

Towards More Cost-Effective Arbitration¹

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Object of arbitration and cost effectiveness

The 'object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense'.⁴ This is the 'general principle' with which the English Arbitration Act 1996 ('the 1996 Act')⁵ opens. Two of the elements of this object, fairness and impartiality, can be found in most other legislations. They are or should be, universal principles in all arbitration, whether or not the arbitration falls under the 1996 Act, is domestic or international, or is being conducted under an arbitral institute or is 'ad hoc'. The third element, avoiding unnecessary delay and expense or, in short, efficiency, can be found less frequently among the legislative enactments on arbitration. Nevertheless, it is vitally important for the success of arbitration as a form of dispute settlement. While most arbitration specialists will readily agree that increasing costs in arbitration is a serious concern and that cost effectiveness is a desirable goal, insufficient work has been done in the past to address these issues. Discussion has tended to centre on fees of the arbitrators and of the arbitral institutions, without focusing on the underlying causes for the high cost of arbitration proceedings.

Some recent legislative enactments and the revisions in the principal rules for institutional arbitration are moving in the right direction. Powers of the arbitrators have been strengthened and their responsibility for an efficient conduct of the proceedings has been underlined. This article seeks to examine, in the light of these enactments and rules, the promotion of cost-efficiency in international arbitration and to put forward proposals for the achievement of more cost-effective arbitration.

High cost of international commercial arbitration⁶

It has to be acknowledged that the cost of arbitration, particularly in international commercial disputes is high – excessively high – and often disproportionate to the amounts in dispute and, even, to the cost of similar proceedings before the courts.⁷

The most visible *cost factors* in an international arbitration are the costs of the proceedings themselves (ie the costs and fees of the arbitrators) and, in institutional arbitration, the charges of the institutions. While the criteria for fixing the fees vary from one set of rules to another, it is significant that the total amount paid to arbitrators and the institution in an international commercial arbitration normally is above, and often substantially above, that which would have to be paid to a court for the same case. The use of different criteria by arbitral institutes, for fixing their administrative costs and the fees of arbitrators, also has its impact. Those institutes who fix their administrative costs and arbitrators' fees on an *ad valorem* basis (ie as a percentage of the amount or amounts in dispute) can result in the parties paying appreciably different amounts for administrative costs and arbitrators' fees than those institutes who fix administrative costs and arbitration fees on hourly rates for the amount of time spent.

The cost of proceedings is only one factor. The parties must pay their counsel and bear their own internal costs. While arbitration, contrary to proceedings before courts, can be conducted without the assistance of counsel, in international commercial arbitration parties are invariably represented by counsel, specialists in the rules and law governing the proceedings. The cost of counsel, especially in complex international cases, often exceeds the costs of the

proceedings. A party's internal costs can be particularly high, especially if one takes into account the disruption that can be caused to a company's operations by ongoing arbitration.

The difference in cost between arbitration and court proceedings is less dramatic if it is taken into account that court cases often are not decided finally by the court of first instance but are subject to appeal proceedings before one, two and in some cases three appellate stages. While appeal proceedings are available also under the statutory provisions governing arbitration in most countries,⁸ the grounds on which appeals are available in modern arbitration legislation are much more restrictive.⁹ Also, the appeal proceedings are normally limited to two and, in Switzerland,¹⁰ to a single stage. If allowance is made for the much more restrictive arbitral appeal proceedings, the cost of arbitration proceedings can compare favourably with those incurred before the courts.

With the objective of identifying *reductions and savings*, the starting point is to look at the costs of the institution and the arbitrators. 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. The availability of an institution may greatly facilitate the commencement of the arbitration and the formation of the arbitral tribunal; it may also be of use during the course of the proceedings. However, there are situations where the relationship between the parties is such that they can expect to overcome without the assistance of an institution the difficulties that may arise in this context. They may then decide to organise their arbitration without the help of an institution and correspondingly save costs.

Such a decision may prove to be short-sighted. In the course of a dispute the relations between parties often degenerate to such an extent that the choice of arbitrators and the organisation of the arbitral procedure become contentious issues which would be resolved more easily with the assistance of an institution. Furthermore, the scrutiny of the award, which the ICC International Court of Arbitration provides, can be useful in avoiding errors and oversights which, uncorrected, could give rise to appeal proceedings or difficulties in enforcement. The counterbalance to the benefit which scrutiny of the award provides is the delay which can arise between the date when the arbitrator agrees the award and the date the institution publishes it.

Concerning arbitrators' fees themselves, the scope for savings is small. The principal concern of the parties when choosing their arbitrators is not the level of their fees. The parties want competent and experienced arbitrators, not cheap ones. Competent and experienced arbitrators must balance their arbitration work with other professional opportunities. Assignments as arbitrators, especially if they are paid on an *ad valorem* basis, may carry less remuneration than experienced international practitioners can earn for similar work as counsel. One of the interesting features of the LCIA is that it remunerates its arbitrators on the basis of the time spent at rates which can compete with the arbitrators' alternative sources of revenue.

