized international arbitration counsel at international law firms, as international arbitration usually involves complex international legal issues, substantive and procedural, as well as logistical and technical challenges in obtaining and presenting evidence.

⁸² See *e.g.*, Chambers, *Global Guide: The World's Leading Lawyers for Business – International Arbitration*(2013); Y. Dezalay & B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of A Transnational Legal Order* 9-18 (1996); Legal Media Group, *Best of the Best – Experts in Commercial Arbitration* (2013); Martindale-Hubbell International Dispute Resolution Directory, available at dispute.martindale.com.

⁸³ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2847.

⁸⁴ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2847.

Specialized counsel are often the best candidates to deal with these type of issues. Many major international law firms provide for specialized international arbitration practices nowadays.

There have been occasional efforts to formulate international codes of ethics that would apply uniformly to counsel engaged in international legal practice. For instance, the IBA General Principles for the Legal Profession and the IBA's International Principles on Conduct for the Legal Profession.

For the most part, these efforts have been general in scope, applying to all aspects of international legal practice, rather than tailored specifically to international arbitration.

IBA adopted Guidelines on Party Representation in International Arbitration in 2013, which prescribe uniform international rules of conduct specifically addressing the conduct of lawyers and representatives in international arbitration proceedings:

*“By virtue of these Guidelines, Arbitral Tribunals need not, in dealing with such issues, and subject to applicable mandatory laws, be limited by a choice-of-law rule or private international law analysis to choosing among national or domestic professional conduct rules. Instead, these Guidelines offer an approach designed to account for the multi-faceted nature of international arbitral proceedings”.*⁸⁵

This provision leaves the scope and applicability of the Guidelines on Party Representation uncertain. The Guidelines also state expressly that arbitral tribunals may apply their substantive provisions, even in the absence of party agreement, where the arbitrators conclude that doing so is necessary to *“ensure the integrity and fairness of the arbitral proceedings.”*

These Guidelines also do not tend to supersede the rules of national law regarding the professional conduct of lawyers (or other party representatives) which are otherwise applicable.⁸⁶ The Guidelines also state that:

“The Guidelines are also not intended to derogate from the arbitration agreement or to undermine either a Party representative's primary duty of loyalty to the party

⁸⁵ 2013 IBA Guidelines on Party Representation, Comments to Guidelines 1-3.

⁸⁶ 2013 IBA Guidelines on Party Representation, Preamble (*“[T]he Guidelines are not intended to displace otherwise applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules that may be relevant or applicable to matters of party representation.”*).

*whom he or she represents or a Party representative's paramount obligation to present such party's case to the Arbitral Tribunal.”*⁸⁷

Similar to the above mentioned provisions, this one also leaves the scope and applicability of the Guidelines unclear. Although imposing a number of substantive obligations on counsel, Guideline 3 appears to envisage that a lawyer's “*primary duty of loyalty*,” and “*paramount*” obligation to represent that party, will override these substantive obligations, even when the Guidelines have been adopted.⁸⁸

The topics addressed by the Guidelines include the role of party representatives, communications of party representatives with arbitrators, submissions by party representatives, disclosure obligations and dealings of party representatives with witnesses (fact and expert).⁸⁹ The Guidelines also provide for the possibility that arbitral tribunals will impose remedies for misconduct by counsel.⁹⁰

If these guidelines were to be updated, the consideration of sanctioning the counsel for misconducting amounting to increased time and costs of the arbitration proceedings could be taken into account.

However, for efficiency purposes, when the counsel is to be sanctioned, it is advisable to take into account the cost/ benefit analysis, given the stage of the proceedings and weighing which challenge will be less disruptive.⁹¹

It has been said that the duty to act ethically should be given broad application, in that it is not limited to the letter of national codes of professional responsibility.⁹² For example, Bernard Hanotiau has argued that it is “*a basic principle of international commercial arbitration that the parties have the duty to cooperate in good faith in the performance of their agreement as well as in the arbitral proceedings*”.⁹³

⁸⁷ 2013 IBA Guidelines on Party Representation, Guideline 3.

⁸⁸ See Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2854.

⁸⁹ 2013 IBA Guidelines on Party Representation, Guidelines 1-25.

⁹⁰ 2013 IBA Guidelines on Party Representation, Guideline 26 (identifying “*Remedies for Misconduct*”: (a) “*admonishing*” party representative; (b) drawing “*appropriate inferences in assessing the evidence*”; (c) considering misconduct in allocating costs of arbitration; (d) “*tak[ing]* other appropriate measures in order to preserve the fairness and integrity of the proceedings”).

⁹¹ See also Arbitral Tribunal Power to Disqualify Unethical Counsel, p. 85.

⁹² David W. Rivkin, 2014 Seoul Arbitration Lecture Ethics in International Arbitration, December 9, 2014.

⁹³ Bernard Hanotiau, *Complex Multicontract-Multiparty Arbitration*, Arbitration International 369, 1988.

Amongst other things,

- “Producing requested documents at the last minute;
- excessive requests for document disclosure;
- a failure truthfully to represent the client’s availability for hearing appearances in order to delay the proceedings;
- frivolous anti-arbitration injunctions;
- frivolous challenges to arbitrators; introducing important arguments, witness statements and exhibits for the first time only in a rejoinder or, worse, on the eve of or during the hearing;
- initiation of criminal proceedings against party officers or counsel;
- witness tampering; incorrect translation of pivotal documents or refusal to accept a corrected translation offered by an interpreter;
- wiretapping and other surveillance methods;
- willfully misstating the record or the holding of a legal authority;
- willfully making false statements or denying facts the parties known to be true; and
- making allegations of fraud or other serious misconduct without citing to any record evidence – and when asked to provide such evidence, withdrawing the allegations rather than supporting them”

are the examples of misconducts if the counsel that can be and must be sanctioned.⁹⁴

When arbitrators prove unable to deter or stop misconducting of the counsel, their ultimate tool is formal sanctions.⁹⁵ It has been argued that sanctions are a last resort, and ultimately a poor resort because sanctions cannot retroactively correct the harm done to the proceedings.⁹⁶

⁹⁴ Edna Sussman and Solomon Ebere. *All’s Fair in Love and War – Or Is It? Reflections on Ethical Standards for Counsel in International Arbitration*, American Review of International Arbitration, 2011. See also Günther J. Horvath, Stephan Wilske, *Guerilla Tactics in International Arbitration*, (Wolters Kluwer 2013).

⁹⁵ See also Günther J. Horvath, Stephan Wilske, *Guerilla Tactics in International Arbitration*, (Wolters Kluwer 2013).

⁹⁶ Ibid.

An assessment of costs for misconduct of the counsel in the final award, for example, can only ever be roughly calculated to compensate for the disorder and prejudice occurred by those misconducts. As mentioned earlier, the most common sanction remains to be the allocation of costs in the final award, with either indicating the percentage of the allocation of costs or specific amounts being attributable to one or both parties' senseless arguments or otherwise misconducts.⁹⁷

It seems likely to be true that arbitrators are willing the most to sanction counsel when they have formal authority to do so. For instance, the 2012 ICC Rules authorize the tribunal as the following:

*“In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner”.*⁹⁸

In order to increase the overall arbitration efficiency, the more proactive tribunals' role to impose sanctions in the form of allocation of costs in the final awards shall be more frequently practiced. In the words, awards should *“take much more account of the conduct of the parties and their attorneys and, if used properly, would focus the parties' minds on the time and cost they are incurring at each stage”*.⁹⁹

The question of whether and when an arbitral tribunal should sanction the counsel in misconduct: directly by assessing costs against the instructing party in the final award explicitly pegged to counsel conduct, or by disqualifying counsel, or by reporting the misconduct to the lawyer's domestic bar authority.¹⁰⁰

In any case, such sanctions can be a very strong incentive for the parties and their counsel to watch their ethical and legal obligations in order to comply with the requirements of time and cost efficiency.

⁹⁷ See also Gary B. Born, *International Commercial Arbitration* (Alphen aan den Rijn: Wolters Kluwer, 2009), pp. 2498–2501; Blackaby & Partasides, *International Arbitration*, para. 9.97.

⁹⁸ Article 37(5) 2012 ICC Arbitration Rules.

⁹⁹ Andrew Clarke, 'International Arbitration: Current Corporate Concerns', 20 *ICC Int'l Ct. Arb. Bull.* 20 (2009): 49.

¹⁰⁰ Günther J. Horvath, Stephan Wilske, *Guerilla Tactics in International Arbitration*, (Wolters Kluwer 2013).

8. Counsel with time

*“Ensure that the counsel you have selected has sufficient time to devote to the case”.*¹⁰¹

As simple as it sounds, this is the next recommendation of ICC for time and cost efficiency in arbitration proceedings, which shall be taken into consideration by parties. Availability of the counsel to devote their time without particular restraints can save the time in arbitration proceedings to a great extent.

Often times, especially in international and/or bigger law firms, counsel are dealing with many cases at hand simultaneously, acting both as an arbitrator and as a counsel. This is not uncommon to turn to counsel who are representing clients in various arbitration and litigation proceedings in over ten cases.

Although counsel is usually consisting of a team of people and not only one person drafting the submissions and representing the parties, it is recommended that parties seek the assistance of those counsel who actually have sufficient free time to devote to a case, in order to ensure that, by way of an example, deadlines for the submissions and hearings would not be extended simply because the counsel has no time to prepare for the case.

This further prevents the loss of time and expenses associated with the lack of availability of the counsel when they are needed. Parties can simply inquire the availability of the counsel before mandating them with a case by evaluating whether that counsel and his/her team have the capacity to deal with one more case, should the said party mandate them.

¹⁰¹ ICC Techniques for Controlling Time and Costs in Arbitration, p. 7.

9. Use of a sole arbitrator

*“After a dispute has arisen, consider agreeing upon having a sole arbitrator, when appropriate. Generally speaking, a one-member tribunal will be able to act more quickly than a three-member tribunal, since discussions between tribunal members are not needed and diary clashes for hearings will be minimized. A one-member tribunal will obviously also be cheaper”.*¹⁰²

We know that in arbitration proceedings, as a first step parties shall refer to the contract or law applicable to the contract for the number of arbitrators. Lacking a specific number, arbitration institutions usually invite the parties to agree on the number of arbitrators. The arbitral tribunal must consist of a one or an uneven number of arbitrators. Though parties are free to choose the number of the arbitrators, for the matters of cost and time efficiency, it has been recommended that parties designate a sole arbitrator to initiate the proceedings.

It has been suggested that where the parties jointly designate the sole arbitrator, they should be aware that their choice is crucial for the quality and outcome of the arbitration. In view of the importance of the choice, each party should dedicate considerable attention and sufficient time to the selection of the sole arbitrator.¹⁰³

Amongst other things, the following factors and questions are important when evaluating candidates:

- Does the candidate have experience in international arbitration?
- What reputation does the candidate have? Is he well known in the arbitration community? What do other arbitrators say? What was his role in previous tribunals?
- What is the cultural and legal background of the candidate? Does this fit with the background of the party?

¹⁰² ICC Techniques for Controlling Time and Costs in Arbitration, p. 7.

¹⁰³ Philipp J. Dickenmann, *Commentary on the Swiss Rules*, Article 7 [Appointment of a sole arbitrator] in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (Kluwer Law International 2013) p. 389.

