Just what the doctor ordered?

Dr Andreas Respondek FCIArb suggests a prescription to combat arbitral procrastination

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Increasingly, there is a perception among users of international arbitration that the process has lost two of its most important advantages over litigation: speed and cost savings. Arbitral proceedings are, as research among the community consistently reports, considered too lengthy, with the knock-on 'symptoms' that they become more expensive and the process inefficient.

Of course, identifying a problem is the easy part. Addressing such issues head on and attempting to solve them is quite another. And when dealing with delays in international arbitration the first step in finding a cure is to determine where and when they may occur, and who or what is causing them.

DELAY DIAGNOSIS

If we look at the stakeholders involved we can see that delays can be caused on at least three fronts: by the arbitral institution, by the parties engaged in an arbitration, or by the tribunal and the arbitrators.

For their part, international arbitration institutions have certainly tried to address perceived procedural shortcomings and delays. In recent years a number have updated or changed their rules to, for example, introduce mechanisms that allow expedited proceedings, easier joinder of parties to an existing arbitration, commencement of a single arbitration under multiple contracts, and the reduction of arbitrators' fees for unjustified delays in submitting draft awards and so on.

A case in point is the 2017 ICC Rules (Article 30), which introduced expedited procedures and reduced the time frame within which the Terms of Reference

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are to be signed from two months to 30 days. The new 2018 HKIAC Rules encourage the use of technology, include effective provisions for disputes involving multiple parties and/or contracts, and have introduced an early determination procedure expressly to empower an arbitral tribunal to establish a point of law or fact that is manifestly without merit or outside the tribunal's jurisdiction.

The new 2018 DIS Rules also include several notable novelties, such as the introduction of a new administrative body and provisions on multi-party and multi-contract arbitration, and set out a number of new deadlines aiming to make arbitration faster and more efficient.

These are certainly significant steps forward and represent a very welcome trend.

PARTY PROBLEMS

But what about the parties in an arbitration? What regulations apply to them with regard to the type of procedural behaviour that causes delays? There are already several regulations in place – primarily the International Bar Association's Guidelines on Party Representation in International Arbitrations (2013) – that contain, among other items, sanctions for misconduct (see bit.ly/WI19_IBA_Guidelines). Nonetheless, a potential drawback of

these guidelines, and others, is that they are non-binding. So it is strictly up to the parties whether or not they want to observe them.

In an attempt to overcome this, and to make such regulatory guidelines enforceable or binding, there are regular calls in professional journals and blogs for a supranational binding code of ethical rules or a uniform legal framework to regulate ethical conduct in international arbitration.

However, quite apart from the fact that it is difficult to identify an international body that could enforce such rules, there remains the question of whether such rules would really be in the best interest of arbitration. After all, every additional set of rules takes away some flexibility from the arbitration process.

QUICKER FIX?

More easily addressed and corrected, in this author's opinion, are faults that lie with arbitrators themselves. Of course, the role of the arbitrator is finely balanced between proactive and judicious efforts to keep the proceedings and the parties moving forward in a linear and efficient manner, and at the same time ensuring party autonomy and equality.

Yet arbitrators have broad discretion to organise the conduct of the proceedings, subject to the arbitration agreement, including the arbitration rules and/or the lex arbitri and any additional agreement between the parties. Accordingly, arbitral tribunals' general procedural discretion has been included in many arbitration laws and rules in order to ensure effective case management.

Under Article 22 (1) ICC Rules, the tribunal and the parties are to "make every effort to conduct the arbitration in an expeditious and cost-effective manner having regard to the complexity and value of the dispute". Moreover, after consulting the parties the tribunal may adopt such procedural measures as it considers appropriate in order to ensure effective case management.

The LCIA Rules (Article 14.4 (ii)) provide that the tribunal's general duties include "a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute".

Article 13.1 of the HKIAC Rules stipulates that "the arbitral tribunal shall adopt suitable procedures for the conduct of the arbitration in order to avoid unnecessary delay or expense".

