

**FOUR WAYS TO SHARPEN THE SWORD OF EFFICIENCY  
IN INTERNATIONAL ARBITRATION**

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**FOREWORD**

The Young ICCA Mentoring Programme 2011-2012 has offered a unique opportunity to four young practitioners coming from different legal backgrounds to share views and experiences in a field of common interest, international arbitration.

Through e-mail exchanges and phone conferences in the course of the two-year duration of the programme they, in addition to becoming friends, have devoted much thinking to the present status of international arbitration, its prospects of development and how best to cope with some of its critical aspects. Hence, the decision to write a joint paper on a subject that has attracted the critical attention of commentators, international operators and arbitral institutions, the excessive delays and costs of international arbitration.

Having been the Mentor in the Programme, I have been gratified by the interest shown by my younger colleagues for this discipline and by their decision to write a joint paper on the subject of how to make international arbitration more efficient and cost effective. I have therefore accepted with great pleasure the request by David, Gardar, Raul and Tobiasz to write this foreword to their paper. Although the product of individual contributions, "Four Ways to Sharpen the Sword of Efficiency in International Arbitration" has resulted in a well-coordinated description of how best to try to overcome what is felt is a pathological aspect of a dispute settlement method that is still largely favoured by international operators.

The first section of the paper, dealing with the impact of the parties' preliminary choices on efficiency of the proceedings, describes the best use to be made of the party autonomy in the initial choice of the best arbitration method, whether ad hoc or institutional, and, in the latter case, of the best suited institutional rules. Although the level of homogeneity reached by such rules is high, differences persist which are aptly evidenced by this section.

Choosing the right arbitrator is another key factor of the process, prompting an analysis of the elements to be taken into account to that effect. Even if a careful choice of the party-appointed arbitrators is essential to achieve greater efficiency, it is however to be noted that the key choice remains that of the presiding arbitrator, the latter being the real driving force of the entire course of the proceedings.

The second section deals with "The Procedure as the Foundation of Arbitral Efficiency". Here the focus is rather on the role that should be assumed by the arbitrator, keeping a balance between "proactive and judicious efforts" to move the proceedings forward in an efficient manner while at the same time ensuring the respect for party autonomy and equality. The

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emphasis is rightly on the need for the arbitrator to adopt procedures and measures that are most suited to the circumstances of the case, by exercising powers that are available under the applicable law or institutional rules to obtain the parties' concurrence, such as the shifting of costs to the party unwilling to comply with the agreed procedure. Asking the parties to initially identify issues in dispute, the so-called "front loading", is perceived as another way to make arbitration more time and cost efficient. In the same vein, separating the proceedings in different phases (so-called bifurcation: jurisdiction/merits and, as to the latter, liability/quantum) may contribute to the same effect, provided the conditions exist for such procedural choice.

The arbitrator as settlement facilitator is considered by the third section as another subject addressing inefficiencies of international arbitration. This particular role of the international arbitrator has been and still is the subject of discussion and pros and cons arguments. The section conveniently draws a distinction between legal systems favouring the arbitrator's intervention in the parties' settlement discussions and those that are hostile to this particular function. It may be noted in this regard that the fact that most legal systems provide for the national judge's intervention as a settlement facilitator is not particularly significant, the position of the judge differing from that of the arbitrator regarding the issue of independence of judgment. In the final analysis, all will depend on the level of the arbitrator's intervention, whether as an active promoter of the settlement attempt or merely as offering, in a neutral way and upon the parties' request, few factual and legal elements that are objectively uncertain in view of the resolution of the dispute. The risk is in fact that by entering into the merits of the case the arbitrator may be felt as having prejudged the case. The section deals appropriately with these various aspects, including the respect owed to the parties' right to enter into a voluntary agreement and the need to avoid separate ex parte communications and meetings so as to preserve the possibility of continuing the proceedings should settlement discussions fail, avoiding possible attacks against the award. A prior waiver by the parties in this regard is advisable: however, it is to be remembered that not all legal systems accept as valid such a waiver (Italian being one of such systems).

Use of Information Technology in Arbitration is the subject of the last session, manifestly written by an expert in the field. Among the aspects considered is the extent to which use of IT in arbitration is compatible with the existing legal framework, including the requirement of written form for the arbitration agreement under Article II(2) and VII(1) of the New York Convention. Due to uncertainties in that regard, it is held advisable that future revisions of institutional and national rules of arbitration address issues of IT use in arbitration.

Electronic case management system is wisely considered as an advanced platform for communication and organization of physical documents in electronic form rather than as a way of replacing oral hearings. This particular aspect is to be approved, the in-person relations between the parties and the arbitrator being an indispensable moment of the arbitrator's decision-making process. The issue of protection of data against the risk of possible robbery by computer hacking is conveniently mentioned as a source of mistrust against the use of online data transmission.

The section considers also the use of expert and witness examination by video conference accompanied by the advice, to be shared, that in case of doubts the in-person hearing is to be preferred. The risk inherent in obtaining evidence in the form of electronic data or other electronically stored information (so-called "e-discovery") is also conveniently mentioned.

By way of conclusive remarks, it may be said that even if the joint paper profits from the numerous contributions devoted to the problem of the inefficiencies of international arbitration, as witnessed by the rich and updated references in the footnotes, it does not fail to positively surprise the reader for the clear and well-reasoned manner in which problems are introduced and appropriate solutions proposed. One may suspect that, even if relatively young in age, the writers have already at their disposal a solid cultural background in addition to a keen interest in exploring the many facets of international arbitration.

Piero Bernardini, 21 February 2013

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## I. THE IMPACT OF THE PARTIES' PRELIMINARY CHOICES ON EFFICIENCY AND COST-EFFECTIVENESS

International arbitration has enjoyed much success in the last decades and is now the predominant method of resolving international commercial and investment disputes. There are many reasons for this success and why parties prefer arbitration over litigation. In order to benefit from the advantages that arbitration has to offer, parties must from the outset play an active role and use any opportunity that party autonomy provides them with to their advantage. Party autonomy is a cornerstone principle in international arbitration; it allows the parties the flexibility of choosing *inter alia*: (i) under which rules they wish to arbitrate, (ii) the seat of arbitration, (iii) the applicable law and procedure, and (iv) the arbitrator(s) to resolve their dispute. Thus, from the outset it is important that the parties make use of the advantages and flexibility party autonomy provides by making well informed choices, which in turn can result in important legal and tactical advantages in the arbitral proceedings.<sup>1</sup>

Arbitration is also often perceived as more efficient than litigation. Indeed, efficiency is one of the reasons often cited as to why parties choose to arbitrate as arbitration supposedly provides faster decisions and lower costs as compared to litigation.<sup>2</sup> Nevertheless, doubts have recently been raised as to whether this perception truly reflects the reality and "*that arbitration is not as efficient as it should be.*"<sup>3</sup> Indeed, delays and increasing costs are considered a serious concern in international arbitration.<sup>4</sup> In fact, there has been growing criticism that international arbitration is not efficient and even in some instances 'expense and time' are considered a disadvantage rather than advantage.<sup>5</sup> Interestingly, most of the discussion on how to achieve greater efficiency in international arbitration has focused on the

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<sup>1</sup> See Paul Friedland and Loukas Mistelis. Queen Mary University of London, "2010 International Arbitration Survey: Choices in International Arbitration" (6 October 2010), p. 2.

<sup>2</sup> See Gary Born, "International Arbitration: Law and Practice" (2012), p. 14; and Lars Heuman, "Arbitration Law of Sweden: Practice and Procedure" (2003), p. 10-11; see also Julian Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (2003), pp. 8-9, paragraph 1-28 to 1-30.

<sup>3</sup> Michael McIlwrath, "Faster, Cheaper: Global Initiatives to Promote Efficiency in International Arbitration"; (2010) Arbitration, pp. 568-570.

<sup>4</sup> See Lord David Hacking and Michael E Schneider. "Towards More Cost-Effective Arbitration"; International Bar Association Newsletter Arbitration and ADR, (1998) Vol. 3, No. 1, See also Claire Davies, "More Efficient and Cost-Effective Arbitration: Changes made to the ICC and Swiss Rules in 2012" and Piero Bernardini, "International Arbitration: How to Make it More Effective", in Liber Amicorum En l'Honneur de Serge Lazareff 71 (Laurent Levy & Yves Derains eds., 2011).

<sup>5</sup> See Gerry Lagerberg and Loukas Mistelis. Queen Mary University of London, "International arbitration: Corporate attitudes and practices" (2006), p. 7 and Piero Bernardini, "Cost and Time of International Arbitration. The point of view of the arbitrator", in Essays in Honour of 60 years of Arbitration at the Polish Chamber of Commerce in Warsaw (Józef Okolski, Andrzej Calus, Maksymilian Pazdan, Stanisław Sołtysiński, Tomasz Wardyński, Stanisław Włodyka eds., 2010), p 438.

status and authority of the arbitrators.<sup>6</sup> Accordingly, the discussion how to increase efficiency seems to be focused more on the role of the arbitrators rather than on the parties themselves and the impact of their choices on the arbitral procedure. This is despite the fact that the arbitral tribunal's existence and authority stem from the 'parties' collective will'.<sup>7</sup> Nevertheless, the fact remains the same; those benefitting the most from an efficient and cost-effective arbitration are the parties themselves.

Consequently, achieving a more efficient conduct of the arbitral process must be approached as a collective undertaking that concerns all participants of the arbitral process.<sup>8</sup> As previously mentioned, since most of the ongoing debate relate to the arbitrators, the focus of this section is on the parties and how their choices impact the efficiency and cost-effectiveness of the arbitral process.

Therefore, it is important to realise that a decision to arbitrate is not a single stand-alone decision. Rather it should be viewed as a series of choices and decisions that have to be made prior to the constitution of the arbitral tribunal. For the purpose of this section these choices and decisions will be referred to as 'pre-arbitration choices'. These pre-arbitration choices should be carefully considered by the parties as the more aware they are, the more likely they will make choices that contribute to the efficiency and cost-effectiveness of the arbitral process.<sup>9</sup>

#### **(a) Selecting the institutional rules governing the arbitral procedure**

Once the decision to include an arbitration clause in a contract has been made, the parties must then choose the type of arbitration they prefer. This is the first pre-arbitration choice the parties are confronted with. As it is more common for parties to opt for institutional arbitration rather than *ad hoc* arbitration,<sup>10</sup> this section will only address issues relating to the selection of institutional rules. By choosing institutional arbitration, the parties benefit from having an institution administer their proceedings, which in turn may facilitate the commencement of the proceedings and the constitution of the arbitral tribunal.

Factors that often come into consideration when selecting the rules of an arbitration institution are *inter alia*: neutrality, 'internationalism', reputation and widespread recognition.<sup>11</sup> Although the arbitration rules of the leading arbitration institutions might seem homogenised,<sup>12</sup> there are still subtle differences that may have an impact on efficiency and cost-effectiveness. Indeed, in response to criticism of mounting costs and delays several arbitral institutions have recently undertaken the task of revising their arbitration rules, with the primary aim of making the arbitration process more efficient.<sup>13</sup> Thus, now more than ever it is important for parties, and their lawyers, to be familiar with the differences between the

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<sup>6</sup> See Lord David Hacking and Michael E Schneider. "Towards More Cost-Effective Arbitration"; International Bar Association Newsletter Arbitration and ADR, (1998) Vol. 3, No. 1.

<sup>7</sup> See V.V. Veeder, "Whose arbitration is it anyway: the parties or the tribunal – an interesting question?", in The Leading Arbitrators' Guide to International Arbitration; Lawrence W. Newman and Richard D. Hill, (2004), Chapter 15, p. 347.

<sup>8</sup> See *Ibid.*, at 6. See also Piero Bernardini, "International Arbitration: How to Make it More Effective", in Liber Amicorum En L'Honneur De Serge Lazareff 71 (Laurent Levy & Yves Derains eds., 2011).