- Does the potential arbitrator have the necessary language skills?
- Is the candidate particularly suited for the dispute at hand, considering its nature and the issues which likely have to be decided?
- What is the applicable law? Is the candidate educated in such law and practicing it? Or does he practice in a jurisdiction with a similar law system?
- Are there publications of the potential arbitrator indicating his position in the matter at stake? Did he sit in other tribunal deciding on similar issues?
- Is the candidate familiar with the business at stake in the arbitration? Where technical issues are relevant for the outcome of the arbitration: Does the prospect have specific knowledge in this respect?
- Can the candidate devote sufficient time to the arbitration?¹⁰⁴

In particular where the other party proposes a sole arbitrator, it should be considered whether there are any links between the sole arbitrator and the counter-party, or whether there are any grounds for one of the parties to logically think that the candidate is more likely than other prospects to decide in its favor.

Such considerations shall be taken into account when appointing a sole arbitrator, in order to prevent the wasting of time for a subsequent challenge and replacement of the arbitrators.

¹⁰⁴ Ibid.

10. Arbitrators with time

The next recommendation of ICC is to select arbitrators who have enough time: *“Whether selecting a sole arbitrator or a three-member tribunal, it is advisable to make sufficient enquiries to ensure that the individuals selected have sufficient time to devote to the case in question. If there is a particular need for speed, this must be made clear to the ICC so that it can be taken into consideration when making any appointments”*.¹⁰⁵

Albeit its simplicity this recommendation is of great importance. When the parties nominate an arbitrator, or when the ICC Court does the same, ICC Secretariat sends a form to the arbitrators to fill out, which enquires their availability by asking how many other cases they are involved in.

This form shall be completed and sent back to the ICC Secretariat by the nominated arbitrators before they are appointed. Their availability will then be assessed by the ICC Court prior to their official appointment to ensure that the arbitrators are available to provide their services to the parties without time constraints.

Although the parties are free to nominate arbitrators, the ICC Court imposes certain conditions regarding the constitution of the tribunal. First, every nominee must be confirmed or appointed by the Secretary General or the ICC Court. This allows the ICC Court to guarantee the required independence, neutrality, impartiality, ability and availability of the tribunal.¹⁰⁶

This procedure maintains a minimum and consistent standard in ICC arbitral tribunals. The ICC Court ‘appoints’ an arbitrator if the selection of the nominee is effected by the Institution under Article 13(3) and (4) of the ICC Rules.¹⁰⁷ All other prospective arbitrators (i.e., those

¹⁰⁵ ICC Techniques for Controlling Time and Costs in Arbitration, p. 7.

¹⁰⁶ Werner Jahnel and Anne-Marie Loong, *Commentary on the ICC Rules, Article 13 [Appointment and confirmation of the arbitrators]* in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (Kluwer Law International 2013) p. 735.

¹⁰⁷ Article 13 ICC Rules states: “3) Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.

4) The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:

a) one or more of the parties is a state or claims to be a state entity; or

b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where

nominated by the parties, co-arbitrators or third parties) must be ‘confirmed’ by the Secretary General or the ICC Court (see Art. 13(2) ICC Rules).¹⁰⁸

As mentioned earlier, the ICC Court's competence to verify the ‘availability and ability to conduct the arbitration’ applies to all nominees. The verification of the ‘availability’ and the ‘ability’ is of course difficult to ensure. The ICC Court bases its decision on the statement of acceptance, availability, impartiality and independence without making any further inquiries.

The ICC Court occasionally decides not to confirm an arbitrator when, although no party has objected, it has important information about the arbitrator's poor performance in previous or ongoing proceedings.¹⁰⁹

When the appointment is made by the ICC Court, it must also take into account the arbitrator's nationality and country of residence. A major requirement is of course the arbitrator's independence and impartiality.¹¹⁰

Since August 2009, prospective arbitrators must not confirm their acceptance and independence, but also their availability.¹¹¹ In that regard, the prospective arbitrators must indicate the number of cases in which they are currently involved as sole arbitrator, president, co-arbitrator or counsel before arbitral tribunals and/or state Courts.

there is no National Committee or Group; or
c) *the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.*”

¹⁰⁸ Werner Jahnel and Anne-Marie Loong, *Commentary on the ICC Rules, Article 13 [Appointment and confirmation of the arbitrators]* in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (Kluwer Law International 2013) p. 735.

¹⁰⁹ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-492.

¹¹⁰ The list of factors in Article 13(1) is not exhaustive and the Court may take into account any other factors it considers relevant, see also J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-494.

¹¹¹ The ICC-form used until December 2011 was entitled “ICC Arbitrator Statement of Acceptance, Availability & Independence”. On 1 January 2012, a new version of the form was released. It now incorporates the term impartiality and includes some small changes relating to the disclosure of an arbitrator's availability, see J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-378.

This should give the parties the possibility to object to those nominees who do not dispose of sufficient time.¹¹² It has been argued that the ICC Court should not refuse the confirmation of a nominee simply because he or she is involved in a significant number of cases, particularly where the parties jointly appoint the nominee as co-arbitrator or president.¹¹³

However, this information may be used by the Court when considering a request for replacement of an arbitrator by both parties under Art. 15(1) ICC Rules,¹¹⁴ based on the argument that the arbitrator lacks availability, even though the parties may have been aware of this fact at the time of his or her confirmation or appointment.

¹¹² When the requirement for availability was introduced it was not clear to what extent the Court would take into account the declaration on availability when deciding on the nominee's confirmation. See Fry/Simon, *ICC Arb. Bull.* 2009/2, pp. 18-22. However, the Court apparently may decide not to confirm or appoint an arbitrator where there are "genuine concerns over availability". Between mid-2009, when the new Statement form was first introduced, and the end of 2011, the Court decided not to confirm three arbitrators on the basis of information relating to availability provided in their Statement, see J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-382.

¹¹³ Under Swiss law, however, the parties may agree that the availability of an arbitrator may be a necessary qualification under Art. 180(1)(a) PILS, which must be respected by the ICC when appointing a tribunal. It is doubtful whether such agreement would be upheld, since it would be difficult to establish that a tribunal is insufficiently available. The ICC Court has not fixed a maximum number of pending cases in excess of which an arbitrator is automatically considered as being ineligible to serve, see J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-382.

¹¹⁴ Article 15 ICC Rules reads as follows: "1) *An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.*"

11. Selection and appointment by the ICC

ICC recommends the parties to consider allowing it to select and appoint the Arbitral tribunal, whether it is a sole arbitrator or a three-person tribunal.

*“This will generally be the quickest way to constitute the arbitral tribunal if there is no agreement between the parties on the identity of all arbitrators. It will also reduce the risk of challenges, facilitate the constitution of a tribunal having a variety of specialist skills and create a different dynamic within the arbitral tribunal. If the parties wish to have input into the selection of the tribunal by the ICC, they can request that the ICC provide a list of possible arbitrators to be selected in accordance with a procedure to be agreed upon by the parties in consultation with the ICC.”*¹¹⁵

It has been suggested that a significant obstacle to increasing the size and diversity in the pool of arbitrators is the high barrier to entry into the marketplace for arbitrator services.¹¹⁶

The most important criteria in selecting an arbitrator are the experience of the arbitrators, but how is a new arbitrator to get his or her first appointment? When a dispute involves a small claim, the ICC usually appoints an arbitrator who is an experienced advocate and who has agreed to be available for and to prioritize the arbitration.

In this regard the Commercial Arbitration Centre of Lisbon has suggested a creative solution: while many institutions undertake specifically to increase diversity in the arbitrators they appoint, the Arbitration Rules of Commercial Arbitration Centre of Lisbon is the only expressly published set of institutional rules to indicate a willingness to ‘create’ new arbitrators by making initial appointments.¹¹⁷

¹¹⁵ ICC Techniques for Controlling Time and Costs in Arbitration, p. 7.

¹¹⁶ Catherine Rogers, *Innovative New Criteria for Appointment of Arbitrators at Commercial Arbitration Centre of Lisbon*, Kluwer Arb. Blog, 10 July 2015.

¹¹⁷ Ibid.

12. Avoiding objections

Based on the ICC, “*any objection to the appointment of an arbitrator will delay the constitution of the arbitral tribunal. When selecting an arbitrator, give careful thought to whether or not the appointment of that arbitrator might give rise to an objection*”.¹¹⁸

As with other aspects of the international arbitral process, a dominant characteristic of the selection of the arbitral tribunal is the principle of party autonomy. A major attraction of arbitration is that it allows parties to submit a dispute to judges of their own choice rather than requiring that choice to be exercised by a third party on their behalf.¹¹⁹ Where having just one arbitrator has not been agreed upon, parties usually nominate one arbitrator (each), and the third arbitrator is then appointed jointly by parties nominated arbitrators.

Sometimes, a party seeking to undermine arbitration will refuse to appoint an arbitrator, or a party-appointed arbitrator will refuse to agree on a third arbitrator. This situation can be avoided by a provision in the arbitration agreement, or in the applicable arbitration rules, that allows an experienced institution to intervene and make the appointment in the event of default.¹²⁰

In an ad hoc arbitration, it is often necessary to fall back on the *lex arbitri* (procedural rules of the place of the arbitration), which normally provides for the appointment to be made by the court of the place of the arbitration. Although most national courts will make an appointment in such a situation, relying on national courts inevitably leads to greater delay and relative uncertainty.¹²¹

Needless to say, the selection of arbitrators is a key step in arbitral proceedings, as the arbitration is only as good as its tribunal. When appointing members of a tribunal, the ICC Court can guarantee a certain standard regarding the arbitrator's qualifications and neutrality.¹²²

¹¹⁸ ICC Techniques for Controlling Time and Costs in Arbitration, p. 7.

¹¹⁹ See Hague Conventions on the Pacific Settlement of International Disputes of 1899 (Art. 15) and 1907 (Art. 37).

¹²⁰ See e.g., ICC Rules, Art. 12(2); LCIA Rules, Art. 7(2).

¹²¹ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 4.35.

¹²² Ibid.

However, the ICC Court has little influence on the selection of arbitrators nominated by the parties or co-arbitrators. Some level of control on the selection process of arbitrators is exercised through the ICC Court's confirmation of each arbitrator by the Secretary General or the Court itself prior to the examination of a nominee's Statement of Independence. Article 13 of the ICC Rules establishes the requirements for and procedure of confirmation and appointment by the ICC Court or Secretary General.¹²³

Although the parties are free to nominate arbitrators, the ICC Court imposes certain conditions regarding the constitution of the tribunal. First, every nominee must be confirmed or appointed by the Secretary General or the ICC Court to allow the ICC Court to guarantee the required independence, neutrality, impartiality, ability and availability of the tribunal. This procedure maintains a minimum and consistent standard in ICC arbitral tribunals (see section 10 above).¹²⁴

Despite the opportunities accompanied with it, the process of selecting the arbitrators also presents significant challenges and risks. When one of the parties does not take cooperative steps to help constitute the arbitral tribunal, or seeks to hinder the process of the arbitral

¹²³ Article 13 ICC Rules states: “1) *In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).*

2) *The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.*

3) *Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.*

4) *The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:*

a) *one or more of the parties is a state or claims to be a state entity; or*

b) *the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or*

c) *the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.*

5) *The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.”*

¹²⁴ Werner Jahnel and Anne-Marie Loong, *Commentary on the ICC Rules, Article 13 [Appointment and confirmation of the arbitrators]* in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide*, (Kluwer Law International 2013) p. 735.

tribunal constitution, or if the parties just have conflicting approaches or expectations regarding the composition of the tribunal, the process can be delayed or derailed.

