Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings

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Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings

by DR. JOERG RISSE*

I. OPENING: THE MAGIC TRIANGLE

Some twenty years ago, time efficiency and cost saving were applauded ad nauseam as being the main advantages of arbitral proceedings.1 In the following years, arbitration has been a tremendously successful ‘product’ for solving disputes, in particular on an international level.2 However, the tide has turned in the meantime, and the inappropriate duration and the magnitude of costs incurred have been identified as the future tombstones of international arbitration.3 And it is true: mid-sized arbitrations are rarely concluded within two years, a significant number of them last four years or longer.4 Costs have definitely exploded: it is not rare that more than 10 % of the amount in dispute is ultimately paid to the arbitrators, the attorneys and the arbitral institutions.5 Against this background, small arbitrations have become almost unaffordable.

This article is based on a presumption: it is the parties themselves and their attorneys who are responsible for this deplorable development, namely that arbitrations have become lengthy and expensive; not responsible are the arbitral institutions, the arbitration rules or the arbitrators.6 In arbitration conferences all

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5 See Queen Mary University of London, 2006 International Arbitration Study: Corporate Attitudes and Practices, p. 19 et seq.; see also Appendix III ICC Arbitration Rules (2012), Appendix to s. 40 subsect. 5 DIS Arbitration Rules.
6 The parties themselves share this view: Queen Mary University of London, 2010 International Arbitration Survey: Choices in International Arbitration, p. 32.

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over the world companies join in the lament about the length and costs of arbitral proceedings, but in almost any given specific case the same parties and their external and in-house counsels are unwilling to accept rules which would accelerate the proceedings. They insist on two full rounds of submissions, a document production phase and witness statements, followed by a multi-day hearing and post-hearing briefs, sometimes in two additional ‘rounds’. When asked whether a deviation from this standard procedure would not be advisable to save time and costs the typical answer is: ‘In principle, we agree with innovative measures to accelerate the proceedings ... but not in this case.’ The reason for this reluctance is evident: too overwhelming is the fear that, if the case is ultimately lost, there will be complaints that not everything has been tried to win the case at hand. The resulting insistence on a full-fledged arbitration is understandable because the amounts in dispute are usually significant, and there is no way to appeal against an unfavourable award. But the parties need to make a choice: do they want a full-fledged arbitration following the usual route, or are they willing to accept certain limitations in order to ensure a swift and inexpensive dispute resolution process? The parties and the attorneys counselling the parties cannot have both.

The problem encountered by the parties resembles the ‘magic triangle’ which financial advisors use when consulting their clients on their future investments. For a customized investment plan the financial advisors typically ask their clients about their priorities, and they do so by presenting a triangle with the three corners ‘profitability’, ‘liquidity’, and ‘security’. The client is asked to mark by a dot within the triangle where his priorities lie. Evidently, no client can maximize all three elements for a future investment: an investment in the stock market might promise profitability but it is not very secure, an investment in real estate is of mediocre profitability and good security, but liquidity must be sacrificed. Professor William W. Park tells the instructive story of a Boston shoemaker advertising his services by offering to his patrons ‘fast service, low price, high quality – pick any two.’

Once again, the irreconcilability of all three objectives is evident, the patron must decide on his priorities. Professor Park continues by suggesting that parties in an arbitral proceeding are faced with a similar dilemma. And, indeed, a ‘magic triangle’ also exists for parties in international arbitration: here, the corners are ‘time efficiency’, ‘cost savings’ and ‘quality of the award’. Hence, the triangle looks as follows:

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And the parties to an international arbitration must choose now, by inserting a dot indicating their preferences, where their priorities lie: are they willing to maximize the quality of the award, regardless of time and costs? Then the dot will be close to the upper corner of the triangle. Or do they prefer to end their dispute quickly, even by a decision of mediocre quality? Do the parties prefer to save costs as to the arbitrators' fees and remuneration for outside counsel, trusting that the impact on the final award will be limited? Parties cannot evade an answer to these questions. If parties provide no answer, an automatism called 'international practice' will step in – and the result is the often criticized long and costly arbitral proceeding.