<sup>9</sup> See Paul Friedland and Loukas Mistelis. Queen Mary University of London, "2010 International Arbitration Survey: Choices in International Arbitration" (6 October 2010), p. 2.

<sup>10</sup> See Gary Born, "International Arbitration: Law and Practice" (2012), p. 28.

<sup>11</sup> See Paul Friedland and Loukas Mistelis. Queen Mary University of London, "2010 International Arbitration Survey: Choices in International Arbitration" (6 October 2010), p. 3.

<sup>12</sup> See *ibid.* at 8.

<sup>13</sup> See Claire Davies, "More Efficient and Cost-Effective Arbitration: Changes made to the ICC and Swiss Rules in 2012".

arbitration rules of the leading arbitration institutions as some rules might serve a party's interest better than the other, e.g. with regards to length of time periods, obligations of the parties to cooperate in good faith and contribute to efficient conduct of the proceedings and the use of different criteria for fixing administrative costs.<sup>14</sup> Therefore, the selection of the institutional rules governing the arbitration should be well considered and should not be a decision left to the last minute of the contract negotiation stage and incorporated as a 'midnight clause'.<sup>15</sup>

By way of example, the International Chamber of Commerce Rules of Arbitration ("ICC Rules") and the Swiss Rules of International Arbitration ("Swiss Rules") have recently been revised. Amongst these revisions have been several provisions aiming to reduce time and cost, or in other words to achieve greater efficiency. Both the revised ICC Rules and Swiss Rules have followed the example of The Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") and have incorporated provision for the appointment of an emergency arbitrator: "*This is intended to reduce the involvement of the state courts where parties wish to apply for urgent interim measure prior to the constitution of the arbitral tribunal.*"<sup>16</sup>

Pursuant to Article 22(1) of the ICC Rules both the arbitral tribunal and the parties are now obliged to "*make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*".<sup>17</sup> Likewise, under Article 15(7) of the Swiss Rules, all participants in the arbitral proceedings should "*make every effort to contribute to the efficient conduct of the proceedings*".<sup>18</sup> These provisions are similar to the obligations of the arbitral tribunal and the parties under the LCIA Rules.<sup>19</sup> However, the ICC Rules take this obligation a step further, and unlike the LCIA Rules and the Swiss Rules, an arbitral tribunal conducting an arbitration under the ICC Rules is now expressly authorised under Article 37(5) to take this 'efficiency obligation' into account when making decisions on costs. Hence, the arbitral tribunal will determine whether and to what extent the parties have conducted the arbitration in an expeditious and cost-effective manner. This provides the arbitral tribunal with the tools necessary to penalise parties for inappropriate behaviour and dilatory tactics, which in turn should contribute to greater efficiency and cost-effectiveness.

As discussed in the subsequent section, under both the ICC Rules and the Swiss Rules the parties must now provide more detailed information at the early stages of the proceedings. This is important as it may help the arbitrators to properly identify the issues of the dispute at an early stage. It could also encourage settlements between the parties as they are better informed about each other's respective positions.<sup>20</sup>

The above mentioned revisions of the ICC Rules and the Swiss Rules demonstrate that institutional rules are constantly being developed to better serve the parties' needs. This development is intended to make the arbitral process more efficient and cost-effective, which is ultimately beneficial to all those involved in the process. Thus, it is important that the

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<sup>14</sup> "When agreeing to a settlement of disputes by arbitration, the parties should consider the services offered by different institutions and examine whether these services justify their costs." See also Lord David Hacking and Michael E Schneider. "*Towards More Cost-Effective Arbitration*". International Bar Association Newsletter Arbitration and ADR", (1998) Vol. 3, No. 1.

<sup>15</sup> See Jean Francois Poudret and Sébastien Besson, "*Comparative Law of International Arbitration*" (2007), p. 123, para. 153.

<sup>16</sup> Claire Davies, "*More Efficient and Cost-Effective Arbitration: Changes made to the ICC and Swiss Rules in 2012*".

<sup>17</sup> ICC Rules Article 22(1).

<sup>18</sup> Swiss Rules Article 15(7).

<sup>19</sup> LCIA Rules Article 14.

<sup>20</sup> See Claire Davies, "*More Efficient and Cost-Effective Arbitration: Changes made to the ICC and Swiss Rules in 2012*".

parties and their lawyers keep abreast of these new developments in their decision to include a specific arbitral institution in their arbitration clause.

Likewise, recent research has found that it is common for corporations to have a dispute resolution policy in place which provides in advance for the key aspects of negotiating an arbitration clause.<sup>21</sup> In the 2006 Queen Mary University of London ("QMUL") International Arbitration Survey, 65% of respondents said that they maintained a dispute resolution policy.<sup>22</sup> In the 2010 QMUL International Arbitration Survey, 92% of those respondents that had a dispute resolution policy had a position on the preferred institutional arbitration rules.<sup>23</sup> This approach, *i.e.* maintaining a dispute resolution policy is considered an important strategic advantage,<sup>24</sup> which can prove useful when the parties have, prior to the negotiation of the arbitration clause, already weighed the risks and advantages attached to the rules of a particular institution. Also, if the opposing party does not agree to arbitrate under the rules of the preferred institution this enables the parties to suggest a strategically favourable alternative.<sup>25</sup>

Therefore, the selection of the arbitration rules governing the proceedings will more than likely have some impact on the efficiency and cost-effectiveness of the upcoming arbitration. It's the parties themselves who stand to gain most from a fair resolution of the dispute by an impartial tribunal without unnecessary delay and expenses. Thus, preparation is key, and the parties should familiarise themselves with the options that are available to them and determine which institution best suits their needs.

Finally, in terms of efficiency, the parties should *inter alia* ask themselves these question when selecting the most appropriate institutional rules to govern their proceedings:

- Is the arbitral tribunal required to do everything necessary for the fair, efficient and expeditious conduct of the arbitration?
- Do the rules oblige the parties to co-operate in the arbitral process in an expeditious and efficient manner and is the arbitral tribunal permitted to take the parties' conduct into account when making decisions on cost? Is the arbitral tribunal empowered to penalise bad faith, dilatory tactics or other uncooperative behaviour?
- Is the arbitral tribunal permitted to shorten any periods of time provided for in the rules to facilitate efficiency?
- Are the parties obliged to identify the issues and to submit most of the arguments and documents they intend to rely on at an early stage of the proceedings?
- Is the arbitral tribunal permitted to make decisions on costs during the course of the procedure and at different stages of the procedure?

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<sup>21</sup> See Gerry Lagerberg and Loukas Mistelis. Queen Mary University of London, "*International arbitration: Corporate attitudes and practices 2006*", pp. 8-9. See also Paul Friedland and Loukas Mistelis. Queen Mary University of London, "*2010 International Arbitration Survey: Choices in International Arbitration*"(6 October 2010), p. 5.

<sup>22</sup> See *Ibid.* at 8-9.

<sup>23</sup> See Paul Friedland and Loukas Mistelis. Queen Mary University of London, "*2010 International Arbitration Survey: Choices in International Arbitration*", (6 October 2010), p. 5.

<sup>24</sup> See Gerry Lagerberg and Loukas Mistelis. Queen Mary University of London, "*International arbitration: Corporate attitudes and practices*", 2006, p. 8.

<sup>25</sup> See Paul Friedland and Loukas Mistelis. Queen Mary University of London, "*2010 International Arbitration Survey: Choices in International Arbitration*", (6 October 2010), p. 6.

- Are the parties afforded a “full” opportunity to present their respective cases or a “reasonable” opportunity?
- Do the rules allow to have an emergency arbitrator appointed?
- Do the rules encourage a proactive promotion of settlement negotiations by the arbitral tribunal?
- Do the rules permit the use of information technology to achieve greater efficiency and cost-effectiveness?

The above considerations are crucial in the final determination of which arbitral institution to select since the parties’ answers to these questions will likely reveal which institution is best suited to administer their dispute.

**(b) Choosing the right arbitrator**

If the parties have agreed to arbitrate and a dispute arises between them, they are confronted with another ‘pre-arbitration choice’, namely whether and to what extent they wish to exercise their freedom to participate in the selection of the arbitral tribunal.<sup>26</sup> The fact that the parties are given the freedom to choose their own tribunal, or at the very least participate in the selection process, is one of the significant features that distinguishes international arbitration from traditional litigation.<sup>27</sup> As stated in the Hague Convention of 1907, arbitration affords the parties the freedom to have their disputes resolved by ‘judges of their own choice’.<sup>28</sup>

Recently, there has been a debate initiated by Mr Jan Paulsson on whether the practice of unilateral appointments in international arbitration should be abandoned altogether.<sup>29</sup> Even though abandoning unilateral appointments would most likely increase the efficiency of the arbitral process, this debate has not to date gained any significant momentum and other commentators are strongly opposed to depart from the current practices.<sup>30</sup> Moreover, according to the QMUL 2012 International Arbitration Survey “*the arbitration community generally disapproves of the recent proposal calling for an end to unilateral party appointments.*”<sup>31</sup>

Hence, it seems that the parties will remain active participants in the constitution of arbitral tribunals should they so choose. Commentators have rightfully stated that “*nothing is more important than choosing the right arbitral tribunal.*”<sup>32</sup>

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<sup>26</sup> See Gary Born, “*International Arbitration: Law and Practice*”, (2012), pp. 121-124, which *inter alia* states: “As with other aspects of the international arbitral process, a dominant feature of the selection of arbitrators is party autonomy.”

<sup>27</sup> See Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, “*Law and Practice of International Commercial Arbitration*” (2004, 4<sup>th</sup> Ed.), pp. 10-11, para 1-14. See also Gary Born, “*International Arbitration: Law and Practice*” (2012), p. 125.

<sup>28</sup> Hague Convention of 1907, Article 37.

<sup>29</sup> See Jan Paulsson, “*Moral Hazard in International Dispute Resolution*”, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law 29 April 2010.

<sup>30</sup> See Alexis Mourre, “*Are unilateral appointments defensible?*”. On Jan Paulsson’s Moral Hazard in International Arbitration, Kluwer Arbitration Blog (5 October 2010). See also Anthony Daimsis, “*Mutual v. unilateral: the future of appointing arbitrators*”, The lawyers weekly (16 September 2011). Available at [www.lawyersweekly.ca](http://www.lawyersweekly.ca).

<sup>31</sup> See Paul Friedland and Stavros Brekoulakis. Queen Mary University of London, “*2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*”, p. 2.

<sup>32</sup> See Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, “*Law and Practice of International Commercial Arbitration*” (2004, 4<sup>th</sup> Ed.), pp. 216-217, para 4-12.

*The choice of persons who propose the arbitral tribunal is vital and often the most decisive step in an arbitration. It has rightfully been said that arbitration is only as good as the arbitrators.*<sup>33</sup>

The manner in which a party exercises its freedom to participate in the selection process is a matter of great importance and certainly has a significant impact on whether or not the arbitral process is efficient and cost-effective. Thus, choosing an arbitrator in whom the parties' place their trust is undeniably an important and often a critical pre-arbitration choice, as "arbitral appointments can [...] readily become arbitral disappointments".<sup>34</sup>

The question then becomes how the parties should exercise this freedom. Although there is no universal answer to that question, as the specificities of each dispute and the needs of the parties differs from case to case, there is still one common denominator which the parties should adhere to: preparation. The parties involved in international arbitration should never nominate or appoint an arbitrator without having done their homework and researched the candidate. This could be described as 'pre-appointment due diligence'.<sup>35</sup> A party that blindly appoints an arbitrator without having done its homework may end up with an 'arbitral disappointment', with only himself (or his lawyer) to blame.

