Stories from the Hearing Room: Experience from Arbitral Practice

Essays in Honour of Michael E. Schneider

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Improving Arbitral Procedure: Perspectives from the Coalface*

Doug Jones

§11.01 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.[1] As a result, this has had the effect of squandering the original cost-effectiveness that had characterised arbitration as a competitive alternative to litigation. Together with the proliferation of international dispute settlement mechanisms and the sophistication of technological advancements, international arbitration is now faced with the challenge of striking a proper balance between the arbitral process and the needs of its users.

In this essay, I seek to examine these challenges facing international arbitration, within the broader context of achieving greater efficiency of the arbitral process. In my opinion, the root causes of these problems are not associated with the intrinsic nature of international arbitration, but in fact lie with the parties involved and the manner in which they choose to conduct their arbitral proceedings. It is therefore the parties, the tribunal, and the arbitrators who are best placed to renew international arbitration as an efficient and cost effective avenue for the resolution of international commercial disputes. Achieving this requires arbitrators to engage in proactive case management techniques, together with reforms to the way in which party-appointed experts and witness statements are used in arbitral proceedings.

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

It is important to note that, ideally, arbitration is a method of alternative dispute resolution that should be distinguishable from litigation. Unlike litigation, arbitration preserves the autonomy of the parties, allowing them to tailor the arbitration process to meet their specific needs. Parties to international arbitration are not constrained by rigid procedural rules one encounters in litigation, and thus, the arbitration process can remain flexible and adaptable to the legal cultures of the parties and the arbitrators.

§11.02 International Arbitration: Losing its Grip?

Once regarded as a swift and cost-efficient method of resolving international commercial disputes, international arbitration is now increasingly lamented as being bogged down in long and costly legal proceedings. 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 "losing its grip".

1. Proactive Case Management

Reviving international arbitration as a timely, efficient and cost effective 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.[2] Tribunals bear a duty to ensure that the arbitral process is conducted as expeditiously and efficiently as possible, to carry out their duties impartially, and to guarantee the equal treatment of parties.[3] However, as arbitration proceedings are increasingly more complex, the time and cost of arbitration have increased dramatically. Such costs and delays associated with international arbitration highlights the need for improvements in case management by the arbitral tribunal.

In recent times, complaints about perceived inefficiencies by the user community have become increasingly noticeable. A survey conducted in 2010 by the School of International Arbitration at Queen Mary University found that, while parties contribute most to the length of proceedings, according to the survey respondents, it is the arbitrators and arbitral institutions who are best placed to reduce delay.[4] The survey respondents gave preference to arbitrators that engage in proactive case management, by taking control of

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2. Charles Price and Yves Stans, *Using Costs as a Case Management Tool in International Arbitration*, 25(4) ASA Bulletin 704, 707 (2007).
3. Philippe Fouchard, *Relationship between the Arbitrator and the Parties and the Arbitral Institution*, ICC Bulletin, (1995).
4. White & Case and Queen Mary University, *2010 International Arbitration Survey: Choices in International Arbitration*, 32, available at <http://www.whitecase.com/files/upload/file

proceedings, firmly adhering to deadlines, and communicating effectively with the parties.[5] While there is no doubt that these considerations are fundamental to case management, a balance must be struck between efficiency and the right of the parties to a fair hearing. Nonetheless, in my experience there have always been opportunities for the parties and the tribunal to engage in proper case management.

Arbitral institutions have also adopted case management techniques to tackle the problem of increasing costs and delay. The most salient example of this is the International Chamber of Commerce's ('**ICC**') Task Force on Reducing Time and Cost in Arbitration. In 2007, the Task Force published a report setting out a number of practical techniques for improving efficiency in arbitration that can be used for organising arbitral proceedings. A second edition of this report was published in 2012, which contains further discussion of additional techniques to control time and cost. Consistent with the findings of the Queen Mary University survey, the ICC Task Force observed that:

> [I]f the overall cost of the arbitral proceedings is to be reduced, special emphasis needs to be placed on steps aimed at lowering 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. The recommendations include: the use of a case-management conference at the early stages of the 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]

§11.03 Pragmatic Solutions for Arbitrators

Promoting efficiency in international arbitration requires a proper balance to be struck between the arbitral process and the needs of the parties. One

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Repository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf> (accessed 14 Feb. 2014).