With respect to counsel, the scope for savings by reducing the fee rates would also appear to be small. Specialised counsel may be prepared to submit a tentative budget for an arbitration,¹¹ but, in the experience of the present authors, the fee rates between the principal firms specialising in international arbitration work do not differ substantially.

Thus the scope for savings by reducing fee rates of institutions, arbitrators and counsel is limited. *Serious cost control and substantial reductions in the costs of an arbitration can only be achieved by a more efficient*

conduct of the proceedings. But such efficiency requires close cooperation between the arbitrators and the parties. Lean arbitration is interactive arbitration. How does the new legislation and regulations respond to the needs of such interactive proceedings?

1996 English Arbitration Act

The 1979 English Arbitration Act ('the 1979 Act') was passed by Parliament with remarkable speed which caused the admiration of arbitration specialists in countries like Switzerland, which are engaged in long and complex processes of reform legislation.¹² The reform of English arbitration law which eventually led to the 1996 Act took a rather longer road. The delay had a salutary effect. During the time while the 1996 Act was prepared in its various successive versions, England was beginning to engage in a profound process of judiciary reform which found its most outstanding expression in the Reports of the Master of the Rolls, Lord Woolf. This process of reform and the experience in other jurisdictions and in international arbitration, has had a general influence in the shift to written proceedings and in the shortening of the hearing and are reflected in the 1996 Act.¹³

The objective of avoiding 'unnecessary delay and expense', which the 1996 Act expresses in its opening section, is buttressed by imposing duties on the arbitral tribunal and the parties. On the former the arbitral tribunal is under a duty to:

- (a) act fairly and impartially between the parties, giving each party a *reasonable opportunity* of putting his case and dealing with that of his opponent, and
- (b) adopt procedures suitable in the circumstances of the particular case, *avoiding unnecessary delay or expense*, so as to provide a fair means for the resolution of the matters following to be determined.¹⁴

In other words, arbitrators need not accept whatever procedural device a party claims necessary for the

presentation of its case; indeed they have a positive duty to avoid unnecessary delay or expense. Compared to the 'hands-off' manner which many arbitrators – and not only in the common law world – today adopt in the conduct of international proceedings, the principle expressed in the 1996 Act is truly revolutionary.

The difficulty, of course, is to determine what is reasonable and what is necessary. In no circumstances should the new powers for and duties of 'pro-active arbitrators', with attendant reductions in delay and expense, bring about unfairness and injustice. The arbitral community is rightly very concerned to preserve due process. The present article seeks to address this concern, emphasising that, in the authors' view, efficiency and fairness are best combined in an 'inter-active' conduct (between the arbitrator, the parties and their representatives) of the arbitration.

The duties of the arbitrators with respect to an efficient conduct of the proceedings correspond in the 1996 Act to a corollary duty of the parties who must 'do all things necessary for the proper and expeditious conduct of the arbitral proceedings'.¹⁵ By these provisions which place the responsibility for an expeditious and efficient conduct of the proceedings *both* on the arbitrators and on the parties, the 1996 Act lays the grounds for truly interactive proceedings.

New ICC, LCIA and AAA Arbitration Rules and other recent texts

Recent years have seen a host of activities intended to provide guidance and directives for the conduct of international arbitration proceedings in a movement which has been described as a '*fureur réglementaire*'.¹⁶ Many new arbitration rules have been adopted by the new institutions created in recent years; among the most important of these new institutions is the World Intellectual Property Organisation (WIPO). This organisation created an Arbitration Centre that administers a number of

procedures for the resolution of international commercial disputes involving intellectual property, including arbitration pursuant to the WIPO Arbitration Rules.

Several of the existing arbitration rules, in particular those of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA) were revised recently and guidance was provided in particular by the Practice Notes issued by the United Nations Commission for International Trade Law (UNCITRAL).¹⁷ In England, existing arbitration rules were adapted to the new legislation and others were newly created to respond to it. In this context one may mention in particular the Construction Industry Model Arbitration Rules (CIMAR) of March 1997.¹⁸

The ICC International Court of Arbitration, which describes itself as 'the leading body in international commercial arbitration', since its establishment in 1923, has revised its rules on several occasions. The last version had been in force since 1975, with some modifications introduced in 1988. These rules have now been revised in an intensive, worldwide consultation process. The new rules, which have been in force as from 1 January 1998, have preserved the basic features of ICC arbitration but have brought some substantial modifications with the objective of accelerating the proceedings, improving clarity, correcting some deficiencies and rendering the rules more 'user-friendly'.