Lord Hacking has effectively described the complications associated with the selection process:

*The question, therefore, has to be asked why, if the parties have the great advantage of being able to choose their own arbitrators, there are 'arbitral disappointments'. There are, I believe, two basic problems: firstly there is not enough true information available to the parties and their lawyers in the selection process for an arbitrator and secondly parties and their lawyers do not approach the selection process with the right criteria. Too often the big names, among the international arbitrators, are favoured without taking into account their availability and their suitability for the arbitration in question. Parties and their lawyers are also too often tempted by an arbitrator's previous experience in a particular form of dispute without having sufficient regard for the more important test of what is the quality of the arbitrator as an arbitrator.*<sup>36</sup>

Considering Lord Hacking's above analysis, it seems that parties are often both underprepared and acting on inadequate information when it comes to the selection of arbitrators.<sup>37</sup> In these circumstances, unfortunately for the parties, ignorance is not bliss. Therefore, it is crucial for the parties to prepare an agenda when approaching the selection process. Such an agenda might be set forth in different steps designed to facilitate the appointment of a suitable arbitrator for the particular case at hand. As an example the parties might approach the selection process on the basis of the four steps described below:

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<sup>33</sup> See J.F. Lalive, "Melanges en l'honneur de Nicholas Valticos: Droit et Justice" (1989).

<sup>34</sup> See Lord David Hacking, "Arbitration is Only as Good as its Arbitrators", in International Arbitration and International Commercial Law: Synergy, Convergence and Evolution – Liber Amicorum Eric Bergsten (S. Kröll, L.A. Mistelis, P. Perales and V. Rogers eds. 2011), p. 224.

<sup>35</sup> See Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides. "Law and Practice of International Commercial Arbitration" (2004, 4<sup>th</sup> Ed.), pp. 235, para 4-50.

<sup>36</sup> See Lord David Hacking, "Arbitration is Only as Good as its Arbitrators", in International Arbitration and International Commercial Law: Synergy, Convergence and Evolution – Liber Amicorum Eric Bergsten (S. Kröll, L.A. Mistelis, P. Perales and V. Rogers eds. 2011), p. 224.

<sup>37</sup> See Michael McIlwrath, "Faster, Cheaper: Global Initiatives to Promote Efficiency in International Arbitration"; (2010) Arbitration, pp. 568-570.

**(i) Establish the professional qualifications required for a specific dispute**

The parties should, before considering which arbitrator to nominate or appoint, analyse the facts of the case and the issues in dispute and establish what their needs and interests are, taking into account the specificities of their particular dispute. Only then will the parties be able to determine what professional attributes and qualities are required from a prospective arbitrator. Also, in addition to the mere professional qualifications and attributes, there are other factors that may affect the selection process and need to be taken into account from the outset. Such factors include: nationality, linguistic skills, legal background and whether the prospective arbitrator has sufficient knowledge of the governing law. This initial analysis has often already taken place during the contract negotiation stage where certain qualifications that are required of the members of the arbitral tribunal have been incorporated into the arbitration clause.

By conducting this analysis prior to making a list of potential appointees the parties increase the likelihood of selecting an arbitrator suitable for their particular dispute. Indeed, it is important to “[m]atch the proposed arbitrator to the proposed dispute”.<sup>38</sup>

**(ii) Make a list of prospective arbitrators – investigate to discover**

This is a two-step process. First, the parties should make a list of individuals, which in their opinion, possess the necessary professional qualifications and fulfil the requirements incorporated into the arbitration clause, if any.

Second, the parties should investigate to discover all available information on the prospective appointees and vet them. “Before appointing an arbitrator a party should seek to gain the best information about the ability, experience and availability of every candidate for the arbitral appointment.”<sup>39</sup> The parties should examine published writings, previous experience and, most importantly, they should ask people that are familiar with the prospective arbitrators’ personal qualities and method of work for references.

This preliminary investigation process is necessary to determine whether the prospective arbitrator is suitable and fulfils the criteria the parties may have. There are various criteria to consider when selecting an arbitrator, these are *inter alia*:<sup>40</sup>

- integrity;
- intelligence and soundness in judgment;
- management skills and attention to detail;
- decisiveness and resoluteness;
- personality, presence and persuasiveness;
- availability, punctuality and ability to keep on track;

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<sup>38</sup> See Lord David Hacking, “Arbitration is Only as Good as its Arbitrators”, in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution – Liber Amicorum Eric Bergsten* (S. Kröll, L.A. Mistelis, P. Perales and V. Rogers eds. 2011), p. 225.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid, at 224-225; See also Lord David Hacking, “Well, Did You Get The Right Arbitrator?”; Mealey’s International Arbitration Report, 2000/Vol. 15, No. 6, pp. 33-34 and Doak Bishop, Craig Miles and Roberto Aguirre Luzi, “Interviewing and selecting arbitrators”, *Latin Lawyer*, (2007) Vol. 6, No. 1, pp. 46-47.

- quality of previous awards and their reasoning; and
- experience of other persons that have worked with him or her in the past.

***(iii) Is the arbitrator available and willing to consider an appointment?***

The next step is to approach the prospective arbitrator, or arbitrators, to inquire whether he or she is available and willing to consider an appointment for a particular dispute as well as whether there are any potential conflicts of interest which could prevent this person from accepting the role. Even though arbitrators are subject to an extensive duty to disclose under most institutional rules, it is advisable to perform the conflict-check at this stage before a formal nomination or appointment is made. In most cases, the prospective arbitrator will perform its own conflict-checks<sup>41</sup> so such a disclosure from the outset should not pose as a problem and in turn it will enable the parties to make an informed decision on whether or not to nominate or appoint that particular candidate.

Moreover, at this stage the parties should request the prospective arbitrator to disclose all relevant information, such as articles, or scholarly writing, information about previous arbitral experience and redacted copies of any awards rendered (if possible). Although the parties might have, prior to approaching a prospective arbitrator, already inquired for information about the candidate's professional and personal qualities, the parties should also when approaching the prospective appointee ask for the information and for references from other arbitrators or counsel with whom the appointee has previously worked with.<sup>42</sup> If there is significant differences between the nature of the information gathered by the party and that supplied by the arbitrator, this should raise a red flag to the parties and provide a reason to investigate further.

In this vein, the ICC Rules require prospective arbitrators to submit a Statement of acceptance, availability, impartiality and independence, that any prospective arbitrator must sign before their appointment or confirmation.<sup>43</sup> This statement "*serves as a basis for parties and the Court to determine an arbitrator's independence, impartiality and availability, and flushes out at an early stage any objections a party may have to the arbitrator*".<sup>44</sup>

At this stage the parties should have sufficient information to make an informed decision as to whether or not this particular individual is a suitable candidate for their particular dispute. Also, as efficiency is dependent on availability it is crucial for the parties to inquire whether

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<sup>41</sup> Article 11(2) of the ICC Rules provides that: "a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall also disclose in writing to the Secretariat any facts or circumstances which might be of such nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality".

<sup>42</sup> See Lord David Hacking, "*Arbitration is Only as Good as its Arbitrators*", in *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution – Liber Amicorum Eric Bergsten* (S. Kröll, L.A. Mistelis, P. Perales and V. Rogers eds. 2011), p. 225-229.

<sup>43</sup> ICC Rules Article 11(2). See Jason Fry, Simon Greenberg and Francesca Mazza, "*The Secretariat's Guide to ICC Arbitration*", ICC Publication 729 (Paris 2012), p. 120, para. 3-381, where it states: "Since 2009, the Statement has placed stronger emphasis on availability and requests arbitrators to provide any additional information that may help clarify their statements regarding availability (e.g. the status of any ongoing cases, or an assessment of the hearing time the arbitrator expects to have available in the coming year or so)." See also Article 11 of the UNCITRAL Arbitration Rules (2010) and the Model statements of independence pursuant to article 11 of the Rules, which advises that parties may consider requesting from the arbitrator in addition to statement of independence that he or she will be able to devote the time necessary to conduct the arbitration, diligently and efficiently.

<sup>44</sup> See Jason Fry, Simon Greenberg and Francesca Mazza, "*The Secretariat's Guide to ICC Arbitration*", ICC Publication 729 (Paris 2012), p. 119, para. 3-376.

the prospective arbitrator can devote sufficient time and attention to resolve the dispute in an efficient and cost-effective manner.<sup>45</sup>

#### **(iv) Pre-appointment interview**

The last step is a pre-arbitration interview. The parties might consider engaging in such an interview at the same time they approach the prospective arbitrator. It is to be noted however that there has been a long standing debate on whether such interviews are appropriate and there has been reticence from some arbitrators not to partake in such interviews.<sup>46</sup> Nonetheless, a pre-arbitration interview is perhaps the best, and perhaps the only, opportunity the parties will get to assess first-hand the prospective arbitrator's experience, substantive field and personal qualifications; including whether the appointee seems resolute and efficient and whether he or she is articulate and has a persuasive personality.<sup>47</sup> "Interviews also provide an opportunity to evaluate a candidate's health, intelligence, experience, language capabilities and availability."<sup>48</sup> Furthermore, a pre-appointment interview is also an excellent opportunity for the parties to verify any information they have previously gathered and ask for clarifications on any issues that might remain unclear.<sup>49</sup>

It is important however to keep in mind the general rule that *ex parte* communications between a party and an arbitrator are prohibited. Thus, pre-appointment interviews might be considered as double-edged sword and the parties should be careful not to ask inappropriate questions and should under no circumstances discuss the merits of the case in detail.<sup>50</sup> The parties should also, to the extent possible, limit any in-depth discussions in such interviews and only communicate sufficient information for the prospective arbitrator to be able to understand the general nature of the particular dispute at hand. In this regard, the parties should either raise the issue directly with the prospective arbitrator before-hand to agree on the line of questioning or have a look at existing guidelines<sup>51</sup> to clarify what the scope and limits of questioning are.<sup>52</sup> Further, it is advisable that minutes or notes of these pre-appointment interviews be taken and kept. If necessary, these can then be provided to the opposing side to establish which topics were discussed. Proceeding in such a manner instils confidence in the fairness of the selection process and avoids any appearance of bias.<sup>53</sup>

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<sup>45</sup> Ibid, at 112, where it states: "Experience has shown that arbitrators who unrealistically assess their workload may find themselves unable to fulfil their responsibilities [...], leading to lengthy delays in the proceedings and in particular in the delivery of the award."

<sup>46</sup> See Gerald Aksen, "The Tribunal's Appointment", in The Leading Arbitrators' Guide to International Arbitration (Lawrence W. Newman and Richard D. Hill eds., 2004), Chapter 2, pp. 35-36. See also Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, *Law and Practice of International Commercial Arbitration* (2004, 4<sup>th</sup> Ed.), p. 235, para 4-50

<sup>47</sup> See Gary Born, "International Arbitration: Law and Practice" (2012), p. 126.

<sup>48</sup> Doak Bishop, Craig Miles and Roberto Aguirre Luzi. "Interviewing and selecting arbitrators", *Latin Lawyer*, (2007) Vol. 6, No. 1, pp. 46-47.

<sup>49</sup> See Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, "Law and Practice of International Commercial Arbitration" (2004, 4<sup>th</sup> Ed.), p. 235, para 4-50.

<sup>50</sup> See Gary Born, "International Arbitration: Law and Practice" (2012), p. 126. See also Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, "Law and Practice of International Commercial Arbitration" (2004, 4<sup>th</sup> Ed.), p. 235, para 4-50.

<sup>51</sup> See e.g. The IBA Guidelines on Conflict of Interest in International Arbitration (Article 4.5.1.); IBA Rules of Ethics for International Arbitrators (Art 5(1)); the Chartered Institute of Arbitrators' guidelines on "The Interviewing of Prospective Arbitrators". See also Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, "Law and Practice of International Commercial Arbitration" (2004, 4<sup>th</sup> Ed.), p. 235, para 4-50.

<sup>52</sup> See Alan Redfern, Martin Hunter, Nigel Blackaby, Constantine Partasides, "Law and Practice of International Commercial Arbitration" (2004, 4<sup>th</sup> Ed.), p. 235, para 4-50.

<sup>53</sup> See Doak Bishop, Craig Miles and Roberto Aguirre Luzi. "Interviewing and selecting arbitrators", *Latin Lawyer*, (2007) Vol. 6, No. 1, pp. 46-47.

