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# Some (Very) Random Thoughts on Decreasing Costs and Increasing Efficiency in International Arbitration<sup>1†</sup>



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Respondents to the 2018 International Arbitration Survey from Queen Mary University of London overwhelmingly confirmed that the worst characteristic of international arbitration was its cost. Thirty-four percent of respondents listed lack of speed as its worst feature.<sup>2</sup> The 2018 survey confirmed concerns regarding the speed and costs associated with international arbitration that have existed for some years.<sup>3</sup>

The cost and speed of international arbitration are inter-related issues. Give counsel additional time, and they will surely fill it with billable hours – *i.e.*, increased costs. Arbitral institutions are beginning to recognize that they must do more to ensure that international arbitrations are conducted in an efficient and effective manner, without unreasonable delays. The International Chamber of Commerce (ICC), for example, now requires

potential arbitrators to provide some assurance of their ability to conduct an arbitration in a timely manner.<sup>4</sup> Many arbitral institutions now provide optional ‘expedited’ procedural rules for arbitrations.<sup>5</sup>

There is a clear need to reduce costs and to increase efficiency in international arbitration. While there are certainly multiple ways in which these goals may be achieved, here are four somewhat random thoughts to consider and keep in mind to promote decreased costs and increased efficiency in international arbitration.

## Joint and Several Liability

Multiple parties may be jointly and severally liable for a single breach of contract or wrong. When parties have joint and several liability, each party is separately liable for the entire obligation until it is performed or remedied in full by one or more of the parties.

This basic legal principle must be remembered and should guide efforts to develop a less costly and more efficient international arbitration process. There are at least four inter-related stakeholders in the international arbitration process: (1) the parties; (2) their counsel; (3) the arbitrators; and (4) the arbitral institutions. Each stakeholder bears responsibility not only for the high costs associated with international arbitration but also the perceived lack of speed in the process. At the same time, costs cannot be effectively reduced and efficiency and speed increased without the cooperation and

1 † This article is adapted from a presentation and comments by the author during a panel discussion entitled ‘Evidence and Procedure in International Arbitration: Streamlining for Efficiency and Cost Effectiveness’ at the 6th International Arbitration Conference, held in Melbourne on 17 October 2018.

2 Queen Mary University of London, ‘2018 International Arbitration Survey: The Evolution of International Arbitration’ (2018) 7-8 <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-\(2\).PDF](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF)>.

3 See, e.g., Queen Mary University of London, ‘2015 International Arbitration Survey: Improvements and Innovations in International Arbitration’ (2015) 6-7 <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015\\_International\\_Arbitration\\_Survey.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf)>.

4 International Chamber of Commerce, ICC Rules of Arbitration, ‘Arbitrator’s Statement of Acceptance, Availability, Impartiality and Independence’ (2012) <[http://library.iccwbo.org/content/dr/PRACTICE\\_NOTES/SNFC\\_0001.htm?I1=Practice+Notes](http://library.iccwbo.org/content/dr/PRACTICE_NOTES/SNFC_0001.htm?I1=Practice+Notes)>.

5 See, e.g., ICC Rules of Arbitration, Article 30 & Appendix VI (1 March 2017) <[https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article\\_30new](https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_30new)>; ACICA Expedited Arbitration Rules (1 Jan. 2016) <<https://acica.org.au/wp-content/uploads/Rules/2016/ACICA-Expedited-Arbitration-Rules-2016.pdf>>.

participation of all stakeholders. Each stakeholder is, in effect, jointly and severally liable for the present high costs and lack of speed in international arbitration. Each stakeholder also is jointly and severally responsible for remedying the present problems. As Benjamin Franklin allegedly said nearly 250 years ago, 'We must, indeed, all hang together, or assuredly we shall all hang separately.'<sup>6</sup>

### 'I feel the need ... the need for speed.'

In the 1986 film *Top Gun*, Maverick (played by Tom Cruise) and his radar intercept officer Goose (played by Anthony Edwards) announce together, 'I feel the need ... the need for speed.' This need surely exists in international arbitration. As mentioned above, it is a need that has been felt for a number of years and remains a critical concern of users of international arbitration. In response, many arbitral institutions now provide expedited procedures that may apply to disputes depending on their size or the agreement of the parties.<sup>7</sup>

