Techniques in Managing the Process of Arbitration[1]

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1. Introduction

The growth in the number, complexity and magnitude of international arbitrations since the 1980s, coupled with the rise of the "arbitration industry", has been accompanied by increasing complaints that arbitration proceedings are becoming as drawn out and expensive as court litigation, squandering the original cost-effectiveness that had characterised arbitration as a competitive alternative to litigation.[2] Together with the proliferation of international dispute settlement mechanisms and the sophistication of technological advancements, the arbitration landscape is changing as are users' expectations of the arbitral process. A fundamental part of meeting the expectations of users is to ensure that a framework is in place to ensure that the arbitration process is adequately managed.

Within the broader context of achieving greater efficiency of the arbitral process, this paper will examine some of the techniques that can be used in managing the process of arbitration. Renewing international arbitration as an efficient and cost-effective avenue for the resolution of international commercial disputes requires that there be a focus on managing the time and costs associated with the arbitral process, together with reforms to the way in which documentary disclosure, party-appointed experts, witness statements and limited-time procedures are used in arbitral proceedings.

2. Promoting Efficiency of the Arbitral Process

The lack of procedural guidance afforded by international arbitral rules is commonly regarded as one of the greatest advantages of international arbitration in comparison to the detailed rules of procedure and evidence found in most domestic legal systems. By granting parties the absolute freedom to determine the rules of the arbitral procedure themselves, party autonomy is preserved and the arbitral process remains tailor-made to take into account the circumstances of the case and the needs of the parties. Similarly, broad procedural discretion is granted to arbitrators to allow them to tailor procedures to a specific set of factual and legal issues, placing them in the position of selecting the procedural rules appropriate to the contours of each dispute "rather than forcing all cases into the type of ill-fitting off-the-rack litigation garment found in national courts".[3]

In light of this flexibility, a number of pragmatic approaches can be adopted to increase the efficiency of the arbitral process without sacrificing party autonomy. Reviving international arbitration as an efficient method of dispute settlement begins with arming the tribunal with effective case-management tools and techniques to enable it to regain control of the arbitral process.[4] To this end, many arbitration organisations, including the International Chamber of Commerce (ICC) and the Australian Centre for International

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[2] Nicolas Ulmer, "The Cost Conundrum" (2010) 26(2) *Arbitration International* 221.

[3] William W. Park, "Arbitration's Protean Nature: The Value of Rules and the Risk of Discretion" in William W. Park (ed.), *Arbitration of International Business Disputes: Studies in Law and Practice* (Oxford: Oxford University Press), p.459.

[4] C. Price and Y. Stans, "Using Costs as a Case Management Tool in International Arbitration" (2007) 25(A) *ASA Bulletin* 704, 707.

Commercial Arbitration (ACICA), have attempted to address these problems through a range of reports and amended arbitration rules. In doing so they have raised a number of practical considerations which may help improve the management of the arbitration process.

Techniques for controlling time and costs in arbitration

In 2007, the ICC's Task Force on Reducing Time and Cost in Arbitration published a report on techniques for controlling time and costs in arbitration.[5] Underlying the report is the principle that the arbitral tribunal should work proactively with the parties to manage the procedure from the outset of the case. In this respect, the report sets out a number of practical techniques for improving efficiency in arbitration through time and cost savings that can be used for organising arbitral proceedings and controlling their duration and cost. The ICC Task Force observed that:

> "[I]f the overall cost of the arbitral proceedings is to be minimized, special emphasis needs to be placed on steps aimed at reducing the costs connected with the parties' presentation of their cases. Such costs are often caused by unnecessarily long and complicated proceedings with unfocused requests for disclosure of documents and unnecessary witness and expert evidence."[6]

The ICC report recognised that the main causes of delay are within the control of the parties and made a number of recommendations. These include: the use of a case-management conference early in proceedings to allow the arbitral tribunal and the parties to identify the relevant issues and the procedural steps necessary to resolve them; the importance of avoiding repetition when presenting submissions and arguments; and the need to focus and minimise the use of witness statements.[7]

ACICA Expedited Rules

Choosing the correct arbitration rules is vital for ensuring the effective management of the arbitration process. To this end, major arbitral institutions, such as the ICC, the London Court of International Arbitration (LCIA) and the Hong Kong International Arbitration Centre, have developed accelerated or "fast track" arbitration procedures. For example, the ACICA Expedited Arbitration Rules were developed in 2008 and amended in 2010 (ACICA Expedited Rules) as a response to the increasing need to have smaller disputes resolved quickly and efficiently. The ACICA Expedited Rules aim to "provide arbitration that is quick, cost effective and fair, considering especially the amounts in dispute and complexity of issues or facts involved".[8] This means that the ACICA Expedited Rules may not be appropriate for complex, multi-party or multi-issue disputes. Nonetheless, the ACICA Expedited Rules art.2.1 allows the parties to agree in writing to variations on specific provisions of the rules. Further, ACICA has adopted an opt-in approach for these rules, requiring parties to explicitly select them (rather than the traditional ACICA Arbitration Rules (the ACICA Rules)) in their arbitration agreement.

