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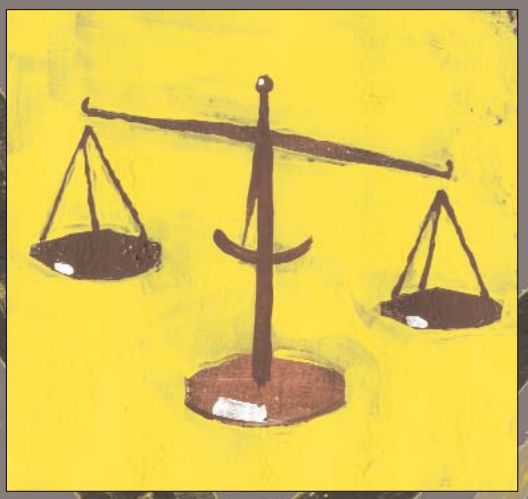

A FAIR AND EFFICIENT INTERNATIONAL ARBITRATION PROCESS

BY JOHN FELLAS

THIS ARTICLE DISCUSSES HOW ARBITRATORS, PARTIES AND COUNSEL CAN CONTRIBUTE TO THE FAIRNESS AND EFFICIENCY OF THE INTERNATIONAL ARBITRATION PROCESS IN WHICH THEY ARE INVOLVED.

One of the perennial debates about arbitration is whether it really is quicker and cheaper than litigation. Proponents of that view point to aspects of arbitration, such as less discovery and narrower grounds for appeal, that would make it likely to be faster and less costly. Detractors point to the fact that, by contrast to litigation, arbitration proceedings are rarely resolved on a motion to dismiss or for summary judgment. I believe that this debate is somewhat beside the point. This is because parties usually make the decision about whether to select arbitration over litigation at the time they negotiate their agreement.[1] At that time, the question of whether arbitration would be quicker and cheaper than litigation turns on many factors that cannot be known with any degree of certainty, such as the nature of the dispute that in fact arises; the relationship between the parties when the dispute arises; whether one of the parties would commence a litigation notwithstanding the arbitration clause and if a lawsuit is commenced, where it would be brought; and whether any arbitration award would be susceptible to challenge.[2]

The long-standing debate is especially beside the point when it comes to international transactions. This is because the reasons to include an arbitration clause in a contract between parties from different countries do not rest solely on supposed savings in cost and time, but lie elsewhere. The two most important reasons are:

- Arbitration provides a neutral forum to resolve international disputes, as compared to the national courts of one of the parties to the contract.

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- International arbitration awards are easier to enforce than national court judgments.[3]

In most international cases, these reasons are sufficient to recommend arbitration over litigation regardless of one's views as to their relative speed and cost. When it comes to international arbitration, the focus should be less on whether it is cheaper or quicker than litigation, and more on how the arbitrators, the parties and counsel can make it as fair and efficient as it can be.

This is a meaningful enterprise. While lawsuits may be subject to procedural rules that govern even the most minor details of the process (local rules of U.S. district courts sometimes go so far as to dictate the size of the font used in court submissions), arbitration is different. One of its central characteristics is flexibility. As a general matter, arbitration rules provide a framework within which the proceeding is to be conducted, but are not so detailed that they dictate every stage of the case.[4] The arbitrator and the parties can determine fundamental aspects of the process (unless the parties have otherwise provided in their arbitration clause or submission agreement), such as whether depositions are permitted, whether there will be live direct testimony or witness statements, the deadlines for filing of papers, and so on.

The importance of speed in international arbitration finds expression in the arbitration rules of the major arbitral institutions.[5] But speed is not an unqualified virtue. An arbitrator could quickly decide a case by flipping a coin, but that would be capricious. Thus, speed cannot come at the cost of fairness and justice. Arbitrators should not unfairly limit the opportunity of the parties to present their case solely for the sake of resolving the case quickly. This requirement, too, finds expression in the arbitral rules of the major institutions.[6]

Given the flexibility of arbitration, the choices made by the arbitrators and the parties will, by their nature, impact the fairness and efficiency of the process. This article offers suggestions that parties and arbitrators can make to promote the goals of fairness and efficiency. What I have to say is a product of my own experience as an arbitrator and as counsel in arbitration proceedings. It is not the first word on the subject[7], and certainly does not purport to be the last.