The focus on the accuracy of the award is an important element of any good arbitration. But in the conflict described, it is too easy to conclude that top quality of the arbitral award is an absolute and indispensable 'must' in arbitral proceedings, a 'must' to which time and costs must subordinate. Such reasoning would ignore the distinction between 'quality of the award' and 'quality of the proceedings'. In the eyes of intelligent parties, time and costs are an integral element of the quality of the proceedings and not an 'aliud'. Therefore, ten drastic proposals are hereinafter presented which are suitable to save time and costs although there is a price to be paid.

II. TEN CONCRETE PROPOSALS

The following ten proposals are arranged according to the general course of proceedings. Each proposal is phrased in a straightforward 'no ifs and buts' format, followed by a short reasoning and an evaluation of why and how time and costs can be saved by adopting this proposal. Finally, some concrete advice is given on how the proposal could be implemented in practice.

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8 Cp. Professor William W. Park, Arbitrators and Accuracy, 1 J. Int'l Dispute Settlement 25 (2010), passim.
Proposal 1: Limit of 100 Pages for Parties' Submissions

The parties' submissions, in their entirety, must not exceed a limit of a total of 100 pages for each party. Such rule should be agreed upon in the Terms of Reference. A strict page limit means fewer pages to write for the parties' counsels and fewer pages to read for the arbitrators. That evidently saves time and costs.  

Certainly, a strict page limitation gives the impression as if a party's right to be heard is abridged, namely to present its case fully and comprehensively. However, think of the following: the widespread observation within the arbitrators' community is that parties tend to repeat their arguments over and over again instead of stating them once. It is true that many parties raise arguments which are hopeless from the outset. And it is true that good arguments are often set forth in great detail and length and excessively supported by dozens of references instead of two or three. All those traits needlessly inflate the parties' submissions and burden the work of the arbitrators instead of helping them to decide the dispute. The German poet Goethe once said: 'Sorry for this long letter, I simply had no time to write a short one.' This bon mot applies to a large number of submissions filed in arbitration.

Whoever now says 'Yes, this is true, but we can nevertheless not limit the parties' right to present their case in any manner they like' may be referred to the procedural rules of the European Court of Justice, which is certainly not known as a forum where parties' rights are disregarded. Those procedural rules see no problem with limiting a party's submission to fifty pages including detailed instructions as to the format to be used (letter type, margins) in order to avoid a circumvention of those rules. Why can arbitral tribunals not do the same?

Proposal 2: Oral Pleadings at a Terms of Reference Meeting and Subsequent Recommendations by the Arbitral Tribunal

At the outset of the proceedings, the parties are instructed to prepare a max. 1 hour oral pleading of their case for the terms of reference meeting/organizational hearing. The pleadings are followed by a discussion with the arbitral tribunal. Within two weeks after the terms of reference meeting, the arbitral tribunal issues

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12 European Court of Justice, Practice Directions Relating to Direct Actions and Appeals, L 361/15, 8th Dec. 2004, para. 41; even more specific: Practice Directions to Parties before the General Court, L 68/23, 7 Mar. 2010, Chapter I s. A.4.

13 As for the United States Supreme Court, only a handful of documents are permitted to encompass the highest word limit of 15,000 words: Rules of the Supreme Court of the United States, Rule 33 para. 1 subparas. d, g. The Rules even provide that the failure to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the relevant points is sufficient reason to deny a petition for a Writ of Certiorari: Rule 14 para. 4.
written recommendations as to topics to be discussed in the submissions and the format of evidence presented.\textsuperscript{14}

The recommendations given by the arbitral tribunal focus the parties’ attention on the ‘live’ issues of the case and show the parties what the tribunal’s preliminary perception of the case is.\textsuperscript{15} That leads to focused submissions and prohibits the frequent mismatch between the core area of the submissions and the focal points the tribunal is interested in. Accordingly, time and costs are saved.

