

Journal of International Arbitration



Wolters Kluwer
Law & Business

Published by *Kluwer Law International*

P.O. Box 316

2400 AH Alphen aan den Rijn

The Netherlands

Sold and distributed in North, Central and South

America by *Aspen Publishers, Inc.*

7201 McKinney Circle

Frederick, MD 21704

United States of America

Sold and distributed in all other countries

by *Turpin Distribution*

Pegasus Drive

Stratton Business Park, Biggleswade

Bedfordshire SG18 8TQ

United Kingdom

ISSN 0255-8106

© 2014, Kluwer Law International

This journal should be cited as (2014) 31 J. Int. Arb. 4

The *Journal of International Arbitration* is published six times per year.

Subscription prices for 2014 [Volume 31, Numbers 1 through 6] including postage and handling:

Print subscription prices: EUR 885/USD 1180/GBP 651

Online subscription prices: EUR 820/USD 1093/GBP 603

This journal is also available online at www.kluwerlawonline.com.

Sample copies and other information are available at www.kluwerlaw.com.

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The Journal of International Arbitration is indexed/abstracted in the European Legal Journals Index.

Printed on acid-free paper

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ISSN 0255-8106

Mode of citation: 31 J.Int.Arb. 4

Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings

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If international arbitration wishes to maintain its competitive edge versus other forms of dispute resolution, urgent reforms are necessary. As part of the service industry, institutional arbitration has to become much more customer oriented. While recently a number of arbitral institutions have revised their rules (e.g., PCA, HKIAC, VIAC, KLRCA, Finland Chamber of Commerce, etc.), these revisions seem far from sufficient. Based on recent cases where the author was involved, detailed proposals will be developed how to further improve the efficiency of international arbitration proceedings for the benefit of the parties and ultimately also arbitral institutions. The proposals to be presented will focus on: (i) 'piercing the arbitral veil'; (ii) measuring the success of arbitral institutions with 'real' factors instead of the conventional ones; (iii) creating incentives to speed up proceedings; (iv) a balanced approach to the appointment of arbitrators in international arbitration; and (v) performance evaluation of international arbitrators.

1 INTRODUCTION

International arbitration has emerged as the principal dispute resolution method for international commercial disputes, but has become hampered in recent years by certain shortcomings, including inefficient proceedings, increasing costs and delays.

The first major international arbitration survey undertaken by the School of International Arbitration, Centre for Commercial Law Studies, Queen Mary University of London, in 2006¹ found that 'expense and the length of time to resolve disputes are the two most commonly cited disadvantages of international arbitration'. Eight years after the first report was published, these perceived disadvantages have apparently not yet significantly improved in international arbitration proceedings and still seemed to be essentially the same in Queen Mary's 2013 survey.² Other surveys reach similar conclusions: a 2010 study of the

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¹ Queen Mary, University of London, *International Arbitration, Corporate Attitudes and Practices 2006*, at 2, www.arbitration.qmul.ac.uk/docs/123295.pdf. (accessed 28 May 2014).

² Queen Mary, University of London & PWC, *International Arbitration Survey 2013: Corporate choices in International Arbitration*, www.pwc.com/gx/en/arbitration-dispute-resolution/index.jhtml. (accessed 28 May 2014).

Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believed that international arbitration ‘takes too long’ (with 56% of those surveyed strongly agreeing) and ‘costs too much’ (with 69% strongly agreeing).

The findings of the Queen Mary surveys are echoed by critical comments from law firms and arbitration practitioners.³ Various conferences have addressed especially the topic of delay⁴ in arbitration proceedings. Whether this means that ‘international arbitration is losing its grip’, as some authors seem to believe,⁵ remains to be seen. But recent evidence⁶ gathered by Queen Mary/PWC in their International Arbitration Survey 2013 suggests that the users of international arbitration institutions are becoming increasingly concerned about persistent delays in arbitration proceedings. Especially, in-house counsel are increasingly focused on getting value from the arbitration process.

If international arbitration wishes to maintain its competitive edge versus other forms of dispute resolution, urgent reforms are necessary. As part of the service industry, institutional arbitration has to become even more customer oriented.⁷ Arbitration institutions have certainly not been idle in recent years and introduced expedited proceedings and emergency arbitration among other measures. Also, last year a number of arbitral institutions have again revised their rules (e.g., PCA, HKIAC, VIAC, KLRCA, Finland Chamber of Commerce, etc.), but these revisions seem far from sufficient.