Arbitration Clause

International arbitration begins with an arbitration clause, and that clause casts a shadow over the entire process. A poorly drafted arbitration clause (such as one that does not identify the place or language of arbitration, if issues) could result in delay since the parties will have to resolve those issues before the arbitration can begin. A "pathological" clause, one that does not unequivocally choose arbitration, could result in litigation over whether there will even be an arbitration proceeding at all.[8] Drafting the clause appropriately is, therefore, critical to ensuring that the arbitration process runs smoothly. For enlightenment on this general subject, I commend readers to the numerous excellent guides to drafting a proper clause.[9]

One drafting issue that obviously has major cost considerations is whether to have one arbitrator or a panel of three. Generally, one arbitrator can decide a case more quickly and at less cost to the parties since there is only one arbitrator whose schedule has to be coordinated with the parties and counsel and only one arbitrator to be paid. In addition, one arbitrator can respond more quickly than three to disputes over discovery and other pre-hearing issues.

However, three are less likely to make an error. For this reason, I do not recommend a sole arbitrator in an international dispute in which more than a modest amount of money or important issues of principle or rights (such as to intellectual property) are at stake. I also do not recommend a sole arbitrator when the parties come from very different legal traditions or cultures. In this situation, three arbitrators are necessary to ensure that the parties' different viewpoints are represented.

Even when a case requires three arbitrators, efficiency can still be promoted. One approach is for the parties to authorize the chair of the panel to decide discovery disputes and other procedural issues without having to confer with the other members of the tribunal. The rules of some of the arbitral institutions explicitly contemplate this approach.[10]

Sometimes three arbitrators are appointed pursuant to the parties' agreement, but it later turns out that one arbitrator would be sufficient in the light of the dispute. In that situation, the parties can agree to have one of the three arbitrators hear the case, notwithstanding the arbitration clause. I know of at least one case where, in order to reduce costs, the parties decided during the arbitration proceeding to ask two arbitrators to step down, so that the chair of the tribunal could sit as a sole arbitrator for the remainder of the case.

Availability of Arbitrators

Another factor to take into account in selecting arbitrators is their schedules. Some arbitrators are in such demand that they are booked well over 18 months ahead. While having the dispute resolved as promptly as possible is not the only (or necessarily decisive) factor to consider in selecting an arbitrator, it is usually important from a business point of view so that the parties can get back to business.

Before accepting an appointment, an arbitrator owes it to

the parties to be candid about his or her schedule. The major arbitral institutions require arbitrator candidates to certify that they have the time to serve. Arbitrator candidates provided by the American Arbitration Association's "list procedure," for example, are required to certify that they are "able and available" to serve. "Ability" to serve, it seems to me, goes to the issue of whether one has the qualifications that might be required in a particular case (such as the ability to speak a particular language) and to the absence of conflicts. "Availability" to serve means the arbitrator's schedule will permit him or her to hold hearings at a reasonable time following the commencement of the case and to issue an award promptly following the closing of the record.

Preliminary Conference

Another important aspect of efficient arbitration is the setting of a schedule early in the case for the conduct of the entire proceedings. It is very common, regardless of the particular rules under which an arbitration proceeding is conducted, for the arbitrators and the parties to hold a conference (by telephone or in person) shortly after the constitution of the tribunal to establish such a schedule. Again, the rules of some of the institutions contemplate this.[11]

When setting a schedule for hearings, it is important for the parties and the arbitrators to anticipate and plan for the significant issues that might arise during the course of the proceedings. Failure to do so can throw off the entire schedule. For example, an international agreement may be governed by foreign law, which may necessitate expert testimony about that law. Or witnesses may have to testify through an interpreter, with the result that their testimony will take longer than if they testified in the language in which the hearings are being conducted. In such cases, the parties and the arbitrators should build into the schedule a timetable for the exchange of expert reports on foreign law, and should schedule sufficient hearing days to accommodate the giving of testimony through an interpreter. If the parties and the arbitrators fail to anticipate in this way, the entire proceeding is likely to be delayed.

