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Faster, Cheaper: Global Initiatives to Promote Efficiency in International Arbitration

by

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When an arbitration goes on for too long, whether in months or years, the finger-pointing begins. Tribunals may admit the proceedings were more protracted than necessary, but will often claim they had limited power to rein in appointed counsel who insisted on lengthy timetables or unnecessarily multiplied the duration and cost of the proceedings; counsel may justify their conduct as being at the behest, or at least in the interest of, their clients, who cannot afford to leave stones unturned; clients may look back to the ultimate decision maker, the tribunal, for having failed to take a firm stand in the face of both sides' worst tendencies.¹ And so the cycle goes on, with nearly everyone accepting that arbitration is not as efficient as it should be,² but no single constituency accepting responsibility for the problem.

Recent developments suggest a procedural trend that may be about to change that, however. In response to concerns about the pace and cost of arbitration,³ different stakeholders have undertaken initiatives designed to help streamline procedure. Notable among these have been joint efforts of arbitrators, counsel and parties such as the Centre for Effective Dispute Resolution (CEDR) which issued the CEDR Rules for the Facilitation of Settlement in International Arbitration in 2009,⁴ the International Chamber of Commerce (ICC) Task Force which published the report *Techniques for Controlling Time and Costs in Arbitration*⁵ and, in the United States, the College of Commercial Arbitrators (CCA), Protocols for Expeditious, Cost-Effective Commercial Arbitration.⁶ Institutions have begun to take steps focused on addressing specific contributors to inefficiency. For example, with respect to document disclosure, the International Centre for Dispute Resolution (ICDR) has issued the *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* (2008).⁷ For the frequent problem of tribunals too busy to manage their cases in reasonable time, the ICC has revised its *ICC Arbitrator Statement of Acceptance, Availability and Independence* (2010) to highlight availability and put teeth into the consequences for an

¹ An example of some highly collegial finger-pointing can be found in the notes to a May 2009 roundtable discussion in London involving a number of well-known in-house lawyers for multinational companies, international arbitration counsel and arbitrators. While all groups of stakeholders tended to identify the same root causes of delays and excessive costs, each tended to believe that another constituency was better placed to implement solutions to the problems. See, e.g. "The Dynamic of Time and Cost" (2009) 4(2) *Global Arbitration Review* May 1, <http://www.globalarbitrationreview.com/journal> [Accessed July 9, 2010]; "The Dynamic of Time and Cost—The Sequel" (2009) 4(3) *Global Arbitration Review* July 15, <http://www.globalarbitrationreview.com/journal> [Accessed July 9, 2010].

² In a departure from recent commentary, arbitrator William Park proffers a defence of arbitration against complaints of procedural inefficiency, noting that parties and tribunals should ultimately place a greater premium on the truth-seeking function of the arbitral process than on the amount of time taken to arrive at a decision: W.R. Park, "Arbitrators and Accuracy" (2010) 1(1) *Journal of International Dispute Settlement* 25.

³ See, e.g. Queen Mary University and PricewaterhouseCoopers, *International Arbitration Study: Corporate Attitudes and Practices* (2006) (noting concerns over time and cost of arbitration), available at http://www.pwc.co.uk/eng/publications/International_arbitration.html [Accessed June 16, 2010]; P. Hoebek, V. Mahnken and M. Koepeke, "Time for the Woolf Reforms in Construction Arbitration" (2008) 11(2) *International Arbitration Law Review* (calling for the adoption of multiple steps to streamline and shorten arbitration proceedings); M. McIlwrath and R. Schroeder, "International Arbitration: In Dire Need of Early Resolution" (2008) 74 *Arbitration* 3 (suggesting that parties are poorly served by a tendency of arbitral tribunals to defer decisions on key issues to final awards reached after years); David W. Rivkin, "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited" (2008) 24(3) *Arbitration International* 375; Jean-Claude Najjar, "Inside Out: A User's Perspective on Challenges in International Arbitration" (2009) 25(4) *Arbitration International* 515. In addition, large users of international arbitration recently formed the Corporate Counsel International Arbitration Group (CCIAG), <http://www.cciag.com> [Accessed June 15, 2010], an organisation that promotes efficiency in the conduct of arbitrations.