Based on the author’s recent practical arbitration experiences, this article will elaborate on five proposals to overcome certain perceived shortcomings and delays in international arbitration proceedings, and address the needs for improvement found in the Queen Mary surveys.

³ Debevoise & Plimpton LLP, *Protocol to Promote Efficiency in International Arbitration* (2010), www.debevoise.com/files/News/2cd13af2-2530-40de-808a-a903f5813bad/Presentation/NewsAttachment/79302949-69b6-49eb-9a75-a9ebf1675572/DebevoiseProtocolToPromoteEfficiencyinInternationalArbitration.pdf (accessed 28 May 2014); Ben Giaretta, *The Evolution of International Arbitration* (March 2014), www.ashurst.com/publication-item.aspx?id_Content=10197 (accessed 28 May 2014); Prell & Partner, *Ousting the Arbitrator for Delaying Proceedings?* www.prell-lawyers.com/index.php?page=newsletter&lang=en&id=35 (accessed 28 May 2014); Berwin, Leighton, Paisner, *Research Based Report on Perceived Delay in the Arbitration Process* (July 2012) www.blplaw.com/media/pdfs/Reports/BLP_International_Arbitration_Survey_Delay_in_the_Arbitration_Process_July_2012.pdf (accessed 28 May 2014).

⁴ ICC UK, *Delays in International Arbitration Proceedings* on 15 Oct. 2012, www.ciarb.org/events/2012/10/icc-uk---delays-in-international-arbitration-proceedings/; SIAC *Daley in Arbitration Proceedings* on 14 Jul. 2010, www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-01-17-31/archive-2010/220-delay-in-arbitration-proceedings (accessed 28 May 2014).

⁵ Steven Seidenberg, *International Arbitration Loses Its Grip*, ABA J. (April 2010), www.abajournal.com/magazine/article/international_arbitration_loses_its_grip (accessed 28 May 2014).

⁶ Queen Mary, University of London & PWC, *supra* n. 2.

⁷ Peter Griffin, *Making Arbitration Better*, www.slaneyadvisors.com/downloads/Making%20Arbitration%20Better%20by%20Peter%20Griffin.pdf (accessed 28 May 2014).

2 THE INTERNATIONAL REGULATORY FRAMEWORK

There is hardly any international arbitration institution that does not have procedural rules that aim to prevent delays and speed up arbitration proceedings.

Article 22(1) of the International Chamber of Commerce (ICC) Rules requires that ‘the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an *expeditious* and cost-effective manner’. Article 25(1) of the ICC Rules stipulates that ‘[t]he arbitral tribunal shall proceed within *as short a time as possible* to establish the facts of the case by all appropriate means.’ Article 30(1) of the ICC Rules contains the six months’ time limit for rendering the award that seems to be routinely extended.

Article 14.1(ii) of the London Court of International Arbitration (LCIA) Rules encourages the parties ‘to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute’.

The AAA’s Commercial Arbitration Rules state in Rule R-32b that ‘the arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute’. Other international arbitration centers have similar rules.⁸ This list could easily be continued.

However, despite these rules that focus on efficient and expeditious proceedings, delays do not only occur but also seem to be on the increase. It is in this respect that there seems to be a clear need to amend the existing regulations of arbitral institutions further.

2.1 FIRST PROPOSAL: ‘PIERCING THE ARBITRAL VEIL’

In a very recent contractual dispute between a European international health care company and its European distributor for damages due to an alleged unfair contract termination, the claimant and respondent (that we represented) had agreed on the appointment of a sole arbitrator. After the first hearing was held and the arbitrator’s fees paid, the arbitrator (a well-known international arbitrator) disappeared and could no longer be contacted. Therefore, the arbitration institution was forced to replace the arbitrator. The parties then agreed on a replacement, who was again a very well-known international arbitrator with excellent reviews from international rating agencies. Against the conventional wisdom that lightning never strikes twice, this second arbitrator also disappeared and no longer responded to any reminders from the arbitral institution.