Recent research shows that a majority of those involved in international arbitration consider pre-appointment interviews to be either appropriate or appropriate sometimes.<sup>54</sup> *"The chief disagreement is not on whether such interviews are appropriate, but on the topics that may properly be discussed."*<sup>55</sup>

The parties should rather than anything else see these interviews as an opportunity to familiarise themselves with the personal qualities of the arbitrator, his traits, availability, independence and impartiality.<sup>56</sup>

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These steps are designed to ensure that the parties act on the best available information about a prospective arbitrator's previous experience and personal qualities and to the extent possible to prevent potential 'arbitral disappointments'. In summary, the question the parties should be asking themselves when making a unilateral appointment is whether the prospective arbitrator is the individual that is best suited for the specificities of the particular dispute and whether he or she is resolute and efficient when it comes to the conduct of the proceedings and case management. Indeed, the ultimate aim should be that the prospective arbitrator inspires confidence in the arbitral process from all those involved.

### **(c) Conclusions**

To conclude, from the outset party autonomy affords the parties various opportunities to achieve greater efficiency and cost-effectiveness in their arbitral proceedings. These pre-arbitration decisions will impact the procedure in one way or another and if the parties are conscious of that fact they can use it to their advantage. After all, when it is all said and done it is the parties themselves who will be picking up the tab.

## **II. PROCEDURE AS THE FOUNDATION OF ARBITRAL EFFICIENCY**

Achieving efficiency in international arbitration is the responsibility and conscious choice of the parties, their legal counsel and the arbitrators that are tasked with adjudicating the dispute. Unlike court litigation, international arbitration arises from a private agreement that has the inherent capability to be efficient. Whether such efficiency is achieved will largely depend upon the procedure devised and ultimately applied to each arbitration. The following considers three elements of arbitral procedure that may serve as a foundation for efficiency: **(a)** a unique agreement to arbitrate; **(b)** the balanced but pro-active role of the arbitrator; and, **(c)** an early-informed procedure.

### **(a) A Unique Agreement to Arbitrate**

The ability to formulate a bespoke arbitration agreement is what overwhelmingly distinguishes arbitration from litigation. As one commentator has described it, *"because users seek different things from arbitration and because business goals and needs vary by company, by transaction, and by dispute, no one form of arbitration is always appropriate."*<sup>57</sup>

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<sup>54</sup> See Paul Friedland and Stavros Brekoulakis. Queen Mary University of London, 2012 *"International Arbitration Survey: Current and Preferred Practices in the Arbitral Process"*, p. 6. According to the survey 86% of respondents considered pre-appointment interviews to be either appropriate (46%) or appropriate sometimes (40%).

<sup>55</sup> Ibid, at 2.

<sup>56</sup> See Doak Bishop, Craig Miles and Roberto Aguirre Luzi, "Interviewing and selecting arbitrators", *Latin Lawyer*, 2007/Vol. 6, No. 1, pp. 46-47.

<sup>57</sup> See Thomas J. Stipanowich, *"Arbitration: The New Litigation"*, U. ILL. L. Rev. 1, (2010) p. 51.

It is therefore important that each arbitration agreement be suitable for the unique circumstances of its users.

An arbitration agreement does not need to be lengthy or overly complex to facilitate efficiency of the proceedings and the rendering of an enforceable award. In many circumstances, a short and concise arbitration agreement that tracks the model arbitration clause recommended by the selected arbitral institution (if one has been identified) is all that is required.<sup>58</sup> However, arbitrations conducted under such "one size fits all" model arbitration agreements may not ultimately have the same ability to provide the parties with an efficient resolution of their unique dispute. Indeed, model arbitration agreements may allow the parties, in the heat of their dispute, to revert to a pro forma dispute resolution model that is akin to litigation.<sup>59</sup> Thus, by tailoring the arbitration agreement to the unique needs of the contract or transaction, parties will have a better understanding of the implications of their arbitration agreement and should be more apt to comply with the agreed procedure if a dispute arises.

It is nevertheless unlikely that the specific details and points of contention in a dispute are capable of being fully contemplated in advance. Therefore, a crucial first step in formulating an arbitration agreement is to choose the most appropriate arbitration platform that can support an efficient procedural outcome of the dispute. Such an arbitral platform may be founded upon well-developed institutional rules, national arbitration legislation or internationally accepted arbitral rules like the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

In the case of arbitral institutions, there is a broad range to choose from and each will usually provide its own proprietary rules of arbitration that can serve as the parties' platform for an arbitration agreement. In circumstances where the arbitral institution's proximity to the parties and their dispute is of paramount importance, it may be sensible for the parties to choose a regional arbitral institution and its associated arbitration rules. Additionally, a regional arbitral institution may be able to offer certain language, cultural or religious requirements unique to the parties and their dispute. Indeed, the continued growth of international arbitration as the predominant form of international dispute resolution encourages the development of new arbitral institutions every year to meet these needs.<sup>60</sup>

It is, however, more common for international parties to refer their dispute to arbitration under the auspices of a well established and experienced arbitral institution. These institutions are, on the whole, well placed geographically to meet the needs of parties from different parts of the globe.<sup>61</sup> Moreover, reference to an established arbitral institution is thought to provide a higher level of predictability and stability arising from the particular institution's tried and tested rules. While institutional arbitration may initially incur costs associated with the institution's administrative fees, the expertise of established institutions in guiding the parties

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<sup>58</sup> See Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, 3rd Ed. (Kluwer Law International, 2010), pp.36-37.

<sup>59</sup> *Ibid.*, at 57.

<sup>60</sup> See e.g. Kigali International Arbitration Centre, in the East African state of Rwanda, launched in June 2012.

<sup>61</sup> Some of the most frequently used arbitral institutions include: the International Chamber of Commerce (ICC); the London Court of International Arbitration (LCIA); the Singapore International Arbitration Centre (SIAC); the Hong Kong International Arbitration Centre (HKIAC); the American Arbitration Association's International Centre for the Dispute Resolution (ICDR); the Cairo Regional Centre for International Commercial Arbitration ("CRCICA"); the Chinese International Economic & Trade Arbitral Center ("CIETAC"); and, the Stockholm Chamber of Commerce Arbitration Institute ("SCC"). There are also arbitral institutions that focus exclusively upon specific areas of commerce, such as: the Arbitral Centre of the World Intellectual Property Organization ("WIPO"); the Court of Arbitration for Sport ("CAS"); and, The London Maritime Arbitrators Association.

and the arbitrators through the process should ultimately result in a more efficient and cost saving arbitration.

For its part, ad hoc arbitration is occasionally considered more appropriate than institutional arbitration. In such circumstances, parties' may choose to rely upon the national arbitration legislation or curial law of the seat (location) of the arbitration, or the aforementioned UNCITRAL Arbitration Rules, to provide the platform for ad hoc arbitral procedure. The absence of institutional oversight, and the associated administrative time and costs, is often said to be one of the main advantages in choosing ad hoc arbitration. In this same regard, some consider institutional arbitration rules to act as a hindrance to the arbitral procedure, which is overcome through the use of ad hoc arbitration procedure. Lastly, some practitioners consider ad hoc arbitration to be more confidential.<sup>62</sup> Whether or not such advantages manifest themselves during the course of an arbitration, a key to initiating ad hoc arbitration in an efficient manner is for the parties' arbitration agreement to identify an appointing authority that has the power to appoint an arbitrator if necessary.<sup>63</sup> Frequently, an appointing authority is asked to assist when, *inter alia*, the parties fail to reach agreement on the identity of a sole arbitrator; a party fails to timely appoint its arbitrator or does not take part in the appointment process at all; where multiple claimants and/or respondents cannot jointly appoint an arbitrator; or, if the two party-appointed arbitrators fail to agree on the appointment of a chairperson of the tribunal.

In any event, the majority of arbitral institution rules and national arbitration legislation, as well as the UNCITRAL Arbitration Rules, contain similar provisions that reflect the developed norms of modern international arbitration practice.<sup>64</sup> Subtle variations of the rules and the associated procedure are all that is typically needed to meet the particular needs of the parties to help achieve an efficient resolution of their dispute. In this regard, a fundamental consideration is to ensure that the institutional or ad hoc rules provide the parties' with the power to agree to vary, or indeed disregard, the rules as they see fit.<sup>65</sup> This may include, *inter alia*, agreeing the number of arbitrators and any specific qualifications, shortening the time for filing party submissions, agreeing provisions on limited document production, the availability of an emergency arbitrator or the expedited formation of an arbitral tribunal or, the ability to appeal an award on a point of law to a national court.<sup>66</sup>

Lastly, by carefully agreeing the scope and applicability of the arbitral procedure while the arbitration agreement is being drafted, rather than at the point when a dispute has arisen,

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<sup>62</sup> Most arbitral institutions include confidentiality provisions as part of their charter or in their arbitration rules so it is unlikely that confidentiality would be an issue for institutional arbitration. However, when an investment treaty arbitration is referred to the International Centre for Settlement of Investment Disputes (ICSID) a public record is made of the claim and the procedure. Some practitioners in investment treaty disputes therefore consider ad hoc arbitration under the UNCITRAL Arbitration Rules to be more advantageous.

<sup>63</sup> Articles 8 – 10 of the UNCITRAL Arbitration Rules (2010) expressly envisage the use of appointing authority. If the parties fail to designate an appointing authority in their arbitration agreement, any party may request the Secretary-General of the Permanent Court of Arbitration in The Hague to make such designation or, if the parties agree, may also act as the appointing authority directly. This process will take up unnecessary time that can be avoided by designating an appointing authority in the arbitration agreement.

<sup>64</sup> Many national laws and institutional rules are based upon the UNCITRAL Model Law on International Commercial Arbitration prepared by UNCITRAL, which was adopted on 21 June 1985 with an amendment in 2006.

<sup>65</sup> LCIA Arbitration Rules, Article 14.1 provides that "*parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so*", while UNCITRAL Rules (2010), Article 17(2) provides that "*at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties*"; see also ICC Article 32; AAA Rule R-1(b); Swiss Rules Article 42; HKIAC Rules Article 38; CIETAC Rules Articles 50-5; and, Japan Commercial Arbitration Association Rules Article 59.

<sup>66</sup> See ICC Rules Articles 22 and 29; SIAC Rules Article 26(2) and Schedule 1; SCC Rules Article 32(4) and Appendix II); HKIAC Rules Article 14; and, LCIA Rules Article 9.

users are more likely to create greater efficiency and cohesion if they ultimately must refer their dispute to arbitration.

**(b) Role of the Arbitrator**

Providing for an efficient and effective arbitral procedure in the arbitration agreement will nevertheless only be as good as those that implement it. Since legal counsel and the parties will be narrowly focused on achieving a favourable resolution for themselves,<sup>67</sup> this responsibility naturally falls upon the arbitrator(s) appointed to organise and implement the overall adjudication of the dispute.

In this regard, the role of the arbitrator is finely balanced between proactive and judicious efforts to keep the proceedings and the parties moving forward in a linear and efficient manner, while at the same time ensuring party autonomy and equality.<sup>68</sup> Thus, when conducting due diligence to select a suitable arbitrator(s), the parties should ensure that the arbitrator(s) has both the gravitas and technical ability to ensure efficient case management, while still rendering an enforceable award. Unsurprisingly, a broad survey of users of international arbitration has shown that they prefer arbitrators that apply a pro-active case management style rather than a deferential or reactive style.<sup>69</sup> That is not to say that an arbitrator does not have to assign significant value to the will of the parties, but the arbitrator must apply a measure of adjudicative autonomy in carrying out his or her procedural mandate.<sup>70</sup>

The balance between the arbitrator's autonomy and adjudicative mandate is commonly reflected in national arbitration legislation and institutional arbitration rules.<sup>71</sup> For example, arbitrations with a seat in England will be conducted pursuant to section 34(1) of the English Arbitration Act 1996, which provides that "[i]t shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."<sup>72</sup> Thus, an arbitrator has discretion in procedural matters, subject only to the parties' right to agree otherwise. In parallel with this provision, the English Arbitration Act 1996 also provides a non-exhaustive list of procedural matters that are expressly included within the arbitrators' discretion.<sup>73</sup> This includes, for example, whether any and if so what form of written statements of claim and defence are to be used and when these should be supplied; or whether any and if so what questions should be put to and answered by the respective parties and when and in what form this should be done.<sup>74</sup> In exercising this discretion, section 33 of the English Arbitration Act 1996 requires that that the arbitrator "adopt procedures suitable to the circumstances of the particular case, *avoiding unnecessary delay or expense*, so as to provide a fair means for the resolution of the matters falling to be

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<sup>67</sup> See Christopher Newmark, *The Leading Arbitrators' Guide to International Arbitration*, (2008, 2<sup>nd</sup> Ed.), Chapter 6, p 81, where he notes some counsels' reaction to efficiency, "When clients instruct me on new case, they do not tell me to conclude the case quickly and cheaply. They tell me to win the case."