The new rules, by avoiding some of the delays in the application of the previous ones and by some other changes, will also contribute to a more cost-effective conduct of the proceedings. However, cost-effectiveness has not been one of the specifically mentioned objectives of the revision.¹⁹ It is essentially a matter of good management of the proceedings. The great flexibility in the conduct of the proceedings, which the ICC Rules offered in their earlier version and which has been preserved in the 1998 rules, provides the

prerequisites of such management. The new rules have introduced some provisions which, by confirming earlier good practice, contribute to the generalisation of this good practice, for instance by requiring that, at a very early stage of the proceedings, the arbitral tribunal establish a provisional timetable for the arbitration.²⁰

The London Court of International Arbitration (LCIA) describes itself as 'probably the longest-established of all the major international arbitration institutions'.²¹ Like the ICC, the LCIA issued new arbitration rules effective for arbitrations commenced on or after 1 January 1998. These revised rules were 'produced after extensive consultation with practitioners in different arbitral systems in a wide range of jurisdictions'.²² The brochure presenting these new rules states expressly that the 'LCIA provides cost-effective international arbitration administration...'.²³ As with the new ICC Rules the new LCIA Rules are conducive to such cost-effective arbitration. They also contain a new fee structure based upon the amount of work performed by the institute and the arbitrators.

The new LCIA Rules repeat the basic principles of Section 33 of the 1996 Act²⁴ and grant to the arbitral tribunal 'the widest discretion to discharge its duties' and require the parties to 'do everything necessary for the fair, efficient and expeditious conduct of the arbitration'.²⁵ The rules also contain other provisions which contribute to rational organisation of the arbitral proceedings.²⁶

There are two clauses which, in the context of the present article, deserve particular mention: Article 19.3 provides that the 'Arbitral Tribunal may in advance of any hearing submit to the parties a list of questions which it wishes them to answer with special attention'. Article 22.1 (c) permits that, under certain conditions, 'the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and the law(s) or rules of law applicable...'. While the

precautions taken in this clause, in particular the requirement of prior hearing of the parties, are justified with respect to an initiative of the tribunal concerning the ascertaining of the facts, it would appear that, after the parties have presented their case on the merits, the arbitral tribunal should be authorised and indeed encouraged to identify those issues which it sees as determining the outcome of the dispute. We welcome both provisions in the interests of more 'interactive' conduct of proceedings and more efficient arbitration.

There are also other provisions in the new LCIA Rules which are directed to faster and/or more cost-effective arbitrations. Under Article 2.1 the LCIA Court can fix a lesser period than 30 days for the respondent to reply to the request for arbitration. Under Article 4.7, the arbitral tribunal can extend or abridge any of the time periods (whether prescribed in the LCIA Rules or the arbitration agreement) for the conduct of the arbitration. Under Article 17, the choice of the language of the arbitration is simplified which should enable the arbitration to be conducted in the language which is most suitable for it with the need for translations of documents and evidence reduced. Under Article 19.5 the arbitral tribunal is given 'the fullest authority to establish time limits for meetings and hearings'. It has now to be judged to what extent their practical application produces the desired result.

The American Arbitration Association (AAA), in the field of domestic arbitration, is probably the arbitration institution which has by far the greatest caseload. Internationally, its experience is less. It administers a variety of different arbitration rules, including those for international arbitration. The revised version of the AAA International Arbitration Rules became effective on 1 April 1997. Here, too, the rules contain provisions which other, more succinct, rules leave to the experience of the arbitrators.²⁷ A passage which deserves particular notice here is that which authorises the arbitrator 'to direct the parties

to focus their presentation on issues the decision of which could dispose of all or part of the case'.²⁸

The new AAA International Arbitration Rules stipulate that the AAA administration fees should be based on the amount of the claim or the counterclaim but the arbitrators' fees on the amount of work they undertake at 'appropriate daily or hourly rate'.²⁹ Under Article 14 the choice of language is simplified so that the arbitration can be conducted effectively under the most suitable language. Under Article 16(2) the arbitral tribunal is charged with conducting 'the proceedings with a view to expediting the resolution of the dispute' and with using procedures to achieve this end. Under Article 23 there are default procedures and under Article 27 the award is to be made 'promptly by the tribunal'. In the interest of an efficient and interactive conduct of the proceedings AAA arbitrators have a special opportunity to use these powers.