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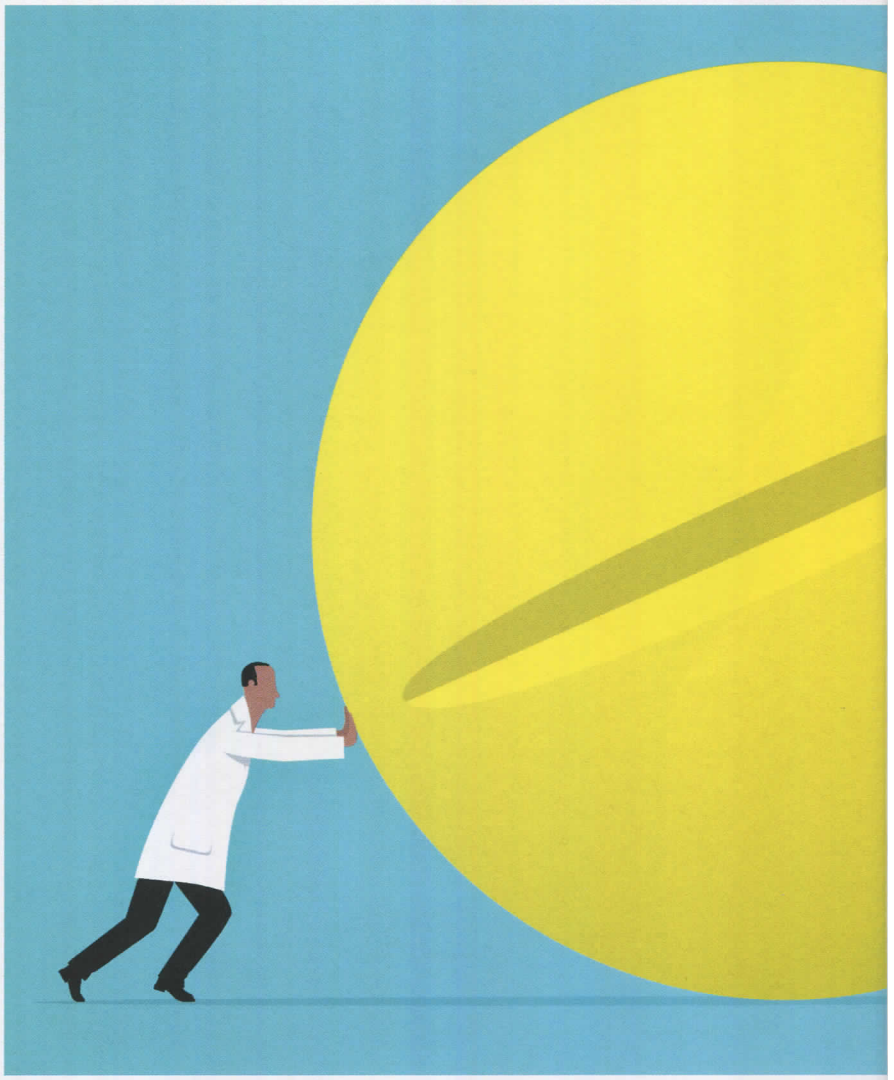


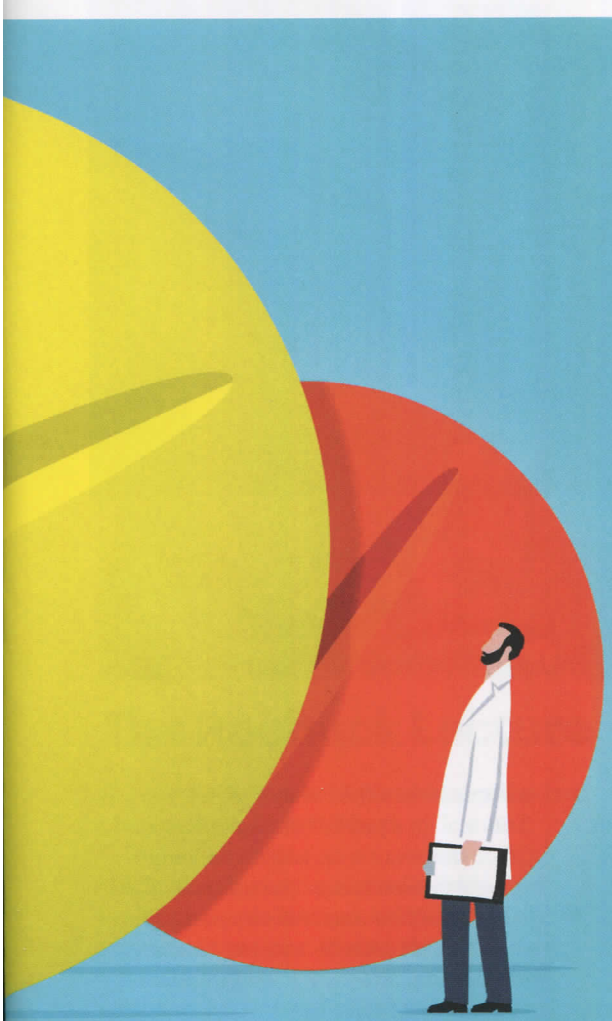
PUSHING IT
Until sanctions become a standard feature of each Terms of Reference there will always be parties who play fast and loose with the international arbitration process