Nowadays, the typical terms of reference meeting/organizational hearing is thoroughly prepared by the arbitral tribunal and the parties: suggested procedural rules are circulated via email, and a draft time schedule is distributed; often a tentative agreement is reached via this electronic communication. Per consequence, there remains little to be discussed in the physical meeting itself. In most cases, the value of a physical terms of a reference meeting is restricted to a personal get-together of the parties, their counsels and the arbitrators – a meeting which does indeed ease future communication. Still, such (limited) organizational hearing remains a waste of time and money because more can be achieved at almost no additional costs. To use time efficiently, it makes sense that both parties, after the procedural rules have been agreed upon and a time schedule has been set up, have an hour each to present their case orally, followed by a discussion moderated by the arbitral tribunal. Based on those two oral presentations, the arbitral tribunal can then elaborate what their view of the case is, what the decisive questions are, and which questions will most likely be/not be decisive for the outcome of the case.\textsuperscript{16} If the result of these elaborations is then summarized in writing and sent to the parties, such instruction will provide valuable guidance to the parties for deciding on which arguments they want to use their 100 pages and which argument might be dropped or at least kept short.

\textit{Proposal 3: Calderbank Offer Mechanism in Each Arbitration}

The arbitral tribunal informs the parties at the outset of the arbitration that it will consider settlement offers made by one party when ultimately deciding on the allocation of costs (‘Calderbank Offer’).\textsuperscript{17}

\textsuperscript{14} To do justice: This idea was originally proposed by Constantine Partasides, Freshfields Bruckhaus Deringer, London, in a conversation with the author. It was first raised in a speech delivered by Constantine Partasides to the Corporate Counsel International Arbitration Group on 12 Mar. 2010.
\textsuperscript{17} Or sometimes: ‘Calderbank Letter’. The name of this settlement offer stems from the case \textit{Calderbank v. Calderbank} [1975] A.E.R. 333, held before the Court of Appeal of England and Wales.
A Calderbank offer provides a clear financial incentive to settle. Accordingly, settlement agreements become more likely, and that saves time and costs in arbitral proceedings.  

A Calderbank offer is a settlement offer made to the other party which must not be disclosed to the arbitral tribunal before the final stage of the proceeding, i.e., the determination of costs. It is then when a party having made a Calderbank offer is allowed to disclose the offer to the arbitral tribunal and invite the arbitral tribunal to consider the rejection of that settlement offer when determining the costs. The scenario is simple: a respondent has made a confidential 10 million Euro settlement proposal in a 30 million Euro arbitration, and the arbitral tribunal ultimately awards those 10 million Euro or even less. Hence, it is clear that the claimant could have saved all participants in the arbitration time and costs by simply accepting the offer. That justifies sanctioning the claimant by ordering him to bear all costs of the arbitral proceeding incurred after having received and rejected the Calderbank offer. Such sanction is in line with notions of procedural fairness if the claimant knew beforehand about potential sanctions linked to its rejection of a settlement offer. This procedural feature originally stems from the English rules of civil procedure but there is no reason not to employ it in an arbitral proceeding.

Proposal 4: No Written Witness Statements; Interrogation by Arbitrators

In its first procedural order, the arbitral tribunal instructs the parties not to submit any written witness statement. Instead, the parties must ‘offer’ a witness by specifying who the witness is and to which (concrete) facts the witness can testify. The arbitral tribunal then decides whether this testimony, as it is offered, can possibly be relevant for the outcome of the case. If so, the witness is called to testify in a hearing solely on the specific facts the witness has been offered for. Details are provided in a procedural order. In the hearing, the arbitral tribunal takes the lead and questions the witness first; only follow-up questions are asked by the parties’ counsels.