Arbitrators as experts in arbitration

While the high cost of international commercial arbitration continues to be a matter of concern, it is not to be found in all international arbitrations. For example, arbitrations at the London commodity exchanges, such as the Grain and Feed Trade Association (GAFTA) and the Federation of Oil Seeds and Fats Associations (FOSFA) are in every sense international (relating to the parties and the flow of goods) and are concerned with substantial claims. Yet GAFTA and FOSFA arbitrations have a reputation for the fast resolution of disputes at low cost. There are special reasons for this. The parties to the dispute (and the arbitrators) are members of the same trade association, who have an interest in continuing to be in active trade with one another. The GAFTA and FOSFA arbitrators act as experts, as grain or seed merchants, as well as arbitrators. The basic issues that they have to decide concern the quality and the quantity of the commodities in

question, which normally can be decided rapidly. Therefore, combining their skills as experts and arbitrators, they are able swiftly to decide whether the grain is of the right quality or the seed of the right quantity.

In other international commercial arbitration, the same circumstances do not arise. While the arbitrators in these proceedings often have some specialised knowledge or at least familiarity with the trade or industry concerned in the dispute, they are rarely experts in these fields as commodity arbitrators are in theirs. Yet all arbitrators³⁰ are (or should be) experts in arbitration. Therefore they should be qualified to deal in an efficient manner with the proceedings and the issues which they have to resolve. They can do so in a number of ways, in particular by assisting the parties in focusing their dispute on the essential issues and avoiding unnecessary confrontation, positioning and wasteful procedures. In the absence of the constraints which exist when the one member of a trade association is suing another, parties in international commercial arbitrations often have the greater need for the arbitral tribunal to insist on a reasonable conduct of the proceedings without excess. In the final analysis, parties in arbitrations wish to win. The counsel, whom the parties employ, also want to win on behalf of their clients. Without restraint, as is exercised in trade association arbitrations, an enormous amount of time and cost can be deployed in procedural moves and, at times, in plain delaying tactics. Volumes of correspondence can be created by exchanges of letters, telexes, faxes and now e-mails. Nothing can be more needed, in such cases, than a calm and firm arbitrator who, in strict neutrality, brings the parties to better sense!

Understanding the case

The first task of the arbitrator is to get the parties to understand that *their first task is to get the arbitrator to understand their case* so that he can make the award which they are

seeking in the arbitration. The principal objective both of the parties and of the arbitrator should be to agree upon procedures which sensibly work towards the decisions which the arbitral tribunal has to make in its award. The case should be presented completely in an early stage of the proceedings, together with the written evidence, upon which each party relies. Other evidence (viz expert reports or inspections) should also be identified and cross-referenced against the allegations which it is intended to support.

At the next stage, when the arbitrator examines the claims of the parties, the arbitrator should ensure that the parties have accurately conveyed to him a proper understanding of their case. Where necessary, clarification must be sought and obtained. Once the arbitrator has achieved, with the assistance of the parties, a proper understanding of their arguments he is in the right position to give the directions (giving the parties an opportunity to comment on them) under which the arbitration will proceed. In particular the arbitrator should identify prior to the hearing the facts which the parties need to establish and the evidence needed to support such facts. It is this evidence and no other which should then be heard.

Working with the parties for efficient and cost-effective arbitration

In this preliminary process there is much scope for the arbitral tribunal, working with the parties, to establish efficient and cost-effective procedures for the conduct of the arbitration. By identifying the decisive issues and the facts which need to be established, the arbitrator can help the parties to limit the documents which they produce and the evidence in general. He can and indeed should only permit those witnesses, who have been offered to testify on issues that he has found to be relevant, to be called. He can save time and improve efficiency by himself examining the witnesses, reserving to the parties an

opportunity to pose further questions which may remain after the arbitral tribunal has completed the examination. The arbitral tribunal can decide the sequence in which issues should be heard and decided. It may propose that certain issues should be decided just on the documents. It can and indeed should set a timetable to which each party must keep for the presentation of its case. It can limit the time for the opening oral submissions³¹ and the closing oral arguments and, as always, working with the parties, take such other steps which (while giving each party a fair opportunity to present its case) will contain the arbitration and the cost of it.

An interactive arbitrator, working with the parties, should also seek to limit the scope of the dispute. For example, he can persuade the parties to discount altogether minor issues between them which carry little monetary value. Much can also be gained, after the parties have submitted their expert testimony, by bringing the opposing experts before the arbitral tribunal to discuss their different conclusions. This process can bring experts onto common ground. It also helps the arbitrator to better understand the technical issues and the points on which the experts disagree.

Parallel to the disciplines which the arbitrator can obtain from the parties in the arbitration process, he should be imposing disciplines upon himself. In the first place, he should not accept the appointment unless there is sufficient room in his calendar for him to give reasonable priority to the conduct of the arbitration about which he has been approached. The next important step is for the arbitrator to become wholly familiar with the file when it is submitted to him. This is decisive for the proper conduct of the case, for the correct identification of the issues and for the evaluation of the parties' submissions.