⁸ See, e.g., HKIAC Arbitration Rules, Art. 13.1, SIAC Arbitration Rules, Art. 16.1; this applies equally to various statutory regulations, e.g., the English Arbitration Act 1996, ss 33(1), 40.

Although both sole arbitrators had severely breached their professional and ethical obligations, the arbitral institution advised that its hands were bound, and it could not take any disciplinary measures against the disappearing arbitrators due to the confidentiality of the proceedings. So, in all likelihood, nobody will ever know about the dereliction of duties of the two arbitrators, and they will continue to be appointed as arbitrators because, other than the parties' counsels, nobody will know that both arbitrators acted unethically and unprofessionally, and international rating agencies will continue to recommend both arbitrators.

In the present case, confidentiality protects the wrong persons. The concept of confidentiality in arbitration proceedings should not protect unethical arbitrators' unprofessional behaviour. In cases like this, confidentiality must be 'pierced'. Therefore, the rules of international arbitration institutions should be amended in such a way that confidentiality does not apply in cases of any misconduct by the arbitrator.

2.2 SECOND PROPOSAL: INTRODUCTION OF NEW PARAMETERS FOR INTERNATIONAL ARBITRATION INSTITUTIONS: MEASURING SUCCESS OF INTERNATIONAL ARBITRAL INSTITUTIONS BASED ON 'REAL FACTORS'

Law firms tend to measure their success in terms of growth in revenue and profit. Do these parameters also matter to their clients? In all likelihood, they do not. What the client is primarily interested in is how well his interests are served, i.e., the quality of the service provided and the time and costs required.

It is not much different with international arbitration institutions. International arbitration institutions tend to see and measure their success with the increase in their yearly caseload. A good year for an arbitral institution is considered a year when a double digit increase of new cases can be recorded and published. While this approach is understandable and well justified from the institutions' viewpoint, this viewpoint is not necessarily shared by the users of international arbitration.

One of the reasons why parties choose international arbitration is the supposed speed of the proceedings. Much has been done by various institutions in recent years with the introduction of expedited proceedings and the appointment of emergency arbitrators. But one aspect has so far been completely neglected. What is of utmost and 'real' interest to the users of international arbitration is the average length of the various proceedings of an institution, from filing the case until rendering the award. As of today, there does not seem to be a single international arbitration institution that publishes any details of the average length of its proceedings.

Although the differing complexity of arbitration cases affects the length of the proceedings, publication of an average length could be a welcome indication as to the overall efficiency of an arbitration institution in administering its cases and could ultimately be used as a marketing tool.

2.3 THIRD PROPOSAL: CREATING INCENTIVES TO SPEED UP PROCEEDINGS

According to a recent survey,⁹ 66% of the survey respondents indicated that they had at some time within the past five years felt dissatisfied about the time they had to wait for an award. According to another survey, the length of time to resolve disputes is the second most commonly cited disadvantage of international arbitration.¹⁰

As pointed out above, arbitration users seem to be rather dissatisfied with the speed of arbitration and have taken issue with these delays. Also, 58% of the survey participants felt that institutions should do more to ensure awards are published in a timely fashion.

Another recent case illustrates this point. In an arbitration between an Asian manufacturer and its European distributor, the sole arbitrator led the proceedings rather efficiently with relatively short and ambitious deadlines, which was welcomed by parties and their counsel alike. However, this initial efficiency vanished abruptly after the close of the proceedings. The arbitral institution granted a total of three time extensions, bringing the time from the close of the proceedings to the rendering of the award to one year, which is unacceptable even for a busy arbitrator.

Arbitration must ensure that it remains efficient and satisfies the demands of its users in terms of the time required to reach a hearing and, ultimately, to deliver an award.¹¹

Arbitral institutions could address this type of delay rather easily by amending their rules such that extensions to render awards are only granted if the tribunal can give real and convincing reasons why the original deadline for the award could not be met. There should definitely not be any 'routine extensions'. In addition, any extension of the deadline for rendering the award should automatically be linked to a decrease in fees for the arbitrator.

This financial disincentive for arbitrators would help to make deadline extensions rather the exception than the rule and significantly speed up the rendering of arbitral awards.

⁹ Berwin, Leighton, Paisner, *supra* n. 3, at 16.

¹⁰ Queen Mary, University of London & PWC, *supra* n. 2.