Similarly, and in violation of most national arbitration legislation and institutional rules, parties sometimes nominate an arbitrator who is little more than an advocate for their position. Although most institutional rules and arbitration statutes are designed to ensure that arbitral tribunals can be smoothly constituted,¹²⁵ with independent and impartial arbitrators, these mechanisms do not always function perfectly. As a consequence, the process of constituting the arbitral tribunal is sometimes delayed (or, in rare cases, frustrated).¹²⁶

It has been frequently observed and argued that “*in international arbitration, the choice of arbitrators may be the most important single task the parties face.*”¹²⁷ As it was once advocated by one eminent author:

*“selecting the tribunal is the most important page decision to be made in any international arbitration (apart from the rendering of the actual award) is, by now, a cliché. It also still happens to be true.”*¹²⁸

Naturally, the parties attempt to choose individuals whose backgrounds, expertise and abilities are well-suited to resolving their dispute in an efficient and quick manner, while also ensuring that the tribunal includes a balanced mix that provides independence and impartiality while selecting the arbitrators.

When parties cannot accomplish this directly, they frequently agree to the assistance of rules of the arbitration centers and an ‘appointing authority’, which offers help in the process of constituting a suitable tribunal.¹²⁹

Sometimes, on the other hand, parties select an inexperienced or incompetent tribunal, which can lead to an objection by the other party, and therefore an unnecessary extension of time and costs.

¹²⁵ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 1659.

¹²⁶ Ibid.

¹²⁷ Art. 5(1)(d) of the Inter-American Convention.

¹²⁸ Gerald Aksen, *The Tribunal’s Appointment, a paper in The Leading Arbitrators’ Guide to International Arbitration* (edited by Newman and Hill), (Juris Publishing 2004) 31. See also, e.g., Lew, Mistelis and Kröll, para. 10-30 and A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 1.15.

¹²⁹ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), pp. 1689 *et seq.*

There are naturally risks accompanied by this. However, it is generally better to leave such risks arising from the selection of the arbitrators at the hand of the parties to deal with through care in selecting a tribunal suited to their particular needs and dispute so that the appointment of the arbitrators will not be objected by the other party.

In this respect, it shall be also noted that under some national legal systems, a party is deemed to have waived its subsequent rights to challenge the arbitrators' jurisdiction when it participates in the selection of the arbitrators. Therefore, "*New York courts have held that participation in selecting arbitrators does preclude a party from later challenging in court the arbitral forum*".¹³⁰ On the other hand, a party's participation in the selecting of the arbitrators may affect the jurisdiction in which such a challenge can be made.¹³¹

When a party reserves its jurisdictional objections at the same time of selecting the arbitrators, a waiver of jurisdictional objections should not be deemed from participation in such appointments. Such participation is not generally regarded as an acceptance of the arbitration agreement or waiver of jurisdictional objections; the result should be no different when participation takes the form of nomination of an arbitrator.¹³²

In the words of one court:

*"When 'a party clearly and explicitly reserves the right to object to arbitrability, his participation in the arbitration does not preclude him from challenging the arbitrator's authority in court. Thus, the question is not whether the Fund participated in the selection of an arbitrator and thereby waived any objection to the arbitrator's jurisdiction, but rather whether the Fund 'clearly and explicitly reserved the right to object to arbitrability...'"*¹³³

Born argues that requiring a party to preserve its jurisdictional objection by refusing to participate in constitution of the arbitral tribunal would both impose a disproportionate penalty and raise serious due process concerns.¹³⁴

¹³⁰ See e.g., *Degi Deutsche Gesellschaft fuer Immobilienfonds mbH v. Haffey*, 1995 WL 669087, at 9 (S.D.N.Y.); *Boston Old Colony Ins. Co. v. Martin*, 310 N.Y.S.2d 820 (N.Y. App. Div. 1970).

¹³¹ English Arbitration Act, 1996, §72 (*any step in arbitration precludes party from seeking immediate judicial determination of jurisdictional objection*); Aeberli, Jurisdictional Disputes under the Arbitration Act 1996: A Procedural Route Map, 21 Arb. Int'l 253, 254-56 (2005).

¹³² Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 1686

¹³³ *Cent. States, S. & S.W. Areas Pension Fund v. C. & V. Leasing, Inc.*, 2010 WL 3024923, at 7 (N.D. Ill.).

¹³⁴ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 1686

However, a few national laws are to the contrary and, in order to avoid waiving jurisdictional objections, it is important to consider the *lex arbitri* and potential recognition forums before participating in constituting an arbitral tribunal.¹³⁵

13. Selecting arbitrators with strong case management skills

*“A tribunal that is proactive and skilled in case management will be able to play its role in managing the arbitration so as to make it as cost and time effective as possible, given the issues in dispute and the number and nature of the parties. Careful consideration should therefore be given to selecting tribunal members, especially the sole arbitrator or chair”.*¹³⁶

Similar to inexperienced counsel, inexperienced arbitrators may fail to ensure that an arbitration procedure stays on track.¹³⁷

They may even make a procedural blunder that allows an arbitration award to be overturned after it is rendered. Parties, therefore, should select an arbitrator who is highly-knowledgeable about arbitration procedures and has good case management skills.

An arbitrator is considered to be more desirable when, in addition to other qualifications, he can devote the necessary time and effort to understand the issues of a case and manage the arbitration efficiently.

Depending on the requirements of the case, an arbitrator who can make strong determinations, resist bifurcation and excessive and unnecessary document production requests can be considered as an arbitrator who shows substantial case management skills.¹³⁸

The case management skills, for obvious reasons, are of utmost importance when it comes to the presiding arbitrators (president of the arbitral tribunal/chairman).

¹³⁵ Ibid.

¹³⁶ ICC Techniques for Controlling Time and Costs in Arbitration, p. 8.

¹³⁷ <https://international-arbitration-attorney.com/how-to-reduce-the-cost-of-international-arbitration/>

¹³⁸ R. Doak Bishop and Edward G. Kehoe, *The Art of Advocacy in International Arbitration* (2nd edn. 2010), p.160.

14. Complying with the Rules

*“The claimant should ensure that the Request for Arbitration includes all of the elements required by Article 4(3), subparagraphs (a)—(h), of the Rules. Failure to do so may make it necessary for the Secretariat to revert to the Claimant before the Request can be forwarded to the Respondent in accordance with Article 4(5). This causes delay. Similarly, when filing its Answer, the Respondent should include all elements required by Article 5(1), subparagraphs (a)—(f), of the Rules.”*¹³⁹

ICC arbitration is commenced by submitting a Request for Arbitration to the Secretariat. While the claimant has considerable freedom to determine how detailed the Request will be, Article 4 requires more than mere ‘notice’ of the commencement of an arbitration.

The information required by Article 4 enables the respondent to familiarize itself with the substantive and procedural aspects of the dispute and may assist the parties in arriving at agreements on procedural matters.¹⁴⁰

It also equips the Court, where necessary, to make decisions during the initial stages of the arbitration (*e.g.* relating to the constitution of the arbitral tribunal, the place of the arbitration and the fixing of the advance on costs).¹⁴¹

The claimant must submit the request to the Secretariat rather than communicate it directly to the respondent. Under the ICC Rules, the Secretariat is responsible for notifying the Request.

Parties should check their arbitration agreement, as arbitration agreements occasionally require the claimant also to send a copy of the request directly to the respondent.¹⁴²

¹³⁹ ICC Techniques for Controlling Time and Costs in Arbitration, p. 8.

¹⁴⁰ J. Fry, S. Greenberg and F. Mazza, *The Secretariat’s Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-80.

¹⁴¹ Ibid.

¹⁴² See also the “Note to Parties” in relation to filing a request which can be submitted in several ways:

a) By mail

Paper Requests must be submitted either to the Secretariat’s headquarters in Paris or to one of its other offices recognized as such pursuant to Article 5(3) of Appendix II to the Rules. Sending a Request to any other ICC body, such as a National Committee, will be ineffective.

The Court’s website provides a list of offices with which a Request can be filed (www.iccarbitration.org). At the time of writing, Requests can be filed at the Paris headquarters of the ICC and at the Secretariat’s Hong Kong office. In the future, it will also be possible to file Requests at the Secretariat’s New York office, due to open in the course of 2012.

However, the claimant is free to determine how it wishes to present its request when it comes to the content of the request. Therefore, the nature, style and format of the requests vary from case to case. Some requests contain a full statement of claim, setting out the case in great detail; others are very short, limited to the strict minimum required by the Rules.¹⁴³

Usually, a combination of cultural factors and pragmatic and tactical considerations will influence the form and content of the request, including the manner in which the claimant presents its case and supporting documentary evidence.

Sometimes, a claimant may have a reason to initiate the arbitration without setting out its claims in great detail. For instance, where the initial aim of the request is to encourage a settlement negotiation, it can be risky and expensive to set out the claims in detail. Otherwise, more detailed requests are generally to be encouraged in the interests of time and cost efficiency.¹⁴⁴ It shall be also noted that

“The Rules do not require a Request for Arbitration or an Answer to set out a full statement of case for either the claim or the defence (or, where applicable, a counterclaim). Whether or not a full statement is made in the Request can have an impact on the efficient management of the arbitration. Where the Request does contain detailed particulars of the claim, and a similar approach is taken by the respondent in the Answer, the parties and the arbitral tribunal will be in a position to make informed decisions at a very early stage in the proceedings regarding the procedural measures and case management techniques that are appropriate for

If a party is uncertain as to whether it is more suitable to send a Request to the Paris headquarters or a regional office, the party should contact the Secretariat at +33 (0)1 49 53 29 05 or arb@iccwbo.org.

Unless required by a particular courier service, the claimant should avoid addressing the Request to a particular individual within the Secretariat. To minimize delays in notifying the Request, the claimant should also consider sending an electronic version of the Request by email to arb@iccwbo.org.

b) By email

The claimant should send an electronic version of the Request, including any supporting documents, to arb@iccwbo.org. The claimant's attention is drawn to the fact that it will also be required to submit hard copies of the Request shortly thereafter (usually within ten days) (see paragraph 3-121).

c) By fax

The claimant alternatively may submit a Request by fax at +33 (0)1 49 53 29 33, although the Secretariat encourages email submissions instead. Again, the claimant should remember that it will also be required to submit hard copies of the Request shortly thereafter (usually within ten days), see J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-85.

¹⁴³ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-90.

¹⁴⁴ *Ibid.*

*the case. This will help to optimize the first case management conference held pursuant to Article 24(1).”*¹⁴⁵

Additionally, the ICC Rules expressly allow the parties to submit any further documents or information that may contribute to the efficient resolution of the dispute together with the submission of request or an answer.¹⁴⁶

Those provisions allow for the submission of a full statement of case but also allow the parties simply to submit additional useful information. Consideration should be given to exercising this option, whether or not a full statement of case is provided.¹⁴⁷

15. Setting out a detailed statement of case

Based on ICC:

*“The Rules do not require a Request for Arbitration or an Answer to set out a full statement of case for either the claim or the defence (or, where applicable, a counterclaim). Whether or not a full statement is made in the Request can have an impact on the efficient management of the arbitration. Where the Request does contain detailed particulars of the claim, and a similar approach is taken by the respondent in the Answer, the parties and the arbitral tribunal will be in a position to make informed decisions at a very early stage in the proceedings regarding the procedural measures and case management techniques that are appropriate for the case. This will help to optimize the first case management conference held pursuant to Article 24(1).”*¹⁴⁸

Article 22(1) ICC Rules contains a precise obligation on the parties to conduct their arbitration in a ‘proportionate’ manner. However, when large sums of money are at stake and

¹⁴⁵ ICC Techniques for Controlling Time and Costs in Arbitration, p. 8.

¹⁴⁶ See Articles 4(3) and 5(1) ICC Rules.

¹⁴⁷ Ibid.

