Drive for Efficiency and the Risks for Procedural Neutrality – Another Tale of the Hare and the Tortoise?

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It is often said that international arbitration has become too expensive and slow. Although this view is, to an extent, overly simplistic, it is undeniable that international arbitration is not necessarily cheap or fast. This fact, in recent years, has fuelled a strong drive for efficiency in the world of international arbitration.

The drive for efficiency is reflected in the leading institutional rules. For example, under Article 14.1(ii) of the LCIA Arbitration Rules 1998 (the ‘LCIA Rules’), one of the general duties that an arbitral tribunal should observe at all times consists of adopting ‘procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties’ dispute’.

Similar provisions are contained in Article 17.1 of the UNCITRAL Rules of Arbitration 2010 (the ‘UNCITRAL Rules’) and Article 22(1) of the ICC Arbitration Rules 2012 (the ‘ICC Rules’).

In addition, the latest version of the ICC Rules goes further in two respects. First, the ICC Rules contain cost incentives, both for tribunals and

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1 In reality, it all depends on the basis of comparison, for example, litigation before many domestic courts can be more expensive than international arbitration and in most cases slower.
parties to ensure that the proceedings are conducted expeditiously and economically. Secondly, Appendix IV to the ICC Rules sets out a number of case management techniques that can be adopted by the tribunal and the parties to reduce the costs and increase the speed of arbitration. Some of the measures set out in Annex IV to the ICC Rules are discussed in the second section of this article.

However, although aimed at a laudable purpose, the drive for efficiency can lead to unwelcome consequences if not kept in check. In particular, it is possible that measures taken towards ensuring quicker and cheaper arbitrations might impinge on the principle of procedural neutrality. But what does that mean? In this article, the term ‘procedural neutrality’ is used to reflect the principle by virtue of which an arbitration is conducted so as not to afford an advantage to one party to the detriment of the other (be that by reason of the parties’ particular characteristics or the legal background of their counsel, for example).

This principle is a manifestation of the overriding tenet of procedural fairness that should inform any dispute resolution mechanism and is not specific to international arbitration. Indeed, procedural neutrality has a close relationship with other manifestations of the principle of procedural fairness, including the right to be heard and the right to a reasonably level playing field.

A second aspect of procedural neutrality (specific to international arbitration) is that the prevailing practice of international arbitration (at least in the leading centres around the world) does not closely resemble the way in which litigation is conducted in any particular jurisdiction. Indeed, it is often said that international arbitration is neutral because it constitutes a common law/civil law hybrid. This hybrid practice of international arbitration has developed as a result of arbitrators transplanting the best

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2 In relation to an arbitral tribunal, Article 2(2) of Appendix III to the ICC Rules states: ‘In setting the arbitrator’s fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 37(2) of the Rules), at a figure higher or lower than those limits.’ In relation to the behaviour of the parties, Article 37(5) of the ICC Rules provides: ‘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.’

3 Appendix IV to the ICC Rules, in general, reflects the contents of an earlier document prepared by the ICC on efficiency issues: Techniques for Controlling Time and Costs in Arbitration, ICC Publication 843.

practices of the common law and civil law traditions and combining them into a supranational form of dispute resolution. The important side-effect of this is that no party (or its counsel) has an advantage (real or perceived) over its opposing party because of its particular legal background, thereby promoting the goal of achieving a reasonably level playing field. (For convenience, this article refers to this specific aspect of procedural neutrality in international arbitration as ‘transnational procedural neutrality’.)

Against the backdrop of procedural neutrality, this article considers four types of measures that an arbitral tribunal wishing to make proceedings less costly and more expeditious could adopt and the risk that the interests and characteristics of the parties (and the background of their lawyers) may be side-lined if the drive for efficiency becomes paramount in the eyes of the tribunal. Should the hare be allowed to outrun the tortoise?

**Efficiency measures**

This section identifies the following four efficiency measures:

1. short deadlines;
2. documents-only arbitrations;
3. limited cross-examination; and
4. reduced document production;

and considers whether such measures could give rise to concerns from the viewpoint of procedural neutrality.

**Short deadlines**

One of the simplest ways in which the speed of the conduct of proceedings can be increased by setting short deadlines to file submissions and serve evidence. In principle, the benefit of taking such measures is self-evident since it should prevent parties (and their lawyers) from dragging their heels. However, when applied to states or parties with limited resources, for example, short deadlines may give rise to concerns as to the procedural neutrality of the process, particularly as regards the right to be heard and the concept of a reasonably level playing field.