Of significance is the fact that the ACICA Expedited Rules art.13.2 departs from the equivalent provisions of the ACICA Rules as it provides that there will be no oral hearing,

[5] ICC, "Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration", ICC Publication 843 (2007), available at: *http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf* [Accessed February 16, 2012].

[6] ICC, "Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration", ICC Publication 843 (2007), available at: *http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf* [Accessed February 16, 2012].

[7] ICC, "Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration", ICC Publication 843 (2007), available at: *http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf* [Accessed February 16, 2012].

[8] ACICA Expedited Rules art.3.1.

other than in exceptional circumstances (as determined by the arbitrator), and either the arbitrator or the parties require a hearing to take place. In the event of a hearing, it shall be no longer than one working day (unless decided otherwise by the arbitrator).[9] Under the traditional ACICA Rules a hearing was to be conducted at the request of either party.[10]

One arbitrator or three?

If proactive management of the arbitral process is an important consideration in achieving procedural efficiency, it follows that selecting the right tribunal will also be of importance. Particularly relevant to the issue of efficiency is the question of whether there should be a sole arbitrator or a three-arbitrator tribunal.

Large and complex contracts often stipulate a three-arbitrator panel. While it is certainly good practice for parties to give detailed thought at the time they are negotiating and drafting their contract to the type of tribunal they might want to hear any dispute, it is not necessarily helpful to fix on either a one- or three-person tribunal at this stage.[11] It is without doubt that three-arbitrator tribunals are more expensive and, generally speaking, take longer to conclude their arbitrations due to increased logistical difficulties. Furthermore, many commentators take the view that even with a three-arbitrator tribunal, if two of the arbitrators are party appointed, the outcome is effectively determined by the view of the chairman alone. When this is the case, then the value that the parties receive in return for the extra cost of a three-arbitrator tribunal is quite hard to identify.[12]

It follows that in terms of efficiency, it is best to use three arbitrators only when these are necessary for the dispute in question. Although a contract may be significant, it is possible that certain disputes arising under it will not be of sufficiently high value to warrant the cost of three arbitrators. However, if a three-arbitrator tribunal has been stipulated in the contract, it may be difficult for the parties to agree to vary this. Nor can the arbitral institution insist on a sole arbitrator without the agreement of the parties.

The alternative solution is for the arbitration clause in the contract to keep open the choice between either a sole arbitrator or a three-arbitrator tribunal until a dispute arises between the parties.[13] If the parties cannot reach an agreement at this stage, it will be for the arbitral institution charged with administering the arbitration to determine whether there will be one arbitrator or three.[14] Leading arbitral institutions have published guidelines as to when it is appropriate to have either one or three arbitrators and the parties will be able to make submissions to the institution in support of their preference. For example, the ACICA Expedited Rules art.8 provides that the tribunal is to consist of only one arbitrator, appointed by ACICA, under a procedure which is subject to challenge by a party only in limited instances.[15]

[9] ACICA Expedited Rules art.13.

[10] ACICA Rules art.17.

[11] Christopher Newmark, "Controlling Time and Costs in Arbitration" in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn (Huntington, NY: Juris Publishing, 2008), p.96.

[12] Christopher Newmark, "Controlling Time and Costs in Arbitration" in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn (Huntington, NY: Juris Publishing, 2008), p.96.

[13] Christopher Newmark, "Controlling Time and Costs in Arbitration" in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn (Huntington, NY: Juris Publishing, 2008), p.94.

[14] Christopher Newmark, "Controlling Time and Costs in Arbitration" in Lawrence W. Newman and Richard D. Hill (eds), *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn (Huntington, NY: Juris Publishing, 2008), p.94.

[15] ACICA Expedited Rules arts 8 and 9.

3. Limits on Document Disclosure

The issue of document disclosure has been at the forefront of debate in recent times. This is fuelled by concerns that the practice of flooding arbitral proceedings with documents, submissions and production requests is having a negative impact on the efficiency and management of the proceedings. As the quantity of information increases, so does the burden and strain on resources in terms of document disclosure, leading to a costly, time-consuming discovery stage. The issue of document disclosure is further compounded by technological developments and the growth of electronically stored information. In the context of electronically stored information, there is a real risk that extensive "e-discovery" type procedures can become disproportionate and uneconomical if not kept within defined limits. On the other hand, with appropriate technical guidance, electronic disclosure has the potential to be used in a positive and proactive manner, reducing the volume of paper and opening up possibilities for the strategic use of technology, which may serve to make the process of arbitration more streamlined and cost-effective, rather than more burdensome and costly. While advancements in technology should be embraced as a means of limiting the time and expense associated with the physical production of documents, the scope of discovery, whether it be electronic or physical, should be limited if arbitration is to be a cost-effective alternative to litigation.

