

Efficiency and costs in arbitration: rule changes and tradition shifts

By: Antje Baumann¹

Costs and delays were first identified as an issue in the 2006 Queen Mary study on international arbitration.² Since then, they have consistently ranked in the top 4 of arbitration users' concerns, with authors and institutions focusing on finding solutions increasing both certainty³ and efficiency. These proposals have tended to follow two routes: the creation of procedural rules (I) and a behavioural shift (II).

I. The creation of procedural rules

The first route has been to create procedural rules. Paradigmatic are the introduction of various rules by arbitral institutions,⁴ including the evaluation of arbitrators by Counsel after the award has been published, or the reduction of arbitrators' fees in case of delays. Two new rules are of particular interest in this regard: the development of fast-track proceedings (A) and of summary judgments (B).

A. Development of fast-track proceedings

The development of fast-track proceedings reflects the tendency to get rid of this traditional image of arbitration as a process which is less rapid than one might wish for. These proceedings fit the entire arbitral process within an abbreviated time period with stringent deadlines.⁵ Specifically designed rules have been adopted by most institutions explicitly, such as the China International Economic and Trade Arbitration Commission (CIETAC), the Singapore International Arbitration Centre (SIAC), the Hong Kong International Arbitration Centre (HKIAC), the German Arbitration Association (DIS), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), and more recently the International Chamber of Commerce (ICC).⁶ Other institutions, such as the London Court of International Arbitration (LCIA) and the United

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² Queen Mary, University of London, International Arbitration, Corporate Attitudes and Practices 2006, at 2, <<http://www.arbitration.qmul.ac.uk/research/2006/>> accessed 7 December 2018.

³ Emmanuel Gaillard and John Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 680–81.

⁴ Andreas Respondek, 'Five Proposals to Further Increase the Efficiency of International Arbitration' (2014) 31 J Int'l ArbJ Int'l Arb, 509-12.

⁵ Ibid, 680; Gary B Born (ed), *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2305.

⁶ CIETAC Rules, Art 56ff; SIAC Rules, r 5; HKIAC Rules, Art 41; DIS Rules, Art 27.4 (ii) and Annex 4 Expedited Proceedings; SCC Rules for Expedited Arbitrations; ICC Rules Art 30.

Nations Commission on International Trade And Law (UNCITRAL), do not offer specific fast-track rules but leave parties free to provide for it by agreement as an expression of party autonomy.⁷

Most fast-track procedure rules are designed for smaller claims, the amount of which does not exceed a certain set level, or for claims for which the parties have agreed that they shall apply.⁸ They arrange for a sole-arbitrator tribunal and for abbreviated time limits, such as for the filing of the claim, defence, and counterclaim, and the rendering of the final award. Oral hearings are usually optional. While the new ICC and CIETAC fast-track rules are designed as mandatory for smaller claims with an opt-out version, the SIAC and HKIAC only offer an opt-in possibility.

Beyond these institutional rules' differences, it is the institutions' role in active case management and adequate organisation that will contribute to speed up the process.⁹ This must be paired with the tribunal's role in ensuring that proceedings will be as efficient and rapid as possible, without which the fast-track arbitration will be of little success.

Fast-track arbitration can only be used for issues which are capable of being resolved this way, an example being disputes relating to price determination.¹⁰ In contrast, it is rather unsuitable for complex disputes, such as those arising out of the delivery of industrial plants. The claimant would have ample time to prepare its case in depth while the respondent would be unable to do so, drastically compromising equality of the parties.¹¹

Fast-track proceedings are, therefore, not a universal method to speed up arbitration. It is nevertheless a welcome development, contributing to the appeal of arbitration to potential users formerly reluctant because of costs and time. Its growing development by institutions and its increasing adoption in arbitration clauses thus comes with no surprise.