Preparing written witness statements takes time – and thus causes respective costs. More time and costs are consumed by the subsequent ‘coaching’ of the witnesses and the preparation of extensive cross-examinations. In the hearing itself, the counsels to the parties spend more than 50% of the entire hearing time

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18 For the downside of settlements, i.e., if parties are ‘forced’ to settle by the arbitral tribunal or state legislation, see Joerg Risse, Ivo Bach, 9 Ger. Arb. J. 14, 15 (2011).
on the cross-examination. Hence, there are time and cost advantages if the
standard approach of introducing witnesses into arbitration is abandoned.

Written witness statements are the perceived 'gold standard' in international
arbitration, as it is, for example, evident from the IBA Rules on the Taking of
Evidence in International Arbitration. The idea is that those written witness
statements can save time because they indicate to the arbitral tribunal and to
the opposing party whether or not it is necessary to hear that witness testifying in
court. Moreover, written witness statements allow the opposing party to prepare
adequately for the interrogation of the witness in the hearing. Surprises and the
introduction of new facts are avoided which might occur when a witness without
a preceding written witness statement is allowed to testify in a hearing and
suddenly comes up with a new 'story'. So far, so good – but let's be honest: reality
in international arbitration is that having a witness prepare a written witness
statement, often assisted by a counsel, is a cumbersome exercise. It is then rare
that a witness who has offered a written witness statement is not heard in person.
Frequently the arbitral tribunal even delegates that decision to the parties by
ordering that the witness must appear unless the party not having offered the
witness waives its right to cross-examine the witness. Accordingly, the tribunal
avoids an early decision on whether the testimony of the witness, as displayed in
the witness statement, can at all be relevant for the outcome of the case. In the
hearing itself, parties’ counsels feel a duty – sometimes also a certain pleasure – to
cross-examine the witness for hours, but the overall outcome of that exercise is
often meager. And even more strikingly: it is relatively rare to read in arbitral
awards that a certain testimony of a witness was crucial for the outcome of a case.
Hence, it is submitted that the attention (= time and costs) paid to witnesses is often
disproportionate to their relevance in a given case. Accordingly, the arbitration
community should reconsider its approach on how to introduce witness
 testimonies in a proceeding. The alternative approach suggested here (no witness
statements, interrogation by the tribunal) is the one followed by most state courts
in civil law jurisdictions, and no complaints have been raised yet that such
procedure is fundamentally unfair.

Proposal 5: Absolutely No Document Production

The arbitral tribunal orders that no document production is going to take place.
Accordingly, the parties must rely on the facts they are aware of and on the

24 Art. 4 s. 4, 5, 6 IBA Rules on the Taking of Evidence in International Arbitration (2010).
25 Queen Mary University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the
Arbitral Process, p. 25; Emmanuel Gaillard, John Savage, Fouchard Gaillard Goldman on International Commercial
26 Queen Mary University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the
Arbitral Process, p. 25.
27 See Queen Mary University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the
Arbitral Process, p. 25.
28 See s. 396 German Code of Civil Procedure; Art. 171 Swiss Civil Procedure Code.
29 Too reluctant: ICC Publication 843: Techniques for Controlling Time and Costs in Arbitration, para. 53; Klaus
documentary evidence they hold in their hands. If asserted facts cannot be proven by documentary evidence or witness testimony, burden of proof-rules are decisive for the outcome of the case.\textsuperscript{30}

Document production is probably the feature in international arbitration which contributes most to the time and cost explosion described in the introductory part of this article.\textsuperscript{31} Extensive document requests are the rule nowadays; their initial discussion is often held under a ‘Redfern’ Schedule format and governed by the few rules contained in the IBA Rules on the Taking of Evidence.\textsuperscript{32} What follows are disputes about the admissibility of the requests, privilege rights and protective orders required to safeguard the confidentiality of the documents. The bulk of the work is then created by the need to diligently compile the documents covered by the request – and the need to thoroughly read the documents provided by the opposing party. Some of the documents are then officially introduced into the arbitration, and be that only for pretending that the document production exercise served a purpose and has ‘proven’ the party’s case theory. Even without opening Pandora’s Box of a full-fledged e-discovery, being still rare in international arbitration, the workload created by document requests is immense. Hence, to do away with document requests in international arbitration proceedings would save enormous amounts of time and costs.