<sup>68</sup> See Piero Bernardini, "International Arbitration: How to Make it More Effective", in Liber Amicorum En L'Honneur De Serge Lazareff 71 (Laurent Levy & Yves Derains eds, 2011)

<sup>69</sup> See Paul Friedland and Loukas Mistelis, Queen Mary University of London, "2010 International Arbitration Survey: Choices in International Arbitration" (6 October 2010), p. 32.

<sup>70</sup> See Bernardini, supra note 68, pp 3-4.

<sup>71</sup> See L. Yves Fortier, The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – "A Few Plain Rules and a Few Strong Instincts", in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series (1998), p. 396 -409.

<sup>72</sup> English Arbitration Act 1996, Article 34(1).

<sup>73</sup> See *ibid.*, Article 34(2).

<sup>74</sup> See *ibid.*, Article 34(2)(c) & (e).

*determined*".<sup>75</sup> (emphasis added). The English courts have held that an arbitrator's failure to adopt procedures which avoided unnecessary delay or expense, was contrary to section 33 of the English Arbitration Act 1996 and such failings amounted to a serious irregularity allowing the award to be open to appeal.<sup>76</sup>

Similar to the English Arbitration Act, the recent 2012 ICC Rules also puts an emphasis upon the arbitrator's role in encouraging and delivering efficiency. Article 22(2) of the 2012 ICC Rules provides the tribunal the discretion to "*adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties*" for the purpose of "*ensur[ing] effective case management*." Although the wording of Article 22(2) provides the tribunal with discretionary powers, these powers must be read in light of Article 22(1), which provides that, "*[t]he arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute*." (emphasis added). Thus, under the 2012 ICC Rules, while the arbitrator has discretionary powers to adopt procedures for effective case management, the arbitrator - and indeed the parties - is required to seek an expeditious and cost-effective procedure in the arbitration.

Since there are no powers of contempt, or similar punitive powers, available generally to arbitrators, an obligation upon the parties to be efficient and expeditious may be *prima facie* unpersuasive. However, if empowered to do so, an arbitrator may seek to ensure party compliance by way of the arbitrator's cost-shifting powers to burden a party with a larger percentage of the costs of the arbitration if they have engaged in dilatory tactics or wasteful conduct.

Cost-shifting is increasingly becoming a formally recognised tool for arbitrators to ensure the parties' reasonable and efficient compliance with the agreed procedure. For example, the 2012 ICC Rules Article 37(5) provides that, "*in making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost effective manner*." This new Article 37(5) of the 2012 ICC Rules is similar to the 2010 revisions to the IBA Rules on the Taking of Evidence in International Arbitration, which provides at Article 9(7) that:

*If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may . . . take such failure into account in its assignment of costs of the arbitration, including costs arising out of or in connection with the taking of evidence.*

A further example is found in Article 28.4 of the 2010 LCIA-India Rules,<sup>77</sup> which also provides an arbitral tribunal with the authority to impose costs consequences for parties' inefficient conduct:

*Unless the parties otherwise agree in writing, or unless in the particular circumstances of the case this approach is inappropriate, the Arbitral Tribunal shall*

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<sup>75</sup> Ibid., Article 33(1)(b).

<sup>76</sup> See *R.C. Pillar & Sons v. Edwards* [2001] CILL 1799.

<sup>77</sup> Compare with the 1998 LCIA Arbitration Rules, Article 28.4, which only provides generally that, "*the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate*."

*make its orders on both arbitration and legal costs on the general principle that costs should reflect:*

*(b) their conduct and cooperation during the arbitration and any undue delays or unnecessary expense caused by or attributable to a party or its representatives.*

Accordingly, an arbitrator should not simply *speak softly and carry a big stick*, but should instead proactively engage the parties from the very beginning of the proceedings to ensure that they are aware that the arbitrator will exercise his/her powers to ensure an efficient and expeditious resolution of the dispute.

### **(c) An Informed Procedure**

Recognising that efficiency largely falls upon the procedural choices of legal counsel, global law firms have devised various protocols that intend to promote efficiency in international arbitration.<sup>78</sup> Likewise, arbitral institutions and organisations have also developed guidelines for counsel and arbitrators on how to organise and control proceedings to achieve efficiency.<sup>79</sup> Almost all of these protocols and guidelines stress that formulating a procedure that best fits the multi-faceted circumstances of the parties and their dispute should be of paramount importance at the beginning of the proceedings.<sup>80</sup>

Engaging in deliberate and broad discussions early in the proceedings will enable the arbitrators and legal counsel to agree upon a procedure that encompasses the initial phase of the arbitration until the final award is rendered. These discussions should take place at the first procedural hearing or at a case management conference, and if the arbitrator(s) is especially proactive, by written correspondence to the parties soon after the arbitrator(s)'s appointment.

An essential topic to be included in these initial discussions, and that which is also at the forefront of recent trends in promoting procedural efficiency, is the concept of "front-loading" the parties' initial submissions with specific information about the claim and the dispute.<sup>81</sup> It is envisaged that front-loading will contribute to the arbitrator's ability to establish the facts and issues central to the resolution of the dispute,<sup>82</sup> thus reducing the ability of parties to engage in dilatory tactics and manoeuvres common to litigation, such as ambush document production tactics late in the proceedings. This may also provide for a greater possibility of settlement at the initial phase of the arbitration since the parties' positions, including strengths and weaknesses, will be more developed and potentially exposed.

The front-loading approach is reflected in the 2010 revisions to the UNCITRAL Arbitration Rules, wherein Articles 4 and 5 provide for more detailed information to be included in the Claimant's Request for Arbitration and the Respondent's Answer. Additionally, Article 20 requires greater detail from a Claimant when submitting a Statement of Claim, since it is now mandatory to include "[t]he legal grounds of arguments supporting the claim",<sup>83</sup> and "as far

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<sup>78</sup> See e.g. Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration (2010).

<sup>79</sup> See e.g. International Chamber of Commerce (ICC), "Techniques for Controlling Time and Costs in Arbitration", ICC Publication No. 843 (2007); United Nations Commission on International Trade Law (UNCITRAL) Notes on Organising Arbitral Proceedings (March 2012).

<sup>80</sup> See *Ibid.*, at 78. Nos. 6 & 7.

<sup>81</sup> See Garth Schofield, "The 2010 UNCITRAL Arbitration Rules – Changes and Implications for Practice" (2011), at p. 6 ("This change is also in keeping with calls to "front-load" proceedings, allowing the early identification of issues in dispute, as a method of making arbitration more time and cost efficient").

<sup>82</sup> See Newmark *supra* note 67, p. 83.

<sup>83</sup> 2010 UNCITRAL Rules, Article 20(2)(e).

*as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain reference to them*".<sup>84</sup> Likewise, the recently updated 2012 Swiss Rules favour the front-loading approach, wherein Article 18(3) requires that, "[a]s a rule, the Claimant shall annex to its Statement of Claim all documents and other evidence on which it relies."<sup>85</sup>

Identifying and narrowing the issues in dispute between the parties should be a conscious approach throughout the arbitration. Ultimately, the arbitrator should require the parties to submit a defined and agreed upon set of contentious issues with any pre-hearing briefs. This will save time and enable the parties and the arbitrator to focus upon the principal differences between the factual and legal positions, while avoiding superfluous arguments or evidence. In effect, this should achieve an overall reduction in documents, witness statements and expert opinions, as well as non-probative and distracting arguments from counsel and potentially immaterial questions from the tribunal.

Another vital procedural technique commonly employed by legal counsel and arbitrators, and which would also greatly benefit from the "front-loading" technique, is to separate the arbitration into different phases that require the claimant to succeed at each phase as a prerequisite for advancing to the next. While this is inherently a defensive approach and is only appropriate in certain circumstances, it is nevertheless ultimately rooted in achieving efficiency.

Separation of the proceedings may take the form of bifurcation, with an initial jurisdictional phase and a subsequent, if appropriate, merits and quantum phase. In other circumstances, proceedings may be trifurcated, with the first two phases focusing on jurisdiction and merits, respectively, and a third phase to ascertain the appropriate quantum of relief. Separating the arbitration into distinct procedural phases provides the possibility that the proceedings will end if the claimant is unsuccessful at any phase, thus obviating the need for the prolonged procedure, legal arguments and evidence of a full arbitration.

On the other hand, separating the arbitration into different phases will be less efficient if the claimant is ultimately successful and the arbitration could have progressed through a single procedure and a single award. To protect against this inefficiency, it is important that the arbitrator is able to assess the basis and strength of the parties' positions at an early stage of the proceedings; this ability is afforded by the aforementioned concept of "front-loading" the initial party submissions and the overall aptitude of the arbitrator.

#### **(d) Conclusions**

In the end, it is for the parties to create an efficient, but also reliable, procedural platform that they will voluntarily adhere to and respect. It is then the arbitrator's responsibility to apply his or her adjudicative mandate to achieve an enforceable and efficient resolution of the dispute.

### **III. PROACTIVE PROMOTION OF SETTLEMENT NEGOTIATIONS BY THE ARBITRAL TRIBUNAL**

As discussed in the previous sections one of the most attractive advantages of arbitration consists of the bespoke procedure and the flexible steps that parties can implement to significantly reduce costs and provide for a speedier resolution than the procedure typically available before domestic courts. Nevertheless, arbitration is becoming increasingly

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<sup>84</sup> Ibid., Article 20(4).

<sup>85</sup> 2012 Swiss Rules, Article 18(3).

expensive and inefficient, with the time and costs of arbitration becoming one of the main difficulties when trying to solve a dispute<sup>86</sup>.

Another technique to address this increasing inefficiency is for arbitrators to intervene through the use of arbitrator assisted settlement negotiations. Nowadays, arbitrators have an increasingly bigger and important role during proceedings to achieve an effective arbitral process. In this regard, the arbitrator's more proactive role in the amicable settlement of the dispute may inevitably result in increased efficiency of the arbitration and, ultimately, reduced costs.

When parties resolve their dispute amicably they save considerable time and money. The role of arbitrators during the preliminary hearing, by encouraging an amicable settlement, can be decisive for the parties' settlement. If an amicable settlement is reached, it can be recorded as a consent award and it will be an enforceable decision.

The arbitrators' intervention in settlement negotiations has been a source of discussion for both arbitration academics and practitioners, with the role of the arbitral tribunal changing depending on the will of the parties as well as the legal background of those taking part in the arbitration.

As a result of the flexible structure and divergences in different cultures around the world surrounding arbitrator involvement in settlement negotiations during an arbitral proceeding, the following sections will examine: **(a)** the importance of the arbitrators' proactive role as a facilitator in settlement negotiations as a way to reduce time and cost; and, **(b)** the limits that must be respected by the arbitral tribunal in order to preserve the neutrality and independence that must exist as a principle in every arbitration procedure.

***(a) The Arbitrators' proactive role in settlement negotiations as a way to reduce costs and time in international arbitration***

The importance of the arbitrators' proactive role in the arbitration proceedings as a facilitator in settlement negotiations has a direct impact on the cost of conflict. Indeed, if the parties reach an agreement the arbitration will come to end. Nevertheless, the question of whether an arbitrator should have a proactive role in the settlement negotiations still remains and it seems to have a different answer depending on the legal background of the participants<sup>87</sup>.