In light of the broad discretionary powers granted to arbitrators, the tribunal has a fairly substantial degree of freedom to define the manner of evidence taking, including the right to documents disclosure and the extent to which this is used. In reality, arbitrators are often reluctant to restrict the submission of documents. In many cases, they appear to have opened arbitration proceedings to requests that are unnecessary for the resolution of the dispute.[16] One possible explanation for this tendency is arbitrators' fear of breaching their duty to assure the parties their right to an equal opportunity in presenting their case. For example, the UNCITRAL Model Law on International Commercial Arbitration (Model Law) art.18 states that "the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case". In upholding the principles of due process, arbitrators tend to err on the side of ordering production of evidence even when that document is not perceived as vital, and, in an effort to avoid allegations of misconduct or serious procedural irregularity, granting requests for production even when the document's relevance and materiality are dubious.[17]

However, a "full opportunity" of presenting one's case under the Model Law is not a licence for arbitrators to grant, or for parties to expect or demand, excessive, time-consuming and demanding disclosure. Courts have repeatedly opined that parties cannot expect to receive the same judicial protections in arbitration proceedings that they receive before a court. Therefore, refusing a request for production or failing to order the disclosure of non-vital documents should not be considered a form of misconduct on the part of arbitrators; instead, such conduct should be recognised as upholding the parties' original intention of choosing arbitration. In fact, in the absence of parties' agreement specifying broader terms of discovery, arbitrators should interpret their contractual intention as one of narrow discovery. So long as the parties are treated equally and given the opportunity to present their case, the tribunal will not be breaching its obligations of due process by enforcing limits on document disclosure.

When it comes to electronically stored information, there is not a lot of assistance for arbitrators seeking to regulate its disclosure. Both the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the Model Law are

[16] Giacomo Rojas Elgueta, "Understanding Discovery in International Commercial Arbitration through 'Behavioral Law and Economics': A Journey Inside the Minds of Parties and Arbitrators" (May 5, 2009), p.23, available at: *http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1015136* [Accessed February 16, 2012].

[17] Giacomo Rojas Elgueta, "Understanding Discovery in International Commercial Arbitration through 'Behavioral Law and Economics': A Journey Inside the Minds of Parties and Arbitrators" (May 5, 2009), p.23, available at: *http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1015136* [Accessed February 16, 2012].

silent on the disclosure of electronic information. However, this issue is considered under the CIArb Protocol for E-Disclosure in Arbitration (CIArb Protocol for E-Disclosure) and the IBA Rules on the Taking of Evidence in International Commercial Arbitration (IBA Rules).

The CIArb Protocol for E-Disclosure[18] is a stand-alone document that deals with the disclosure of electronically stored information in international arbitration. The Protocol highlights the importance of co-operation between the parties and focuses on the early consideration of the disclosure of electronically stored information where it is appropriate and necessary in arbitral proceedings. The CIArb Protocol for E-Disclosure art.1 provides that:

> "In any arbitration in which issues relating to e-disclosure are likely to arise the parties should confer at the earliest opportunity regarding the preservation and disclosure of electronically stored documents and seek to agree the scope and methods of production."[19]

The Protocol also identifies tools and techniques for reducing the burdens of electronic discovery, including limiting disclosure to specific categories of documents, specific date ranges, the use of agreed search terms, the use of agreed software tools, the use of data sampling and formats and methods of electronic discovery.

Reflecting similar concepts to those set out in the CIArb Protocol for E-Disclosure, the IBA Rules[20] provide a useful resource for parties and arbitrators, enabling them to conduct the evidentiary process involved in international arbitral proceedings in an efficient and economical manner that harmonises the procedures commonly applied in international arbitration across different legal systems. First published in 1999, the IBA Rules were revised in 2010 to reflect current practices and challenges in international arbitration, most notably modifying the disclosure procedure to specifically provide for electronic documentation. The IBA Rules art.3 provides that electronic documents disclosed are to be submitted in the form "most convenient or economical ... that is reasonably usable by the recipients". Accordingly, should it be most convenient or economical for the documents to be provided by email, or to be provided on a USB flash drive, this is explicitly permissible. However, in keeping with underlying principles of party autonomy in international arbitration, this requires agreement between the parties. To combat excessive and unnecessary disclosure requests, the revised IBA Rules provide for a continuing requirement for any type of disclosure under the IBA Rules for a statement as to the relevance of the documents to the case and the materiality of the documents to the outcome of the case.[21] Clearly this provision improves the management of the arbitral process by reducing the proliferation of redundant paperwork.