The document production concept followed in international arbitration has its roots in the Anglo-American discovery proceeding.\textsuperscript{33} Its underlying concept is appealing: if both parties are forced to open their books, the ‘truth’ will ultimately come to light and provide a solid basis for the tribunal’s decision on the merits.\textsuperscript{34} However, reality is somewhat less attractive. To begin with, nobody can guarantee or control that a party really complies in full with an order to produce documents. While it apparently lies in the genes of Anglo-American parties that non-compliance is an absolute no-go, some parties might interpret a production order more ‘generously’. Secondly, it is rare that the proverbial ‘smoking gun’ is revealed during a document production phase which then becomes the crucial piece of evidence. It is submitted that in many cases a document production remains nothing but a costly exercise for the parties. Thirdly, if the document production produces meaningful results, the question remains whether those results are proportionate to the time and (cost) efforts invested. Civil law jurisdictions have survived long and quite well without the ‘total truth on the table’-concept pursued by the Anglo-American discovery approach. And there is no compelling reason to

\textsuperscript{33} Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, Redfern and Hunter on International Arbitration, 5\textsuperscript{th} Edition 2009, para. 6.107.
\textsuperscript{34} See Jean-François Poudret, Sébastien Besson, Comparative Law of International Arbitration, 2\textsuperscript{nd} Edition 2002, paras. 652 et seq.
adopt this approach as a matter of course even if the case bears no relation to a common law jurisdiction.

Proposal 6: Directives by Tribunal as to Material Issues

After two rounds of submissions the arbitral tribunal deliberates and determines which issues are – on the basis of the parties’ assertions – potentially crucial for the outcome of the case and which issues are not. Only with regard to the relevant issues evidence is heard in the oral hearing, and the case is allowed to go forward. The tribunal informs the parties about the issues which were sorted out as being not relevant.35

Many arbitral tribunals take the approach that the parties should be permitted to present evidence to each and every assertion made in the hearing albeit it may be or later turn out that many of the assertions made are simply irrelevant for the outcome of the case.36 In that context, arbitral tribunals often hesitate to make up their minds early and to render a tough decision. The tough decision is to decline hearing evidence as to certain issues because those issues are immaterial for the outcome of the case.37 Accordingly, time and costs are wasted for irrelevant discussions and unnecessary taking of evidence.

The recommended approach for analyzing the case consists of three steps: In a first step, the arbitral tribunal assumes that all factual assertions made by the claimant are correct. On that basis, the tribunal assesses whether the claim would be justified. If not, the claim is to be dismissed without any taking of evidence. In a second step, the arbitral tribunal assumes that all factual assertions made by the respondent are correct. On that basis, the claim would need to be dismissed for legal reasons; otherwise the defence arguments are evidently immaterial and the claim must be granted without taking of evidence. It is only the remaining alternative, namely when the claimant’s assertions would provide a sufficient basis for granting the claim while respondent’s factual assertions provide a basis for rejecting the claim, that a third step is required: the arbitral tribunal then needs to clarify who is right and who is wrong in his factual assertions. Accordingly, only with regard to those issues evidence must be taken.38

Proposal 7: Comprehensive Opening Statements and Discussion on the Merits

Both parties are invited to hold an elaborate opening statement in the oral hearing, leading the arbitral tribunal through the evidence submitted. Those opening statements are then followed by a discussion among the parties and the arbitral tribunal on the merits of the case.