Most civil law legal systems consider the encouragement of settlement negotiations as a duty of judges and a "noble obligation".<sup>88</sup> However, most common law legal systems regard the intervention of arbitrators in negotiations with a level of suspicion and mistrust. Overall, studies by the "Harvard Negotiation Law Review" show that international guidelines and

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<sup>86</sup> See Michael McIlwrath, "Faster, Cheaper: Global Initiatives to Promote Efficiency in International Arbitration"; (2010) Arbitration, pp. 568-570. See also, Lord David Hacking and Michael E Schneider, "Towards More Cost-Effective Arbitration"; International Bar Association Newsletter Arbitration and ADR, (1998) Vol. 3, No. 1. See also Claire Davies, "More Efficient and Cost-Effective Arbitration: Changes made to the ICC and Swiss Rules" in 2012 and Piero Bernardini, International Arbitration: "How to Make it More Effective", in Liber Amicorum En l'Honneur de Serge Lazareff 71 (Laurent Levy & Yves Derains eds., 2011).

<sup>87</sup> See Bernd Ehle. Walking a thin line, What an arbitrator can do, must do or must not do. Recent developments and trends. "The arbitrator as a settlement facilitator". Ed. Bruylant. September 29 (2010).

<sup>88</sup> See Daniele Favalli and Max Hasenclever, "The role of Arbitrators in Settlement Proceedings", 23, Mealey's International Arbitration Report 7 (Lexis Nexis, 2008), p. 2.

model laws have contributed to harmonizing the perspectives in international arbitration as to the appropriateness of settlement negotiations.<sup>89</sup>

The following explores (i) the reasons why some legal systems have traditionally relied on the arbitrators' intervention in settlement negotiations, and (ii) the arguments used by other legal systems in order to deny the importance of such a role.

### **(i) The reliability of arbitrators' intervention in settlement negotiations**

Most civil law legal systems encourage arbitrator involvement in settlement negotiations as a way to settle the dispute without having to go through the entire arbitration procedure. This may result in an amicable settlement for all or part of the dispute, thus considerably reducing time and money for the different actors taking part in the arbitration.

In 2007, the Center for effective Dispute Resolution (CEDR) set up a commission chaired by Professor Gabrielle Kaufmann-Kohler and Lord Woolf of Barnes to draft best practice guidelines for the facilitation of settlement by international arbitral tribunals. In 2009, the Commission issued a final report as well as the "CEDR Settlement Rules".<sup>90</sup> Even though these rules are not binding, they represent a useful set of guidelines for encouraging the settlement of disputes, as they can be included in an arbitration agreement, or by a procedural agreement. Professor Gabrielle Kaufmann-Kohler says that an arbitrator's involvement can take three forms in an amicable settlement: "*the arbitrator may record the parties' agreement, rectify their agreement, or...attempt to conciliate the parties*".<sup>91</sup> Moreover some global law firms have developed Protocols to promote efficiency that include the intervention of arbitrators in the settlement of the dispute<sup>92</sup>.

Indeed, the parties may expect that the arbitrator will manifest a preliminary point of view on the merits of the case and therefore, encourage an amicable settlement. German arbitrators, for example, are more inclined to engage and encourage an amicable settlement of the dispute than their English or American counterparts.<sup>93</sup>

Additionally, by providing a preliminary view the arbitrator can help the parties to anticipate the outcome of the proceedings and to weigh the cost of an arbitral proceeding against the possibility of an amicable settlement. In doing so, the arbitrator can identify critical issues based on the parties' pieces of evidence and arguments. However, it is essential to emphasize the fact that the arbitrator's preliminary views are non-binding.

The arbitrator's duty does not consist ensuring the settlement of the dispute, but his actions may facilitate the amicable settlement. Given the fact that the arbitrators reserve the right to reconsider their position during the arbitration, providing a preliminary view on the merits and taking a proactive role in an amicable settlement does not necessarily mean that there is a

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<sup>89</sup> See Alia F. Shahla, "*The Morality of Conciliation: An Empirical Examination of Arbitrator Role Moralities in East Asia and the West*", 16 Harv. Negot. L. Rev. 1. Spring (2011).

<sup>90</sup> CEDR Rules for the Facilitation of Settlement in International Arbitration (2009).

<sup>91</sup> See Gabrielle Kaufmann-Kohler and Victor Bonnin, "*Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background*", in 18(2) ICC Bulletin (2008); also available in ICC DRL, <http://www.iccdrl.com> (2008), 15/04/2009. p.3.

<sup>92</sup> See Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration (2010). No. 25 "*When appropriate, we will ask arbitrators to provide preliminary views that could facilitate settlement*".

<sup>93</sup> See Gabrielle Kaufmann-Kohler and Victor Bonnin, "*Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background*", in 18(2) ICC Bulletin (2008); also available in ICC DRL, see <http://www.iccdrl.com> (2008), 15/04/2009

pre-judgment of the case. It may be appropriate for the arbitrators to discuss the case with the parties at a preliminary conciliation hearing.

Many civil law systems contemplate this possibility in their domestic law and this thus reflects on arbitral proceedings. The administrative efficiency is better served by a settlement than by a dispute and that contributes to reducing costs in the arbitration. For instance, the German Code of Civil Procedure envisages the assistance of domestic courts in settlement negotiations, on their own initiative or at the request of the parties, at any time in the proceedings.<sup>94</sup>

In some Asian countries, parties are accustomed to arbitrators taking part in settlement negotiations.<sup>95</sup> In the Chinese model, the arbitrator may become a conciliator, and then become an arbitrator again at any stage of the arbitration.<sup>96</sup>

Some Latin America countries are used to the intervention of the arbitral tribunal in settlement negotiations. For instance, Brazil has taken a similar approach; for instance, Article 21(4) of the Brazilian arbitration law, September 23, 1996, empowers the arbitral tribunal to try to conciliate the parties.<sup>97</sup> In Colombia, a new Arbitration Act for international and domestic arbitration came into force on October 12, 2012. Concerning domestic arbitration, the arbitrators have an important role in trying to conciliate the parties. The conciliation hearing takes place after a request for arbitration and the answer of the request has been made, and before the arbitral procedure begins. It is important to point out that this hearing is not optional in domestic arbitration. Article 24 provides that: “...*In the settlement hearing the tribunal shall encourage the parties to resolve their differences by means of a settlement, and to this end may put forth proposals, but this shall not constitute a pre-judgement. If the parties reach a settlement, the tribunal shall approve it by an order that shall have res judicata effects, and that, if it contains an explicit, clear and payable obligation, shall be enforceable*”<sup>98</sup>.

## **(ii) The mistrust of arbitrators’ intervention in settlement negotiations.**

Common law jurisdictions do not usually favor allowing arbitrators to take part in settlement negotiations. The reason for this arises from the (supposed) lack of impartiality of imputed to arbitrators that conduct *ex parte* discussions with the parties. Additionally, by expressing a preliminary point of view on the merits, it is perceived that arbitrators create an air of suspicion and distrust for those taking part in the arbitration.

In this context, some practitioners think that the participation of arbitrators in the settlement negotiation taints the arbitration process and “*runs the risk of dissatisfied parties and the loss*

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<sup>94</sup> German law has a tradition of judges assisting the parties in negotiation. German Civil Procedure Code. Sec. 278 (1)  
<sup>95</sup> See Harold I. Abramson, “*Protocols for International Arbitrators Who Dare to Settle Cases*”; The American Review Of International Arbitration, (1999) Vol. 10, No.1. p.5.

<sup>96</sup> The China International Economic and Trade Arbitration Commission, the Japan Arbitration Commission and the Hong Kong International Arbitration Commission permit an arbitrator to encourage settlement through conciliation with the consent of the disputing parties.

<sup>97</sup> Arbitration Law. Brazil, September 23, 1996, Art. 21 (4) : “The arbitral procedure shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitral institution or specialized entity, it being possible for the parties to empower the sole arbitrator or the arbitral tribunal to regulate the procedure. Fourth Paragraph: The arbitrator or the arbitral tribunal shall, at the beginning of the procedure, try to conciliate the parties, applying, to the extent possible, Article 28 of this Law”.

<sup>98</sup> Colombia Arbitration Act. Law 1563, 2012.

of immunity".<sup>99</sup> The parties may also believe that the arbitral tribunal was unduly influenced by his reasoning in case of failure of the amicable settlement at the preliminary hearing.

The US and Mexico serve as examples of jurisdictions that are reluctant to accept that the arbitrator can act as a conciliator because, in their view, the two roles are significantly distinct: the conciliator assists parties to reach an agreement, while the arbitrator only decide the dispute. Additionally, any information given during mediation could affect the arbitration.<sup>100</sup> Nevertheless, despite the apprehension to arbitrator involvement in common law legal systems, the panorama of dispute resolution as a whole is changing. For instance, in England, judges are required to have a proactive role by encouraging settlement discussions.<sup>101</sup>

The parties can also try to give this role to a third party neutral to help them carry on settlement negotiations during the arbitration. That would however create additional costs in the arbitration and would not take advantage of the unique role of the arbitrator – that being one who already knows the case and has all the tools to help determine the best moment to promote a settlement negotiation. Moreover, the settlement negotiation does not have to take place during the preliminary hearing; the parties can try to settle the dispute at any time, even after an interim award.<sup>102</sup>

Additionally, the Model Laws have contributed to harmonizing the perspectives of international arbitration as to the appropriateness of settlement negotiations. For instance, even if the UNCITRAL Rules did not provide an express role for arbitrators to act as conciliators, the UNCITRAL secretariat suggested a working group to draft a Model Law on Conciliation, with this group allowing a global dialogue on the topic. The result is that an arbitrator can act as a conciliator when parties agree to give him such a role. The Model Law provides guidelines for arbitrators' involvement in settlement practices.<sup>103</sup>

Similarly, the International Bar Association's suggested Rules of Ethics for International Arbitrators provide that arbitrators should be impartial, independent, competent, diligent and discreet,<sup>104</sup> while also allowing arbitrators to participate in settlement discussions at the agreement of parties.<sup>105</sup> The International Chamber of Commerce has developed some

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<sup>99</sup> See Committee on Mandatory Fee Arbitration, "*The Arbitrator's Role in Settlement at the Time of the Hearing*", December 13, (1996) p.3.

<sup>100</sup> See Alia F. Shahla, "*The Morality of Conciliation: An Empirical Examination of Arbitrator Role Moralities in East Asia and the West*", 16 Harv. Negot. L. Rev. 1. Spring (2011) p.5.

<sup>101</sup> English Civil Procedure Rules (CPR) Part 1 at 1.4(2)(e) and (f).

<sup>102</sup> See Gabrielle Kaufmann-Kohler and Victor Bonnin, "*Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background*": "Our study has not shown any particular tendency as regards the moment at which a settlement is most frequently reached in the course of arbitral proceedings...they have been seen to occur after an award on jurisdiction, after an earlier interim or partial award, after briefs, after hearings or after the filing of experts reports." in 18(2) ICC Bulletin (2008); also available in ICC DRL, see <http://www.iccdrl.com> (2008), 15/04/2009. p.5.

<sup>103</sup> See Alia F. Shahla, "*The Morality of Conciliation: An Empirical Examination of Arbitrator Role Moralities in East Asia and the West*", 16 Harv. Negot. L. Rev. 1. Spring 2011.

<sup>104</sup> International Bar Association, Rules of Ethics for International Arbitrators (2008), available at [http://www.ibanet.org/images/downloads/pubs/Ethics\\_arbitrators.pdf](http://www.ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf).