Another influential resource that may assist parties and arbitrators who are faced with the issue of document disclosure is the books and articles published by David Howell.[22] Howell is a partner and co-head of Fulbright & Jaworski International LLP's International Arbitration and ADR practice group as well as a leading expert in commercial arbitration. His book *Electronic Disclosure in International Arbitration*,[23] together with other relevant works, provides a useful stepping stone towards more detailed guidelines on electronic disclosure. Also of practical assistance, the College of Commercial Arbitrators in its Protocols

[18] CIArb, "Protocol for E-Disclosure in Arbitration", CIArb Publication (2008), available at: *http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf* [Accessed February 16, 2012].

[19] See also CIArb Protocol for E-Disclosure arts 2 and 3, for emphasis on co-operation and early consideration.

[20] International Bar Association, "Rules on the Taking of Evidence in International Commercial Arbitration", IBA Publication (2010), available at: *http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx* [Accessed February 16, 2012].

[21] IBA Rules art.6(3).

[22] For more information see: *http://www.fulbright.com/dhowell* [Accessed February 16, 2012].

[23] David Howell (ed.), *Electronic Disclosure in International Arbitration* (Huntington, NY: Juris Publishing, 2008).

for Expeditious, Cost-Effective Commercial Arbitration (CCA Protocols)[24] develops best practice guidelines that highlight the importance of limiting discovery to what is necessary, in order to avoid the replication of court-style discovery. Although the CCA Protocols are intended for domestic application, they provide guiding principles that are applicable to limiting document disclosure in international arbitration.

The controls placed on the disclosure process are essential in limiting the time and cost associated with arbitral proceedings. This is evidenced in recent ICC statistics, which illustrate that 82 per cent of the costs in ICC arbitrations are those borne by the parties in presenting their cases.[25] Thus, by specifically allowing for electronic disclosure, limiting the scope of discovery and minimising redundant paperwork, it is possible to achieve effective management at this stage of the arbitral process.

4. Party-Appointed Experts

The use of party-appointed expert witnesses is common in international arbitration, yet lamentably the efficient use of these experts is far less common. The issues have centred on the impartiality of expert witnesses, as well as the need to reduce the costs and time delays associated with the proliferation of expert evidence. One of the most significant challenges related to the use of party-appointed experts is that they tend to be perceived as "hired guns", tailoring their evidence to support the interests of the party by whom they were appointed. This situation is exacerbated when parties and tribunals operate on an implicit understanding that this, indeed, is their role. Overcoming this challenge requires party-appointed experts to recognise that their duty is to the tribunal, not the party by whom they were appointed; only then is the expert's evidence going to be most efficiently and effectively utilised.

The use of party-appointed experts, and its associated challenges, is not unique to arbitration. Indeed, the use of experts has been the subject of much scrutiny in the context of domestic litigation in recent years, beginning in the United Kingdom and spreading throughout other common law countries. The lessons learnt in the courtroom are worth considering, as tribunals and parties to arbitration can consider how the courts have addressed these issues, and adapt their solutions to suit arbitration.

In 1996, Lord Woolf in the United Kingdom produced a report that expressed concerns over the excessive costs and delay involved in litigation.[26] Lord Woolf acknowledged the uncontrolled proliferation of expert evidence as a major contributing factor to the lengthy delays and high costs of litigation as this phenomenon gave rise to a tendency for experts to view themselves (and to be viewed) as being within the "camp" of the party by whom they are appointed and remunerated. This causes the risk that they will give partisan evidence as a "hired gun", an outcome which does nothing to assist either the tribunal, or indeed their "own" party. Further, this leads to a focus on the quantity of expert evidence, as opposed to its quality. Parties hoping to strengthen a weak case or perhaps simply hoping to render a strong one impenetrable have exhibited a tendency to call multiple experts where perhaps one would have sufficed, or to call an expert where none was needed. This too leads to unnecessary delay and cost which may result in an unjust outcome where there is financial inequality between the parties.

As a result of these concerns, Lord Woolf proposed a number of measures for reducing the likelihood of expert bias. These measures centred on the management of the arbitral

[24] CCA, "Protocols for Expeditious, Cost-Effective Commercial Arbitration", CCA Publication (2010), available at: *http://www.thecca.net/CCA_Protocols.pdf* [Accessed February 16, 2012].

[25] ICC, "Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on Arbitration", ICC Publication 843 (2007), available at: *http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf* [Accessed February 16, 2012].