B. Summary judgments

Another recently debated means to accelerate the resolution of business disputes in international arbitration are summary judgements. They are already successfully operated by common law courts, where it has led to greater

⁷ Born 'International Commercial Arbitration' (n 2) 2305; Julian DM Lew, Loukas A Mistelis, and Stefan Michael Kröll (eds), *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 548.

⁸ SIAC Rules, r 5, and the HKIAC Rules, Art 41 also provide for expedited rules in case of exceptional emergency.

⁹ Lew, Mistelis, and Kröll (n 5) 549.

¹⁰ As e.g. in the probably best-known fast-track arbitration case, *Panhandle*, in which the award was rendered nine weeks after the Request for Arbitration was filed with the ICC International Court of Arbitration: Lew, Mistelis, and Kröll (n 5) 548.

¹¹ *ibid* 549; Gaillard and Savage (n 2) 680–1.

efficiency in the progression of claims.¹² For the arbitration world, such a summary procedure would mean that on the basis of an application for a summary award, an arbitrator would be allowed to determine an issue within the arbitration without a full exchange of pleadings, expert reports, witness statements, or a hearing.

There is currently a striking absence of any explicit provisions for the use and operation of summary procedures within the procedural rules of most major arbitral institutions. This is due to concerns regarding the principle of fair trial and the enforceability of arbitration awards obtained in this manner.¹³ The only Rules providing for it are the new edition of the SIAC rules, which came into effect in 2016, and the ICSID arbitration rules, published in 2006. Both sets of rules provide for summary judgments to be used only for the early determination of claims or defences that are manifestly without legal merit.¹⁴

Summary judgments show one of the limits of increasing efficiency in international arbitration. While some see it as an important and desirable shift in international arbitration's culture towards a more efficient disposal of meritless arguments,¹⁵ others consider it an unjustifiable transgression of the parties' right to be heard. The issue is reinforced by another concern, identified as due process paranoia. The result is that arbitrators, fearing their award will later be set aside in state proceedings, favour arbitral proceedings where parties are heard on every matter they wish to argue.¹⁶

Without expressly introducing summary proceedings, another possibility for arbitrators to deal efficiently with meritless arguments would be to take a more active and inquisitorial approach to arbitration proceedings. This would mean changing practitioners' culture towards a more civil-law based attitude.

II. A behavioural shift

¹² Solomon Ebere, 'Summary Adjudication in Arbitration Proceedings' (2011 Writing Contest Winner) (CPR International Institute for Conflict Prevention & Resolution, 4 May 2011) < <https://www.cpradr.org/news-publications/articles/2011-05-04-summary-adjudication-in-arbitration-proceedings-2011-writing-contest-winner> > accessed 7 December 2018.

¹³ Dermot McEvoy, 'Summary judgment in international arbitrations – to be or not to be? That is the question' (Eversheds Sutherland International, 14 December 2015) Eversheds Sutherland International, < https://www.eversheds-sutherland.com/global/en/what/articles/index.page?ArticleID=en/Construction_And_Engineering/Summary_judgment_in_International_Arbitrations > accessed 7 December 2018.

¹⁴ Ibid.

¹⁵ Edward Attenborough, Matthew Secomb and Alina Sartogo, 'A new dawn for summary determination in international arbitration: the revised SIAC Rules' (White & Case Client Alert, International Arbitration, 1 August 2016) < <https://www.whitecase.com/publications/alert/new-dawn-summary-determination-international-arbitration-revised-siac-rules> > accessed 7 December 2018.