<sup>105</sup> Rules of Ethics for International Arbitrators. Art. 8. "Involvement in Settlement Proposals: Where the parties have so requested, or consented to a suggestion to this effect by the arbitral tribunal, the tribunal as a whole (or the presiding arbitrator where appropriate), may make proposals for settlement to both parties simultaneously, and preferably in the presence of each other. Although any procedure is possible with the agreement of the parties, the arbitral tribunal should point out to the parties that it is undesirable that any arbitrator should discuss settlement terms with a party in the absence of the other parties since this will normally have the result that any arbitrator involved in such discussions will become disqualified from any future participation in the arbitration."

“Case Management Techniques” that include the possibility for arbitrators to intervene and facilitate an amicable settlement between the parties<sup>106</sup>.

To summarize, in general institutions agree on principles of settlement negotiations but apply them in unique ways across regions.

**(b) Limits of arbitrators’ power to interfere and propose an amicable settlement**

Most parts of the theory surrounding this issue, and indeed the academics studying it, share the view that it is appropriate for arbitrators to suggest settlement negotiations to parties and to participate in settlement negotiations at parties’ request. However, it is not seen as appropriate for the arbitrator to “*hint at the possible outcome of the arbitration without being asked to do so*”.<sup>107</sup>

Practitioners agree that arbitrators can and, sometimes, should intervene in settlement negotiations. However, arbitrators must have limits on their powers to do so; **(i)** they must observe some obligations, **(ii)** in order to preserve the main principles of international arbitration. Precautions must be taken by the arbitrators to preserve the effectiveness of the award.

**(i) Obligations that arbitrators must observe “vis à vis” the parties in order to preserve the neutrality and independence of their role**

There must be a limit to arbitrator's power to proactively engage in settlement negotiations. Therefore, arbitrators must never force the settlement of a dispute, must be apply the norms and techniques of conciliation to maintain the integrity of the arbitration. Additionally, the arbitral tribunal must respect the right of each party to enter into a voluntary agreement, and the parties should be free to accept or reject the settlement negotiation.

The different actors should enter into a confidentiality agreement to avoid producing any information disclosed in the settlement process. In the circumstance were settlement negotiations fail, the arbitrator must not refer to confidential information given during the negotiation process during the arbitral proceedings.<sup>108</sup> Although, arbitrators can take into account any offer to settle on the allocation of costs, see e.g Article 3(4) of the CEDR Settlement Rules.<sup>109</sup>

Additionally, arbitrators must not have separate *ex parte* meetings with the parties. This is known as "no-caucusing". Private meetings between one of the parties and the arbitral

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<sup>106</sup> International Chamber of Commerce. ICC, Arbitration Rules. Appendix IV, Case Management Techniques: “*h) Settlement of disputes. (i) Informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC ADR Rules; (ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law*”.

<sup>107</sup> See Alia F. Shahla, “*The Morality of Conciliation: An Empirical Examination of Arbitrator Role Moralities in East Asia and the West*”, 16 Harv. Negot. L. Rev. 1. Spring (2011) p.10.

<sup>108</sup> See Committee on Mandatory Fee Arbitration, “*The Arbitrator’s Role in Settlement at the Time of the Hearing*”: “In addition to the possible loss of immunity, the arbitrator who participates in the settlement discussion and then goes on to arbitrate when those discussions fail runs the risk of being perceived by the parties as biased...because certain information may have been disclosed which would not have been given to an arbitrator”. December 13, (1996) p.2

<sup>109</sup> “CEDR Settlement Rules”. The Center for effective Dispute Resolution (CEDR) set up a Commission chaired by Professor Gabrielle Kaufmann-Kholer and Lord Woolf of Barnes to draft best practice guidelines for the facilitation of settlement by international arbitral tribunals.

tribunal may compromise the appearance of impartiality of arbitrators.<sup>110</sup> In this circumstance, the party that has been excluded from the discussion may become concerned that the arbitrator prejudicially played one party against the other during settlement efforts.<sup>111</sup>

Indeed, the International Bar Association's Rules of Ethics for International Arbitrators encourage the discussions to be conducted in a joint session.<sup>112</sup> Private meetings can interfere with the possibility for parties to work together to resolve the dispute: "*If one party is particularly worried that the other party will use the time spent in private caucuses to unduly influence the arbitrator-mediator, and that the arbitrator-mediator may be influenced by this, then the party should demand that private caucuses be banned*".<sup>113</sup> However, the parties may authorize the use of caucuses and determine the restrictions applicable to arbitrators.

**(ii) Precautions arbitrators must observe in order to avoid a possible procedural objection or attack against the award**

The arbitrators should obtain the express consent of the parties before any attempt to promote the settlement of the dispute. It is recommended that the agreement be contained in a detailed writing in order to keep a record of the parties' consent that may be later relied upon. The parties should also waive any later objections to the fact that the arbitrator has participated in trying to assist with the settlement of the case.<sup>114</sup>

Furthermore, arbitrators should discuss with the parties all the different possibilities, impacts and outcomes of the decision. The parties should be given a copy, or at least an explanation, of the advantages and risks of the settlement negotiation in order to facilitate their decision.

In order to preserve the integrity of the arbitration, the arbitrator must not be influenced by off-the-record information revealed during the settlement process. If the arbitral tribunal makes their decision based on facts disclosed during settlement negotiations, given that the parties agreed that the information would not be part of the arbitration, then the award is against the parties' agreement and may be challenged or set aside.<sup>115</sup>

It is also recommended to arbitrators to obtain, in cases where the negotiation fails, an express written waiver from the parties saying that they will not use such failure as a way to challenge the award.<sup>116</sup> Alleged arbitrator bias is a common ground for challenging the arbitrator or the award; the arbitrator has to avoid the parties' perception that it has already reached a decision.

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<sup>110</sup> See e.g., Under the UNCITRAL Model Law the arbitrators can be challenged if there are justifiable doubts to his impartiality. UNCITRAL Model Law, Article 12 (2). "Grounds for challenge: (2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made".

<sup>111</sup> See Harold I. Abramson, "*Protocols for International Arbitrators Who Dare to Settle Cases*"; *The American Review Of International Arbitration*, (1999) Vol. 10, No.1. p.11.

<sup>112</sup> International Bar Association, *Rules of Ethics for International Arbitrators* (2008), available at [http://www.ibanet.org/images/downloads/pubs/Ethics\\_arbitrators.pdf](http://www.ibanet.org/images/downloads/pubs/Ethics_arbitrators.pdf).

<sup>113</sup> See Jacob ROSOFF, "*Hybrid efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med proceedings*". *Journal of International Arbitration*. Kluwer Law International (2009) V. 26, Issue 1. p.4.

<sup>114</sup> The stipulation is usually used as follows: « The attorneys for the above named parties stipulate and consent to the Arbitrator's participation in settlement negotiations. The parties hereby waive the objection that based solely on the fact that the Arbitrator participated in settlement negotiations, he/she is unable to hear this case on its merits »

<sup>115</sup> See Jacob Rodoff, "*Hybrid efficiency in Arbitration : Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med proceedings*". *Journal of International Arbitration*. Kluwer Law International (2009) V. 26, Issue 1. pp. 89-100.

<sup>116</sup> The arbitrator must nonetheless resign to his task if after failing the parties to negotiate; he is not in measure to remain impartial or independent.

Professor Piero Bernardini says that even if the arbitrator's role in the settlement negotiations may be questionable, they must not preclude the parties from "*finding ways to agree on such an alternative solution*".<sup>117</sup> The fact of obtaining an express waiver from the parties in case of failure of the negotiation will create "*a positive climate of cooperation by removing grounds for procedural objections and for possible attacks against the award*".<sup>118</sup>

If a settlement of the dispute is reached, it will result in the withdrawal of a claim followed by an order terminating the case, or in an award by consent.<sup>119</sup>

### (iii) Conclusion

The arbitrator's proactive role in the amicable settlement of the dispute can save time and money for the different actors taking part in the arbitration. If an amicable settlement is reached, it can be recorded as a consent award and it will be an enforceable decision. Providing a preliminary view on the merits does not necessarily mean that there is a pre-judgment of the case, the arbitrator has to avoid the parties' perception that it has already reached a decision. Moreover it is recommended for arbitrators to obtain, in cases where the negotiation fails, an express written waiver from the parties saying that they will not use such failure as a way to challenge the award.

To conclude, even if civil law legal systems are more used to the intervention of judges and arbitrators in settlement negotiations, the panorama of dispute resolution in common law legal systems as well as in international and domestic arbitration is starting to change.

## IV. USE OF INFORMATION TECHNOLOGY IN ARBITRATION

The past decades have witnessed an inexorable advance of information technology ("IT") causing a profound impact on almost every aspect of human society, including the legal profession. The modern lawyer comfortably utilizes IT, *inter alia*, by producing documents with computer software or researching databases for case law.

What makes IT so appealing is the fact that modern technology supervenes barriers of time and geography. This means that information can be exchanged round-the-clock and within a split second from one location to another. Furthermore, at least in the commercial sector, IT is generally available and affordable to everyone involved.

Consequently, one could suppose that aspects of the technological revolution have already completely altered the world of commercial arbitration and maybe even created some sort of "Commercial Arbitration 2.0"<sup>120</sup>. Nevertheless, IT still meets some resistance among parties and arbitration tribunals. The following sections aim to show how an arbitration may deal with issues related to IT: The examination of the relation between the legal framework and IT **(a)** is followed by elaborations on electronic case management **(b)**, witness and expert examination via video conference **(c)** and e-discovery **(d)**.

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<sup>117</sup> See Piero Bernardini, "*International Arbitration : how to make it more effective*", p.10.

<sup>118</sup> See Piero Bernardini, "*International Arbitration : how to make it more effective*", p.5.

<sup>119</sup> See Gabrielle Kaufmann-Kohler and Victor Bonnin, "*Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrator's Role and Legal Background*", in 18(2) ICC Bulletin (2008); also available in ICC DRL, see <http://www.iccdrl.com> (2008), 15/04/2009. p.2.

<sup>120</sup> The expression Commercial Arbitration 2.0 derives from the popular term Web 2.0 which is a watchword for the current development of online web pages approaching to be more collaborative, interactive and responsive, see James Schurz, Commercial Arbitration 2.0: Re-Booting Arbitration to make it more user friendly, in BNA's Corporate Counsel Weekly 2012, p. 157.

**(a) The Legal Framework and IT**

As a preliminary matter it needs to be determined whether the regulatory framework in arbitration sets a favorable setting for IT. Concerns about the use of IT in arbitration might arise by the mere fact that due to its rapid development a procedure assisted by technology may not yet stand on any firm legal ground.

A clear position on this issue is taken by a fundamental pillar of arbitration, the principle of party autonomy. Generally speaking party autonomy gives parties the right to determine the rules governing the arbitral procedure. Hence, parties are given a free hand to decide whether and to which extent they want to incorporate IT for their arbitration.

Different arbitral institutions tend to follow this perception since provisions in their rules expressly refer to IT. As an alternative to regular mail, most institutions specifically authorize communication with the court or secretariat by e-mail, facsimile or other means that provide record of its transmission.<sup>121</sup> Other providers even go a step beyond that and offer special rules allowing to conduct full online proceedings.<sup>122</sup>

When speaking about the lawfulness of IT in arbitration a special focus needs to be given to the recognition and enforcement of awards under the New York Convention (“NYC”). Since the NYC came into force in 1959 its drafters obviously could not have contemplated the forthcoming changes in technology. In this regard, an exemplary area of concern are arbitration agreements concluded in digital form. The wording of Article II (2) NYC requires an agreement to be in writing, signed by the parties or contained in an exchange of letters or telegrams. Electronic arbitration agreements are clearly not envisaged by the plain wording of Article II (2) NYC. However, in light of the current technological development, common business practice and the acceptance of such agreements by domestic legislation<sup>123</sup> and the UNCITRAL Model Law<sup>124</sup>, make it valid to construe that electronic arbitration agreements fulfill the writing requirement of Article II (2) NYC.<sup>125</sup>

Thus, it can be asserted that arbitral regulatory framework allows parties to confidently apply IT to their proceedings. Current developments show that future revisions of institutional and national rules arbitration rules will have the tendency to address even more issues of IT.<sup>126</sup>

**(b) Electronic Case Management**

An introduction to arbitration created by modern technology is the possibility to use software that allows electronic case management systems creating a virtual workspace between the parties and the tribunal. Pioneers on institutional level include the AAA's Webfile,<sup>127</sup> ICC's

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121 Article 4 (1) LCIA Rules, Article 4 (2) KCAB International Rules, Article 6 (2) CAM Rules.