⁴ Available at http://www.cedr.com/about_us/arbitration_commission/Rules.pdf [Accessed June 15, 2010].

⁵ ICC Publication 843 (2007). Available at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf [Accessed June 15, 2010].

⁶ See <http://www.thecca.net> [Accessed June 15, 2010].

⁷ Available at <http://www.adr.org/si.asp?id=5288> [Accessed June 15, 2010].

arbitrator who slows the pace of proceedings.⁸ Even more ambitious projects are new rules providing for time-limited and procedurally compacted proceedings for disputes of any size, such as the International Institute for Conflict Prevention and Resolution (CPR) Global Rules for Accelerated Commercial Arbitration (2009)⁹ and the DIS (German Institution of Arbitration) Rules for Expedited Arbitration (2008).¹⁰

To bring about genuine improvements, however, these initiatives must actually be put into practice by arbitrators, counsel, and parties involved in each proceeding. For that reason, perhaps the most interesting recent development was the unilateral declaration of a major international law firm in April 2010 that it would take 25 specific steps to reduce the time and cost of arbitration. With its Protocol to Promote Efficiency in International Arbitration,¹¹ Debevoise & Plimpton has issued a unilateral public statement of how the firm's lawyers will conduct themselves at each phase of a proceeding. The Protocol reaches the firm's clients indirectly, through a pledge to explore with them "how such procedures may be applied in each case".

The Debevoise Protocol shares common underlying principles with the other efficiency initiatives and has many of the same features. One is a general preference for the procedural approach adopted in many civil-law jurisdictions of requiring parties to present a fully developed case at the early stages of the proceedings, together with supporting documentary evidence, rather than skeletal pleadings that leave cases to be developed once information is acquired from the opposing party.¹² For most commercial/contractual disputes this front-loaded approach makes sense, as claimants ought to have sufficient evidence in their possession to support their case when they file it, rather than pinning their case on what they hope to obtain from the respondent once proceedings are under way.

⁸ The ICC's revised statement requires a nominated arbitrator to specify other proceedings in which he or she is acting as an arbitrator and acknowledge the premium the ICC places on a reasonably prompt conclusion, with arbitrator compensation tied to the "duration and conduct" of the proceedings. Available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/News/2010/January_SAAI.pdf [Accessed June 15, 2010].

⁹ Available at <http://www.cpradr.org/CPRStore/tabid/67/ProductID/159/Default.aspx> [Accessed June 15, 2010].

¹⁰ Available at http://www.dis-arb.de/download/2008_SREP_Download.pdf [Accessed June 15, 2010].

¹¹ Available at <http://www.debevoise.com/arbitrationprotocol> [Accessed June 15, 2010].

¹² Debevoise Protocol para.5: "When possible, we will include a detailed statement of claim with the request for arbitration, so that briefing can proceed promptly once the procedural calendar is established"; the CPR Accelerated r.7.1 specifies that the statement of claim, the purpose of which "is to define the issues to be arbitrated and to provide the Respondent with sufficient information to respond directly to the factual and legal positions that comprise the claim", shall be served "[n]o later than ten (10) days after service of the Notice of Arbitration"; the CCA Protocol for Arbitration Providers action 8: "Providers' arbitration procedures should require fact pleading rather than notice pleading in both demands and answers, and require that claimants and respondents serve with their initial pleadings all documents supporting each claim or defense, as well as a list of witnesses they expect to call."

Other features that the Debevoise Protocol shares with the various other efficiency initiatives are an emphasis on the utility of mediation during the course of arbitration to shorten proceedings and optimise outcomes for parties,¹³ the appointment of arbitrators whose schedules are not too busy to impede the reasonably efficient conduct of the proceedings¹⁴ and a commitment to minimise the quantity of documentary disclosure.¹⁵

Like the other efficiency initiatives, the Debevoise Protocol represents an enhancement, or modernisation, of existing arbitration practice rather than truly radical change. Perhaps because of concerns or even a fear of treading too far on accepted traditions, there remain areas where no institution or law firm has yet realistically addressed calls for change. For example, with the exception of one initiative being piloted by the CPR Institute for Arbitrators,¹⁶ no one has yet introduced a means for making available reliable information about the past performance of arbitrators.¹⁷ Although the reliability of information about arbitrator candidates is often as imperfect as its distribution in the appointing process,¹⁸ the Debevoise Protocol does not offer to make the firm's own proprietary information about arbitrators available to opposing counsel or practitioners at other law firms. Similarly, some of the Protocol's steps do not move beyond existing practice. Asking arbitrators to render an award within three months of the close of proceedings is hardly ambitious, especially when far more stringent time limits already exist.¹⁹