5. White & Case and Queen Mary University, above n. 4, 32.
6. ICC, *Techniques for Controlling Time and Costs in Arbitration: Report of the ICC Commission on Arbitration and ADR Task Force on Reducing Time and Costs in Arbitration*, 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/> (accessed 14 Feb. 2014).
7. ICC, above n 6.

of the greatest advantages of international arbitration is the flexibility of its procedural rules, as compared to the detailed rules of procedure and evidence found in most domestic legal systems. In my experience, by granting parties the absolute freedom to determine the rules of the arbitral procedure themselves, the tribunal is able to take into account the circumstances of the case and the needs of the parties. I have witnessed on various occasions how broad procedural discretion allows the tribunal to tailor procedures to a specific set of factual and legal issues, which in turn places the tribunal in the position of selecting the procedural rules appropriate to the contours of each dispute.

In light of the current challenges facing international arbitration, I have therefore adopted a number of pragmatic approaches for increasing efficiency in the arbitrations in which I participate. Arbitral tribunals must ensure that the process remains flexible and efficient, without sacrificing party autonomy. As discussed below, these approaches include the efficient use of party-appointed experts and witness statements, and the implementation of limited time procedures.

1. 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. One of the most significant challenges regarding the use of party-appointed experts is their tendency to act 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 is indeed 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.

The use of party appointed experts, and its associated challenges, is not unique to arbitration. It has been the subject of much scrutiny in the context of domestic litigation in recent years, beginning in the UK and spreading throughout other common law countries. The lessons learned in the courtroom are worth considering, by looking at how the courts have addressed these issues and how these solutions can be adapted to suit arbitration.

In 1996, Lord Woolf in the UK produced the *Access to Justice* report ("**Woolf Report**"), which expressed concerns over the excessive costs and delay involved in litigation.[8] The report acknowledged the uncontrolled

8. Right Hon. Lord Woolf MR, *Access to Justice: Final Report to the Lord Chancellor of the Civil Justice System in England and Wales* (1996).

proliferation of expert evidence as a major contributing factor to the lengthy delays and high costs of litigation. The report also identified the 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. There is then the risk that the party-appointed expert will give partisan evidence, which does nothing to assist either the tribunal, or indeed its 'own' party. Further, parties hoping to strengthen a weak case, or perhaps simply hoping to render a strong one impenetrable, tend to call multiple experts unnecessarily.

As a result of these concerns, the Woolf Report proposed a number of measures for reducing the likelihood of expert bias. These measures promoted active case management by judges and full court control of how, when and by whom expert evidence is given. In essence, Lord Woolf'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. Recent amendments to the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* ("**IBA Rules**") and the *CIArb Protocol for the Use of Party Appointed Expert Witnesses* ("**CIArb Protocol for Party Appointed Experts**") were born out of this context, providing a strong foundation for tribunals to tailor the optimal procedure for each particular arbitration.

(a) The IBA Rules

While the IBA Rules are not exhaustive,[9] partly due to the wide scope of their intended operation, they provide a "tried and tested" basis upon which arbitral tribunals can design their evidentiary procedure. Article 5(2)(c) of the IBA Rules require the party-appointed expert's report to contain a statement of independence from the parties, from their legal advisors 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 IBA Rules also include a provision at Article 5(2)(b) requiring the expert to provide a description of the instructions that they have 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, Article 5(2)(g), which requires 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.

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9. For example, there are some questions as to how they operate in regards to hearsay. See S I Strong and James J Dries, *Witness Statements under the IBA Rules of Evidence: What to Do about Hearsay?*, 21(3) Arbitration International 301, (2005).

(b) 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. The CIArb Protocol for Party Appointed Experts was developed alongside the recent common law developments in the treatment of expert witnesses, and as a result, it reflects and draws on many of these developments. This is most evident in the emphasis it places on the independence of experts.[10] In order to establish areas of consensus on the relevant evidential issues, it also requires the experts to meet before they tender their reports.[11] Ideally, by addressing these issues at the earliest possible stage, the parties maximise efficiency in preparing their evidence, and minimise the need for unnecessary expense in presenting their case.