This proposal appears to be counter-intuitive since long opening statements and discussions on the merits are time-consuming and, thus, cause costs. However,
detailed opening statements can compensate the parties for the strict page limits they had to accept for their written submissions. In addition, those oral statements provide an introduction for the arbitral tribunal, especially for the (unfortunately not unlikely) eventuality that the arbitrators have not read and understood every page of the written submissions. In sum, it saves time and costs if opening statements are invited – which stands in stark contrast to the common practice to limit opening statements to a fraction of an hour or to deny the need of opening statements by assuring the parties that the arbitral tribunal has thoroughly read the parties' submissions. The following detailed discussion with the arbitral tribunal provides the opportunity for the parties to solve possible misunderstandings within the arbitral tribunal or with the opposing party. Moreover, the parties come to know what the arbitral tribunal is particularly interested in and can thus structure their questioning of the witnesses or their post-hearing submissions accordingly.

Proposal 8: Parties' Assistance in Writing the Final Award

Immediately after the hearing, the arbitral tribunal identifies the main issues in 'question', e.g. 'Was the representation in Art. 7.4 of the SPA breached?', 'Is Claimant barred from asserting this claim?'. Subsequently, the arbitral tribunal instructs the parties to summarize their positions on those issues in a maximum of two pages, but with references to those parts of their earlier submissions where the issue is discussed in detail. The respective summary is forwarded to the arbitral tribunal as a Word file, allowing the arbitral tribunal to 'copy/paste' those paragraphs as a summary of the parties' submissions in the final award.

This technique evidently accelerates the writing of the final award since it frees the arbitrators from summarizing the parties' positions from the various submissions, always in fear that important arguments are overlooked. Such omission might later even provide the basis for attacking the award based on the reasoning that the right to be heard has been violated due to the perceived act of 'ignoring' those arguments. Both, the internal deliberation of the arbitral tribunal and the writing of the award are accelerated if the parties themselves summarize their positions so that the arbitral tribunal can concentrate on the key analysis why one party's position is right and the other's is wrong or why a third alternative is the solution provided by law.

Proposal 9: Explicit Cost Sanction for Inefficient Handling of Proceedings

The parties agree with and explicitly instruct the arbitral tribunal to allocate the costs of the proceedings not least according to the efficiency shown by the parties' counsels in handling the proceedings. At least 20 % of the total costs must be allocated according to efficiency shown and adequacy of costs incurred.

39 The ICC has already implemented such a mechanism in its 2012 Arbitration Rules, leaving the cost allocation for efficient/inefficient case management up to the full discretion of the arbitral tribunal: Art. 37 sect. 5.
Respectively, the arbitral tribunal shall take into account whether the total amount of the attorneys’ fees appears to be proportionate to the case and whether unreasonable lines of argument were raised.\textsuperscript{40} The arbitral tribunal must comment on this issue in its cost decision.

This proposal aims at promoting reasonable behaviour by parties’ counsels. Inefficiency is sanctioned, and the parties learn about the inefficiency of a counsel when reading the final award and the cost decision.\textsuperscript{41} ‘The costs follow the event’, that is the almost universal rule applied by arbitral tribunals when deciding on the costs.\textsuperscript{42} The prevailing party is reimbursed in full; if the claim is awarded/dismissed in part, costs are allocated proportionally.\textsuperscript{43} Rarely, a different cost allocation is made. If so, such decision tends to focus on different, clearly separate parts of the arbitral proceeding, i.e. a phase 1 addressing the challenged jurisdiction of the tribunal, followed by a liability phase and a separate quantum phase.\textsuperscript{44} What is almost never discussed in the cost decision is the total amount of costs incurred by one party or the procedural behaviour which led to cost increases. To illustrate this: it is not rare that one party claims cost compensation which is more than double what the other party claims, without any explanation apparent from the course of the proceedings or the nature of the disputed claim.\textsuperscript{45} Simply, one party hired a more expensive law firm or inefficient attorneys leading to an excessive number of billable hours.\textsuperscript{46} If Party A complains, Party B might respond that it cannot be held responsible for the ‘bare bone approach to justice’ adopted by Party A and its counsel during the arbitration leading to comparably low legal fees. Arbitral tribunals might read that exchange of arguments, and they do realize that under most arbitral regimes they are entitled to impose cost sanctions for inefficiency or excessive costs incurred.\textsuperscript{47} But very rarely this topic is then discussed and considered in the cost decision. Quite apparently, arbitral

\textsuperscript{40} See also ICC Publication 843: Techniques for Controlling Time and Costs in Arbitration, para. 8.5; Chartered Institute of Arbitrators, Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration, para. 4.5.