¹⁴⁸ ICC Techniques for Controlling Time and Costs in Arbitration, p. 8.

experienced counsel are engaged on both sides, at least one of the parties has a rational incentive to ‘intensively litigate’ the dispute, thus increasing costs and causing delays.¹⁴⁹

When the disputes arise, it is unrealistic to expect the parties to act contrary to their own interest and not to seek the arbitral efficiency. Therefore and pursuant to ICC guidelines in this regard, by empowering the arbitral tribunals to take proportionality-based case management decisions, time and costs are best kept in check.¹⁵⁰

In this respect, Article 22(2) of the 2012 ICC Rules follows:

*“In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties”.*¹⁵¹

Base on Article 24 ICC Rules, it is mandatory for the arbitral tribunals to convene an initial “case management conference to consult the parties on procedural measures” that may be held “in person, by video conference, telephone or similar means of communication”.¹⁵² Article 24 also offers that the tribunal may adopt one or more of the case management techniques described in Appendix IV.¹⁵³

¹⁴⁹ Paul Freidland, *The New ICC Rules: Continuing Evolution of Case Management Powers to Control Costs and Delays in International Arbitration*, Kluwer Arb. Blog, 13 September 2011.

¹⁵⁰ Ibid.

¹⁵¹ Article 22(2) ICC Rules.

¹⁵² Article 24 ICC Rules.

¹⁵³ Article 24 ICC Rules follows:

“1) When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.

2) During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.

3) To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.

4) Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative.”

Based on the Secretariat Guide to ICC Rules, Article 24(1) was drafted as a

“response to the increasing concern over time and cost efficiency in arbitration. That concern has been borne out of a number of regrettable situations ranging from cases in which parties (or their counsel) adopt unnecessarily litigious tactics (also called "guerrilla tactics") to those in which busy arbitral tribunals operate on autopilot and adopt boilerplate procedures that may not be suited to the needs of a particular case”.¹⁵⁴

Under the 1998 ICC Rules, experienced arbitral tribunals would often hold a form of case management conference when establishing a procedural timetable. However, those Rules did not explicitly require the arbitral tribunal and the parties to consider case management techniques.

The new Article 24(1) should serve as a reminder that the flexibility offered by arbitration should be used to the advantage of time and cost-efficient dispute resolution.¹⁵⁵

Measures must be taken to ensure that the arbitral proceedings suit to the needs of each individual case if arbitration is to continue serving the needs of the business community and its many other users.

¹⁵⁴ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-914.

¹⁵⁵ *Ibid.*

16. Submitting additional information

The ICC Rules expressly allow the parties to submit with a request or an answer any further documents or information that may contribute to the efficient resolution of the dispute:¹⁵⁶

*“Those provisions allow for the submission of a full statement of case but also allow the parties simply to submit additional useful information. Consideration should be given to exercising this option, whether or not a full statement of case is provided”.*¹⁵⁷

The 2012 ICC Rules have added a final sentence to Article 4(3) explicitly inviting the claimant to submit any additional documents or information that it considers appropriate or that would help to ensure that the dispute from which its claims arise is resolved efficiently.¹⁵⁸ To support their claims, parties frequently submit core documentary evidence as exhibits to the request.¹⁵⁹

The initiation of arbitration proceedings does not lead to the elimination of the possibility of a settlement between the parties. In the process of an arbitration hearing, parties may settle. This is not uncommon in the international arbitration best practice. Although the approaches to settlement during arbitration proceedings are different in different arbitration rules, such settlements are generally encouraged.

¹⁵⁶ See Articles 4(3) and 5(1) of 2012 ICC Rules.

¹⁵⁷ ICC Techniques for Controlling Time and Costs in Arbitration, p. 8.

¹⁵⁸ Article 4(3) ICC Rules follows: *“The Request shall contain the following information:*

- a) the name in full, description, address and other contact details of each of the parties;*
- b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;*
- c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;*
- d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;*
- e) any relevant agreements and, in particular, the arbitration agreement(s);*
- f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;*
- g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and*
- h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.*

The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.”

¹⁵⁹ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-106.

Parties may settle prior to the first witness hearing, or after it. Some arbitration centers such as DIS expressly state that the arbitral tribunal should seek to encourage amicable settlement of the dispute for the parties.¹⁶⁰

Such evidences and information can illustrate the strength of the claimant's case to the respondent at an early stage, by the likelihood of motivating the parties to engage in settlement negotiations at an earlier phase rather than later, when a significant amount of costs and time will have been devoted to the case.

As in Articles 4(3) and 5(1) of ICC Rules, the 2012 Rules have also added a sentence to the Article 5(5) explicitly stating that parties may also submit any additional documents or information they consider appropriate or that would contribute to resolving the dispute efficiently.¹⁶¹

Respondents also often submit core documentary evidence and relevant information in support of their counterclaims. They may also consider including any proposals relating to case management or the arbitration procedure.

When such measures are taken, parties and the tribunals are in a much stronger position to ideally manage to save the time and costs incorporated in the proceedings at the later stage of the arbitration.

¹⁶⁰ Section 32 (1) DIS follows: "At every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute".

¹⁶¹ Article 5 (5) ICC Rules:

"Any counterclaims made by the respondent shall be submitted with the Answer and shall provide:

a) a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made;
b) a statement of the relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims; c) any relevant agreements and, in particular, the arbitration agreement(s); and
d) where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made.

The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute."

17. Determination of the language by the arbitral tribunal

Based on the ICC's next recommendation, "*if the parties have not agreed on the language of the arbitration, the arbitral tribunal, when determining the language, should consider doing so by means of a procedural order pursuant to Article 20 of the Rules, prior to drawing up the Terms of Reference and after ascertaining the positions of the parties*".¹⁶²

It has been advocated by eminent arbitration authors that the language of the arbitral proceedings is an issue of substantial practical importance.¹⁶³ An important characteristic of international arbitration that distinguishes it from litigation in state courts is the parties' freedom to select the language or languages of the arbitration proceedings.¹⁶⁴

Amongst others, the language of the arbitration affects the choice of counsel and arbitrators, the effectiveness of witness testimony and cross-examination, the need for translations and special court reporters etc.

For the obvious reasons, selecting the language of the arbitration, in the arbitration agreement is advisable.¹⁶⁵ There is generally no basis for challenges to the validity of agreements selecting the language of the arbitration, and failure to give effect to parties' agreement regarding the language would expose the award of the arbitral tribunal to the challenges and annulments.

English, in practice, has become the default choice for most of the international commercial arbitrations (although French, Spanish, Mandarin, Arabic and other languages are of course also frequently used).¹⁶⁶

Similar to ICC, when such agreement on the language of the arbitration does not exist, most institutional rules have authorized the arbitral tribunal to select a language or languages for

¹⁶² ICC Techniques for Controlling Time and Costs in Arbitration, p. 8.

¹⁶³ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2231.

¹⁶⁴ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-728.

¹⁶⁵ See also G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 87 (4th ed. 2013).

¹⁶⁶ Fry & Greenberg, *The Arbitral Tribunal: Applications of Articles 7-12 of the ICC Rules in Recent Cases*, 20(2) ICC Ct. Bull. 12, 21 (2009) (75% of ICC arbitrations conducted in English, 7% in French and 5% in Spanish).

the arbitration.¹⁶⁷ In doing so, arbitrators will often select the language of the underlying contract to govern the arbitral proceedings,¹⁶⁸ although there are cases where other considerations (including a common language shared by the parties and counsel) will prevail.¹⁶⁹

Sometimes arbitrations are also conducted in two languages, with simultaneous or other translations. Although superficially attractive, this approach is disfavored, because it materially increases the costs and reduces the efficiency of the arbitral process.¹⁷⁰

In this respect it shall be also noted that in general, any documents and information produced in the course of arbitration proceedings shall be translated by the party submitting the document, and the same applies to parts of a document on which a party relies:

*“Documents specifically prepared for the purpose of the arbitration, such as affidavits, are likely to require translation, as they typically relate very closely to the written statements, which automatically must be submitted in the language(s) of the arbitration. Conversely, translation is less crucial with respect to documents that are not prepared specifically for purposes of the arbitration case.”*¹⁷¹

Another point to consider is that difficulties are incorporated with the language in which witnesses wish to conduct their testimonies. It is a common practice for the arbitral tribunals to allow the witnesses to testify in their native languages, even though the witness might speak the language of the arbitration – which is usually English – very well.¹⁷²

When this is the case, a translator is needed to be present during the witness hearings. Hence, it has been accepted that the time used for translation of a witness’s testimony into the language of the arbitration will be counted against the party on whose behalf the witness has testified.¹⁷³

¹⁶⁷ See e.g., 2010 UNCITRAL Rules, Art. 19; 2012 ICC Rules, Art. 20; ICDR Rules, Art. 14; LCIA Rules, Art. 17; 2013 HKIAC Rules, Art. 15(1); 2010 SCC Rules, Art. 21; 2013 SIAC Rules, Art. 19(1).

¹⁶⁸ See 2012 ICC Rules, Art. 20. J. Fry, S. Greenberg and F. Mazza, *The Secretariat’s Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-735.

¹⁶⁹ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2232.

¹⁷⁰ Ibid.

¹⁷¹ D. Caron & L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* 382 (2d ed. 2013).

¹⁷² M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 164 (2d ed. 2010).

¹⁷³ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2234.

Some authors rightly argue that it is both customary and logical for the language of the arbitration to be the language of the contract.¹⁷⁴

This will be the usual position in an institutional arbitration, although the arbitral tribunal usually has discretion to direct that other languages may be used or that documents may be admitted in their original language without the need for a translation.¹⁷⁵

In cases where a contract is made in two languages, each is to be considered of equal authenticity, and simultaneous translations at the hearing of the arbitration may be unavoidable (although it slows down the proceedings and is not inexpensive).¹⁷⁶

There is no restriction on which language(s) the parties may select for ICC arbitrations. Important thing to take into account is that the decision on language should be taken seriously as it leaves an impact on the efficiency and cost of the proceedings and the choice of arbitrators, as mentioned above.¹⁷⁷

Often, arbitral tribunals make their decisions on language in short but reasoned procedural orders issued before the Terms of Reference. Sometimes, determining the language may prove to be very complicated that the arbitral tribunal will prefer to reserve its decision until after the Terms of Reference.

In such cases, the Terms of Reference will need to be drafted either in all of the potential languages or, with the parties' agreement, in one of those languages with a clear stipulation that doing so does not prejudice the arbitral tribunal's eventual decision on language.

If more than one language is used for the Terms of Reference, the arbitral tribunal will need to specify which version prevails in the event of inconsistency.¹⁷⁸

¹⁷⁴ See e.g. A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 2.86.

¹⁷⁵ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 2.86.

¹⁷⁶ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 2.87.

¹⁷⁷ See also J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-728.

¹⁷⁸ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-734.

In determining the language of the arbitration – where parties have failed to do so – Article 20 of 2012 ICC Rules requires the arbitral tribunal to have regard to all relevant circumstances, including the language of the contract, when deciding on the language of the arbitration.¹⁷⁹

In this respect, there are generally two broad approaches that arbitral tribunals make: the first is to attempt to identify the language in which the parties would have expected the arbitration to proceed when they made their arbitration agreement, using objective factors and taking into account the language of both pre- and post-contractual communications between the parties:

“Adopting this approach, the language in which the arbitration agreement is drafted (assuming it to be in only one language) serves as a highly persuasive indicator in determining the language of the arbitration. However, other factors may rebut that presumption in certain circumstances (e.g. where all of the parties' correspondence in connection with the negotiations and performance of the contract was in a different language)”.¹⁸⁰

The second approach is to make a balance between the conveniences of different languages to the actors in the arbitration. In particular, the arbitral tribunal will consider the languages of its own members, the parties' counsel and the potential witnesses, as well as the language of the most of the documentary evidence.

For the interest of time and cost efficiency, where an arbitral tribunal determines that the language of the arbitration is a language not spoken by one or more arbitrators, the arbitrator(s) might consider it appropriate to give in their resignation.