[26] Right Hon. Lord Woolf M.R., *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996).

process through active case management by judges and full court control of how, when and by whom expert evidence is given. Fundamentally, his Lordship's reforms were based on the notion that the expert has an overriding duty to assist the court impartially and independently, and not to advocate the case of the party by whom he or she is retained.

The reforms that followed from the Woolf Report provide the context for the recent amendments to the IBA Rules regarding party-appointed experts and the CIArb Protocol for the Use of Party Appointed Expert Witnesses (CIArb Protocol for Party Appointed Experts). The IBA Rules and the CIArb Protocol for Party Appointed Experts provide a strong foundation for tribunals to build from in tailoring the optimal procedure for each particular arbitration.

The IBA Rules

While the IBA Rules are not exhaustive,[27] partly due to the wide scope of their intended operation, they provide a "tried and tested" basis upon which arbitral tribunals can manage their evidentiary procedure. Following the 2010 amendments, the revised IBA Rules art.5 now requires the party-appointed expert's report to contain a statement of independence from the parties, from their legal advisers and from the arbitral tribunal. This revision is a significant step towards establishing an assumption that party-appointed experts will be independent and reinforces the expert's duty to the tribunal. The revised IBA Rules also include a provision at art.5(2)(b) requiring the expert to provide a description of the instructions received from the parties. This ensures that the parties will not instruct the expert to behave in a manner that would affect the expert's impartiality. Further, the insertion of art.5(2)(g), requiring an affirmation of the expert's genuine belief in the opinions expressed in the report, obliges the expert to specifically consider the legitimacy of the evidence tendered.

Other 2010 revisions to the IBA Rules expressly provide for consultation between the tribunal and the parties at the earliest appropriate time "with a view to agreeing on an efficient, economical and fair process for the taking of evidence".[28] It is stated that this should include issues such as the "scope, timing and manner" of, among other things, "the preparation of witness statements and expert reports".[29] These revisions acknowledge the importance of expert evidence while also tailoring the process of adducing this evidence to each particular arbitration in a fair and efficient manner.

The CIArb Protocol for Party Appointed Experts

Another popular and helpful protocol for the engagement of party-appointed experts is found in the CIArb Protocol for Party Appointed Experts, which provides an established manner of conducting the evidence of expert witnesses.[30] The CIArb Protocol for Party Appointed Experts has been developed alongside the recent common law developments in the treatment of expert witnesses, and as a result of this it reflects and draws on many of these developments. This is most evident in the emphasis it places on the independence of experts.[31] It also requires the experts to meet before they tender their reports in order to establish areas of consensus on the relevant evidential issues.[32] Ideally, by addressing these issues at the earliest possible stage, the parties maximise efficiency in preparing their

[27] For example, there is some question as to how they operate in regard to hearsay, see S.I. Strong and James J. Dries, "Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?" (2005) 21(3) *Arbitration International* 301.

[28] IBA Rules art.2(1).

[29] IBA Rules art.2(2)(b).

[30] CIArb, "CIArb Protocol for the Use of Party Appointed Expert Witnesses", CIArb Publication (2007), available at: *http://www.ciarb.org/information-and-resources/practice-guidelines-and-protocols/list-of-guidelines-and-protocols* / [Accessed February 16, 2012].

[31] CIArb Protocol for Party Appointed Experts art.4.

[32] CIArb Protocol for Party Appointed Experts art.6.

evidence, and minimise the need for unnecessary expense in presenting their case. The CIArb Protocol for Party Appointed Experts is intended to provide more detailed guidance than the IBA Rules and also caters for tests and analyses to be conducted, an area upon which the IBA Rules are silent.

Under the CIArb Protocol for Party Appointed Experts, the experts must first enter a discussion to identify issues upon which they are to provide an opinion.[33] The experts must also identify tests and analyses that need to be conducted and, where possible, reach agreement on those issues, tests and analyses as well as the manner in which they shall be conducted. The tribunal may direct the experts to prepare and exchange draft outline opinions for the purposes of these meetings. These opinions are without prejudice to the parties' positions and are privileged from production to the tribunal. The CIArb Protocol for Party Appointed Experts also includes an important article that establishes the independence of party-appointed experts.[34] This declaration of independence follows the recommendation of the Woolf Report in requiring the expert to acknowledge that his or her duty is to the arbitral tribunal.

Hot-tubbing, witness conferencing and the exchange of early drafts

An essential tenet of independent experts is that, in addition to being independent, they ensure that the expert evidence is tendered as efficiently as possible. An important aspect of maximising the efficiency of the arbitral process is to encourage the experts to limit the differences between themselves prior to giving evidence. This allows the evidentiary hearings to be conducted more quickly, and thus with less expense. It also increases the chances of settlement, as the conferral of experts with their colleagues in relation to matters of contention may lead them to revise their opinion in such a way that a party's claim no longer presents the same prospects of success as originally thought.