Realism, not idealism, should govern the process of setting the schedule, especially when it comes to fixing the time for the hearings and scheduling enough hearing days. Hearings are generally scheduled to take place several months after the preliminary conference. This allows time for the parties to prepare their sides of the case. This includes, where necessary, taking discovery, exchanging pre-hearing briefs, engaging experts, obtaining and exchanging expert reports, preparing witness statements (if they are to be used), and the like. Therefore, at the time of the preliminary conference, everyone's schedule is likely to be relatively open for the scheduling of the hearings several months later.

If, once hearings begin, it becomes apparent that the case will not be concluded in the days set aside for them, it might be several months before another set of days can be scheduled due to the varying commitments of the participants. This not only delays the proceedings, but also adds to the cost. Counsel for the parties will inevitably forget something of the case between the end of one set of hearings and the beginning of the next, and will have to spend time refamiliarizing themselves with the record. The same goes for the arbitrators. I have been involved in numerous cases as counsel where there have been five or six sets of hearings scheduled months apart as a result of a failure to set an appropriate schedule at the outset.

Of course, it is often difficult to establish an appropriate schedule at a preliminary conference. In order to do so, the parties need to have a very good idea at that time about who their witnesses will be, how long they will testify, how long their cross-examination of the opposing party's witnesses will take and so on. It is not always easy to know this with certainty at such an early stage in the case.

Moreover, it is not always desirable to schedule one long set of hearings. The desire for speedy resolution must be balanced against the need to give the parties a fair opportunity to present their cases. Forcing a party and its attorneys to prepare in advance for 20 consecutive days of hearings might be an enormous burden—one that could adversely impact that party's case. If a large number of hearing days appear to be required, it is advisable to schedule more than one set of them. In a case involving 20 hearing days, for example, it might be worth attempting to schedule them over an eight to 10 week period. Alternatively, hearings can be bifurcated, a procedure discussed below.

Hearings

Not only is it necessary to schedule sufficient hearing days, it is also necessary to ensure that they are used efficiently. One thing that wastes time at hearings is cumulative testimony. Occasionally, counsel for parties make the same point again and again through the testimony of different witnesses out of fear that the arbitrators "won't get it."

Arbitrators can curb cumulative or irrelevant testimony by imposing strict time-limits for the parties' presentations. For example, each side can be allotted, say, 10 hours to present its case. The tribunal can use a stopwatch (or a chess clock) to time the presentations. I have always appreciated the discipline of this process of presenting my case within time constraints. Of course, under the arbitration rules of many well-

known arbitral institutions, arbitrators have authority to exclude irrelevant or cumulative evidence.[12] While I believe that arbitrators should use all the authority they have, placing time limits on presentations is an effective method of getting the parties and their counsel to agree to use their time efficiently.

Time spent in hearings can be shortened by using witness statements instead of live witness testimony on direct examination. Witness statements are a well-known feature of the litigation process in England and they are now well-accepted in international arbitration.[13] These statements are prepared in advance of the hearings and record the witness's direct testimony. They are given to the opposing party and to the arbitrators prior to the hearings. When written witness statements are used, direct examination of witnesses is often brief or nonexistent, and the main focus of the hearings is on cross-examination of witnesses. Witness statements save a considerable amount of hearing time, although this has to be balanced against the time (and, therefore, the costs) involved in preparing these statements. Witness statements also avoid surprise at the hearings, which can be helpful since discovery in arbitration is more limited than in litigation.

However, witness statements are not appropriate in every case. Where the witness's credibility is a decisive issue in the case, the arbitrators may need to hear the witness's entire direct testimony live. Assessing credibility rests not only on the content of testimony, but also on how it is delivered. The nuanced aspects of live direct testimony are lost in a written witness statement.

