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## **Reducing Time and Costs on International Arbitration**

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### **I. Introduction**

1. The topic of costs and time of arbitration is constantly debated. Believers, and fanatics, of arbitration affirm in conferences, written material and business meetings, that arbitration is cheaper and quicker than court litigation. On the other side, opponents to arbitration argue that arbitration is becoming akin to litigation and expensive, that arbitrators tend to split the baby and are less reliable than courts, and so on and so forth. These polemics are natural, and I instead of joining it; I will limit myself to point out where most of the problems are; and to recommend a few strategies that may be of some help in practice. That is what really matters

2. What is undeniable is that the increasing sophistication, and the importation into arbitration of court litigations practices, setting aside old healthy arbitration usages, has caused arbitration to become more expensive and time consuming.

### **II. Great expectations**

3. Before going into the subject, let us put things in perspective. This debate, as many others, is more founded in opinion than in facts. No wonder that, due to the quasi confidentiality nature of arbitration, there is little hard data on time incurred and costs spent in international arbitration, regarding costs, I only know the recently issued Report from the ICC Commission on Arbitration “Techniques for Controlling Time and Costs in Arbitration (“ICC Report”) ([www.iccwbo.org](http://www.iccwbo.org)). Regarding time, some institutions, from time to time, publish averages of time spent in international arbitrations held under their rules; but averages provide no details. Other sources come from commentary in relation with certain practices that are, or may be, creating difficulties; like the recurrent topic of interchange of information (identified as “discovery”, in the common law system). There are, also, some very useful and interesting papers dealing, directly or indirectly, with my subject in this occasion.

4. Dealing with costs of arbitration, only the ICC Report has actual, useful, information. The ICC Rules of Arbitration, as others, give to the arbitrators the power to adjudicate the costs of the arbitration, and to the ICC Court the power to determine the amount of administrative and arbitrators’ fees. Thus, the practice is that before closing the instruction, the arbitrators require the parties to inform the costs each party incurred. The Institution, before making any determination, asks the arbitrators about the time spent in the case. Thus, the ICC has objective information available, and the ICC Report is based in hard data.

5. According to the ICC Report, 2% of the cost of arbitration is spent in administrative expenses of the ICC Court, 16% in arbitrators’ fees and expenses. The rest, 82%, is spent in costs borne by the parties to present their cases; “including, as the case may be, lawyers’ fees and expenses, expenses related to witness and expert evidence, and other costs”. What these data is telling us, is that the major cause of escalation of costs and increase in time spent is not a problem particular to arbitration. Most probably it is due to litigation practices and strategies, rather than costs inherent and peculiar to the arbitration procedure. It is a problem of international litigation that also pervades arbitration.

6. Any arbitration takes time and has costs in accordance with the amounts in dispute and the complexity of the case; time and costs that naturally increase when the dispute is international. Why then people complain? The answer is that missionaries of arbitration stress too much the fact that arbitration is less expensive and less time consuming than litigation; which I think is true. But in their enthusiasm they raise high expectations to un-experienced audiences. Great expectations are rarely fulfilled, and when arbitration proceedings result more expensive, and longer than expected, and if followed by post-award litigation, disillusion ensues and the whole institution becomes vulnerable to criticism.

7. There are three reasons that cause arbitration to reduce substantially the risks, costs and time in international litigation. Firstly, arbitration clauses eliminate forum shopping, which is one of the worst evils of international litigation; parties that agreed arbitration are entitled to request local courts to refer the parties to arbitration and forum disputes in different countries are avoided. Secondly, service of a request for arbitration does not require court intervention, rogatory letters or other formalities; only simple delivery. Thirdly, foreign arbitral awards are enforceable under the New York Convention, while there is not a universal similar treaty on the enforcement of foreign judgments ((United Nations Convention on the recognition and enforcement of foreign arbitral awards (“New York Convention” or “NYC”) Articles III and V, National enforcements of the UNCITRAL Model Law on International Commercial Arbitration (“UMLA”), articles 8, 35 and 36, and other advanced national arbitration laws).

8. The fact is that arbitration remains less expensive and time consuming than litigation, that there is an element of unfulfilled expectations and that, indeed, costs and time have increased by litigation practices and overlawyering. But that does not mean that nothing can be done.