Likewise, the UNCITRAL Rules 2010 (Article 17.1) provide that the arbitral tribunal shall conduct the proceedings "so as to avoid unnecessary delay and expense, and to provide a fair and efficient process for resolving the parties' dispute". Arbitral tribunals possess the power to police conduct in their proceedings and to levy appropriate sanctions if necessary.

So it appears that under most institutional arbitration rules arbitrators already have not only far-reaching powers to structure the proceedings, but also the power (and even obligation) to structure them in such a way as to prevent procedural delays and unnecessary expense. Arbitral tribunals should, I would suggest, therefore take the lead in addressing and combatting the delay issue.

TERM LIMITS

Increasingly, delay can be attributed to so-called 'guerilla tactics'. This refers to a range of hostile practices employed by some parties in arbitration in an attempt to gain advantage over the opposing party.



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At the very least, the Terms of Reference should address the following crucial objectives:

REDUCE DOCUMENT PRODUCTION

It is essential that the tribunal ensures a limited document disclosure process. Terms of Reference could even direct that whatever document requests are made by either party must be paid for by the requesting party. This will ensure that they only ask for really important and relevant documents.

SET PAGE LIMITS ON WRITTEN SUBMISSIONS

The length of documents to be submitted to the tribunal should not exceed a certain size. Penalties should be applied for anything longer than the stated size. Tribunals may also require the parties to respond to specific points identified by the tribunal as being material to its determination.

LIMIT SCOPE OF WITNESS AND EXPERT EVIDENCE

To prevent the submission of irrelevant items, the tribunal may define the issues on which it requires evidence and may demand that experts meet in advance of preparation of reports so that the reports can focus on the disputed issues only.

SET TIME LIMITS

Efficiency and fairness can be enhanced when the tribunal manages the proceedings effectively. Directions should be linked to an agreed timetable for each step of the arbitration so that the parties also know what they have to do and by when – and what the sanctions for non-compliance are. For example, fixed deadlines must be imposed within which every party must present its submissions.

This may include: changing counsel in mid-proceedings in order to create a conflict with the arbitrator; abuse of discovery; excessive requests for document disclosure; late introduction of evidence; commencement of injunctions in the courts, and intimidation of witnesses and similar tactics.

The principal and foremost tool and appropriate vehicle through which such delay can be addressed and sanctioned by the tribunal are the Terms of Reference and/or Procedural Orders. With this in mind, the Terms of Reference must include a clear road map covering (at least) three items:
(i) what constitutes permissible behaviour,
(ii) what constitutes delay, and, most importantly,
(iii) what sanctions the tribunal will apply in the case of such delays.

To reduce the risk of disruptive behaviour and to make it easier to deal with such behaviour when it arises, the Terms of Reference should clearly set out the financial and other consequences of non-compliance, with directions contained in the Terms of Reference or Procedural Order. That means the Terms of Reference should not only incorporate a framework for the conduct of the arbitration, but also include the repercussions for failure to adhere to this binding framework. Costs should be awarded during the proceedings explicitly on the basis of tactics that cause delays or other additional costs.

In my experience, Terms of Reference often extend to 30 pages or more and contain elaborate regulations about every aspect of the upcoming arbitration proceedings. However, what the overwhelming majority of such terms do not contain or address are detailed sanctions for procedural misconduct.

In a way this is understandable because who wants to think of potentially negative or unpleasant parts of an arbitration during its initial 'honeymoon period'? But unless procedural and financial sanctions become an integral and standard part of each set of Terms of Reference, we will continue to see complaints, wayward procedural behaviour and delays in international arbitration proceedings.

ABOUT THE AUTHOR
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