\textsuperscript{41} According to Sessler/Voser, Art. 37 s. 5 ICC Arbitration Rules (2012) should therefore provide for an effective mechanism to discipline parties’ counsel: 10 Ger. Arb. J. 120, 122 (2012).


\textsuperscript{43} High Court of England and Wales, 10 Nov. 2004, Newfield Construction Ltd. v. John Laing Tomlinson, EWHC 3051 (TCC); Emmanuel Gaillard, John Savage, Fouchard Gaillard Goldman on International Commercial Arbitration, 1\textsuperscript{st} Edition 1999, para. 1255; Chartered Institute of Arbitrators, Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration, para. 4.4.1.


\textsuperscript{45} See Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, \textit{Redfern and Hunter on International Arbitration}, 5\textsuperscript{th} Edition 2009, para. 9.95.


tribunals feel uncomfortable to sanction a party for an inefficient handling of the proceedings.\textsuperscript{48}

That is why this proposal adjusts the traditional cost allocation rule to a new rule ‘The costs follow the event and the efficiency demonstrated by the parties in conducting the arbitration’. A party’s counsel might fear that his esteemed client will ultimately read in the award that costs were incurred unnecessarily, quite a strong incentive to behave reasonably. And the arbitral tribunal cannot evade a discussion and decision on this issue.

\textit{Proposal 10: Financial Incentive for the Arbitral Tribunal to Render the Award Quickly}

The parties agree with the arbitral tribunal that the arbitral tribunal receives a 20\% premium on the arbitrators’ fees otherwise applicable if the award is rendered within two months after receipt of the post-hearing submissions. If the award is rendered in a timeframe between two and three months after receipt of the post-hearing submissions, the standard fee is to be paid. If the award is rendered later than three months after receipt of the post-hearing submissions, the arbitrators accept a ‘penalty’ of 20 \% for delaying the service they contracted for, namely deciding the dispute.

The proposal provides an incentive for the arbitrators to decide quickly, an incentive otherwise not existing.\textsuperscript{49} If the incentive works, time is saved.

It is not rare nowadays, especially in high calibre cases before famous and thus busy arbitrators, that the tribunal needs more than six months for rendering the final award.\textsuperscript{50} While a case might be complicated and while the submissions might be voluminous, such timeframe can always be shortened by proper time management on the arbitral tribunal’s side. The problem is that the arbitrators usually have no incentive to do so.\textsuperscript{51} The proposal provides for such an incentive speeding up the arbitration at a relatively moderate increase in costs, if any.

If the arbitrators know beforehand that their fees will be cut if an award is not rendered quickly, the arbitral tribunal will allocate sufficient time immediately after receipt of the post-hearing briefs for deliberating and writing the award.

\textsuperscript{48} This reluctance, however, is unfounded, since an overwhelming majority of arbitration practitioners supports that improper conduct by a party or its counsel during the arbitral proceedings should be taken into account by an arbitral tribunal when allocating costs: Queen Mary University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, p. 41.

\textsuperscript{49} Parties will probably tend to set such incentives as they are not happy with the time it takes between the final hearing and the rendering of the award: Queen Mary University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, p. 39; Queen Mary University of London, 2010 International Arbitration Survey: Choices in International Arbitration, p. 32.