¹⁶ For further discussion on the issue, see K.P Berger and J.O. Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", *Arbitration International*, 2016, 32, 415-435

In conjunction with these efficiency-promotion rules, a development in the practice of holding arbitration procedures is thus also needed. Accordingly, the second, more recent trend, tries to create rules with the underlying aim of encouraging a behavioural shift in the “traditional” approach to arbitration. Such encouragement has in particular been the driving force in the creation of the Prague Rules. The need for a shift was epitomised by the “creeping Americanisation of international arbitration”,¹⁷ the idea being that were arbitration procedures to be more civil-law oriented, efficiency would increase and costs decrease.¹⁸ In essence, this entails a more proactive role of the arbitral tribunal, and a more inquisitorial approach to the arbitration procedure. It is interesting to note that most of these proposals are already implemented to a large extent by German practitioners.¹⁹ Arbitration rules, written loosely to leave space for personalisation,²⁰ already allowed for such practice. This overlap is particularly striking with regards to document production (A), the conduct of proceedings (B), expert witnesses (C), and settlement facilitation (D).

A. Document Production

Document production is one of the major lengthening factors in arbitration procedures. Criticised for “rarely bringing a smoking gun to light”,²¹ many practitioners would like to see it curtailed. The issue was discussed in 2015 by the Queen Mary University Study on International Arbitration,²² which found that 62% of respondents wished counsels of both parties worked together towards limiting document production. Since then, arbitration institutions have done little to address the issue, on the basis that arbitration rules are meant to leave as much space as possible for parties to decide which procedure to follow.

The issue is meant to be dealt with discretionarily by arbitral tribunals. To guide arbitrators in the process, the IBA Rules on the Taking of Evidence first codified what has become common international practice.²³ Their adversarial approach, with requests having to be made between the parties,²⁴ coupled with the fact that

¹⁷ Legal update: archive, “Prague Rules on taking of evidence to launch in December 2018”, Practical Law arbitration, 4 April 2018

¹⁸ Dr Andreas Respondek, “How Civil Law Principles Could Help to Make International Proceedings More Time and Cost Effective”, Singapore Law Gazette February 2017, 33-37

¹⁹ Dr. Andrea Respondek and Charlotte Burger, “International Arbitration – The German Model”, Law Gazette Feature 2018

²⁰ Nigel Blackaby and others and others (eds), Redfern and Hunter on International Arbitration (6th edn, OUP 2015) 353

²¹ Inquisitorial Rules on the Taking of Evidence in International Arbitration (The Prague Rules), Draft of 11 March 2018, Note of the Working Group, 3

²² Queen Mary, University of London, 2015 Improvements and Innovations in International Arbitration <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf> accessed 7 December 2018

²³ Born ‘International Commercial Arbitration’ (n 2) 2321

²⁴ IBA Rules Art. 3.2

requests for categories of documents are allowed,²⁵ has however led to the present situation. The accompanying IBA Commentary stating “expansive US or UK style discovery is generally inappropriate in international arbitration”²⁶ has been of little help in curtailing these requests.

In response to these critics, the Prague Rules specify that parties must send document production requests to the tribunal directly, which will decide whether such request is sound.²⁷ Requests must further relate to particular documents, and not to categories of documents.²⁸

Such restrictions are well known in Germany.²⁹ The principle underlining document production rules in the country is that the opposing party is not obliged to participate in the process of gathering sufficient evidence to substantiate a party’s case. Document production is the exception, not the rule. Although the concept may seem curious to common law lawyers, it has been the general principle underlying German state court proceedings since centuries. Fairness of trials will not be hindered with such restrictions.

B. Conduct of proceedings

The Prague Rules take an inquisitorial approach to the conduct of arbitral proceedings.

At the initial stage of the case management conference,³⁰ this entails that arbitrators must fix the procedural timetable for the arbitration, and clarify the relief sought, the undisputed facts, and the parties’ legal position. Where useful, they can indicate the evidence they would consider appropriate, order parties to produce evidence, limit submissions, and even share their preliminary views on the dispute. At the further stage of hearings,³¹ arbitrators are invited to take the lead, deciding which witness to hear, requesting parties to address issues not covered in their submissions, and ordering site inspections. Witnesses are not cross-examined, it is for the arbitral tribunal to ask questions. Time is left at the end for counsel’s questions, would there be some relevant issues which they thought arbitrators did not address during the hearing.