### III. UNCITRAL may Update its Notes

9. Under this perspective, I am going to address the question that I was asked by the Secretariat. Is there something that UNCITRAL can do on the topic of costs and time in international arbitration? If the idea is to produce more rules, codes and guidelines, my answer is no. Please do not create more regulations and guidelines; there are too many, and they help to promote overlawyering and post-award-litigation.

10. Perhaps something may be done, on the side of educational efforts, and updating the UNCITRAL Notes on Organizing Arbitral Proceedings (“Notes”, see them in [www.uncitral.org](http://www.uncitral.org)), might be a good idea. Costs and time may be controlled with experience and prudence; and experience and prudence are important ingredients of the Notes. The experience gathered since their approval in 1996, may be of great value in updating the Notes. Furthermore, the use of information technologies in arbitration, under the topic of Online Arbitration, is a priority of future work of the UNCITRAL Working Group on International Arbitration. And information technologies are an important tool for reducing costs and time.

### IV. Strategies

11. But with or without the Notes, there are other important, useful, strategies. Many are well known but frequently forgotten.

12. Reducing costs and time, starts when the parties make a wise selection of experienced counsel. Experienced Counsel and experienced arbitrators do not waste time and money. Experienced counsel would advise good arbitration clauses, and it would also advise the selection of good, experienced and prudent arbitrators.

13. The arbitration clauses are the basis of the whole building of the future arbitral proceedings. In practice, good arbitration clauses are drafted by experienced counsel; and bad ones by the un-experienced. This is not a surprising statement, but let me explain it. Many times arbitration clauses are written by transactional lawyers, and it is natural, because they agree and draft most relevant transactions. The problem is that transactional lawyers have not the experience of litigators that practice arbitration, experience which is badly needed. Some transactional lawyers, acting wisely, consult their draft conflict resolution clauses with their litigation partners or relationships, but many don't. And there is where a lot of bad practices develop. For instance, choice by personal preferences (“I find that the xxx Rules are the best”); or worse, blind acceptance of the preferences of the internal legal counsel of their client. Others, give little importance to the dispute resolution clause, and perhaps use clauses taken from some previous contract, that are imported at the last moment. Others, very

dangerously, are “creative”; which in the ends result in the creation of unforeseeable problems when the arbitration is put in movement.

14. Unfortunately, it happens frequently that the expert litigators in international arbitration, that handle the cases, know the dispute resolution clause when there are required to intervene in the battle. Then they are as the goalkeepers in soccer: they need to catch the ball as it comes; and not always in a very comfortable position and with good possibilities.

15. The UNCITRAL Arbitration Rules (“UNCITRAL Rules”) and the rules of most institutions, as well as experts, recommend short, uncomplicated arbitration clauses. What is needed is only to identify the legal relationship, most times a contract, that may give, or gave, cause to the dispute, and put forward the agreement to arbitrate. It is always recommended to agree also in the rules, place of arbitration, language, and applicable law; and, under the UNCITRAL Rules or in ad hoc arbitrations, also on the appointing authority. That is enough. But the experience of arbitral institutions and practitioners is to confront the need to deal with pathological clauses that create all kinds of problems and delays- Among the more common mistakes are: the wrong identification of the rules or the arbitral institution, arbitrators requiring to fulfil especial qualifications, mandatory conciliation periods before starting the arbitration, time limits to start the arbitration, time limits to conduct the arbitration, the reference to legal provisions made for court proceedings, and so on and so forth

16. In many occasions, the defects of pathological clauses can be cured by agreement. Those agreements may be concluded due to the intelligent intervention of the arbitrator. In other cases, by negotiation and bargaining; between wise counsel, each representing opposing parties. Not always with excellent results; for instance, a friend told me that in a recent case, in order to cure a defect of a clause, he was forced to accept the challenge of one of the arbitrators. That is no good.

## **V. A Good Dialogue. Prudence and Common Sense**

17. Good arbitrators are essential. Arbitration is an art that develops, mainly, through a dialogue between the arbitrators and counsel of the parties. Good arbitrators, before giving directions and making resolutions, take extreme precautions to be sure that they have fully and attentively heard the parties, and understand their positions and expectations; and make the parties known that they did so. For instance, before producing the timetable they need to clarify hidden contradictory expectations; do the parties expect to have previous interchange of information? When and how written submissions are the parties expecting to produce? What evidence, how and when is going to be introduced? And many others.