¹¹ Berwin, Leighton, Paisner, *supra* n. 3.

2.4 FOURTH PROPOSAL: A MORE BALANCED APPROACH TO THE APPOINTMENT OF ARBITRATORS IN INTERNATIONAL ARBITRATION

Most arbitration institutions have well drafted regulations regarding the nationality of the arbitrators to be appointed.¹² But should not arbitral institutions also put more emphasis on the legal background of the arbitrators appointed, to enable more balanced awards?

For example, in a recent award involving a civil law jurisdiction, an arbitrator with a common law background discussed ‘consideration’ at some length in an award based on a contract governed by a civil law system. This seemed rather misplaced in those circumstances. Such mishaps can easily be prevented if the arbitral institution pays proper attention to the legal background of the arbitrator and tries to make sure that the legal background of the arbitrator (common or civil law) matches the character of the substantive law governing the dispute.

In the examples above, the parties were domiciled in a civil law jurisdiction and the law of a civil law country applied to the underlying contracts. Nevertheless, sole arbitrators with a common law background were appointed in all cases. Arbitrators with a common law background are frequently appointed in arbitration disputes that are entirely based in civil law systems. While this may be considered ‘enriching’ in some cases, there is a risk that such appointment will lead to wrong decisions, as in the ‘consideration’ case referred to above.

An argument may also be made that arbitration has become less accommodating to the different legal cultures it was intended to serve.¹³ There is certainly no shortage of very well qualified arbitrators with a civil law background, and it would seem more appropriate to have an arbitrator with a civil law background in a purely civil law matter and to have arbitrators with a common law background decide matters that are rooted in a common law system.

The relevance of this proposal is underscored by statistics of the nationalities of the arbitrators appointed in international arbitrations: certain nationalities seem to have a quasi-monopoly on arbitrator appointments. There does not seem to be a rationale for such nationality bias. Such disproportionate appointment of certain nationalities should be eliminated to avoid the impression of a nationality bias from the outset. It is hoped that arbitral institutions could find a more balanced approach between the legal background of arbitrators and the nationalities of the arbitrators they appoint in relation to the cases to be decided.

¹² See, e.g., ICC Rules of Arbitration, Art. 13.1; London Court of International Arbitration Rules, Art. 6.

¹³ Griffin, *supra* n. 7.

2.5 FIFTH PROPOSAL: PERFORMANCE EVALUATION FOR INTERNATIONAL ARBITRATORS

While arbitration fulfils a judicial function, arbitration is simultaneously providing a service. As such, arbitration institutions should try to make their proceedings more customer-friendly and transparent. Recent efforts in this respect include various arbitral institutions' plans to publish their arbitral awards. This takes away some of the 'mystery' surrounding arbitration proceedings.

Another possibility that should be seriously considered is a performance evaluation of arbitrators by the respective parties' counsel after proceedings have been closed and the award rendered. While any performance evaluation has always some subjective features, the introduction of performance evaluation would greatly facilitate the prospective users' decision with regard to whom they wish to appoint. It would also help good talents to be more easily recognized in the market.

3 CONCLUSION

Arbitration has come a long way and proved to be an irreplaceable, highly valuable and very efficient tool in the resolution of international economic disputes. But this does not mean that something good cannot be improved. In Voltaire's words: 'the better is the enemy of the good'.¹⁴

Like any successful industry, there is a risk that the arbitration world becomes too inward looking.¹⁵ By introducing the five proposals above, the efficiency of international arbitration proceedings would be further improved for the benefit of the parties and ultimately also the arbitral institutions involved.

¹⁴ Voltaire's poem 'La Bégueule' that starts 'Dans ses écrits, un sage Italien dit que le mieux est L'ennemi du bien'.

¹⁵ Griffin, *supra* n. 7.

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Since its 1984 launch, the Journal of International Arbitration has established itself as a thought provoking, ground breaking journal aimed at the specific requirements of those involved in international arbitration. Each issue contains in depth investigations of the most important current issues in international arbitration, focusing on business, investment, and economic disputes between private corporations, State controlled entities, and States. The new Notes and Current Developments sections contain concise and critical commentary on new developments. The journal's worldwide coverage and bimonthly circulation give it even more immediacy as a forum for original thinking, penetrating analysis and lively discussion of international arbitration issues from around the globe.

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