**States parties vs private parties**

It is no secret that the decision-making process of states (particularly when it is necessary to consult multiple government departments) is often more bureaucratic and time-consuming than the approach of private parties, particularly sleekly run corporate entities. Accordingly, if the deadlines for the different stages in the proceedings are brief
(say, the relevant state is given 21 days from the date of receipt of the statement of claim to file a statement of defence), there is a risk that a state would have insufficient time to prepare its case. Obviously, this would be detrimental to the state and, at the same time, beneficial to the private entity on the other side.

Moreover, in the great majority of investment arbitrations, a state will be the respondent. In such cases, the investor claimant will, in all likelihood, only commence proceedings when it is satisfied that it is fully prepared to engage in the dispute. In contrast, the state respondent will have a limited amount of time to prepare its case and marshal its evidence prior to serving its statement of defence. The imbalance in time available to the parties to prepare their respective cases will be exacerbated in circumstances where a streamlined procedure is ordered and procedural neutrality will not be achieved. Indeed, this issue needs to be borne in mind in all cases where the claimant has had an extensive amount of time to prepare its case in contrast to the respondent in order to maintain a reasonably level playing field.

Parties with differing resources at their disposal.

At first sight, the prospect of faster and cheaper proceedings when an entity with limited resources is engaged in an arbitration against a party with vast resources at its disposal seems advantageous – in principle, an economical and quick arbitration should level the playing field. However, at closer inspection, attempting to increase the speed at which an arbitration is conducted could be detrimental to the party with limited resources. For example, suppose that the arbitral tribunal in an arbitration involving Small Co, the claimant, and Big Co, the respondent, wishes to make the arbitration as efficient as possible and sets a tight timeline for the proceedings with the evidentiary hearing to take place only seven days after exchange of witness statements. The in-house lawyer of Small Co is doing the advocacy on behalf of the claimant. By contrast, Big Co is represented by a large law firm. While Small Co’s in-house lawyer would struggle to be well-prepared for the hearing, Big Co could simply expand its team of advocates to be ready in time.

In a situation like this, a condensed timeline is (once again) likely to exacerbate the imbalance in the proceedings arising from the different resources available to the parties. A tribunal cannot ensure perfect equality of arms, but it can try to maintain a reasonably level playing-field between the parties by allocating sufficient time to each side to present its case and hence achieve procedural neutrality.
Documents-only arbitration

One of the management techniques suggested in Appendix IV(c) of the new ICC Rules for making an arbitration more efficient is as follows: ‘Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.’

Where this results in certain arguments being dealt with by way of a preliminary issue, it is difficult to see how a complaint about procedural neutrality (or the lack of it) could be raised, particularly as preliminary issues often relate to a point of law that requires no evidence for determination (for example, the ambit of a limitation of liability clause). However, concerns as to procedural neutrality may arise if all the issues in dispute are to be determined without an oral hearing involving witnesses.

Under the rules of most leading arbitral institutions, a tribunal would only be in a position to order a documents-only arbitration if all of the parties to the proceedings agree to that course. For example, Article 25(6) of the ICC Rules provides: ‘[t]he Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.’

Article 19.1 of the LCIA Rules requires that the agreement of the parties to a documents-only arbitration be recorded in writing: ‘Any party which expresses a desire to that effect has the right to be heard orally before the Arbitral Tribunal on the merits of a dispute, unless the parties have agreed in writing on documents only arbitration.’

Similarly, Article 17(3) of the UNCITRAL Rules provides: ‘If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.’

In contrast, section 34(2)(h) of the English Arbitration Act 1996 suggests that an arbitral tribunal has the power to dispense with the production of witness evidence:

‘34. (1) It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter.

(2) Procedural and evidential matters include –

... 

(h) whether and to what extent there should be oral or written evidence or submissions.’
There is evidence of arbitral tribunals having decided disputes on the basis of the documents alone, even against the objection of the parties, but this is rare and there is good reason for that. First, international arbitration has as one of its core attributes the ability of the parties to influence the procedure adopted to determine the dispute. Also, foregoing an oral hearing could undermine the basic tenet of procedural neutrality affording each party the right to be heard and to present its case as it wishes. Of course, the documents-only approach would apply to both parties, but does it also impinge on the concept of transnational procedural neutrality?