122 The most prominent example are the CIETAC Online Arbitration Rules. Though being drafted for e-commerce disputes the rules can also be applied for other types of arbitration, see Article 1 (2) CIETAC Online Arbitration Rules.

123 Article 2a (5) International Arbitration Act of Singapore, Art. 9 (3) Spanish Arbitration Act, Article 583 (1) Austrian Civil Code of Procedure.

124 Article 7 (4) UNCITRAL Model Law.

125 See UNCITRAL, Recommendation Regarding the Interpretation of Article II (2) and Article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (2006).

126 E.g., Commentators point out that many modifications of the revised ICC Rules from 2012 intend to adapt to the latest developments in IT, see Thierry Berger and Mark Robertson, “*The New ICC Rules of Arbitration: A Brief Overview of the Main Changes*”, in 14 Int. A. L. R. 5, p. 145 (2011); the Colombian Arbitration Act in forced in October 12, 2012, dedicates a whole provision to electronic means of communication expressly authorizing them for all procedural measures, see Article 23 Colombian Arbitration Act.

127 <http://apps.adr.org/webfile/>.

NetCase<sup>128</sup> and JAM's Electronic Filing System<sup>129</sup>. Alternatively, software solutions not affiliated with any arbitration institution are also available. Practical experience shows that parties in the recent years are showing more enthusiasm towards electronic case management, e.g. during the period between 2005 and 2011 the number of international cases filed under AAA's Webfile increased from 47 to 163 cases.<sup>130</sup>

Above all, electronic file management serves the purpose of transferring documents on a joint platform. The uploaded documents can be searched, structured and cross-referenced. Other features which might vary depending on the chosen software include, *inter alia*, filing the claim, communication via message boards, access to the full contract, access to the relevant legal provisions and a status of information on the advance of proceedings. Emphasis needs to be put on the fact that electronic case management does not replace oral hearings, but is simply an advanced platform for communication and organization of physical documents in electronic form.

The question that arises in this context is how an arbitration can actually benefit from these innovative features. The answer is simple –they are able to raise the efficiency of an arbitration resulting in saving of costs. The virtual electronic platform gives convenient round-the-clock and location-independent accessibility to all relevant materials of the case. Like e-mails, documents are available on the platform as soon as they are transferred, with the advantage that they are automatically placed together with other documents related to the case minimizing the risk of being overlooked. This feature, in connection with the possibility to search and cross-reference documents, enables an advanced and comprehensive overview of very complex cases involving a large number of documents. In case the parties agree on the usage of AAA's Webfile or ICC's Netcase the digital workspace solution is even included in the administrative fees of the respective institution.

As with online data transmission in general, there might exist some mistrust towards the true efficiency of electronic file management. Even though new safety measures are in constant development, it is not completely possible to fully prevent data robbery by computer hacking; but theft of confidential information can likewise occur in relation with e-mails and traditional mail. Further, a virtual workspace is incapable to prevent fraudulent modifications or edition of uploaded documents. A practicable solution to erase this problem would be to agree on the possibility to demand a physical proof of authenticity in case the origin of the virtual document raises justifiable doubts. Admittedly, very inexperienced computer users might feel overwhelmed by electronic case management systems. Thus, parties are strongly advised to acquaint themselves with the software before they agree to use it. If the possible precautions are taken the virtual case platform is an advisable IT tool.

### ***(c) Witness and Expert Examination via Video Conference***

IT provides the possibility to conduct arbitral hearings from different locations through the use of video or phone conferencing. A common field of application for these tools is the examination of witnesses and experts. Technical development has recently caused a shift from phone to video conferencing as the preferred IT tool, and therefore video conferencing involving witnesses and experts receives the focus of this section.

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128 <http://www.iccnetcase.org/Netcase/>.

129 <http://www.jamsadr.com/electronic-filing/>.

130 Statistics provided to the author by the AAA.

Arbitration hearings can derive multiple benefits from using video conferencing instead of personal interrogation. First, virtual interrogation cuts attendance expenses, e.g. the need to book flight tickets and overnight accommodation or to compensate for lost wages. This advantage is very valuable where a testimony is actually not expected to be too long or of essential importance.<sup>131</sup> Witnesses and experts are also sometimes unable to appear in person due to health issues or a denied travel permit or entry visa. Even though all of the above listed arguments in favor of conferencing apply to documentary based hearings as well, there is a diametrical difference between both forms of interrogation: unlike documentary based interrogation, video conferencing permits follow up questioning and cross-examination.

Nonetheless, the benefits of virtual hearings do not come without a catch. The transmission via an internet connection is always susceptible to disruption due to technical difficulties. Depending on the length of interrogation, remote hearings might be perceived as being too impersonal and very fatiguing, thus hindering an effective process of interrogation. Additionally, conferencing also creates doubts on credibility of the collected testimonies- it is impossible to exclude that an unseen third person is feeding answers to the witness or expert. If the worst comes to the worst a witness testimony obtained via video is even capable to negatively alter the outcome of a case.

The latter statements lead to the following recommendation regarding the question whether parties should agree on a personal or a virtual interrogation: in order to observe the principle of fair hearing an in-person interrogation is the most reliable method and should be always preferred in case of any doubts. A thoughtful cost-benefit analysis of the factual circumstances might nevertheless justify the decision to conduct a hearing with the use of IT.<sup>132</sup> Two situations are conceivable where the just listed advantages make it legitimate to abstain from a personal appearance of a witness or expert. Time constraints of expedited procedures make it often completely impossible to conduct personal hearings leaving only the options of conferencing or written testimonies. The same applies to cases with a low amount in dispute where a personal examination can be an unnecessary reason for the increase of costs.

#### ***(d) E-Discovery***

The tremendous changes in technology are unfortunately not solely limited to delivering helpful tools to an arbitration. IT advancements have created a new area of concern which is coined under the now ubiquitous term "e-discovery". E-discovery can be simply defined as the process of obtaining evidence in form of electronic documents and other electronically-stored information ("ESI"). Since approximately more than 90% of new information is created in an electronic format,<sup>133</sup> rather sooner than later every counsel and arbitrator will be confronted with e-discovery of ESI.

It is important to recognize that electronic data does not share the same characteristics as paper documents. To name but a few examples: it is possible to recover ESI even after it's

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131 See Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration (2010), No. 19, where the parties are advised to consider video conferencing "for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours".

132 The ICC seems to follow a similar strain of thought by recommending video or phone conferencing where "attendance in person is not essential", see Appendix IV Section (f) ICC Rules.

133 See The Sedona Principles: Second Edition, "Best Practices Recommendations & Principles for Addressing Electronic Document Production" p. 1 (2007).

deletion; ESI data exists in sheer volume; ESI can be stored on various digital sources; and, so called metadata on electronic files reveals specific information like the time of the files' creation and it's later editions. These particularities of e-discovery require special methods of retrieval that can incur a huge amount of costs to the discovery process and the whole arbitration.<sup>134</sup> Likewise, excessive e-discovery may lead to the revelation of personal data and business secrets.

In order to avoid this e-discovery trap it would be desirable to have protective legal provisions in absence of any party agreement on this matter. Both national legislators<sup>135</sup> and arbitral institutions<sup>136</sup> usually empower the tribunal to order evidence, failing to give any specific guidance on duties for presentation and preservation of ESI.

Yet, parts of the arbitration community looked into to this problem and different institutions and organizations have introduced guidelines and protocols on how to handle e-discovery.<sup>137</sup>

The provisions put a special emphasis on the prevention of high costs and burden caused by e-discovery. The question of preservation of ESI is advised to be addressed before the commencement of procedures.<sup>138</sup> Requests for electronic data are recommended to contain a detailed description of a narrow and specific category of documents to make searching for them as affordable and fast as only possible.<sup>139</sup> ESI is allowed to be submitted and produced in the most convenient and economical form.<sup>140</sup>

Since each single dispute needs a different degree of discovery the guidelines are limited to a rather vague terminology. Nevertheless, they serve as a basis for a careful balancing test between potentially relevant ESI and the interest in a time and cost efficient arbitration, e.g., a tribunal bound by one of the guidelines should deny requests of disclosure where e-discovery causes substantial financial and temporal burden in comparison to the amount in dispute or the need for information.<sup>141</sup>

Hence, if parties aim for a discovery free of any complaints concerning costs and necessary efforts related to ESI they are required to either mutually agree on the production of necessary evidence or at least agree on a protocol or guideline for evidence.

### **(e) Conclusions**

As the latter sections have shown, IT solutions can play a leading and positive part in an arbitration proceeding as long as the two following requirements are fulfilled: first, IT must be employed prudently, and, second, the tribunal and the parties need to obtain the necessary knowledge on the relevant IT issues surrounding the case.<sup>142</sup> Regardless of whether the

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134 See Anke Meier, "The Production of Electronically Stored Information in International Commercial Arbitration", in German Arbitration Journal (2008), p. 180.

135 Article 184 (1) Private International Law Act of Switzerland, Article 34 (1) and (2)(d) English Arbitration Act, Article 1042 (4) German Civil Code of Procedure.

136 Article 19 (3) AAA International Arbitration Rules, Article 26 (1) SCC Rules, Article 27 (3) CRCICA Rules.

137 See CPR "Protocol on Disclosure of Documents and Presentation of Witnesses in International Commercial Arbitration" (2009); IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010); ICDR Guidelines for Arbitrators concerning Exchange of Information (2008).

138 See Section 1 (d) (3) CPR Protocol on Disclosure of Documents and Presentation of Witnesses in International Commercial Arbitration (2009).

139 Article 3 (3) (a) (ii) IBA Rules on the Taking of Evidence in International Commercial Arbitration (2010).

140 Article 4 ICDR Guidelines for Arbitrators concerning Exchange of Information (2008).

141 See Section 1 (e) (2) CPR Protocol on Disclosure of Documents and Presentation of Witnesses in International Commercial Arbitration (2009).

142 See Gabrielle Kaufmann-Kohler and Thomas Schultz, "The Use of Information Technology in Arbitration", in Jusletter December (2005), p. 12 and 13.

influence of IT on arbitration already deserves to be named “Commercial Arbitration 2.0” or not, the potential benefits of IT make it completely implausible to show any hesitance towards the use of modern digital tools. Especially since technology keeps progressing relentlessly every arbitration practitioner is required to reckon with and keep up with new technical revelations in order to ensure a cost and time effective arbitration.

## **V. CONCLUSION**

Those who are active participants in the international arbitration community must constantly be vigilant not to stray from elements that make arbitration an effective form of dispute resolution. Achieving greater efficiency and cost-effectiveness in international arbitration requires joint and continuous effort from all those involved in the arbitral process. This involves educating the parties and enabling them to make informed choices at all stages of the arbitral process. This also requires that the arbitrators, as well as the lawyers involved in the process, avoid overscheduling and are resolute in dedicating the time necessary for the effective resolution of the dispute at hand – in this regard less might in fact be more (efficient). Moreover, and perhaps most importantly, this requires an active dialogue between the parties, their lawyers and the arbitrators. Indeed, effective arbitration is interactive and purposeful arbitration.

In this vein, the arbitration community must not shy away from different approaches and new technology. Although issues such as proactive settlement negotiations by the arbitral tribunal, or the use of information technology to electronically manage cases or conduct hearings, may now seem unimaginable to some participants, it is up to them to adjust or risk becoming obsolete. International arbitral procedure is flexible and continues to evolve with modern trends just like it has from the outset. This flexibility should be applauded and encouraged since this ability to adjust to the party's needs is indeed another element that makes arbitration unique.