Need for Hearings

Parties and arbitrators often approach arbitration with the assumption that there will be hearings regardless of the nature of the dispute. The rules of the major arbitral institutions contemplate hearings. For example, Article 20.6 of the International Chamber of Commerce (ICC) Arbitration Rules require a hearing to be held if one party requests it.[14]

Hearings are not always necessary. Cases can sometimes be resolved on the basis of written submissions and documentary evidence without affecting the due-process rights of the parties. However, arbitrators are usually reluctant to forgo hearings. This reluctance stems from the fact that one of the few grounds on which an award might be vacated or denied confirmation is that a party did not have a fair opportunity to present its case.[15] As a result, arbitrators are often concerned that the denial of a request for a hearing will make the award susceptible to challenge. This concern is valid. It does the parties no good, from the standpoint of finality, to have an award be vulnerable to challenge. That simply commits the parties to years of litigation while one party seeks to have the award vacated and the other to have it confirmed.

It is important to note, however, that, while the number of arbitration cases resolved by dispositive motions are few, U.S. courts have upheld awards rendered without hearings.[16] I have been involved in ICC cases where the arbitrators entertained motions for summary judgment over the objection of a party who insisted on a hearing pursuant to Article 20.6 of the ICC rules. The arbitrators found that the hearing requirement in this rule was satisfied by having oral argument on the motion for summary judgment. Nevertheless, the concern about providing a full opportunity to be heard is well-founded and should not be minimized.

Bifurcating the Case

Bifurcating a case can promote efficiency. When people speak of bifurcation in litigation they tend to think of a liability phase and a damages phase. Arbitration can also be bifurcated into these phases and achieve the same benefits. However, because of the flexibility of arbitration, bifurcation does not have to follow the traditional liability/damages division.[17] In construction cases, for example, while there may be hundreds of discrete issues, the vast majority of the damages may be associated with only a handful of issues. Resolving these issues first might render it unnecessary to reach the remainder, as the parties may decide to settle once the important issues have been addressed.

Award

This article began with the arbitration clause and it closes, appropriately, with the award. Arbitrators should aim to issue an award promptly after the close of the record to ensure that the award is enforceable.[18] An award that is susceptible to challenge might transform the arbitration into the first skirmish in a long battle as each party engages in protracted litigation after the award is rendered.

Conclusion

There is no *a priori* answer to the question of how to make arbitration fair and efficient. Each case depends on its facts. Resolving an arbitration on the basis of documentary evidence may be appropriate in one case, but not another. Witness statements may be suitable in one case, but not another. While the arbitrators have the ultimate responsibility to keep the proceeding on track, the parties and counsel are key players and their choices can contribute toward the achievement of these goals. ■

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ENDNOTES

[1] Parties do sometimes agree to submit a dispute to arbitration after it has arisen, and, in such cases, it might be possible to make a relatively well-informed decision as to whether arbitration or litigation would be quicker or cheaper.

[2] I do not mean to suggest that it is never possible to make an informed decision, at the contract negotiation stage, about whether litigation or arbitration would be the quicker or cheaper option. For example, in the case of a loan agreement under which party A lends money to party B, there is a good basis to believe that litigation might be quicker than arbitration. This is because the most likely dispute arising out of such a contract would be that B fails to pay back the money due to A, a dispute susceptible to resolution through summary procedures.

[3] The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards—often referred to as the New York Convention—gives effect to arbitral awards in over 130 countries which have ratified the treaty. 330 U.N.T.S. 38, 21 U.S.T. 2517, T.I.A.S. No. 6997 (1958). There is no analogous treaty regarding the enforcement of foreign judgments with the scope of the New York Convention. Moreover, while the United States is a party to the New York Convention, it is not a party to any treaty regarding the enforcement of foreign judgments.

[4] For an interesting and enlightening criticism of the flexibility of arbitration, see William W. Park, "The 2002 Freshfields Lecture—Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion," (2003) 19 *Arb. Int'l* 79.

[5] Article 16.2 of the International Arbitration Rules of the International Centre for Dispute Resolution of the American Arbitration Association (ICDR rules) provides that "The tribunal, exercising its discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute." Article 20.1 of the Arbitration Rules of the International Chamber of Commerce (ICC rules) provides that: "The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means." And Article 14.1 of the Arbitration Rules of the London Court of International Arbitration (LCIA rules) calls upon arbitrators "to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute."