A major source of waste and dissatisfaction in the conduct of international commercial arbitrations lies in the arbitral tribunal failing to accurately

identify and then to focus on the decisive issues in an arbitration. It is not always easy. Without a decision on an important preliminary issue, such as the choice of the governing law, it may appear that the arbitral tribunal cannot decide the issues before it, nor can the parties know their precise liabilities towards one another. Yet, arbitration cases are often ultimately decided not on points of law but considerations of fact and evidence. In such cases considerable time and cost, taken up in reaching a decision on the governing law, may be wasted. The pertinent question is, therefore, what is the importance, measured against the result in the arbitration, in deciding the governing law as a preliminary issue when the exercise is likely to be time consuming and expensive.

Liability for costs – should the principle 'costs follow the event' apply?

In English court proceedings there has been a long established principle that 'costs should follow the event'. However, there is now a significant movement for this principle to be diluted. In his recent Reports to the English Lord Chancellor, Lord Woolf has advised that: '... the general rule that costs should follow the event should be relaxed so that the court [can] use to the full its very wide discretion over costs to support the conduct of litigation in a proportionate manner and to discourage excess'.³² This advice is all part of the wider recommendation of Lord Woolf: 'that courts should pay greater regard than they do at present to the manner in which the successful party has conducted the proceedings and the outcome of individual issues'.³³

Actually the English rule of 'costs following the event' has never been a rule under which the winner recovers his costs in all circumstances from the loser. On the contrary the test is not simply whether a party has won or lost the case but how successful it has been in the overall outcome of it. As Mr Justice Bingham (now Lord Chief

Justice Bingham) stated in *The Catherine L*,³⁴ the test is: 'What order for costs is in all the circumstances most fair and just to reflect the relative success and failure of each party as a matter of substance in the arbitrations.' Lord Woolf is, however, going further in recommending that even the overall outcome of the case should not be the only criterion. The primary question is: has the complainant succeeded in the major issues which it raised? Even if it has succeeded in the major issues, were they the major issues that were contained in its original claim or were they major issues which were only advanced in amended pleadings made during the course of the arbitration thereby substantially altering the case that the respondent had originally faced? What was the comparative importance of the claim and counter-claim and how did they relate to the central issues before the arbitral tribunal? Above all, how have the parties cooperated in the arbitral process? Have they been efficient and timely or have they adopted costly time-wasting tactics?

In international arbitration, practice varies considerably with respect to cost decisions. Most arbitration rules now provide for the power of the arbitrators to award costs to the losing party who may have to bear the costs of the arbitration and the legal costs incurred by the winning party.³⁵ What is of interest here are the criteria which should determine the decision on costs. The outcome of the case generally is considered as the principal if not the only criterion. It is not the practice for a prevailing party, which has failed in some of its claims, to be awarded all of the costs. Normally the decision on costs takes account of the degree of success: often it does so proportionately to the percentage of the claim which was awarded.³⁶

In some cases, international arbitrators have taken account of other considerations when deciding on costs, in particular the behaviour of the parties. They can make allowance for honest differences of opinion over difficult issues or penalise bad faith or uncooperative

behaviour.³⁷

As mentioned above, the 1996 Act makes a point of requiring the parties 'to do all things necessary for the proper and expeditious conduct of the arbitral proceedings';³⁸ places on the arbitral tribunal the duty of 'avoiding unnecessary delay or expense';³⁹ and even includes the absence of 'unnecessary delay or expense' as part of the very object of arbitration.⁴⁰ In view of the importance which is thus attributed to efficiency in the proceedings one might have expected that the Act would invite the arbitrators to take the parties' conduct into account when they decide on the allocation of the costs of the proceedings. Surprisingly, the Act not only fails to invite such consequences but consecrates the 'costs follow the event' principle without reference to any other criteria. In Section 61 (2) it provides the following: 'Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.' To a Continental observer of English arbitration, used to such concise drafting as can be found for instance in French or Swiss legislation, this Section is a counterproductive clause, where 'pedagogic rule-making'⁴¹ has restricted the scope of the 1996 Act – if it has not also caused confusion.⁴²

It is suggested that Section 61 (2) of the Act should not restrict international arbitrators sitting in England in their decision on costs. They should feel free to apply other principles and criteria whenever this is appropriate.⁴³ Indeed, if it is the basic duty of arbitrators and parties to cooperate in the arbitration process and if a party by not cooperating causes 'unnecessary delay and expense' then it is proper for the arbitral tribunal to take such conduct into account when making its award on costs.