But there can be little question that the Debevoise Protocol is, in its entirety, a bold move, as much as it may also have been intelligent law firm marketing. While the various other efficiency initiatives portray an emerging ideal of how modern international proceedings *should* be conducted, the Debevoise Protocol purports to put this ideal into practice, and other practitioners are bound to take notice. In fact, the announcement of the Debevoise

¹³ Debevoise Protocol para.23: "We will investigate routes to settlement, including by suggesting mediation, when appropriate, either at the outset of the case or after an exchange of submissions has further clarified the issues"; CPR Accelerated rr.19-2: "With the consent of the parties, the Arbitral Tribunal at any stage of the proceeding may arrange for mediation of the claims asserted in the arbitration by a mediator acceptable to the parties who may be a member of the Arbitral Tribunal"; CEDR Rules art.4 para.2: "At the First Procedural Conference, the Arbitral Tribunal shall (2) ensure that the Parties are aware of the different dispute resolution processes (such as mediation) ...; (3) where appropriate, discuss with the Parties how other dispute resolution processes used to facilitate settlement might be accommodated ... (for example by way of a Mediation Window)", and art.5 para.3(3): "The Arbitral Tribunal shall insert a Mediation Window in the arbitral proceedings when requested to do so by all parties in order to enable settlement discussions, through mediation or otherwise, to take place"; CCA Protocol for Arbitration Providers action 2: "provider-developed arbitration clauses and procedures should be employed within comprehensive, stepped-dispute resolution provisions that begin with executive negotiation and mediation".

¹⁴ Debevoise Protocol para.1: "Before appointing arbitrators, we will ask them to confirm their availability for hearings";

CCA Protocol for Arbitration Providers action 12: "Providers should require arbitrators being considered for appointment in expedited proceedings to expressly confirm their availability to both manage and hear the case within a specific number of days prior to being confirmed";

ICC Arbitration Rules art.9: "In confirming or appointing arbitrators, the Court shall consider ... the prospective arbitrator's availability."

¹⁵ Debevoise Protocol para.11: "We will limit and focus requests for the production of documents";

CCA Protocol for Outside Counsel action 5: "cooperate with opposing counsel and the arbitrator in looking for appropriate ways to limit or streamline discovery";

CPR Global Rules for Accelerated Commercial Arbitration r.11: "Any party may request the Arbitral Tribunal to order the production of additional specific documents that are essential to a matter of import in the proceeding for which a party can demonstrate a substantial need."

¹⁶ CPR's "Positively Neutral" rating system at: <http://www.cpradr.org/CPRNeutrals/NEWPositivelyNeutralEvaluations/tabid/434/Default.aspx> [Accessed June 15, 2010].

¹⁷ By contrast, significant progress in this area has been made with respect to the practice of mediation. The International Mediation Institute (IMI), <http://www.IMIMediation.org> [Accessed June 15, 2010], is an initiative led by parties (including my employer, General Electric) to provide a free, publicly-accessible database of leading mediators around the world, together with feedback from parties and counsel about the mediator's past performance. At the time of writing, such feedback was available for over 300 mediators worldwide.

¹⁸ M. McIlwrath, "Grading the Arbitrator" (2007) 73 *Arbitration* 224.

¹⁹ Compare Debevoise Protocol para.2: "We will ask arbitrators for a commitment that the award will be issued within three months of the merits hearing or post-hearing briefs, if any" with American Arbitration Association (AAA) r.R-41, which requires that: "The award shall be made ... no later than 30 days from the date of closing the hearing."

Protocol was immediately followed by the public statement of at least one other firm that it would also abide by the stated principles, with other firms indicating that they would consider adopting similar measures of their own.²⁰

No doubt, one side to an arbitration cannot, through its own unilateral declarations, make the entire process more efficient. Yet, if efficiency improvements continue to gain currency, at least there will be no need to point fingers when an arbitration takes too long. Parties who cause delay and proliferation of costs, or arbitrators and institutions that tolerate such tactics, will stand out as sore thumbs.