Documents-only arbitrations may give rise to concerns when the parties come from different legal traditions. For example, would foregoing an oral hearing be to the detriment of a party coming from the common law tradition, whose counsel may be less well-equipped to deal with a documents-only arbitration vis-à-vis parties coming from the civil law tradition.

In many civil law jurisdictions, witness testimony is given little weight and its scope is limited (for example, the parties and their employees cannot appear as witnesses before the court). As a result, documentary evidence is employed in lieu of witness testimony and parties coming from civil law countries often create a welter of contemporaneous documentation – frequently notarised – in contemplation of future disputes.

In contrast, there is less pressure to create a trail of documentary evidence in advance of a dispute in common law countries, and, as a result, there is a risk that a common law party may find it difficult to establish its case and/or challenge the other side’s case in a documents-only arbitration involving parties from different legal traditions. Such a situation offends the principle of procedural neutrality on a number of levels – the right to be heard, the right to a reasonably level playing-field and even the transnational hybrid arbitration procedure where an oral hearing is ordinarily held even if time for cross-examination is limited.

In short, there will be limited circumstances when it will be appropriate for a tribunal to order a documents-only arbitration without the consent of the parties.

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5 A situation like this took place in ICC Case No 1512 of 1970, as to which it has been said: ‘Many of you will be familiar with the famous ICC Case No 1512 in which Professor Lalive was sole arbitrator. He refused to hear oral evidence on the grounds that he could decide the matter quite properly on the documents which had been given to him by the parties and hearing the arguments of counsel. He was criticised in England but his approach was upheld by the Court of Appeal, the leading judgment being given by Lord Justice Kerr.’ A Marriott, ‘Evidence in International Arbitration’ (1989) 5(3) Arbitration International 280–290.
Limited cross-examination

An alternative way to decrease the costs and length of an arbitration is to limit the cross-examination of witnesses at hearings. In this respect, Appendix IV(e) of the new ICC Rules proposes the following efficiency measure: ‘Limiting the length and scope of... oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.’

In theory, there are two different approaches that could be taken in this respect. First, the parties could agree to forego cross-examining any of the witnesses from whom statements and expert reports have been served. The parties are quite entitled to do this and under Article 8.1 of the IBA Rules on the Taking of Evidence in International Arbitration, for example, a witness is not obliged to appear at a hearing for cross-examination unless his appearance is requested by the counterparty or the arbitral tribunal. However, this would be highly unusual and the tribunal is likely to afford little weight to the witness statements and expert reports produced by the parties.

Secondly, and this is a much more likely scenario, the tribunal could set a short time-frame for cross-examination of witnesses; for example, no more than one hour per witness. Under the ICC Rules (Article 26(3)), the LCIA Rules (Article 19.5), the UNCITRAL Rules (Article 17.1) and the English Arbitration Act 1996 (section 34(2)(h)), arbitral tribunals have the power to determine the amount of time that will be afforded to the parties for cross-examination. In most cases, this can be an effective way to avoid time being wasted exploring irrelevant issues at the hearing.

However, if an arbitral tribunal were to limit the time available for cross-examination to an unreasonably short period given the factual issues in dispute, this would be likely to result in concerns being voiced about the procedural neutrality of the arbitration by an aggrieved party. From one perspective, common law practitioners faced with such a situation may consider that they will have insufficient time to explore all of the evidence put forward by a witness. However, an effective cross-examiner should be in a position to test the evidence fairly quickly and it is more likely that an inexperienced cross-examiner from a civil law tradition may be prejudiced to a greater degree.

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6 Indeed, it is often said that the first few minutes of a cross-examination are crucial to assess the credibility of a witness.
Reduced scope of document production

Document disclosure or discovery is one of the reasons that makes litigation in common law countries expensive in comparison to litigation in civil law jurisdictions. In common law proceedings, litigants are obliged to disclose a broad range of documents relevant to the issues in dispute. For example, Rule 31.6 of the UK Civil Procedure Rules 1998 provides as follows:

‘Standard disclosure requires a party to disclose only –

(a) the documents on which he relies; and

(b) the documents which –

(i) adversely affect his own case;

(ii) adversely affect another party’s case; or

(iii) support another party’s case...’

Parties may follow up with requests for their counterparty to produce additional documents. However, any such requests must be narrowly drawn and aimed at disclosure of materially relevant documents.