The Construction Industry Model Arbitration Rules, published in London in March 1997 by the

Society of Construction Lawyers, draw the logical conclusion from the principles set out in the 1996 Act with respect to the duty to proceed efficiently. There specific provision is made for the arbitrator, in allocating cost between the parties, to take into account:

- '(a) which of the claims has led to the incurring of substantial costs and whether they were successful;
- (b) whether any claim which has succeeded was unreasonably exaggerated;
- (c) the conduct of the party who has succeeded in a claim and any concession made by the other party;
- (d) the degree of success of each party'.⁴⁴

The 1998 LCIA Rules, in their provision on the allocation of costs, have clearly been drafted to reflect Section 61 (2) of the 1996 Act. However, they modify the 'cost follows the event' rule by providing for an allocation proportionate to the relative success and failure of the parties. No other criterion for the allocation of costs is mentioned and derogation from it is foreseen only if 'in the particular circumstances this general approach is inappropriate'.⁴⁵

The UNCITRAL Arbitration Rules provide for the principle that the unsuccessful party shall bear the costs of arbitration, allowing for apportionment when the arbitral tribunal deems this to be 'reasonable'.⁴⁶ More recent arbitration rules, with the quoted exception of LCIA Rules, do not regulate the matter, as in the case of the new ICC and AAA Rules, or provide for greater flexibility. Thus the WIPO Arbitration Rules require the arbitral tribunal to apportion the costs 'between the parties in the light of all of the circumstances and the outcome of the arbitration'.⁴⁷

It follows that in ICC, AAA and WIPO arbitration proceedings, the conduct of the parties can be taken into account when deciding on the costs. We suggest that this is also a proper interpretation of the LCIA Rules, taking into account the importance which, elsewhere in these rules, is placed on efficient conduct of the proceedings and the

express duty of 'avoiding unnecessary delay or expense'.⁴⁸

Pricing each stage of the arbitration process and deciding its costs separately

There is another important dimension. The identifying of issues, and the separate decision making upon them, can enable the arbitral tribunal to price each stage of the arbitration and make it subject to a separate decision on costs. In the preliminary stages of litigation in the English courts, it is commonplace for the court to make separate orders on costs depending upon whether the court rejects or accepts the procedural application being made for it. The party, therefore, who makes an unsuccessful procedural application to the court has to pay the cost of it irrespective of the final result in the litigation.

In international arbitration, such decisions on the costs of procedural applications are rare. Even partial awards often reserve the decision on costs until the end of the case. International arbitrators are generally reluctant to make cost decisions during the course of the procedure. Apart from the fact that some arbitrators seem to consider issues of costs as of secondary interest, this practice is probably motivated by the belief that it is easier to find a fair apportionment of the cost of the procedure once the outcome of the entire case is known. In addition, under some arbitration rules, it is difficult for arbitrators to decide on costs during the course of the proceedings.⁴⁹

However, there are good reasons for making decisions on costs as the case proceeds. One such reason is that the parties normally pay advances for costs and fees to the arbitral tribunal and spend significant amounts of money on the preparation of their defence. It is reasonable to argue that a party who has prevailed in the first part of the arbitration, for instance on jurisdiction or on the principle of liability, should recover immediately the costs relating to this part of the proceedings rather than having to wait for another

long period until the arbitration is completed.

Making separate cost decisions during the course of the proceedings can contribute to increasing the parties' sense of cost consciousness. If the various elements or issues of the case which require separate steps in the procedure, and call on the tribunal's time and efforts, are priced separately, the decision on them can also be made for each issue. A party will tend to be more reluctant to defend untenable positions on such issues if its liability for the costs caused by each of them is identified distinctly. In other words, the parties pay according to the issues of the case and the complication which they have introduced.

If there is separate pricing of issues there may even be, within certain limits, the possibility for the arbitrator to fix the costs for deciding these issues.⁵⁰ This applies, of course, only in those proceedings where the arbitrators themselves fix the fees and not an institution such as, in ICC proceedings, the ICC International Court of Arbitration. However, in ordinary commerce, there is no more effective way of ensuring cost-effectiveness in the production of goods or services than providing that a fixed price should be paid to the seller by the receiver of those services. Similarly, there is no better way of making an arbitration cost-effective than by fixing the cost of each stage of it. The difficulty, of course, results from the fact that the scope of the services of an arbitrator depends to a large extent on the manner in which the parties put their case; any commitment as to his fees, thus must be related to the means he has to contain the presentation of the case within certain limits.

Irrespective of the method of pricing of the arbitrator's services, we believe that it is advisable to consider, wherever possible, separately the costs for each stage of the proceedings or for each issue of substance and procedure which the arbitral tribunal must decide. Knowing that the costs of proceeding with the issue will be assessed and awarded separately renders the parties attentive to the

cost effects of the manner in which they present their case. They can decide whether certain points which they might wish to make are worth the expense caused by deciding them in a costly arbitration.

In this respect, the 1998 ICC Arbitration Rules bring a useful clarification. In proceedings under these rules the fees of the arbitrators and the ICC administrative costs are fixed by the ICC Court. In the practice of the Court, these fees and costs are fixed only at the end of the proceedings. This remains the position under the new ICC Rules. However, Article 31 (2) of the rules now contains a new provision: 'Decisions on costs other than those fixed by the Court may be taken at any time during the proceedings'.