Beyond the guidelines prescribed by the IBA Rules and CIArb Protocol for Party Appointed Experts, there are several methods that can be adopted to streamline contentious issues, namely hot-tubbing (witness conferencing) and the exchange of draft reports. Arbitral tribunals and parties to an arbitration should, as a matter of best practice, consider these methods in utilising expert evidence.

Hot-tubbing is a positive trend in arbitration, and it is becoming an increasingly common method of disposing of traditional witness examination and cross-examination procedures. While there is no standardised definition of exactly what "witness hot-tubbing" or "witness conferencing" entails in the context of arbitration, generally they refer to the process of taking evidence from witnesses in the presence of other witnesses (from both sides of the dispute) and allowing them to engage with each other to test the accuracy of their opinions. Frequently, the term "hot-tubbing" is used in relation to expert witnesses and "conferencing" to refer to both lay and expert witnesses, but this distinction is not universal.

All the major international arbitration rules and institutions permit the arbitral tribunal considerable flexibility in dealing with witnesses, and some specifically empower the tribunal to adopt hot-tubbing techniques. For example, the IBA Rules provide that:

> "The Arbitral Tribunal … may vary this [traditional] order of proceeding, including the arrangement of testimony by particular issues or in such a manner that witnesses presented by different Parties be questioned at the same time and in confrontation with each other."[35]

However, there are no standard guidelines or rules provided by any arbitral institution to facilitate conferencing or hot-tubbing, primarily because the nature of the process is particularly dependent on the specific nature of the matter.

[33] CIArb Protocol for Party Appointed Experts art.6.

[34] CIArb Protocol for Party Appointed Experts art.4.

[35] IBA Rules art.8(2).

Hot-tubbing and witness conferencing will not always be appropriate, but are especially effective in highly technical arbitrations where there are complex factual and technical issues that need to be resolved and both parties rely on evidence from a number of expert witnesses. The efficiency derives from the fact that witnesses "in conference" can effectively confront each other's evidence on the spot. Traditional methods of each side calling their witnesses in a linear fashion can lead to a cognitive disconnect in the arbitrators' and counsel's understanding of the issues. This disconnect is exacerbated in situations where there are large numbers of witnesses and it could be days before the contradictory evidence of an expert witness's counterpart is heard. Further, it is possible that due to the highly technical nature of the evidence, opposing counsel will not be able to develop fully informed questions until they have been advised by their own expert. Therefore, allowing experts to analyse and question directly the evidence of other experts ensures greater celerity of the hearing.

Hot-tubbing can be an efficient and effective tool when used correctly, but care must be taken to ensure the proceedings are conducted in a manner that will result in the most accurate, as well as efficient, evidence. Tribunals wishing to utilise these methods of adducing expert evidence should pay heed to court guidelines such as those discussed above in ensuring that the process is undertaken as effectively as possible.

Another effective way of limiting the differences between experts is to require them to exchange drafts of their reports early in the proceedings. This allows for the early clarification of contentious issues. Further, it exposes the experts to the views of their fellows, which may prompt them to consider things differently, and potentially reach consensus on some of the issues at the outset of proceedings. The CIArb Protocol for Party Appointed Experts allows for, but does not mandate, the exchanging of draft reports by expert witnesses, when so directed by the arbitral tribunal.[36] It is suggested that, as far as is practical, tribunals should utilise this discretion in order to facilitate the most efficient procedure for hearing expert evidence.

Best practice directions

The effective use of party-appointed expert witnesses requires a proactive acknowledgement by the arbitral tribunal of the difficulties of adducing expert evidence, and communication with the parties as to the best process to be utilised in managing this evidence. As a matter of general guidance, the tribunal should raise this issue with the parties at the earliest practical stage of the proceedings, to ensure that all the parties and the tribunal are aware of the ensuing process.

Best practice directions for the appointment and use of expert witnesses should have regard to an early identification of the areas that will require expert evidence and an appointment of the experts, with the approval of the tribunal. This will ensure that expert evidence is only heard on relevant issues. The hearing of expert evidence can be superfluous, especially in situations where the tribunal already possesses the relevant expertise. Further, it is not uncommon for the situation to arise whereby, in the process of determining the issues on which expert evidence will be produced, the parties find that the scope of their disagreement on those issues does not require the production of expert evidence.

The tribunal should then settle on joint briefs to the experts within each discipline area. This should include directions for two types of report to be produced. First, joint reports from the experts in each area of expertise are required, identifying areas of agreement and disagreement in response to their briefs, with reasons for disagreements. Secondly, the experts must produce individual reports, but only on areas of disagreement. This requires the experts to confer, and limit the differences as far as possible. The tendering of a joint report brings cost and time benefits, as well as the increased utility of the evidence, as the

[36] CIArb Protocol for Party Appointed Experts art.6.1.

tribunal's attention, and that of the parties, will be focused primarily on the contentious issues.