Pressure to utilize expedited arbitration rules and to increase the speed of international arbitration will only continue to increase. The United Nations Commission on International Trade Law (UNCITRAL) recently received proposals from the United States, Switzerland, Italy, Norway and Spain that one of its Working Groups take up consideration of rules for expedited arbitration, which neither the UNCITRAL Model Law nor the UNCITRAL Model Arbitration Rules presently contain.<sup>8</sup> One of the key complaints raised by delegations at UNCITRAL's Working Group III, which is considering reforms to the Investor-State Dispute Settlement (ISDS) process, is the length of time the process takes and associated high costs.<sup>9</sup>

Thus, each stakeholder in the international arbitration process must be prepared for the 'need for speed' to play

an increasingly important role in international arbitration. All stakeholders should be ready to conduct all stages of arbitral proceedings with greater dispatch in shorter time periods than now is typically the case.

### 'Round up the usual suspects.'

Near the end of the classic 1942 film, *Casablanca*, French police Captain Renault tells his men, 'Major Strassor has been shot. Round up the usual suspects.' This instruction is followed by Rik Blaine (played by Humphry Bogart) saying to Renault, 'Louis, I think this is the beginning of a beautiful friendship.'

For far too long, parties, their counsel, and arbitral institutions have 'round[ed] up the usual suspects' in international arbitration. This means that parties have consistently selected the same (usually large) law firms as counsel. These counsels, in consultation with their clients, have selected the same (usually white male European or North American) arbitrators. Arbitral institutions similarly have too often appointed the 'usual suspects' as arbitrators or panel chairs.

However, selecting the same counsel and the same arbitrators often results in higher costs and lengthier proceedings as counsel juggle multiple matters and arbitrators accept appointments that they in fact (despite affirmations to the contrary) do not have adequate time to undertake. Most egregiously, these long-standing 'beautiful friendships' have effectively excluded otherwise qualified counsel and prevented the appointment of otherwise qualified arbitrators. For arbitrators in particular, the pool has been unfairly limited. Indeed, UNCITRAL's Working Group III has identified as areas of concern in ISDS 'the lack of diversity in the appointment of arbitrators involved in ISDS cases and ... that some of the arbitrators were repeatedly appointed.'<sup>10</sup>

6 Attributed to Benjamin Franklin in Jared Sparks (ed), *The Works of Benjamin Franklin* (Hilliard Grey, 1840) vol I, 408.

7 For an overview and comparison of expedited arbitration rules amongst Asia-Pacific arbitral institutions, see Ben Davidson and Jonathan Mackojc, 'Expedited Arbitration: Asia-Pacific Institutional Rules – Overview and Comparative Table Guide' (12 Sept. 2018) <<https://www.corrs.com.au/thinking/insights/expedited-arbitration-asia-pacific-institutional-rules-overview-and-comparative-table-guide/>>.

8 Proposal by the Governments of Italy, Norway and Spain: future work for Working Group II, A/CN.9/959 (30 Apr. 2018) 2 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/028/10/PDF/V1802810.pdf?OpenElement>>.

9 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017) (Part I); A/CN.9/930/Rev. 1 (19 Dec. 2017) 7-9 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/83/PDF/V1802983.pdf?OpenElement>>.

10 'Report of Working Group III (Investor-State Settlement Reform) on the work of its thirty-fifth session (New York, 23-27 April 2018); A/

By breaking down the typical 'beautiful friendship' that exists, and refusing to 'round up the usual suspects', stakeholders can increase gender, ethnic, cultural, and geographic diversity in international arbitration – a need that remains critical. There is no requirement for the same counsel to be retained, particularly in light of the advancements in technology. These advances allow highly qualified, but often ignored, smaller firms to effectively, efficiently, and usually at lower costs, handle the largest and most complex of international arbitrations. Similarly, many well-qualified, frequently younger, arbitrators are available today who are from diverse, non-traditional backgrounds and who will bring fresh eyes and new views to international arbitration. Stakeholders in the international arbitration process must encourage the appointment and use of diverse counsel and arbitrators to better reflect reality in international arbitration.

### The Pareto Principle

In all but the simplest and most-straightforward of international arbitrations, analysing and assessing liability and damages is expensive and time-consuming. The costs associated with international arbitration often increases almost exponentially the more complex the matter or the higher the amount of damages in issue.<sup>11</sup> The ICC has suggested that the starting assumption in commercial arbitrations should be that no expert witnesses will be required in order to control costs.<sup>12</sup> However, such a presumption is rarely, if ever, practical in all but the most simplistic of matters. Regardless, the costs associated with damages issues and damages experts alone often are viewed as a barrier to early analysis of this critical aspect of any dispute, and their in-depth analysis and evaluation can significantly increase costs.