In this way, the CIArb Protocol for Party Appointed Experts is intended to provide more detailed guidance than the IBA Rules. It also caters for tests and analyses to be conducted – an area in which the IBA Rules are silent. Having first entered discussions and identified the issues, the experts must then identify tests and analyses that need to be conducted[12] and, where possible, reach agreement on those issues, tests and analyses as well as the manner in which they shall be conducted.[13] 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 protocol also includes an important requirement for party-appointed experts to provide a statement declaring their independence.[14] 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.

(c) Hot-Tubbing, Witness Conferencing and the Exchange of Early Drafts

In addition to ensuring the independence of experts, expert evidence ought to be tendered as efficiently as possible. An important aspect of maximising the efficiency of the 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 conferral between experts may lead

10. CIArb Protocol for Party Appointed Experts, Art 4.
11. CIArb Protocol for Party Appointed Experts, Art 6.
12. CIArb Protocol for Party Appointed Experts, Art 6(1)(a)(ii).
13. CIArb Protocol for Party Appointed Experts, Art 6(1)(a)(iii).
14. CIArb Protocol, Arts 4(4)(k) and 8

to the revision of their opinions, in a way such that a party's claim no longer presents the same prospects of success as originally thought.

Beyond the guidelines provided by the IBA Rules and the CIArb Protocol for Party Appointed Experts, there are several methods that can be adopted to streamline contentious issues, such as hot-tubbing, or witness conferencing, and the exchange of draft reports. These methods have been highly successful in my experience, and should be considered by arbitral tribunals and parties to an arbitration as a matter of best practice.

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."[15] 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 dependent on the specific circumstances of the matter.

Hot-tubbing and witness conferencing will not always be appropriate, but are especially effective in highly technical arbitrations where there are complex factual issues involving 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' 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

15. IBA Rules, Art 8(3)(f).

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.

The other way of limiting the differences between experts, namely the early exchange of draft reports, allows for the early clarification of contentious issues. From my experience, by being exposed to the views of other experts, this method can prompt experts to consider things differently, potentially reaching a consensus on some issues at the outset. The CIArb Protocol for Party Appointed Experts provides a mechanism for this exchange of drafts, when so directed by the arbitral tribunal.[16] As far as is practical, tribunals should utilise this discretion in order to facilitate the most efficient procedure for hearing expert evidence.

(d) Best Practice Directions

The effective use of party appointed expert witnesses requires a proactive acknowledgement on behalf of the arbitral tribunal as to the difficulties of adducing expert evidence. As a matter of general guidance, the tribunal should communicate the processes to be followed to the parties at the earliest practical stage of the proceedings. This will 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 the early identification of the areas that will require expert evidence. It should also require the appointment of experts to be approved by the tribunal. Often 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. Regard to these potential issues will ensure that expert evidence is only heard on relevant issues.

The tribunal should then settle joint briefs to the experts within each discipline area. This should include directions for two types of reports produced. The first type consists of joint reports from the experts in each area of expertise identifying areas of agreement and disagreement in response to their briefs with reasons for disagreements. The second type consists of individual reports produced from the experts but only on areas of disagreement. This requires the experts to confer and limit the differences as far as possible. By tendering a joint report, not only does this realise cost and time benefits, but

16. CIArb Protocol, Art 6(1)(a)(iv).

it also increases the utility of the evidence by focusing the attention of the tribunal and the parties on the contentious issues.

Together with proactive case management, ensuring best practice begins with the management of party appointed experts and the making of procedural decisions at the earliest possible stage of the proceedings.

2. Witness Statements

As a product of the factually complex nature of international arbitration, witness statements, as opposed to oral evidence in chief, have become an integral component in 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 as to whether the present practice is delivering the best outcome for arbitral processes. The challenge facing international arbitration is how to harness witness statements as a tool for promoting greater efficiency during the hearing stage of an international arbitration.

The use of written statements in international arbitration was intended to overcome the inefficiencies of oral testimony by using detailed written testimony of each witness. It can level the playing field and 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, the use of witness statements would reduce the length of hearings and give parties notice prior to the evidentiary hearing. It also allows parties to understand the pertinent issues at a relatively early stage in the arbitration 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. The reality in international arbitration is that witness statements are predominantly drafted by lawyers, only to be signed and affirmed by the witness. 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 tribunal takes a proactive approach to managing

the evidentiary process, there is no inbuilt mechanism that prevents the abuse of witness statements.