By considering recent common law developments in this area and guidance provided by the IBA Rules and the CIArb Protocol for Party Appointed Experts, parties to international arbitration are provided with a strong model by which the arbitral process can be managed. Together with the impetus provided by the trend towards active case management, ensuring best practice begins with a proactive approach to the management of party-appointed experts, with procedural decisions being made by the parties and the tribunal at the earliest possible stage of the proceedings.

5. Witness Statements

As a product of the factually complex nature of international arbitration, witness statements, as opposed to oral evidence in chief, have become integral to the international arbitral process. The present use of witness statements in the evidentiary process is a product of hybridisation, where elements of common law and civil law procedure are drawn upon to guide the conduct of international arbitration. However, there are significant questions to be asked about whether the present practice delivers the best outcome for arbitral processes. The challenge facing international arbitration is how to manage the use of witness statements as a tool for promoting greater efficiency during the hearing stage of arbitral proceedings.

Use of witness statements in international arbitration was intended to overcome the inefficiencies of oral testimony through the submission of the detailed written testimony of each witness. This would bridge the gap between participants in the arbitral process by allowing parties from different cultural and legal backgrounds to present evidence to arbitral tribunals in a fair manner. In theory, this would reduce the length of hearings and give parties notice before the evidentiary hearing, forcing them to understand the pertinent issues at a relatively early stage in the proceedings and assist counsel in preparing for the hearing on the merits. In some cases, written statements entirely replace oral testimony where, for example, the opposing party concludes that cross-examination would not be productive.

However, heavy reliance on written witness statements raises concerns as to the reliability of evidence provided by written testimony. Further to this issue, the reality in international arbitration is that witness statements are often predominantly drafted by lawyers as a detailed account of the witness's testimony and merely signed and affirmed by the witness. Without any clear and mandatory ethical guidelines in the international arbitration process, the extensive preparation and proofing of witnesses means that witness statements are now a vehicle of advocacy, not of evidence. As one commentator noted:

> "Written witness statements can bear little relation to the independent recollection of the factual witness, with draft after draft being crafted by the party's lawyer or the party itself, with the witness's written evidence becoming nothing more than a special pleading, usually expressed at considerable length."[37]

In these cases, the value of a witness statement is diminished. Consequently, lawyer involvement in drafting witness statements should be kept to a minimum.

Another contributing factor to the flawed use of witness statements in international arbitration is the structural context in which the practice takes place. Unlike domestic courts, international arbitration has no mandatory rules of evidence. Therefore, each arbitration procedure can, in theory, be drawn on a blank canvas. This puts witness statements at risk of being used without consideration of their utility in the particular dispute, or the manner in which such evidence should be adduced. Except where the particular arbitrator or arbitral

[37] V.V. Veeder, "Introduction" in Laurent Lévy and V.V. Veeder (eds), *Arbitration and Oral Evidence* (Paris: ICC Publishing, 2005); Richard H. Kreindler, "Benefiting from Oral Testimony of Expert Witnesses: Traditional and Emerging Techniques" in Laurent Lévy and V.V. Veeder (eds), *Arbitration and Oral Evidence* (Paris: ICC Publishing, 2005), p.7.

tribunal takes a proactive approach to managing the evidentiary process, there is no inbuilt mechanism that prevents the abuse of witness statements.

In regard to cost and efficiency and obviously as a direct result of the profound involvement of lawyers in the process, the expense incurred in drafting witness statements represents a very substantial part of the cost of the preparation of a case. Similarly, the additional time spent deconstructing witness statements during cross-examination to discredit a witness's written testimony significantly lengthens evidentiary hearings and adds further to the largest component of costs incurred in arbitral proceedings—counsel's fees.[38] Furthermore, the current approach to witness statements generates a vast volume of documents which are tendered to the tribunal, thus contributing to the already existing strain on resources.

As noted above, the IBA Rules and some institutional arbitration rules address some aspects of how witness statements should be used in international arbitration. However, the approach taken is not prescriptive and does not address the significant flaws in current practice. In order to rein in over-zealous counsel and to avoid practices that lead to escalating costs of arbitration, arbitral tribunals need to take a more proactive approach to controlling the use of witness statements. It must always be kept in mind that witness statements are most effective where they are concisely written and do not simply replace or repeat the same information to be given during the oral hearing. Ultimately, the role and management of witness statements needs to be tailored to the individual needs of each particular arbitration.