The ICC Court, for instance, has in the past accepted challenges based on such circumstances. Where counsel does not speak the language of the arbitration, a party may consider engaging different or additional counsel.¹⁸¹

¹⁷⁹ Article 20 ICC Rules: “in the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract”.

¹⁸⁰ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-35.

¹⁸¹ Ibid.

18. Proceedings involving two or more languages

The nature of international arbitration means different parties and arbitrators from different nationalities, with different backgrounds and speaking different languages. Therefore, the language of the proceedings is of great importance. In spite of this, the proceedings' language is often dealt with as a secondary question.

Nevertheless, the choice of the language may have an important role in the efficiency of the proceedings. Parties should choose the language with due consideration. The choice of the language without sufficient due consideration may entail the necessity of translation and interpretation for most of the proceedings. Translation and interpretation obviously affect the costs and the time of the proceedings and of course may always have accuracy problems.¹⁸²

In international arbitration, it is common that parties agree on only one language. Needless to explain, having two or more languages in the same arbitration proceedings will increase the incorporated time and costs. Therefore, the use of two or more languages shall be thoughtfully and completely assessed to ensure that it justifies the additional time and costs.

On the other hand, sometimes the use of an additional language should be considered if it would reduce time and costs, where there is a single language of the arbitration:

*“Where appropriate, the parties can agree that documents, legal materials and witness testimony in a particular language need not be translated into the language of the arbitration. If the parties have agreed, or the arbitral tribunal has decided, that the arbitration will be conducted in two or more languages, the parties and the arbitral tribunal should consider agreeing upon practical means to avoid duplication. In cases where the members of the arbitral tribunal are fluent in all applicable languages, it may not be necessary for documents to be translated”.*¹⁸³

¹⁸² Valentina Faienza, *The Choice of the Language of the Proceedings: An Underestimated Aspect of the Arbitration?* 6 May 2014, Kluwer Arbitration Blog

¹⁸³ ICC Techniques for Controlling Time and Costs in Arbitration, p. 8.

19. Compliance with the procedural timetable

The next recommendation of the ICC in respect to applying time and cost-efficient applications is to comply with the procedural timetable. The arbitrators and the parties should make all reasonable efforts to comply with the procedural timetable, consistent with their obligation under Article 22(1) of the Rules to make every effort to conduct the arbitration in an expeditious and cost-effective manner:

*“Extensions and revisions of the timetable should be made only when justified. Any revisions should be promptly communicated to the Court and the parties in accordance with Article 24(2) of the Rules”.*¹⁸⁴

One of the underlying aims of the revision process leading to the 2012 Rules was to include ways and means of encouraging parties and arbitral tribunals to control the time and cost of arbitrations. Business people were particularly insistent on the importance of this aim. Article 22 serves as a general basis for setting expectations and implementing measures to improve time and cost efficiency.¹⁸⁵

Cost-wise, in most of the ICC arbitrations, the largest amounts of cost spent are not the fees of the arbitral tribunal and the administrative expenses of ICC, but rather are the legal fees and expenses relating to the parties' submissions and presentations of their cases. Counsels' fees, witnesses and expert witnesses' testimonies and other similar procedural expenses are usually proportionate to the duration and complexity of the case and may vary greatly depending on the manner in which a case is being handled.

Also, it is not uncommon for parties to appoint more experts than necessary or to call too many factual witnesses to testify despite the flawed contribution they are likely to make to the arbitral tribunal's fact-finding mission.¹⁸⁶

¹⁸⁴ ICC Techniques for Controlling Time and Costs in Arbitration, p. 8.

¹⁸⁵ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-793.

¹⁸⁶ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-794.

Document production phase is also another factor which likely increases costs significantly, particularly if it is conducted through a process of discovery or rounds of Redfern Schedule submissions exchanged between the parties (see chapter 2, section 4 below).

Having said the above, Article 22(1) creates a dominant expectation that parties and the arbitral tribunals should make arbitration proceedings as swift, rapid and cost-effective as possible, considering the complexity and the quantum of the claim.

The requirement imposed by Article 22(1) is broad but not absolute, *“it requires “every effort” to be made to fulfil its purpose, subject to the sole limitation of ensuring appropriate proportionality to the complexity and value of the dispute. This does not mean that the arbitration may be conducted more or less efficiently depending on the complexity and value of the case”*.¹⁸⁷

To the contrary, the efficiency measures shall always be considered and applied to the extent allowed by the circumstances of each individual case, in particular regarding its complexity and monetary or non-monetary value. *“This Article aims above all to exclude unnecessarily aggressive, improper or disruptive tactics and what might be described as an over-lawyered approach”*.¹⁸⁸

The 2012 ICC Rules, under Article 22(1), provide the arbitral tribunals and parties with some certain measure to assist them in fulfilling their obligations. For instance, this Article empowers the arbitral tribunals to adopt the procedural measures which it considers appropriate to ensure swift and efficient case management – after having first consulted with the parties.¹⁸⁹

However, once the proceedings are under way, the arbitral tribunal can make any necessary alternations by adopting further procedural tools and/or adjustments to the procedural timetable as stated in Article 23(4),¹⁹⁰ although it must first consult the parties. Article 22(3)

¹⁸⁷ Ibid.

¹⁸⁸ J. Fry, S. Greenberg and F. Mazza, *The Secretariat’s Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-796.

¹⁸⁹ Article 22 (1) ICC Rules follows: *“The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.”*

¹⁹⁰ Article 23 (4) ICC Rules reads: *“After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized*

requires the parties to abide by such procedural measures and any other orders of the arbitral tribunal.¹⁹¹

It should be noted, however, that most of the institutional rules do not provide a complete or detailed procedural timetable for the arbitrations, such as the sequence, timing and nature of written submissions, taking and presenting the evidence, the structure and organization of hearings etc.

Institutional rules generally establish only the broad outlines of a procedural framework and rather identify the major actions, such as the request for arbitration, the hearing, the award, etc. Institutional arbitration rules in general grant the arbitral tribunal a broad procedural authority, to the extent that they may even override the parties' procedural autonomy in order to obtain more efficient and fair proceedings.

Some arbitrators in particular in ad hoc arbitrations, lack this authority and are permitted to disregard the parties' agreements regarding the procedures only when the procedural requirements in the arbitral seat require otherwise.

However and in spite of such authorities granted to arbitral tribunals, it is very important for the arbitral tribunals to seek the parties' opinions regarding the timetable of the arbitration.

For instance, the need for hearings, document production phase, rounds of submission etc. can be discussed with the parties in an appropriate stage and only after having done so a procedural timetable is to be provided. This is essential since it enables the parties and the counsel to plan their efforts and is therefore critical to an efficient and fair arbitral process.¹⁹²

In arbitration the proceedings must be planned, scheduled and managed: this is particularly important because there is no standard set of applicable procedural rules and because parties agree to international arbitration in part to obtain an efficient, sensible procedure that is tailor-made for their particular dispute.¹⁹³

to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances”.

¹⁹¹ Article 22 (3) ICC Rules reads: “Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information”.

¹⁹² Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2234.

¹⁹³ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2234.

For the reason of efficiency, planning and case management are necessary and crucial. It is also a requirement for the procedural fairness and equality of treatment, when each party is granted with a timetable for presenting its case.

In order to allow parties to plan their case, the arbitral tribunals usually are required to consider the most important issues of the case at the outset of the arbitration and to consider what the dispute is really about, what the legal and factual issues are, how the parties contemplate the arbitral proceedings and timetable unfolding, and similar matters.¹⁹⁴

Only after having done so, the parties and arbitrators will be able to develop a procedural timetable for the arbitration, ideally with the parties agreeing with many of the procedural steps between themselves.

A procedural timetable will then enjoy the benefit of clearly and hopefully efficiently organizing the arbitral proceedings. It shall be noted that, however, sometimes arbitration agreements already deal with the issue of the procedural timetable, with the exception of cases when a fast-track proceeding is prescribed.¹⁹⁵

It is also recommend that parties, in their arbitration agreements, impose deadlines on the arbitral tribunal for *e.g.* making an award or taking other steps. It should be noted, however, that in practice the time limitations are waived frequently or extended once the arbitration is underway and the demands of a particular dispute are appreciated.¹⁹⁶

Arbitrators in general draw up a procedural timetable for the arbitration at an early stage in the proceedings and provide the timetable in an early procedural order then. The procedural timetables usually set out a schedule in agreement with which the parties must present their written submissions, file documentary and witness evidence and conduct their cases at a hearing.¹⁹⁷

Of course the mere fixing of a procedural timetable is not sufficient, but it is also important that the arbitral tribunal enforce it to avoid causing great expense and waste of resources.

¹⁹⁴ Ibid.

¹⁹⁵ G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* 104-05 (4th edn. 2013).

¹⁹⁶ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2234.

¹⁹⁷ See also T.H. Webster and M. Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3rd edn, Sweet & Maxwell 2014), paras. 24-14 *et seq.*

20. Need for a hearing

The ICC recommends the parties the need to “*consider whether or not it is necessary to be a hearing in order for the arbitral tribunal to decide the case. If it is possible for the arbitral tribunal to decide the case on documents alone, this will significantly reduce costs and time*”.¹⁹⁸

It is the overwhelming practice, confirmed by all leading institutional arbitration rules and many national arbitration statutes,¹⁹⁹ for tribunals to make provisions for oral evidentiary hearings, at which the witnesses can be examined and the parties’ counsel can make legal submissions. That is particularly true if a hearing is requested by one or both parties, as well as when a hearing is deemed appropriate by the tribunal.

In many respects, the oral hearing is the center-piece of the arbitral process and will have enormous importance in the parties’ respective presentations of their cases.²⁰⁰

In recent years and with the advances of video-conferencing technology, many steps may be taken without the need for a physical hearing. This is particularly to be encouraged where the amounts in dispute are limited and the costs of organizing the meeting considerable.²⁰¹

Unless the case is to be decided solely on the basis of documents, there are also usually final hearings, at which the parties and their counsel attend in order to present the evidence of their witnesses and their legal arguments.²⁰²

Witness hearings are mainly held at the seat of the arbitration. Some institutional rules provide for the arbitral tribunal to meet elsewhere,²⁰³ for instance, at times when the evidence

¹⁹⁸ ICC Techniques for Controlling Time and Costs in Arbitration, p. 10.

¹⁹⁹ See *e.g.*, 2010 UNCITRAL Rules, Art. 17(3); 2012 ICC Rules, Art. 26; LCIA Rules, Art. 19(2); 2012 CIETAC Rules, Arts. 39, 40; 2010 SCC Rules, Art. 27(1); 2013 SIAC Rules, Art. 21(1); 2013 VIAC Rules, Art. 30.

²⁰⁰ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2264; see also Böckstiegel, *Major Criteria for International Arbitrators in Shaping An Efficient Procedure*, in ICC *Arbitration in the Next Decade* 49 (ICC Ct. Bull. Spec. Supp. 1999); Briner, *Domestic Arbitration: Practice in Continental Europe and Its Lessons for Arbitration in England*, 13 *Arb. Int’l* 155 (1997); Brower, *Evidence Before International Tribunals: The Need for Some Standard Rules*, 28 *Int’l Law* 47 (1994); Bühler & Dorgan, *Witness Testimony Pursuant to the 1999 IBA Rules of Evidence in International Commercial Arbitration – Novel or Tested Standards?*, 17(1) *J. Int’l Arb.* 3 (2000); Coulson, *Appropriate Procedure for Receiving Proof in Commercial Arbitration*, 71 *Dick. L. Rev.* 63 (1966)

²⁰¹ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 4.171.