The Prague Rules also introduced the principle of *jura novit curia*,³² which requires the tribunal to know the law. Contrary to common law jurisdictions, the

²⁵ IBA Rules Art 3.3

²⁶ "Commentary on the New IBA Rules of Evidence in International Commercial Arbitration", 1999 IBA Working Party

& 2010 IBA Rules of Evidence Review Subcommittee

²⁷ Prague Rules Arts 4.3-4.4

²⁸ Prague Rules Article Art 4.3

²⁹ Dr. Andrea Respondek and Charlotte Burger, “International Arbitration – The German Model” (n17)

³⁰ Prague Rules Art 2.

³¹ Prague Rules Arts 3, 5, 6, 8.

³² Prague Rules Art 7.

law is not treated as fact, to be proven by the parties.³³ The principle has two important consequences. “Knowing the law” means that the arbitrators can also base themselves upon arguments not put forward by the parties, or request parties to address issues they did not address in their submissions. It thus could potentially entail that arbitrators act beyond their mandate, rendering the award vulnerable to set aside proceedings. The Prague Rules countered this issue by making the use of *jura novit curia* conditional to the tribunal consulting the parties beforehand.

This has also been the traditional approach taken in German arbitration.³⁴ The inquisitorial approach requires arbitrators to address issues which are central to the dispute, but have not been considered by the parties. It does not mean necessarily that the tribunal will act *ex officio*. A simple discussion suffices to understand where the parties stand. Where the parties do not want to address the issue, the tribunal should then set it aside.³⁵ Along the same lines, it is for the tribunal to question witnesses. Cross-examination is scarcely used, the idea being that the best witness is an unprepared witness. Preparing witness statements and training witnesses to cross-examination is seen as hindering evidence.³⁶

C. Expert witnesses

The Prague Rules predominantly make provisions for the appointment of expert witnesses by the tribunal, not by the parties.³⁷ Tribunal-appointed experts are held to be neutral, their cost forming part of the arbitral tribunal’s expenses. Such appointment is also seen as having the benefit of avoiding extensive discussions between party-appointed experts. A curious point to note is that the Rules are silent on the opportunity to respond to the expert’s report, and do not address whether and how the parties can examine correspondence between the tribunal and the expert.³⁸ Such silence must be constructed as being a point to be addressed during the case management conference. Indeed, excluding the possibility of responding to the expert’s report or examining tribunal-expert correspondence would be an obvious breach to the parties’ right to be heard.

Were the issues to be complex and parties wishing to get a second opinion, the tribunal could appoint a second expert, or parties could appoint their own. The

³³ Dr Andreas Respondek, “How Civil Law Principles Could Help to Make International Proceedings More Time and Cost Effective” (n17), 35.

³⁴ Dr. Andrea Respondek and Charlotte Burger, “International Arbitration – The German Model” (n17).

³⁵ Unless a mandatory rule is at issue, see e.g. Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* (1999) ECR I-3055.

³⁶ Dr Andreas Respondek, “How Civil Law Principles Could Help to Make International Proceedings More Time and Cost Effective” (n16), 35.

³⁷ Prague Rules Art 6.

³⁸ Round table discussion: V. Khvalei, A. Khrapoutski, O. Perepelynska, K. Czech, “The Prague Rules on conduct of the taking of evidence: an alternative to the IBA Rules?”, GESSEL Attorneys at Law, 24 May 2018

Rules provide for it by affirming “appointment of experts by the Arbitral Tribunal does not preclude a party from submitting its own expert report”.³⁹ If this is the case, the Rules set forth that before doing extensive research and submitting their reports, party-appointed experts should meet and make a list of what they agree or disagree on.⁴⁰ They are then to focus only on what they disagree.

Again, such practices are widely established in Germany.⁴¹ Expert witnesses need to be neutral from any pressure from the parties if they are to be credible, and are thus generally appointed by the arbitral tribunal. This is nevertheless the default regulation under the German arbitration rules. If the parties agree upfront that party-appointed experts should be used, then the will of the parties will override this principle.