These concerns have obvious cost and efficiency implications, as 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' written testimony significantly lengthens evidentiary hearings. This adds further to the advocate's fees, which often form a significant component of costs incurred in arbitral proceedings. Furthermore, the current approach to witness statements generates a vast volume of documents to be tendered to the tribunal, thus contributing to the already existing strain on resources.

There have been several developments, by way of international guidelines and rules, that have sought to address these issues. For example, the IBA Rules acknowledge the potential influence of counsel over witnesses, by requiring witnesses to disclose any present and past relationships they have with any of the parties to the dispute.[17] Also in addition to the IBA Rules, the IBA's most recent input with the release of the *IBA Guidelines on Party Representation in International Arbitration* ("**IBA Party Representation Guidelines**") specifically address the issue of counsel conduct. The IBA Party Representation Guidelines do not intend to displace applicable mandatory laws, professional or disciplinary rules, or agreed arbitration rules.[18] Nor do they intend to undermine counsel's duty of loyalty to its client or its obligation to present its case to the arbitral tribunal. Instead, the IBA Party Representation Guidelines recognise that the role of counsel in drafting written witness testimony should be limited, but not necessarily excluded.

These rules and guidelines provide a foundation for formulating a tailored approach to witness statements. In order to reign in over-zealous counsel and to avoid practices that lead to escalating costs of arbitration, a more proactive approach needs to be taken by the arbitral tribunal with respect to controlling the use of witness statements. In doing so, it is worth keeping in mind some guiding principles:

(i) documents should be allowed to speak for themselves, witness statements should only be used to prove facts that cannot be proved from documents;

(ii) 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;

17. IBA Rules, Art 4(5)(a).
18. IBA Party Representation Guidelines, guideline 3.

(iii) 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;

(iv) the role of counsel in drafting a witness statement should be limited to the presentation of witness evidence, and the statement must be that of the witness and not the lawyer; and

(v) a proactive approach to case management is essential to achieving a common understanding between the parties and content of witness statements.

It is my strong opinion that the efficient use of witness statements is a worthy goal to pursue, 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 in the hearing room.

3. Limited Time Procedures

Finally, it has been my experience that the hearing in international arbitration often contribute significantly to the delay of arbitral proceedings. In this context, the use of limited time procedures, such as 'stop clock' or 'chess clock' hearing procedures, has proven to be successful and 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 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 each party to manage its respective time allocations 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, the tribunal and the parties will tally the minutes that have been used by each party and by the tribunal. In that way, the parties can keep track of how many minutes each has left for its case.[19]

By limiting the amount of time allocated to each party, the time and expense associated with hearings can be minimised. Parties are encouraged to make the most prudent use of the time allocated and to make strategic choices

19. Albert A Monichino, *Stop Clock Hearing Procedures in Arbitration* 27(2) Asian DR 76, 78 (2009).

as to which witnesses, and on which issues, to cross-examine.[20] Further, the parties' control of the arbitral proceedings is preserved without the risk of becoming lost in the vortex of an intermediate process.

Despite the advantages, limited time procedures are not always suitable to all arbitral hearings. Parties need to give careful consideration to their needs before adopting limited time procedures. They work best when the parties have a roughly equal number of witnesses, 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. However, they are not appropriate if the case is "unbalanced", either in the strength of evidence or counsel.[21]

There are also natural justice concerns associated with the use of limited time procedures. Without careful consideration of the parties' needs, time limited procedures have the risk of inhibiting fair and proper administration of the case, resulting in a rigid and 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. Again, returning to the central theme of this essay, these considerations highlight the importance of adopting proactive case management techniques in resolving potential issues and ensuring that the arbitral process is tailored to meet the needs of the parties.

§11.04 Conclusion

In order to retain its position as an effective and efficient dispute resolution process, international arbitration needs to continue to adapt and meet the evolving needs of its users. Resolving the current challenges facing international arbitration requires arbitral tribunals to embrace case management in a proactive manner. It is necessary for users of arbitration to devise a more streamlined and disciplined approach, but at the same time maintaining a process which is tailor-made to the needs of users. By doing so, the international arbitration community could move towards an arbitral procedure that is more reflective of its quintessential characteristics: efficiency, celerity and affordability. In my opinion, the task of dealing with these challenges needs to be a co-operative effort by all involved in the arbitral process, from arbitrators and arbitral institutions, to counsel and parties.

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20. Monichino, above n 19, 78.
21. Ulmer, above n 1, 243.