A more restrictive form of document disclosure is usually adopted in international arbitration whereby the parties only have to produce the documents on which they rely in the first instance. This is reflected in Article 3 of the IBA Rules, which provides for requests for parties to produce additional documents as follows:

‘A Request to Produce shall contain:

(a) (i) a description of each request Document sufficient to identify it, or
(ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;

(b) a statement as to how the Documents requested are relevant to the case and material to its outcome;

(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and

(ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.’
In most circumstances, this more limited level of exchange of documents strikes a fair balance between the common law and civil law traditions. However, a protracted exchange of requests to produce can prove to be time-consuming and expensive.

With a view to reducing such costs and delays, Appendix IV(d) (ii) of the new ICC Rules suggests ‘avoiding requests for document production when appropriate in order to control time and cost’.

This may be appropriate in a case of contractual interpretation, but if there are factual issues in dispute, complaints might be voiced if requests for document production are not permitted.

A civil law party may be less aggrieved in such a situation, particularly if steps have been taken in advance to preserve documentary evidence. Also, parties may be able to find alternative ways to obtain evidence to prepare their case, by retaining private investigators, for example. However, this could prove costly and the outcome of the investigations would be likely to take some time, putting a party with limited resources at a disadvantage.

Tribunals should therefore consider all the circumstances of the case very carefully before restricting the ambit of disclosure severely, so as to preserve procedural neutrality as far as possible.

Conclusion

Whether trimming deadlines, ordering documents-only arbitrations, limiting the parties’ ability to cross-examine witnesses or reducing the scope of document production is appropriate ultimately depends on the circumstances of the case. Pertinent circumstances include, for example, whether states parties are involved in the dispute, the resources available to the parties, the issues in dispute and the legal background of the parties and their lawyers.

There will be circumstances when the types of measures described above might be perfectly acceptable. However, speed and cost-efficiency should not be allowed to trump the fundamental principles of the right to be heard and the right to a reasonably level playing-field, thereby undermining the procedural neutrality of the arbitration proceedings.

Although dispensing with or restricting a particular procedural step may result in speeding up the process and/or saving costs in the short-term, this has to be weighed against the long-term consequences. For instance, a violation of the principles underpinning procedural neutrality could give rise to grounds for setting aside the award at the seat of the proceedings7 and/or

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7 See, eg, s 68(2) (a) of the English Arbitration Act 1996; Article 2(a) (ii) of the UNCITRAL Model Law (amended in 2006).
the denial of recognition and enforcement of the award. Indeed, the rules of many arbitral institutions require arbitrators to make every effort to ensure that an award is enforceable. Accordingly, a tribunal should always consider the impact that any measure taken under the guise of improving efficiency might have on the enforceability of the resulting award.

If a tribunal does consider that a measure aimed at making an arbitration more efficient has the potential to put procedural neutrality at risk or otherwise to prejudice the enforceability of an award, it should explore other potential avenues that may achieve similar effects without creating an imbalance between the parties. Following the guidance provided in Appendix IV of the new ICC Rules, some of those measures may include:

- bifurcating the proceedings or rendering partial awards on discrete issues with an eye to encouraging the parties to settle early in the proceedings;
- identifying issues that have the potential to be agreed between the parties so as to reduce the ambit of the dispute;
- limiting the length and scope of submissions made in writing;
- arranging pre-hearing conference calls to plan the logistics of hearings;
- conducting procedural hearings via telephone or video-link; and
- allowing the examination of witnesses via video-link if attendance in person is not essential.

Probably the best tool to balance the drive for efficiency with procedural neutrality lies in the flexible and bespoke nature of international arbitration. The tribunal and the parties are in a position to design a dispute resolution mechanism that ensures that the parties are afforded an equal opportunity to present their case, while at the same time streamlining the procedure to avoid unnecessary delays and control costs.

This may rule out far-reaching efficiency measures in many cases, but short-term speed and cost-savings will be rendered pointless if the award is ultimately challenged for a lack of procedural neutrality resulting in annulment or contested enforcement proceedings. In a tribute to Aesop, allowing the tortoise to prevail over the hare in arbitration proceedings may not necessarily be a disadvantage; indeed, in certain cases, it may preserve the neutrality of the process and lead to a more readily enforceable award.

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8 Article V(1)(2) of the New York Convention.
9 See Article 41 of the ICC Rules and Article 32.2 of the LCIA Rules. In the absence of a specific provision in the applicable rules, it is generally considered that arbitrators have at least a moral duty to render enforceable awards.