D. Settlement facilitation

Another innovating rule is the introduction of the arbitral tribunal’s assistance in amicable settlement.⁴² If the parties wish to, and the applicable law allows it, the arbitrator(s) can also act as mediators.⁴³ If no settlement is reached, the parties can then choose whether to continue with arbitration with the same mediator as arbitrator, or appoint another arbitrator. This is because mediators can be entrusted with information from one party which will not be disclosed to the other party, but this is not possible in arbitration.⁴⁴ Arbitrators should be aware only of what is “officially” disclosed to them by the parties, that is, what is disclosed to the opposing party as well.

Such approach is also common in German arbitration,⁴⁵ and the 2018 edition of the DIS Rules provides “unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues”.⁴⁶

While this innovation increases the active role of the arbitral tribunal in proceedings, it is to be seen whether it will decrease time and costs in arbitration. This would be true where the parties actually find a settlement, but would increase costs where a settlement is not found, since another arbitrator will then usually need to be appointed. Another, already existing way of creating such a scheme is to include escalation clauses in contracts. These pair arbitration

³⁹ Prague Rules Art 6.5.

⁴⁰ Prague Rules Art 6.7.

⁴¹ Dr. Andrea Respondek and Charlotte Burger, “International Arbitration – The German Model” (n17).

⁴² Prague Rules Art 9.

⁴³ Prague Rules Arts 9.2.

⁴⁴ A. Doudko and O. Golovtchouk, “Introducing the Young Contender – The Prague Rules”, Ukrainian Journal of Business Law, October 2018.

⁴⁵ D.G. Henriques, “The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?” 36 ASA Bulletin 2/2018 (June) 360.

⁴⁶ Article 26, DIS Rules 2018.

with compulsory previous ADR. The Queen Mary Study of 2018 shows that 60% of in-house counsel participants prefer such a method to arbitration alone.⁴⁷ Recent German case law on the matter shows that where the parties do not comply with the escalation clause and go directly to arbitration, the court will still uphold the award.⁴⁸ This is so because the escalation clause does not render the arbitral tribunal's jurisdiction void. Rather, in view of the escalation clause, the arbitral tribunal can refuse the claim as currently inadmissible.⁴⁹ This interesting arbitration-friendly development joins the idea of settlement facilitation as included in the Prague Rules, in that the arbitrator, in view of the position of the parties, decides whether it is best to force the parties to mediate where there is a possibility that this could lead to a settlement, or prefers to directly start with the arbitration where such settlement is unforeseeable.

III. Conclusion

Both institutional rules and the IBA Rules on the taking of evidence offer the possibility to render arbitration procedures more cost-efficient. The development of further rules with such aim necessarily encroaching sooner or later with the right of being heard by the parties, the run to efficiency increase and costs decrease should thus rather concern a change in approach to the existing rules. Such approach already exists in German arbitration, and has recently been put on paper by the Prague Rules on the taking of evidence. While the Prague Rules are a good way to show arbitrators that they can take a greater, more inquisitorial lead in arbitral proceedings, it is to be seen how common law arbitrators will implement the rules if chosen. National legal cultures having been the shaping forces of existing rules, taking a more proactive approach seems more probable if the younger generation will learn so at university.

⁴⁷ Queen Mary, University of London, 2018 International Arbitration Survey: The Evolution of International Arbitration, < [http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey--The-Evolution-of-International-Arbitration-(2).PDF)> accessed 7 December 2018.

⁴⁸ *Escalation Clauses: No Longer a Tripping Hazard for Arbitrations with Seat in Germany?*, by Rupert Bellinghausen and Julia Grothaus, Kluwer Arbitration Blog.

⁴⁹ Bundensgerichtshof case no. I ZB 1/15,16 August 2016.