DEBEVOISE PROTOCOL TO PROMOTE EFFICIENCY IN INTERNATIONAL ARBITRATION (APRIL 2010)

International arbitration can provide significant advantages for parties to cross-border disputes, such as a neutral forum, input into selecting the decision-maker and nearly worldwide enforceability of awards. With seemingly greater frequency, however, parties to international arbitrations express concerns about increased length and cost of the arbitration process. These concerns have caused some parties to question the value of international arbitration as an efficient dispute resolution mechanism.

To respond to these concerns, the international arbitration practitioners at Debevoise & Plimpton LLP have developed this Protocol to Promote Efficiency in International Arbitration. This Protocol identifies specific procedures that generally make an arbitration more efficient. Through this Protocol, we express our commitment to explore with our clients how such procedures may be applied in each case. In each arbitration, parties, counsel and arbitrators should take maximum advantage of the flexibility inherent in international arbitration and should use only the procedures that are warranted for that particular case. The procedures set out here are therefore not meant to be inflexible rules. However, through their consideration, we believe that we can improve the arbitration process and thereby enable our clients to enjoy the advantages of international arbitration.

Formation of the tribunal

- Before appointing arbitrators, we will ask them to confirm their availability for hearings on an efficient and reasonably expeditious schedule.
- We will ask arbitrators for a commitment that the award will be issued within three months of the merits hearing or post-hearing briefs, if any.
- We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators.

Establishing the case and the procedure

- We will encourage consolidation and joinder of parties and disputes to avoid multiple proceedings when possible.
- When possible, we will include a detailed statement of claim with the request for arbitration, so that briefing can proceed promptly once the procedural calendar is established.
- We will propose and encourage the arbitral tribunal to adopt procedures that are appropriate for the particular case and that are designed to lead to an efficient resolution. We will use our experience in crafting such procedures, and we will not simply adopt procedures that follow the format of prior cases.

²⁰ (2010) *Global Arbitration Review* April 16, <http://www.globalarbitrationreview.com/journal> [Accessed July 9, 2010] (quoting a partner at the SLCG law firm in Italy as having immediately embraced the initiative, and quoting partners at leading international law firms in London as giving consideration to adopting a similar measure).

- We will request the arbitral tribunal to hold an early procedural conference, usually in-person, to establish procedures for the case. Although in-person meetings may cost more because of travel time and expense, they often ultimately save costs by allowing a more complete discussion of the procedural issues that may arise. We will seek to set the merits hearing date, as well as all other procedural deadlines, in this first procedural conference.
- We will request our clients and opposing clients to attend any procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.
- When appropriate to the needs of the case, we will consider a fast track schedule with fixed deadlines.
- We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.

Evidence

- We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules of Evidence generally provide an appropriate balance of interests.
- We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.
- We will, when possible, make filings electronically and encourage paperless arbitrations. When cost-effective, we will use hyperlinks between documentary exhibits and their references in memoranda.
- We will use written witness statements as direct testimony to focus the evidence and hearings.
- We will avoid having multiple witnesses testify about the same facts.
- We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing.
- We will generally brief legal issues and consider presenting experts on issues of law only when the tribunal and counsel are not qualified to act under that law.
- We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.

The hearing

- We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.
- We will consider the use of a chess-clock process (fixed time limits) for hearings.
- We will not automatically request post-hearing briefs, but we will consider in each case whether they would be helpful in promoting the efficient resolution of the issues. When post-hearing briefs are appropriate, we will ask the arbitral tribunal to identify the issues on which it may benefit from further exposition, and then seek to limit the briefing to such issues.
- We will also consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.

Settlement consideration

- We will investigate routes to settlement, including by suggesting mediation, when appropriate, either at the outset of the case or after an exchange of submissions has further clarified the issues.
- Where applicable rules or law permit, we will consider making a “without prejudice except as to costs” settlement offer at an early stage. This will not only protect our client’s costs position, but it may lead the opposing party to consider potential outcomes more seriously.
- When appropriate, we will ask arbitrators to provide preliminary views that could facilitate settlement.