18. Here the UNCITRAL Notes are an excellent tool. Experienced arbitrators do not need the Notes, but they used them, very often by recommending the parties to look through them in preparation of the preliminary conference for the procedural timetable. For instance, some arbitrators handle the Notes to the parties and invite them to try to agree in the issues relevant to the arbitration, and only to refer to the arbitrators the unresolved issues.

19. Especial mention deserve the IBA Rules on Taking Evidence in International Commercial Arbitration, which are very helpful used as guidelines, because they comprehend a practical approach, negotiated and drafted by experienced participants in international arbitration, coming from different legal systems. By consulting the IBA Rules, parties and arbitrators may avoid repetitive debates and the search for solutions that already exist. One caveat, it is risky to incorporate the IBA Rules as part of the arbitration agreement or rules; they may make rigid what must be flexible, limit the discretion of the arbitral tribunal, and increase the opportunities of challenging the award.

20. Counsel of the parties should never hesitate to inquire with the arbitrators what are they expecting from the parties. Counsel shall ask the arbitrators to give them directions in whatever issue that is of relevance and they did not understand or find it is missing. For instance, how do foreign law must be proved? By reports of legal experts or by direct submission of the law and authorities by counsel? What happens if some relevant principles of the applicable law were not debated in the hearing? And many others.

21. When there is an atmosphere of dialogue, things run smoothly. Good arbitrators constantly invite the parties to agree on procedural issues by themselves; and only intervene when the roads are blocked. This is the best way to avoid unnecessary fights, waste of time and additional expenses.

22. Arbitrators must be fair but firm. Debates and queries that slow down the regular course of proceedings, are easily prevented by clear and informed directions. Sometimes I have seen arbitrators

that accept unproductive motions or useless evidence; for instance, when it is repetitive, or on facts already agreed or accepted by the parties. The argument is always based on the need to render a valid and enforceable award and not to give the parties reasons for post award litigation. But arbitrators that have given the parties reasonable opportunities to be heard, and let them know that they understand what the parties expect, are in the position to issue appropriate directions, capable to be sustained by any state court. The parties, also, will have good disposition to accept the arbitrators' rulings; even when they are unsatisfactory to them. And, in any event, if a party correctly objects, there is always the possibility to rectify. Even there is nothing wrong if arbitrators, when giving directions, inform the parties that they may consider observations of the parties when promptly made.

23. Another cause of dilations and extra expenses are long and repetitive briefs. Information technologies are now very useful. But the availability of online databases, electronic copies of documents, and the cut and paste techniques, have cause an epidemic of overweight written submissions and exhibits. Again, prudence recommends that parties, under the guidance of the arbitrators, take care to make written submissions short, on time and to the point. Some counsel thinks that important allegations, to become true, must be repeated not less than three times. And yes, sometimes, it is needed to insist on important issues; but the message will be more productive if made, in different short and clear presentations, than in endless briefs (that are not brief); recently I counted the same statement repeated verbatim ten times in a submission; all indications were that the text was "cut" and "pasted. That is to abuse the time of the arbitrators, distracting and boring.

24. Voluminous documentation is a large problem. Its preparation, copying, organization, shipping, archiving and consulting are time consuming and expensive. The probabilities that important documents remain forgotten in their files, increase with the grow of the amount of documents filed. Many times the parties send tons of documents, when they should have consulted in advance with the arbitrators; for instance, statements like "My documentary evidence in issue "Y" is in the documents listed in Exhibit X. Shall I annex all the documents the submission "X2 to be made, or will it be sufficient if I attach the ones I find relevant, and keep the rest at the disposition of the arbitrators and counterpart?" Some arbitrators are afraid to send them documents back or refuse to receive them. On the contrary, in a recent procedural order, the arbitrators directed the parties that, before annexing voluminous documentation, they shall inform and ask directions from the tribunal.

25. I have three recent, and very illustrating, examples. In one, the tribunal stated in the award that one of the parties filed voluminous documentation as evidence, but with no indication of its organization and in such disarray, that the tribunal could not consider it. In another, claimant filed the request of arbitration, with twenty five boxes of documents, copied to each of the arbitrators, its counterpart, and the institution. Respondent also send heavy documentation. Most boxes of documents remained closed until the end of the case. Notwithstanding, the tribunal could decide without problems, because during the proceedings expert reports and memorials were submitted, with copies of the relevant documents that were examined by the tribunal. In arbitration, a party informed the arbitrators that it has three thousand drawings, and asked whether it should send them to the counterpart, the arbitrators and the institution. Two arbitrators said yes; the other recommended that the party should produce the drawings it consider relevant, and keep the rest available to be produced in case the other party or the tribunal require some or all. Again, the copies of the drawings remained sleeping in their boxes; but the relevant ones were copied and attached to the experts' reports.