\textsuperscript{51} This lack is e.g. displayed in: ICC Publication 843: Techniques for Controlling Time and Costs in Arbitration, para. 96.
III. CLOSING: THE ‘YES, BUT ...’ OBJECTION AND A FINAL PROPOSAL

When studying the ten proposals, the reader will certainly have many ‘yes, but ...’ objections springing up in his mind: ‘Yes, a strict page limit might save time and costs, but it abridges the right of a party to present its case fully and, thus, makes an award vulnerable for challenges.’ ‘Yes, a document production often is a waste of time and money, but sometimes, it produces very useful results, and it may be a party’s only chance for obtaining the evidence needed for proving its case.’ ‘Yes, a Calderbank Offer encourages settlement, but why should a party be sanctioned for trying its luck in court?’ Surprise, surprise, all those and other ‘Yes, but ...’ objections are valid – and they miss the point: The ultimate question is what the parties want and what the parties opt for. Do all parties want the best reasoned and most detailed award possible, after having turned around every stone and tried any procedural manoeuvre? If so, that is a legitimate objective since arbitration is more than a simple peace-making mission which does not care about the accuracy of the decision.52 But, in the alternative, the parties may believe that such ‘best’ award is of little value if it is received some five years after the arbitration commenced and after 25 % of the amount in dispute have been invested in costs. Both approaches are acceptable; what is required is a clear choice. However, nowadays the parties are neither invited nor encouraged to make that choice.53 Instead, a strange animal called ‘standard arbitration practice’ takes the lead and makes the choice for the parties. What needs to be changed is to hand back the choice to the owners of the arbitration proceeding, i.e. to the parties.

It is submitted that the informed customers of the product ‘arbitration’ consider costs and time invested as an integral element of the overall quality of the product. Informed parties have realized that features nowadays offered as key parts of an international arbitration are either unlikely to promote the overall quality of the arbitration or that the benefits received under those features are disproportionate to the time and costs invested. Yes, there exists a diminishing marginal utility between the time and costs invested in the arbitration and the quality of the final award. Hence, a choice must be made where the right balance lies, and the choice must be made by the parties as process owners, and it must be made for every case individually.

The final proposal in this article therefore is to turn to the parties and ask them for their educated choice: do they want ‘standard’ international arbitration or are they willing to compromise on a few issues in order to save time and costs? Accordingly, a two-step approach is recommended:

In a first step, i.e. latest in the organizational hearing, the parties are invited to clarify their preference in the field of tension existing between the quality of the award, the duration of the proceedings and the costs to be invested. That

53 Although the majority of the parties prefer that a tribunal manages the proceedings pro-actively rather than reactively: Queen Mary University of London, 2010 International Arbitration Survey: Choices in International Arbitration, p. 32.
preference is stated best by visualizing it as a ‘dot’ in the magic triangle presented in the introduction of this article:

![Magic Triangle Diagram]

In a second step, the parties are asked to implement their preferred choice by considering and then agreeing/not agreeing on one of the ten proposals made above. To this end, they should prioritize and rank the proposals according to their preferences and state whether they would accept or reject such proposal for the dispute to be arbitrated. That is quickly done by filling out the following schedule (please note that the entire diagram is not reproduced here):

<table>
<thead>
<tr>
<th>Proposal to save time and costs</th>
<th>Accepted</th>
<th>Not accepted</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Page Limit of 100 pages total</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Oral Pleading during ToR-conference</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Calderbank Offer</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If both parties agree, the proposal is accepted. If no proposal is accepted, the arbitral tribunal can discuss the three top-ranked proposals by both parties, *i.e.* those where the added ranking numbers are the lowest, in order to double-check whether the parties’ rejection is definite. Once the choice has been made it is quickly implemented by either incorporating it into the terms of reference or into the procedural rules. It might well be that the parties choose to reject all ten proposals, and it might well be that the parties have very good reasons to do so. However, if they do so, it was at least the parties’ choice, and they will then hopefully happily pay the price of a standard arbitration, namely that it is relatively costly and time-consuming if all what counts is a top-quality award.