In light of these issues, the role of witness statements in international arbitration and their content are questionable. Until a settled approach for dealing with witness statements is reached, it is worth keeping in mind some guiding principles:

1. Documents should be allowed to speak for themselves; witness statements should only be used to prove facts that cannot be proved from documents.
2. Where given by a witness of fact, a witness statement should restrict itself to matters of fact alone, rather than being an extension of the party's submissions.
3. Witness statements are more convincing and persuasive where they are drafted in a concise fashion, without too many rhetorical frills or excessive partiality tailored to further the party's claims.
4. The role of counsel in drafting a witness statement should be limited to the presentation of witness evidence; the statement must be that of the witness and not the lawyer.
5. A proactive approach to case management is essential to achieving a common understanding between the parties and content of witness statements.

The efficient use of witness statements is a worthy goal, and given the desire to do so, it is certainly within the grasp of any arbitral tribunal. When used as intended, witness statements can be an effective mechanism in preparing for arbitration and can assist in maximising the efficiency of the arbitral process.

6. Limited-Time Procedures

It is acknowledged that hearing procedures in international arbitration contribute significantly to the delay of arbitral proceedings. Countering delay through the use of limited-time procedures, such as "stop clock" or "chess clock" has become a prevailing trend in international arbitration. These techniques impose a time limit on proceedings whereby the arbitral tribunal will establish in advance of the hearing the precise number of hours and

[38] Queen Mary University of London and PriceWaterhouseCoopers, *International Arbitration: Corporate Attitudes and Practices 2006*, p.20, available at *http://www.arbitrationonline.org/docs/IAstudy_2006.pdf* [Accessed February 16, 2012].

minutes that will be allocated to the arbitration hearings. This total number of hours and minutes is then allocated between the parties equally, with some additional time allocated to the arbitrators themselves. It is then left to the parties to manage their respective time allocation to ensure that they leave sufficient time for any opening statements, cross-examinations, redirect examinations and closing statements. If a party runs out of time, that party should not expect that additional time will be given, except in exceptional circumstances. In order to monitor the time allocations, a stop clock or chess clock is used. At the end of each day of hearings, the tribunal and the parties will tally how many minutes each party and the tribunal has used, respectively. In that way, the parties can keep track of how many minutes each has left to present its case.[39]

By limiting the amount of time allocated to each party at various stages of the arbitral proceedings, the time and expense associated with hearings can be minimised as parties are encouraged to make the most prudent use of the time allotted and to make strategic choices as to which witnesses to cross-examine regarding which issues.[40] Further, the parties' control of the arbitral proceedings is preserved and does not risk becoming lost in the vortex of an intermediate process.

Despite their merits, limited-time procedures cannot be applied automatically or routinely to all arbitral hearings. Parties need to give careful consideration to their needs before adopting limited-time procedures as they work best when the parties have a roughly equal number of witnesses and are both represented by similarly sophisticated counsel who are well prepared for the hearings and can intelligently make the difficult trade-offs required by stop-clock rules. The use of limited-time procedures may also have a detrimental effect when the case is "unbalanced", in the strength of either evidence or counsel.[41]

Likewise, there are natural justice concerns associated with the use of limited-time procedures as the parties are required to plan the conduct of the arbitration hearing in a manner that accommodates strict time limits to ensure the parties have a reasonable opportunity to present their case. Without careful consideration of the parties' needs, limited-time procedures can risk inhibiting fair and proper administration of the case in favour of a rigid false "equality" between the parties. Thus, parties need to take measures to ensure a fair procedure, in both form and substance, when adopting limited-time procedures. These considerations highlight the importance of adopting proactive management techniques which can be an important tool in managing the arbitral process and ensuring that it continues to meet the needs of its parties.

7. Conclusion

Broader discovery, longer briefing schedules, considerably larger briefs, far greater reliance on experts and witness testimony and increasing procedural challenges are contributing to the perception that international arbitration is as drawn out and expensive as court litigation. In order to retain its position as an effective and efficient dispute resolution process, international arbitration needs to continue to adapt to meet the continually evolving needs of its users. In doing so, it is essential that the arbitral process be effectively managed in a proactive manner that promotes a more streamlined and disciplined yet tailor-made process.

While the aforementioned techniques are not exhaustive, both parties and arbitral tribunals can benefit from these practical tools to facilitate efficient procedures which enable better control of time and cost and more effective management of the arbitral process. Ultimately, the appropriate procedural tools will depend on the specific nature of each dispute and the needs of the parties involved.

[39] Albert A. Monichino, "Stop Clock Hearing Procedures in Arbitration" (2009) 27(2) *Asian Dispute Review Journal* (July) 9.

[40] Albert A. Monichino, "Stop Clock Hearing Procedures in Arbitration" (2009) 27(2) *Asian Dispute Review Journal* (July) 9.

[41] Nicolas Ulmer, "The Cost Conundrum" (2010) 26(2) *Arbitration International* 243.