

# Controlling Time and Costs in Arbitration: A Progress Report (Part 1 of 2)

## Kluwer Arbitration Blog

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I'm honored to join today the fine ranks of contributors to this blog. For my first two posts, I thought I would offer a progress report of sorts on the critical task of controlling time and costs in international arbitration. This Part 1 focuses on the good news about various institutional reforms by the ICDR, ICC and ICSID that already are helping to reduce the average duration of cases. The next Part 2 offers suggestions for further action by these institutions, as well as a more sober "reality check": that institutional reforms (no matter how vigorous) always will be a mere drop in the bucket, unless the users of the system also reform their expectations and practices.

My reflections in these posts draw on remarks I offered at last week's AAA-ICDR/ICC/ICSID Joint Colloquium, at which I was asked to address the topic of time and costs from the institutions' perspective. That might seem an odd task for someone who has never worked at any of these organizations. But I've been fortunate to have a good view of all three, sitting as arbitrator and appearing as counsel. It has been said that from the outside looking in you can never understand — but from the inside looking out you can never explain. So as some sort of hybrid of outsider and insider, I have tried both to understand *and* explain the institutional perspective, while pressing nonetheless for further action both by the institutions and by other key stakeholders in the arbitral process.

I begin with a few basic principles.

First, there's no denying that users of international arbitration are frustrated. Arbitration is still seen as the best mechanism to ensure neutrality and enforceability for international disputes. But a 2010 study of the Corporate Counsel International Arbitration Group found that **100%** of participants believe that it "takes too long" and also "costs too much." These complaints are of course related. It's a truism that a given task — whether presenting a case as counsel, or resolving it as arbitrator — will take as much time as one realistically has available to accomplish it. Without limits on the duration of arbitrations, therefore, it is practically impossible to control their cost, short of fixed-fee arrangements at every level in the process.

Second, there is a disconnect between the root *sources* of delay and cost, and users' expectations for a *solution*. The 2010 Queen Mary Survey of "Choices in International Arbitration" found that users believe the parties (and *not* the institutions) are largely responsible for cost and delay — but they nonetheless look to institutions to guide the solution. That is not surprising: in sport, we expect the umpires to ensure proper play. But at the end of the day, it is the players who will either take the game to new heights, or leave the fans despairing of the game.

Third, the institutions have stepped up to the plate — to continue the sports metaphor a little longer. Over the last five years we've seen an extraordinary number of studies and task forces on this topic, but it has not been *just talk*. There have been numerous real initiatives. From the ICC, we've seen the 2007 suggested Techniques for Controlling Time and Costs, and now the revised 2012 Rules. From the ICDR, we've seen the 2009 Rules amendment and before that the 2008 Guidelines for Arbitrators Concerning Exchanges of Information — which was a particularly welcome initiative, given the perception that it is American lawyers who are chiefly driving the explosion of “discovery” in arbitration. From ICSID, we've seen numerous efficiency initiatives in recent years, which have resulted in a remarkable reduction in the average duration of cases. The statistics show that disputes concluded during ICSID's 2011 fiscal year on average took *12 months* less than cases concluded during the previous year — whether one measures from the time of registration or from tribunal constitution. That's an extraordinary result. The ICDR also has seen a dramatic reduction in the length of its international cases, from 395 days in 2006 to 304 days in 2010. I don't have similar statistics from the ICC, but I would expect its initiatives also to bear fruit.

Since institutions nonetheless are an easy target for criticism, let me highlight some of the practical steps they have taken, in four basic areas.

**First, at the outset of a case.** ICSID has started to put its own house in order. It has reduced the average time to register a case to 27 days. The new ICC Rules require parties to provide more information upfront to expedite early processing of a case, and has introduced a “gateway” procedure so *prima facie* challenges to the agreement to arbitrate can be referred directly to the tribunal, rather than awaiting formal review by the ICC Court.

**Second, constitution of the tribunal.** Much of the time here is driven by the parties themselves, since most appointments are made directly and not through the institutions. But when the institutions are needed to play a role, they are doing so faster. The ICC Court now has direct powers of appointment if a national committee fails to do its job promptly, or where one of the parties is a State entity. The ICDR is turning around its lists of prospective arbitrators more quickly than in the past. And ICSID has reduced the average time to constitute a tribunal to 6 weeks from the date it is asked to do so.

**Third, case management conferences.** The ICDR has long required a preliminary conference, and suggested agendas that include early identification of preliminary motions or sequencing of issues. The new ICC Rules now make case management conferences mandatory. ICSID has always required First Sessions to organize proceedings, but no amount of planning at that stage could prevent delay, when the old rules required automatic suspension of merits proceedings for any and all jurisdictional objections. The 2006 Rules revision empowered tribunals to decide for themselves whether suspending the merits would or would not increase efficiency.

**Finally, document exchange.** As the Queen Mary survey found, this is one of the stages most likely to result in delay and added cost. But both the 2008 ICDR Guidelines and the new ICC Rules remind arbitrators of their responsibility to carefully police this stage, and that they can use their discretion in cost assessment as a possible control mechanism.

There is more, however, that the institutions can do. Two areas stand out: arbitrator availability at the outset, and arbitrator diligence in rendering awards at the end. In my next post, I'll offer some concrete suggestions in both areas, as well as a cautionary note about the limits to which any institutional reforms can fully address the related problems of time and cost, without greater self-discipline (and a modicum of internal reflection) by the users of the system themselves.