26. Regarding witnesses and expert witnesses, there are well known strategies to reduce time and costs. For instance, when needed, the use of teleconferences and videoconferences. The practice that parties produce written witness statements is widely followed. Only a few of the witnesses that made written statements, are cross examined in the hearing. The predominant practice is that the party who will cross, decides which witnesses to call. But the arbitrators must prevent deviations. In a recent case, a party produced around thirty witnesses written statements. The opposing party, when it came the time limit to designate the ones it proposed to cross examine, called all the witnesses; it was evident that the agenda and duration of the hearing would not allow enough time to do so. But the arbitral tribunal denied a request of the other party to prudently reduce the number. During the hearing, gradually, the party which was to cross examine, liberated the witnesses and, at the end, it did not cross examined even one out of the thirty. The waste of costs, and time in preparation and attendance of the witnesses was enormous. The arbitrators should have taken measures to prevent or reduce it. It may be alleged that the abusing party shall pay the costs; but prevention is far better than remedies.

27. Dealing with experts, witness conferences are a very useful tool. The experts are put to confront themselves, asking questions each other.. They know very well what to ask, and the practice is very productive and the results illustrative.

28. Perhaps there is no better tool to reduce costs and time in arbitration, than the intelligent use of information technology. When, in 1996, the Notes were finalized, information technologies were in their beginnings. Thus, they are practically absent in the Notes. As we will see, important practices have developed since then.

29. Email, electronic or digital signatures, enhanced signatures, encryption, and data storage just have changed the world. Instant and secure filing of submissions and documents overseas is today a regular practice; I wake up every morning to see what came from Europe during the night. Those documents may be easily stored in small memory gadgets. Not only stored but backed up, so data lost by accident can be safely retrieved. Arbitrators, counsel and witnesses now can travel and read the relevant documents while on the road, without the need to be burdened with large, heavy carpets, filled with documents not very easily to be handled in airports, aircraft seats or hotel rooms.

30. For instance I travel, even within Mexico City where I am located, with a small USB memory stick. Is so small that sometimes I have difficulties to find it in my briefcase, but it has a capacity of 15 gigabytes. When information must be copied, for instance, filings from a carpet, a scanner at the speed of 36 pages a minute does it and there is no problem to load those files into the memory stick. Then, with the use of programs as the Acrobat PDF, I can mark, write, tag, bookmark, and do all the tasks usually are made on hard documents; and even more. If I lose it, nobody could read the information, because it is stored in a 12 gigabytes, encrypted section. I also would avoid the risk of losing the information, because I carry another encrypted backup that is in the safe of my room in the hotel. I regularly update the backup. And, naturally, all this information is also stored in my server in Mexico.

31. Today it is feasible to have secured communications, electronic rooms of documents for each party, the arbitrators and all participants; and also online hearings and chatting for arbitrators. With email interchanges between arbitrators, personal meetings and long teleconferences are reduced, when not eliminated. Drafts can be rapidly distributed, received, revised and redone. And with flexibility, the non online activities that are needed can be carried on. Thus, these resources facilitate rapid proceedings, with less expenses incurred and substantial decrease of costs.

32. And with the UNCITRAL Model Law of Electronic Commerce widely adopted by the countries of the world and the new 2005, United Nations Convention on the Use of Electronic Communications in International Contracts, the legal validity of these instruments is out of the question.

33. What must be recognized is that no matter what age and previous training we have. As we did when we were children and learnt to read, write and use and store paper information, now we must learn how to make the best use of the information technologies.

34. Some institutions, among them, the WIPO and the American Arbitration Association, have implemented very interesting facilities for handling online arbitrations. For instance the AAA have its Online Arbitration Supplementary Procedures, and a WebFile section in which parties may file a new case, manage filed cases, complete conflict check lists, review and select arbitrators, view and upload documents, use the message board, and make payments.

35. This, and many other common sense strategies, may be of great help to reduce costs and time in international arbitration.