[6] Article 16.1 of the ICDR rules provides that: "Subject to these rules, the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case." Article 15.2 of the ICC rules provides that "... the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case." Similarly, Article 14.1 of the LCIA rules refers to the "Arbitral Tribunal's general duties at all times ... to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting on its case and dealing with that of its opponent."

[7] For an illuminating discussion, see David W. Rivkin, "21st Century Arbitration Worthy of Its Name," in *Law of International and Business Dispute Revolution in the 21st Century (Liber Amicorum Karl-Heinz Böckstiegel*), (Eds: Robert Briner, L. Yves Fortier, Klaus Peter Berger, Jens Bredow) (2001).

[8] Consider the following example of a pathological clause that appears in W. Laurence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* (3d ed. 2000): "In case of dispute, the parties agree to submit to arbitration, but in case of litigation the *Tribunal de la Seine* shall have exclusive jurisdiction."

[9] See, e.g., John M. Townsend, "Drafting Arbitration Clauses: Avoiding the Seven Deadly Sins," 58 (no. 1) *Dispute Resol.*, J. 28 (Feb.-April 2003); Paul D. Friedland, *Arbitration Clauses for International Contracts* (2000).

[10] Article 26.2 of the ICDR rules provides: "When the parties or tribunal so authorize, the presiding arbitrator may make decisions or rulings on questions of procedure, subject to revision by the tribunal." Article 14.3 of the LCIA rules states: "In the case of a three-member Arbitral Tribunal the chairman may, with the prior consent of the other two arbitrators, make procedural rulings alone."

[11] Article 16.2 of the ICDR rules provides that the tribunal "may conduct a preparatory conference with the parties for the purpose of organizing, scheduling and agreeing to procedures to expedite the subsequent proceedings." Article 18.4 of the ICC rules states: "when drawing up the Terms of Reference, or as soon as possible thereafter, the Arbitral Tribunal, after having committed the parties, shall establish in a separate document a provisional timetable that it intends to follow for the conduct of the arbitration and shall communicate it to the parties and the Court."

[12] Article 16.3 of the ICDR rules provides that: "The tribunal may in its discretion ... exclude cumulative testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which would dispose of all or part of the case."

[13] Article 20(5) of the ICDR rules specifically allows direct evidence to be presented through signed, written witness statements.

[14] Article 20.6 of the ICC rules provides that: "The Arbitral Tribunal may decide the case solely on the documents submitted unless any of the parties requests a hearing."

[15] Under the Federal Arbitration Act, an arbitral award may be vacated "[w]here the arbitrators ... [refused] to hear evidence pertinent and material to the controversy." (9 U.S.C. §10(a)(3).) Article V(1)(b) of the N.Y. Convention provides that the recognition and enforcement of an award may be refused where "[t]he party against whom the award is invoked ... was ... unable to present his case."

[16] See, e.g., *Griffin Indus. Inc. v. Petrojam*, 58 F. Supp. 2d 212, 219 (S.D.N.Y. 1999) ("[w]hile hearings are advisable in most arbitration proceedings, arbitrators are not compelled to conduct oral hearings in every case."); *Cragwood Managers, L.L.C. v. Reliance Ins. Co.*, 132 F. Supp. 2d 285, 289 (S.D.N.Y. 2001) (upholding interim order issued without hearings or oral argument); *British Ins. Co. of Cayman v. Water Street Ins. Co.*, 93 F. Supp. 2d 506, 512 (S.D.N.Y. 2000) (same).

[17] Article 16.3 of the ICDR rules provides that: "The tribunal may in its discretion...bifurcate proceedings ... ."

[18] The ICC rules explicitly require arbitrators to ensure that their award is enforceable. Article 35 provides: "In all matters not expressly provided for in these Rules, the Court and Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law." In *M&C Corp. v. Erwin Behr GMBH & Co., KG*, 326 F.3d 772 (6th Cir. 2003), the court relied on Article 35 of the ICC Rules to remand an arbitral award to the original arbitrator for clarification, despite the fact that the arbitrator was *functus officio*, having already rendered a final award. "We read [Article 35] to permit remand in this case, given that clarification by the original arbitrator is critical in order to make the [award] enforceable at law." *Id.* at 783-84.