²⁰² A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 4.172.

of a particular witness is absolutely needed, and it is more convenient for the arbitral tribunal and the parties to go to the seat of that witness rather than asking the witness to go to the seat of the arbitral tribunal:

*“This may be the case if witnesses are unable to travel for health reasons, or if the witnesses are high-ranking government officials or ministers. However, once again, it is now common for witnesses who, for good reason, cannot be physically present to be heard by video conference.”*²⁰⁴

Although it is not easy to estimate how long the hearing(s) might last, the arbitral tribunal should bear in mind the length of time that the hearing is likely to take when fixing the date of the hearing(s), in particular in respect of making travel and hotel arrangements, booking rooms for the hearing, making arrangements for the attendance of the parties and their witnesses, making arrangements for the court reporter and other such logistics.

Once fixed, the final hearing dates will act as a backstop beyond which the arbitration cannot be delayed. This helps to concentrate the minds of counsel and the arbitral tribunal in the face of any subsequent attempts to extend the procedural schedule.²⁰⁵

Conducting the hearings when requested by a party is explicitly required by many institutional rules, unless the parties’ arbitration agreement waives or excludes the possibility of an oral hearing.²⁰⁶ For instance, Article 25(6) of 2012 ICC Rules follows that:

*“The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing”.*²⁰⁷

Article 24(1) of the UNCITRAL Model Law provides that, *“unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate*

²⁰³ See, e.g., the UNCITRAL Rules, Art. 18(2); LCIA Rules, Art. 16(3).

²⁰⁴ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), FN. 205.

²⁰⁵ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 4.173.

²⁰⁶ See e.g., 2010 UNCITRAL Rules, Art. 17(3); 2012 ICC Rules, Art. 25(6); LCIA Rules, Art. 19(1); 2013 HKIAC Rules, Art. 22(4); 2010 SCC Rules, Art. 27(1).

²⁰⁷ Article 25(6) ICC Rules.

stage of the proceedings, if so requested by a party.”²⁰⁸ Therefore, the arbitral tribunals are not required to hold hearing(s) unless such a request is made.

Tribunals sometimes order split hearings, with certain witnesses or issues being heard at one time and other witnesses or issues being heard subsequently. For example, one week of hearings might be conducted in February (on contract formation and negotiation) and another in May (on contract performance and/or damages).²⁰⁹

This approach sometimes makes sense from a case management perspective (*e.g.*, hearing expert witnesses after hearing fact witnesses may be very sensible). Nonetheless, it more often entails a considerable measure of inefficiency and added cost (because the entire infrastructure for the hearing must be reconstructed and because it is costly and undesirable for counsel and arbitrators to be required to reread into the case on multiple occasions) and tribunals are therefore often reluctant to order split hearings.

There may, however, be circumstances where the calendars of the arbitrators, counsel and witnesses will not allow any alternatives.²¹⁰

Together with the consideration of a need for the hearing, the following shall be also taken into account:

- *Fixing the hearing date;*
- *Pre-hearing conference;*
- *Short and realistic time periods;*
- *Bifurcation and partial awards; and*
- *Briefing everyone involved in the case.*²¹¹

²⁰⁸ Article 24(1) UNCITRAL Model Law.

²⁰⁹ Gary B. Born, *International Commercial Arbitration*, (2nd edn, Kluwer Law International 2014), p. 2268.

²¹⁰ Ibid. For more information see also Goldman, *The Complementary Roles of Judges and Arbitrators in Ensuring That International Commercial Arbitration Is Effective*, in ICC, *International Arbitration: 60 Years of ICC Arbitration: A Look at the Future* 255 (1984); Holtzmann, *Fact-Finding by the Iran-United States Claims Tribunal*, in R. Lillich (ed.), *Fact-Finding Before International Tribunals* 101 (1991); ICC, *Taking Evidence in International Arbitral Proceedings* (1990); M. Kurkela & S. Turunen, *Due Process in International Commercial Arbitration* 157-58 (2d ed. 2010); L. Lévy & V. Veeder (eds.), *Arbitration and Oral Evidence* (2004); Marriott, *Evidence in International Arbitration*, 5 Arb. Int'l 280 (1989); Paulsson, *Overview of Methods of Presenting Evidence in Different Legal Systems*, in A. van den Berg (ed.), *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration* 112 (ICCA Congress Series No. 7 1996); Paulsson, *The Timely Arbitrator: Reflections on the Böckstiegel Method*, 22 Arb. Int'l 19 (2006);

21. Documentary evidence

In the presentation of every case, parties develop and present factual scenarios which form the basis for their contentions. The claim or defence, and the remedies sought, depend on the existence of certain facts. If the facts vary, the result may not be the same.

The establishment of the facts is therefore essential in any arbitration.²¹² Taking and presentation of evidence to the tribunal is one of the key issues of international commercial arbitration.

Documentary evidence is extremely important in the sense of determining the disputed issues of facts and expert opinions. In addition, in some jurisdictions, foreign law must be proven as if it were a fact.

Establishing the facts and clarifying disputed issues of expert opinions is crucial in assisting the tribunal to reach a decision. Therefore, many cases are decided on the facts or their interpretation. Historically, at least in England, one of the main reasons for the development of arbitration is that parties wanted more flexibility with respect to taking and presenting evidence.²¹³

From the outset of the case the parties should consider using a coherent system for numbering or otherwise identifying documents produced in the case. This process can start with the request for arbitration and the answer, and a system for the remainder of the arbitration can be established with the arbitral tribunal at the time of the first case management conference.

In litigations before courts, documents are the primary – if not only – source of evidence. The arbitration generally offers more flexibility in taking evidence, and documentary evidence is the cornerstone of evidence in arbitration.²¹⁴ The importance of documentary evidence is highlighted by the fact that arbitration proceedings may be conducted on the basis of documents only.

²¹¹ For more information see ICC Techniques for Controlling Time and Costs in Arbitration, pp. 10 & 11.

²¹² J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), para. 22-1.

²¹³ J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), para. 22-4.

²¹⁴ Maarten Draye, *Commentary on Part VI of the Belgian Judicial Code, Chapter V: Article 1700* in Niuscha Bassiri and Maarten Draye (eds), *Arbitration in Belgium*, (Kluwer Law International 2016) para. 152.

It shall be noted that the term ‘document’ is usually not defined in most institutional arbitration rules. However, this term should be interpreted broadly to include any forms of modern data bearers.²¹⁵ This is the approach taken by the IBA Rules, which aptly define documents as “*a writing, communication, picture, drawing or data of any kind, whether recorded or maintained on paper or by electronic, audio, visual or any other means*”.²¹⁶

Based on Lew and Mistelis,

*“Documentary evidence includes letters, faxes or emails exchanged between the parties, contractual instruments, protocols, minutes of meetings, records of discussions or phone calls; financial instruments, account records, warehouse records, dock receipts, bills of lading, certificates of quality, licences. More controversial, but increasingly acceptable as documents are CD, audio and visual recordings, floppy disks and hard disks.”*²¹⁷

Production of documents can exhibit the written evidences that would otherwise not be available and can be the key to winning a case. However, document production proceedings is a costly and time-consuming exercise, and arbitral awards in particular are often challenged on grounds that relate to document production orders.²¹⁸

It is often important that several documents are made available during the arbitration. Where a party does not produce a document requested voluntarily, the tribunal may be asked to order production of the documents sought.

“Parties may be ordered by the tribunal to produce documents, including many of their own internal documents, to the other party during the course of the arbitration”.²¹⁹

Generally speaking, these requests will be granted only for relevant identified documents:

²¹⁵ Maarten Draye, *Commentary on Part VI of the Belgian Judicial Code, Chapter V: Article 1700* in Niuscha Bassiri and Maarten Draye (eds), *Arbitration in Belgium*, (Kluwer Law International 2016) para. 153.

²¹⁶ IBA Rules on the Taking of Evidence in International Arbitration, definitions.

²¹⁷ J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), para. 22-40.

²¹⁸ Bibliography, ASA Bulletin, (Association Suisse de l'Arbitrage; Kluwer Law International 2016, Volume 34 Issue 1) p. 260.

²¹⁹ J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), para. 22-48.

*“The tribunal will generally not allow fishing expeditions for documents or information which may be useful”.*²²⁰

Discovery is an integral part of common law procedure and has been described as a powerful instrument of justice, if it is employed with discretion.²²¹ In civil law proceedings, parties' counsel generally produce those documents upon which they seek to rely. Although the concept of compulsory disclosure of documents exists in civil law systems, its implementation is quite limited.²²²

In this regard, UNCITRAL Rules Article 24(2) and (3) state:

“2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

*3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine”.*²²³

This is considered to be an important attempt to make a difference in the process of document production.

In principle, parties rely on the documents in their possession and there is no obligation to produce copies of internal and confidential documents merely because requested by the opposing party.

In practice document production may be ordered by a tribunal but generally this is limited to specific and identified documents or categories of documents, which are directly relevant to the issues in the arbitration.²²⁴

²²⁰ Ibid.

²²¹ Mustill and Boyd, *Commercial Arbitration*, (2nd edn. 2011), p. 324.

²²² J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), para. 22-49.

²²³ Article 24(2) and (3) UNCITRAL Rules.

²²⁴ J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), para. 22-51.

Most of the arbitration rules grant the tribunal the power to order production of documents.²²⁵ For instance, ICC Rules Article 20(5) states:

*“At any time during the proceedings, the Arbitral Tribunal may summon any party to provide additional evidence”.*²²⁶

According to an expert report submitted to an ICC tribunal, an arbitral tribunal may request the production of specific categories of documents.

Such specific categories include minutes of the board of directors' meetings of one party referring to the transaction in question, all internal memoranda dealing with a particular corporate decision, correspondence with a specified third party, reports of meetings on a specified subject and complaints about a specific matter received from third parties.²²⁷

The IBA Rules of Evidence dealt with production of documents both in the 1983 and in the 1999 edition. The 1999 edition, Article 3 (2) provides that a party may submit to the tribunal a request to produce which must have:

- “(a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail ... of a narrow and specific requested category of documents that are reasonably believed to exist;*
- (b) a description of how the documents requested are relevant and material to the outcome of the case; and*
- (c) a statement that the documents requested are not in the possession, custody or control of the requesting Party, ...”*²²⁸

²²⁵ See e.g., UNCITRAL Rules Article 24(3); AAA ICDR Article 19(3); LCIA Articles 22(1)(e) and 15(6); LMAA rule 12(b) and 3rd Schedule para 3; ICAC Articles 15, 19, 22 and 34; NAI Article 28; Stockholm Institute Articles 21, 26; WIPO Article 48; Zurich Article 42.

²²⁶ Article 20(5) ICC Rules.

²²⁷ The letter of the expert is mentioned in Bond, “Recent Interesting Issues and their Resolution in International Arbitration”, presentation at the Japan Commercial Arbitration Association, 22-24 November 2000 - Osaka/Tokyo, 30-31.

²²⁸ Article 3 (2) IBA Rules on Taking of Evidence in International Arbitration.

The arbitral tribunals have discretion to decide whether to order the production of documents or categories of documents. The IBA Rules provide that a tribunal may exclude from production any documents for reasons listed in Article 9(2).²²⁹

ICC recommends the parties to also bear in mind the following items when it comes to the production of documents:

- *Producing documents on which the parties rely;*
- *Establishing procedure for requests for production;*
- *Managing requests for production efficiently;*
- *Avoiding duplication;*
- *Selection of documents to be provided to the arbitral tribunal;*
- *Keeping hard copies to a minimum;*
- *Translations; and*
- *Authenticity of documents.*²³⁰

²²⁹ Article 9 (2) IBA Rules reads:

“The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons: (a) lack of sufficient relevance to the case or materiality to its outcome; (b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable; (c) unreasonable burden to produce the requested evidence; (d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred; (e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling; (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or (g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”

²³⁰ ICC Techniques for Controlling Time and Costs in Arbitration, p. 12.