Thus, ICC arbitrators can now decide in a procedural order or a partial award the costs of the parties or of the experts. Thereby they can settle a major part of the cost claim and may provide much appreciated relief, for instance to a claimant who finds it financially difficult to pursue his claim over several years.

Conclusions

Thus, the tools are available in the statutory provisions and in the rules which empower the arbitrator to conduct the proceedings in an efficient manner. What is needed are more arbitrators to use these powers sensibly. While arbitrators have a responsibility for such efficient conduct of the proceedings, they must respect the parties' right to present their case adequately. In international arbitration, where parties and their counsel often come from different backgrounds and traditions, patience must be exercised and differences accommodated.

Once the parties have presented their case, the remainder of the proceedings must be designed and managed by the arbitrator, in constant exchange with the parties. Efficiency in the conduct of the proceedings does not mean simply reducing time and cost. It means above all, focusing the dispute to the central issues. This requires

communication and interactivity between the parties and the arbitral tribunal, and an understanding of how orders on costs, when fairly and firmly exercised, are all part of achieving cost-effective arbitration. Recent enactments and arbitration rules have provided openings in this direction. Arbitration practitioners, as counsel and as arbitrators, must now make use of them.

Notes

- 1 Both authors have written about the impact of costs on the arbitration process. Michael E Schneider wrote an article 'Lean Arbitration: Cost Control and Efficiency Through Progressive Identification Of Issues and Separate Pricing Of Arbitration Services': *International Arbitration*: 1994 Volume 10 No 2. David Hacking wrote an article 'The Principle Of Civil "Costs Following The Event" under the Arbitration Act 1996': *Practical Arbitration Journal*: 1997 Volume 1 No 5. This article seeks to develop further the authors' proposals for more cost-effective arbitration.
- 2 David Hacking is a Fellow of the Chartered Institute of Arbitrators in London and, in the House of Lords as Lord Hacking, has been actively involved in English arbitration law reform for the last 20 years. He has contributed widely to the contemporary debate in the development of arbitration. He was a member of the English Working Party on the 1998 ICC Arbitration Rules.
- 3 Michael E Schneider is a member of the Executive Committee of the Swiss Arbitration Association and Chairman of the IBA/SBL Subcommittee T7 on the Resolution of Construction Disputes and an Associate of The Chartered Institute of Arbitrators in London. He was a member of the Working Party which prepared the 1998 ICC Arbitration Rules.
- 4 Section 1 English Arbitration Act 1996.
- 5 The English Arbitration Act 1996 legislates for the jurisdictions of England and Wales and Northern Ireland. However, for ease of reference, the jurisdiction of England, Wales and Northern Ireland is referred to as 'England' or 'English'.
- 6 The cost factors in international commercial arbitration and the scope for savings have been discussed in greater detail in Schneider, 'Lean Arbitration . . .', *loc cit* p 120 *et seq.*
- 7 See Redfern & Hunter: *Law and Practice of International Commercial Arbitration* (2nd edition, 1991), page 248.
- 8 A notable exception is Belgium where, in international arbitration proceedings,

- all possibilities of appeals are excluded.
- 9 Corresponding in general to the grounds for refusing enforcement of a foreign arbitral award under Article V of the New York Convention.
 - 10 One of the features which makes arbitration in Switzerland particularly attractive is the provision which limits appeals to a single instance directly before the Supreme Court (Article 191 of the 1987 Act on Private International Law, PIL Act).
 - 11 Such budgets, although they can obviously not be a binding lump sum fee, in the experience of the present authors, provide useful tools for cost control and are greatly appreciated by parties, especially when, at the beginning of a case, they wish to assess chances and risks of an arbitration.
 - 12 The Swiss Federal Act on Private International Law (PIL Act), which contains in its Chapter 12 the provisions on international arbitration, took nine years from the first draft to its final adoption.
 - 13 In his article 'Will English Arbitrations Follow Woolf', John Bolton wrote: 'On 8 July 1996, The Right Honourable Lord Justice Saville said that he believed that arbitration should mirror Lord Woolf's Rules of the Court for Civil Procedure and therefore considered the reforms that he was introducing should be embodied in future arbitration rules and procedure. No doubt Lord Woolf's Access to Justice Inquiry will have a long-term effect on arbitration.' in: *Practical Arbitration Journal* 1997, 55. This passage also shows that the contribution which reform of the civil justice system has made to the improvement of English arbitration law has some risks. It may continue the tendency of English lawyers to pattern the conduct of arbitration on the court proceedings, disregarding the particularities of arbitration, especially in international disputes.
 - 14 Section 33 English Arbitration Act 1996.
 - 15 Section 40(1) English Arbitration Act 1996.
 - 16 Pierre Lalive, *ASA Bulletin* 2, 1994, page 213 *et seq.*
 - 17 UNCITRAL Notes on Organising Arbitral Proceedings, 1996.
 - 18 The CIMAR Group, established in 1996 following an initiative in England by the Society of Construction Lawyers, and proceeding under the Chairmanship of Lord Justice Auld produced a set of rules which it recommends for adoption by the relevant construction institutions and bodies. The rules, published by the Society of Construction Arbitrators, are intended for arbitration under the English Arbitration Act 1996 by a single arbitrator.
 - 19 The Foreword to the new rules states that the changes brought by them are 'designed to reduce delays and