Fortunately, in 1896 Italian political economist Vilfredo Pareto posited what now is known as the Pareto Principle, also referred to as the 80/20 Principle or 80/20 Rule.<sup>13</sup> The 80/20 Principle asserts that a minority of causes, inputs, or effort usually lead to a majority of the results, outputs, or rewards.<sup>14</sup> The Pareto Principle equally applies to the evaluation and analysis of liability and damages issues in international arbitration. Typically, 80% of the benefit from the analysis of liability and damages issues can be obtained for 20% of the costs. Indeed, the International Institute for Conflict Prevention & Resolution has stated that early identification of damages issues is '[o]ne of the most important and cost-effective steps arbitrators can take'.<sup>15</sup>

International arbitration stakeholders must keep in mind the Pareto Principle throughout the arbitration process. Initial assessment of liability and damages, sometimes through the employment of early neutral evaluation processes, should result in more informed decisions by parties and their counsel regarding the merits of their case without the expenditure of significant sums. These early assessments may lead to faster resolution or identify specific areas for focus. Further, the 80/20 Rule means that parties and their counsel do not need to turn over every stone, request and examine every document, or make every possible argument in an arbitral proceeding. The costs associated with the last twenty percent of such efforts usually will greatly exceed the benefits gained. Arbitrators similarly should encourage parties and their counsel to focus their efforts more astutely and carefully. Proper determination of a dispute will rarely, if ever, require the submission of hundreds of exhibits and associated testimony. Multiple witnesses testifying on the same issue or issues usually do not establish any fact more firmly than a single good witness.

CN.9/935 (14 May 2018) 11 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/59/PDF/V1802959.pdf?OpenElement>>.

11 For a study establishing this fact in ICSID cases, see Tim Hart, 'Study of Damages in International Center for the Settlement of Investment Disputes Cases', Credibility Consulting (2014) 14-15 <[www.credibilityconsulting.com/ICSID\\_Damages\\_Study.pdf](http://www.credibilityconsulting.com/ICSID_Damages_Study.pdf)>.

12 International Chamber of Commerce, ICC Commission Report, 'Controlling Time and Costs in Arbitration' (2012) 13, ¶62 <[www.iccwbo.org](http://www.iccwbo.org)>.

13 See generally Vilfredo Pareto, *Manual of Political Economy: A Critical and Variorum Edition*, Aldo Montesano, Alberto Zanni, Luigino Bruni, John S. Chipman, and Michael McLure (eds) (Oxford University Press, 2014).

14 Richard Koch, *The 80/20 Principle: The Secret to Achieving More with Less* (Doubleday, 2nd ed 2008) 4.

15 CPR International Committee on Arbitration, 'CPR Protocol on Determination of Damages in Arbitration', International Institute for Conflict Prevention & Resolution (2010) 3 <[www.cpradr.org](http://www.cpradr.org)>.

Applying the 80/20 Rule is undoubtedly difficult, especially for counsel who frequently believe they must present every exhibit and make every argument, no matter how marginally relevant or likely of success. Parties and their counsel in international arbitration should not shy away from analysing and assessing liability and damages issues with less than all of the documents or facts known. If it is followed, the Pareto Principle ensures that significant, and usually cost-saving benefits, can be obtained in international arbitration.

### Conclusion

Users of the international arbitration process have long recognised that costs must be decreased and efficiency increased. All stakeholders in the process must recognize

that they are jointly and severally responsible for the present deficiencies and the need to correct them. International arbitration must be conducted with greater speed and efficiency. To achieve this goal, the same counsel and arbitrators should not be consistently retained and appointed. Doing this will also have the benefit of increasing gender, ethnic, cultural, and geographic diversity in international arbitration. Finally, stakeholders must recognize that the Pareto Principle means that every document, argument and issue does not need to be reviewed or presented. Nearly all useful information and analysis can be obtained for 80% of the typical effort, thereby further reducing costs and increasing efficiency in international arbitration.

It is with tremendous pleasure that we invite you to attend the  
**XXV<sup>th</sup> Congress of the International Council  
for Commercial Arbitration (ICCA)**  
which will be held in Edinburgh from 10<sup>th</sup> to 13<sup>th</sup> May 2020



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