22. Correspondence

ICC recommends that parties and their counsel

*“should avoid unnecessary correspondence” and that “the arbitral tribunal may consider informing the parties that the persistent use of such correspondence may be viewed as unreasonable conduct and be taken into consideration by the arbitral tribunal when exercising its discretion in allocating costs pursuant to the Rules”.*²³¹

Besides, parties should

*“avoid sending correspondence between counsel to the arbitral tribunal unless a decision of the arbitral tribunal is required. Any such correspondence that is addressed to the arbitral tribunal should be copied to the Secretariat in accordance with Article 3(1) of the ICC Rules”.*²³²

Article 3(1) ICC Rules specifies the number of copies of pleadings and other written communications to be supplied by the parties. It also clarifies that a copy of any arbitral tribunal correspondence to the parties must be sent to the Secretariat. These requirements ensure, in the interests of due process and efficiency, that all actors in arbitration are informed at the same time of all matters relevant to the proceedings.²³³

Copying all correspondence to the Secretariat enables it to be kept informed about the progress of a case and to maintain a full record of all communications and documents so that it and the Court can fulfil their functions under the Rules.²³⁴

In addition to the parties' submissions, the Secretariat will send the arbitral tribunal copies of the correspondence between it and the parties and between it and the arbitrators. It will usually omit correspondence that is clearly not relevant to the arbitral tribunal's task.

²³¹ ICC Techniques for Controlling Time and Costs in Arbitration, p. 13.

²³² Ibid.

²³³ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-54.

²³⁴ Ibid.

For example, correspondence relating exclusively to the arbitral tribunal's constitution will not normally be included.²³⁵ Parties may contact the Secretariat if they feel that certain correspondence between the Court and the parties should not be transmitted. The Court will normally respect such a request if the correspondence does not relate to the dispute itself (*e.g.* a letter containing objections to the confirmation of a particular arbitrator).²³⁶

²³⁵ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-660.

²³⁶ J. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration. A Practical Commentary on the 2012 ICC Rules of Arbitration from the Secretariat of the ICC International Court of Arbitration* (Paris, ICC, 2012), para. 3-660.

V. What methods can be applied to increase the efficiency level of arbitration proceedings?

1. Limitation on submissions' volumes

Parties' written submissions are in different forms and under different names. They range from the Request for Arbitration and the Answer, to the statements of case and defence, memorials and other written arguments, and opening and closing written submissions. These comments apply to written submissions generally.

There are different proposals as what can be done by the parties and institutions to limit the costs and time of the arbitration proceedings and therefore maximizing the efficiency of such proceedings. As seen in section one above, ICC has provided the most comprehensive guidelines in this regard.

Some of the authors have offered a limitation of the pages of parties' submissions: based on this view, the parties' submissions, in their entirety, must not exceed a limited number of pages for each party. It has also been suggested that such limitations must be included in Parties' terms of engagement.²³⁷

But what is the significance of limited page numbers per parties' submissions? It indeed leaves an impact on saving both time and costs, as fewer pages entail less legal work and preparation by the counsel and less pages to read for the arbitral tribunal.

There is unfortunately a misleading view amongst the parties that longer submissions mean that parties are heard fully and comprehensively, however, case studies show that parties usually tend to repeat the same argument over and over again.²³⁸

Although the importance of providing factual and legal details and the corresponding evidences and references in preparing the arguments should not be underestimated, it has to be

²³⁷ The ICC shares this view: Appendix IV s. e ICC Arbitration Rules (2012); Report from the ICC Commission on Arbitration (ICC Publication 843): *Techniques for Controlling Time and Costs in Arbitration* (2007), para. 50. According to the 2010 Queen Mary International Arbitration Survey, written submissions are one of the top three reasons for delaying arbitral proceedings: Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, p. 32.

²³⁸ ICC Publication 843: *Techniques for Controlling Time and Costs in Arbitration*, para. 51; Siegfried Elsing, 9 Ger. Arb. J. 114, 117 (2011).

noted that many counsel tend to provide fruitless arguments from the beginning of the proceedings, hiding them in the numerous pages of submissions with the hope that the number of the pages and the volume of the submissions make it more complicated for the arbitral tribunal to discover the irrelevancy and immateriality of such arguments.

In general, these items shall be taken into consideration when it comes to the written submissions:

- *Setting out the case in full early in the proceedings;*
- *Avoiding repetition;*
- *Sequential or simultaneous delivery;*
- *Specifying form and content;*
- *Limiting the length of submissions; and*
- *Limiting the number of submissions.*²³⁹

2. Settlement offered by the Arbitral Tribunal

Another option to minimize the time and the cost of arbitration is entailed in the potential settlement of the parties. The arbitral tribunal occasionally, usually at the beginning of the proceedings, informs the parties that settlement offers will be considered while allocation the costs. This is considered to be as a financial motivation for the parties to settle.

Needless to say, settlements between the parties save time and costs in arbitral proceedings. Based on the ICC, the arbitral tribunal should consider informing the parties that they are free to settle all or part of the dispute at any time during the ongoing arbitration, either through direct negotiations or through any form of ADR proceedings. For example, mediation proceedings can be conducted under the ICC Mediation Rules.²⁴⁰

However, this needs to be carefully conducted: There is an ongoing debate regarding the involvement of the arbitral tribunal in settlement offers.

²³⁹ See ICC Techniques for Controlling Time and Costs in Arbitration, pp. 11-12.

²⁴⁰ Further information can be found in the ICC International Court of Arbitration Bulletin, Vol. 24/No. 2 (2013).

Approaches to arbitrator's role in promoting settlement may vary even between an international arbitration practitioner and his or her domestic jurisdiction. On the other hand, there may be jurisdictions which are geographically and legally further, but their arbitration practice in this matter will be similar.

This diversity is reflected in para. 47 of the UNCITRAL Notes on Organizing Arbitral Proceedings:

*“Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations”.*²⁴¹

In international arbitration environment, where legal cultures and different jurisdictions clash constantly, arbitrators must be aware of the fact that under some jurisdictions, the intention to facilitate a settlement or to offer the same might be excluded, or it might even raise doubts to the arbitrators' impartiality and independence.²⁴²

Therefore, it is advised that the parties agree on encouraging an amicable solution throughout the settlement negotiations, and also expressly agree on the limits of the arbitrators' involvement,²⁴³ including, for example on whether information obtained by the tribunal throughout the proceedings can be disclosed to other parties where the settlement negotiations

²⁴¹ UNCITRAL Notes on Organizing Arbitral Proceedings. See also a revised draft of the UNCITRAL Notes which has been adopted during the sixty-second session of UNCITRAL Working Group: UNCITRAL Doc. A/CN.9/WG.II/WP.186 - Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings Note by the Secretariat section 11. The draft of the section concerning settlement reads: *'In appropriate circumstances, an arbitral tribunal may raise the possibility of settlement outside the context of the arbitration. In some jurisdictions, where parties agree on both the principle and the modalities of settlement, the applicable law permits facilitation of settlement by an arbitral tribunal exercising due caution and restraint; however, in many other jurisdictions it is not permissible for the arbitrator to do more than raise the prospect of settlement by a third party mediator outside the context of the arbitration.'*

²⁴² See also J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration* (The Hague, Kluwer Law International, 2003), paras. 11-1.*et seq.*

²⁴³ For instance, the parties may request the arbitral tribunal only to suspend the arbitration proceedings for a specific period of time while settlement discussions take place. See ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration, 2012, p. 11, available at: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/>

are not successful. The parties' consent therefore can be obtained in written, for example, in terms of reference or minutes of the proceedings.²⁴⁴

Finally, it must be agreed that there will be no recourse against the arbitrator(s) who attempts to facilitate a settlement or offer the negotiations of the same, subject to instances of liability.²⁴⁵

In the common law jurisdictions, for example, it is not the tradition to offer the settlement possibilities to the parties,²⁴⁶ and the arbitrators' involvement in the settlement discussions may even lead to challenging the award.²⁴⁷ Anglo-American arbitrators and counsel often consider the arbitrators' participation in settlement negotiations as a mediation/conciliation process.²⁴⁸

The problem is that, in the course of such deliberations, the parties may disclose some information that they would not have disclosed to the 'arbitrator/mediator' and to the other parties otherwise.

However, a problem with this could be that mediators usually express preliminary opinions as to the merits of the case, which can give rise to some issues such as an objection by a party who considers that arbitral tribunal has pre-judged an issue.²⁴⁹

Some authors also comment that during the mediation process an arbitrator can potentially get some confidential information which cannot be disclosed to the other party.²⁵⁰ If such information subsequently influences the arbitrator's decision, that may be classified as violation of arbitrator's impartiality and independence.

²⁴⁴ B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd edn, Stämpfli/C.H. Beck/Hart/Manz, 2015), para. 172; H. Raeschke-Kessler, 'The Arbitrator as Settlement Facilitator' (2005) 21(4) Arb Int'l, 536.

²⁴⁵ See B. Berger and F. Kellerhals, *International and Domestic Arbitration in Switzerland* (3rd edn, Stämpfli/C.H. Beck/Hart/Manz, 2015), para. 172.

²⁴⁶ 'Med-arb' is not perceived as a usual procedure in arbitrations in England and Wales. See W. Sun and M. Willems, *Arbitration in China* (Kluwer Law International 2015), p. 427.

²⁴⁷ T.H. Webster and M. Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3rd edn, London, Sweet & Maxwell, 2014), p. 360; T.H. Webster, *Handbook of UNCITRAL Arbitration: Commentary, Precedents, Materials* (2nd edn, London, Sweet & Maxwell, 2015), Article 36, para. 36-9.

²⁴⁸ H. Raeschke-Kessler, 'The Arbitrator as Settlement Facilitator' (2005) 21(4) Arb Int'l, 525.

²⁴⁹ T.H. Webster and M. Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3rd edn, London, Sweet & Maxwell, 2014), p. 360.

²⁵⁰ W. Sun and M. Willems, *Arbitration in China* (The Hague, Kluwer Law International, 2015), p. 428.

3. Witness Statements

In international arbitration, witness evidence can be considered as the second best evidence compared to document production. The general “best practice” principle is that the agreement of the parties, if any, or failing this, the discretion of the arbitrators may structure the taking of witness evidence, both written and oral.²⁵¹

However, it is a fact that preparation of the witness statements can prove to be very long and costly. The costs are even increasing when the counsel has to ‘train’ the witnesses and prepare them for the witness examinations and cross-examinations.²⁵² It is said that the counsels to the parties spend more than 50 % of the entire hearing time on the cross-examination.²⁵³

Therefore, it has been suggested that the arbitral tribunal first instructs the parties not to submit any written witness statement, and rather ‘offer’ a witness name and specify who the witness will be and on which facts will he/she testify, and why his/her witness statement would be relevant and material to the outcome of the case.

Based on the ICC, Every witness adds to the costs, both when a witness statement is prepared and considered and when the witness attends to give oral evidence. Costs can be saved by limiting the number of witnesses to those whose evidence is required on key issues. The arbitral tribunal may assist in identifying those issues on which witness evidence is required and focusing the evidence from witnesses on those issues. This whole process will be facilitated if the parties can reach agreement on non-controversial facts that do not need to be addressed by witness evidence.²⁵⁴

If the arbitral tribunal considers the witness statement to be necessary, then witness will be called to testify in a hearing but only on the issues that he has testified, and nothing out of the scope of his testimony.