- ambiguities and to fill certain gaps, taking into account the evolution of arbitration practice'.
- 20 Such a provisional timetable, which some arbitrators have used for some time, is now expressly required by Article 18 (4)
 - 21 Introduction in the brochure containing the New LCIA Rules.
 - 22 *Ibid.*
 - 23 *Ibid.*
 - 24 Set out in sub-paragraphs (i) and (ii) of Article 14.1.
 - 25 Both passages contained in Article 14.2.
 - 26 Eg the provision regulating the written stage of the proceedings, requiring for instance that the Respondent clearly state in the Statement of Defence which points of fact and law in the Statement of Claim he admits or denies (Article 15.3) and the powers of the arbitrator to require a party to give notice of the identity of each of its witnesses (Article 20.1).
 - 27 For instance Article 16 (3) which gives to the arbitral tribunal the discretion to 'direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence ...'
 - 28 Article 16 (3) *in fine*.
 - 29 Article 32.
 - 30 Arbitrators are both of the male and female gender. Throughout this article, references to the male gender should be treated as also references to the female gender.
 - 31 In proceedings where the hearing is preceded by extensive written argument, such opening statements can and indeed should be short, if they are necessary at all.
 - 32 Access to Justice: Final Report: July 1996: Chapter 7 paragraph 9 page 80.
 - 33 Access to Justice: Final Report: July 1996: Chapter 7 paragraph 8 page 79.
 - 34 1 Lloyds Report 484, 1982.
 - 35 Article 40 of the UNCITRAL Rules, Article 31 (1) of the 1998 ICC Rules, Article 31 of the 1997 AAA International Arbitration Rules, Article 28 of the 1998 LCIA Rules.
 - 36 For details of the practice in ICC arbitration and the great variety encountered there see Eric Schwartz, 'The ICC Arbitral Process: Part IV: The Costs of ICC Arbitration', *The ICC International Court of Arbitration Bulletin*, 4/1, 1993, 8 at 20 *et seq.*
 - 37 Schwartz, *op cit* 22 and 23.
 - 38 Section 40 (1).
 - 39 Section 33 (1) (b).
 - 40 Section 1 (a).
 - 41 We owe this expression to Mathieu de Boisesson who, in the Working Party on the revision of the ICC Rules, warned against such a tendency to which some other rule-makers have succumbed and which the Working Party intended to avoid in the revision of the ICC Rules.
 - 42 In its report of February 1996 the Departmental Advisory Committee on

- Arbitration Law (DAC), recognised the argument 'that arbitration tribunals should not be fettered in this way' but it thought it 'helpful to state the principle, especially for those who may not be lawyers or who otherwise may not know how to proceed'.
- 43 For a further development of the point see David Hacking, 'The Principle of Civil "Costs Following the Event" Under the Arbitration Act 1996', in *Practical Arbitration Journal* 1997, 54 *et seq.*
 - 44 CIMAR. See note 18 above.
 - 45 Article 28 (4) reads as follows: 'Unless the parties otherwise agree in writing, 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. Any order for costs shall be made with reasons in the award containing such order.'
 - 46 Article 40 (1) 'Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.' Paragraph 2 concerns the 'costs of legal representation'. In this respect, 'the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.'
 - 47 Article 71 (c) with respect to the costs and fees of the arbitral tribunal and the institution, and Article 72 with respect to 'the reasonable expenses incurred by the other party ...'.
 - 48 Article 14.1 (ii).
 - 49 This was the case in the old ICC Rules. Article 20 (1) provided in the French version 'La sentence définitive de l'arbitre, outre la décision sur le fond, liquide les frais de l'arbitrage ...' (emphasis added). The English version only said that 'the arbitrator's award shall, in addition to dealing with the merits of the case, fix the costs of the arbitration and decide which of the parties shall bear the costs or in what proportions the costs shall be borne by the parties'. The ICC International Court of Arbitration and many arbitrators concluded from this and in particular from the French wording that, under the ICC Rules, decisions on costs during the course of the proceedings were not admissible.
 - 50 For a further development of this approach see Schneider, 'Lean Arbitration ...', *op cit* 133.