²⁵¹ Available at http://www.chsh.com/fileadmin/docs/publications/Welser/Beitrag_Welser_2010.pdf

²⁵² Please note that in some jurisdictions, such as England, it is impermissible for a lawyer to ‘coach’ a witness on the evidence to be given at a hearing, whereas in others, constraints on lawyers appear to be far more limited. See Bar Council of England and Wales Code of Conduct, Pt VII, s. 705(a); see also A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 3. 222.

²⁵³ William W. Park, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 2013 *Journal of Intl. Arb.* Vol. 29 issue3, 459.

²⁵⁴ ICC Techniques for Controlling Time and Costs in Arbitration, p. 13.

Consequently, time and costs will be saved if this method is employed by the arbitral tribunal. It is said to be relatively rare to read in arbitral awards that a specific witness testimony has been extremely important to the outcome of a case therefore, the time and costs paid to witnesses are sometimes disproportionate to the relevance and materiality.

4. The issue of document production

It is not exaggerated to assume that document production is amongst the most important features in contributing to the time and the costs in international arbitrations (see chapter one section 21).

The concept of document production in international arbitration has its roots in the Anglo-American discovery proceeding,²⁵⁵ and comes from the idea that if both parties are obligated to expose their hidden documents, the ‘truth’ will finally be revealed and this will provide a solid basis for the tribunal’s decision on the merits.²⁵⁶

However, it has been argued that in reality this is somewhat otherwise, as nobody can guarantee or control that a party really complies completely with an order to produce documents.²⁵⁷

Today, many of the document productions are governed under the famous ‘Redfern Schedule’.

The purpose of drawing the Redfern Schedule is to “*is to crystallise the precise issues in dispute, so that the arbitral tribunal knows the position that the parties have reached following the exchanges between them*”,²⁵⁸ making it possible for the arbitral tribunal to make informed decisions regarding the production of a particular document, or a class of documents, without having to be involved in the details of the exchanges between the parties’ counsel and often without the need for a meeting.²⁵⁹

²⁵⁵ Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration*, 5th Edition 2009, para. 6.107.

²⁵⁶ See Jean-François Poudret, Sébastien Besson, *Comparative Law of International Arbitration*, (2nd Edition 2002) paras. 652 *et seq.*

²⁵⁷ William W. Park, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 2013 *Journal of Intl. Arb.* Vol. 29 issue3, 460.

²⁵⁸ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 6.101

²⁵⁹ *Ibid.*

Redfern Schedule shall have at least four columns:

1. *“In the first column, the ‘requesting party’ sets out (a) a brief description of the requested document in sufficient detail to identify it, or (b) a description in sufficient detail to identify a narrow and specific category of documents that are reasonably believed to exist;*
2. *In the second column, the requesting party states why the requested document(s) are both relevant to the case and material to its outcome, as well as the statements required by Article 3(3) (c)(i) and (ii) of the IBA Rules;*
3. *In the third column, the requested party states the extent to which, if at all, it is prepared to accede to the request, and if it objects, the grounds on which it does so; and*
4. *The fourth column is left blank for the arbitral tribunal's decision”.*²⁶⁰

When the tribunal considers that the schedule does not request for sufficient information, the arbitral tribunal can either ask for additional information or, exceptionally, arrange a meeting.

As explained above, the process of document production can be – and in fact usually is – time-consuming and expensive, as documents covered by the request shall be diligently compiled – and as there is a need to thoroughly read the documents provided by the other party.

Having said the above, to limit the scope of the document production in international arbitration proceedings would save enormous amounts of time and costs. Even in cases where document production leads to material results in the outcome of the case, it is not necessarily proportionate to the costs it was incorporated with.

²⁶⁰ A. Redfern, M. Hunter, N. Blackaby and C. Partasides, *Redfern and Hunter on International Commercial Arbitration* (6th edn, Oxford University Press 2015), para. 6.101.

5. Cost Sanction for delaying the Proceedings

Arbitral Tribunals sanction parties through cost allocation. Guideline 26 of the IBA Guidelines on Party Representation in International Arbitration gives Arbitral Tribunals the discretionary power to take into account the Party Representative's Misconduct when allocating the costs of the arbitration.²⁶¹ This Guideline specifically provides that the Party Representative should be notified and heard before any sanction is determined.

Firstly, it shall be noted that costs usually represent a considerable part of the amount in dispute in small and/or medium-sized disputes; the allocation of costs can be a crucial issue consequently.

'The costs follow the event', that is the almost universal rule applied by arbitral tribunals when deciding on the costs.²⁶² This means that usually the winning party is reimbursed in full and when the claim is partially awarded or dismissed; costs are allocated in proportion to that fact.²⁶³

Arbitral tribunals tend to apply a different approach than above very seldom. But when they do so, it usually involves the events of the arbitral proceedings such as jurisdictional objections raised by a party. It has been argued that the total amount of costs incurred by one party or the procedural behavior which led to cost increases is almost never discussed.²⁶⁴

It happens often that the costs claimed by a party are – sometimes quite significantly – more than what the other party claims. This happens because inter alia one party might have a more costly law firm or inefficient attorneys leading to an excessive number of billable hours.²⁶⁵

²⁶¹ Carlos González-Bueno, *Arbitral tribunals' decisions on costs sanctioning the parties for counsel behavior: A phenomenon expected to increase?* Kluwer Arb. Blog, 16 April 2014.

²⁶² Gary Born, *International Commercial Arbitration*, (3rd edn. 2009), pp. 2488 *et seq.*; Mauro Rubino-Sammartano, *Costs Awards in Arbitration*, 28 J. Intl. Arb. 113, 113 (2011); John Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 Mich. J. Intl. L. 1, 6 *et seq.* (1999); Queen Mary University of London, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, p. 40 *et seq.*

²⁶³ High Court of England and Wales, 10 Nov. 2004, *Newfield Construction Ltd. v. John Lawton Tomlinson*, EWHC 3051 (TCC); Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, 1st Edition 1999, para. 1255; Chartered Institute of Arbitrators, *Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration*, para. 4.4.1.

²⁶⁴ William W. Park, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 2013 Journal of Intl. Arb. Vol. 29 issue3, 463.

²⁶⁵ See Gary Born, *International Commercial Arbitration*, 3rd Edition 2009, pp. 2488, 2497; John Gotanda, 21 Mich. J. Intl. L. 1, 7 (1999).

Arbitral tribunals might read the arguments raised by the parties in such situations and realize that they are entitled to impose cost sanctions for inefficiency or excessive costs incurred, but this topic is rarely discussed and considered in the cost decision. This could be due to the reason that often arbitral tribunals do not feel comfortable to sanction a party for inefficient handling of the proceedings.²⁶⁶

For the reasons set above, arbitration institution can consider applying a new rule that costs do follow the event and the efficiency of parties' behavior during the arbitration proceedings. If such provisions are introduced in arbitration rules or practiced by the arbitral tribunals, then counsel advise the parties and warn them about the consequences of frustrating the efficient flow of the arbitration proceedings in allocating the costs.

If the above mentioned instruction is applied, it will result in promoting reasonable behavior by parties and parties' counsels, leading to sanctioning the inefficiency as a strong incentive for procedural economy.

²⁶⁶ Gary Born, *International Commercial Arbitration*, (3rd edn., Kluwer Law International 2009), pp. 2498 *et seq.*

VI. Conclusion

It is a well- established fact that Arbitration offers diverse advantages, and that it has become the most popular alternative dispute resolution mechanism for business people.

However, in recent years, parties' dissatisfaction with the duration and high costs of the arbitration proceedings led the ICC to come up with a guideline providing solutions to parties to lower the costs and shorten the time of arbitration.

Albeit being very well-founded in theory, the recommendations of ICC will not leave an impact on the arbitration proceedings unless the parties to such arbitrations truly intend to apply those recommendations in good faith. It has been suggested that it is the parties themselves and their attorneys who are responsible that arbitrations have become lengthy and expensive; not responsible are the arbitral institutions, the arbitration rules or the arbitrators.

The practice of ICC in this regard can be taken as an example for other arbitration institutions to prepare such guidelines as well.

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Abstract

Parties to a dispute often initiate arbitration proceedings for the convenience of time and cost efficiency that arbitration is supposed to offer. However, over time arbitration proceedings have shown to have become increasingly long and expensive, leaving the parties frustrated by the unexpected length and costs. Nevertheless, costs incurred by the parties themselves are said to constitute the largest part of the total cost of arbitration proceedings. Therefore, to reduce the overall costs of the arbitral proceedings, due consideration shall be given to how parties' presentation of their cases can be less costly.

The arbitration costs have nowadays increased by, amongst other things, long proceedings with unnecessary requests for more and more document productions, lengthy rounds of witness statements and some complications from the arbitral tribunal's side such as rendering the final award late. Counsel can add to this problem by lengthy and unnecessary correspondence, lack of time and availability and non-compliance with the rules.

Obviously, the above mentioned issues contribute to the complication of the proceedings and naturally lead to an explanation why arbitration proceedings have become increasingly long and expensive. Consequently, longer proceedings become more expensive.

This work aims at introducing and explaining the techniques, as offered by ICC, which can be used by both parties and arbitral tribunals to adhere to time and cost efficiency of arbitration proceedings and to help them tailor the time and costs in a manner proportionate to the size and complexity of their disputes.

Some of these techniques might be suitable for smaller disputes and certain proceedings, but inappropriate for the other. Hence, it is within the discretion of the parties and the arbitral tribunals to choose the techniques most appropriate for their case. The table of contents to this thesis can be served as a checklist to consider.

Abstrakt

Die Streitparteien initiieren oft Schiedsverfahren, um die Zeit- und Kosteneffizienz zu nutzen, die das Schiedsverfahren bieten soll. Im Laufe der Zeit hat sich jedoch gezeigt, dass Schiedsverfahren zunehmend lang und teuer geworden sind, was die Parteien durch die unerwartete Dauer und die unerwarteten Kosten frustriert. Die Kosten, die den Parteien selbst entstehen, machen jedoch den größten Teil der Gesamtkosten eines Schiedsverfahrens aus. Um die Gesamtkosten des Schiedsverfahrens zu verringern, ist daher angemessen zu berücksichtigen, wie die Parteien ihre Fälle kostengünstiger präsentieren können.

Die Schiedsverfahrenskosten sind heute unter anderem wegen langer Verfahren mit unnötigen Anträgen auf immer mehr Dokumentenproduktion, langwierige Zeugenaussagen und einige Komplikationen seitens des Schiedsgerichts, wie z. B. die verspätete Abgabe des endgültigen Schiedsspruchs, gestiegen. Der Anwalt kann zu diesem Problem durch langwierige und unnötige Korrespondenz, Zeitmangel und Verfügbarkeit sowie Nichteinhaltung der Regeln beitragen.

Die oben genannten Punkte tragen zur Verkomplizierung des Verfahrens bei und liefern eine Erklärung, warum Schiedsgerichtsverfahren zunehmend lang und teuer geworden sind. Folglich werden längere Verfahren teurer.

Diese Arbeit zielt darauf ab, die vom ICC angebotenen Techniken vorzustellen und zu erklären, wie diese sowohl von den Parteien als auch von Schiedsgerichten verwendet werden können, um die Zeit- und Kosteneffizienz von Schiedsgerichtsverfahren zu gewährleisten und zu helfen, Zeit und Kosten an das Verhältnis zu Größe und Komplexität des Falles anzupassen.

Einige dieser Techniken eignen sich möglicherweise für kleinere Fälle und bestimmte Verfahren, sind aber für andere ungeeignet. Daher liegt es im Ermessen der Parteien und der Schiedsgerichte, das für ihren Fall geeignetsten Verfahren zu wählen. Das Inhaltsverzeichnis dieser Arbeit kann als Checkliste dienen.