Procedural Reform: Two Party-Appointed Arbitrators and a Presiding "Expert"

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Arbitration in the 21st Century requires some bold, fresh thinking. We must seek flexibility and innovation if legal civilization is to survive. [fn] Thomas E. Carbonneau, The Law and Practice of United States Arbitration, xxix (6th. ed. 2018)[/fn] Similarly, when the market speaks strongly, we should listen very carefully. We believe that open and free markets, receptive to innovation, have proven superior for economic growth and political and legal stability.

It is not a coincidence that arbitration has been the dispute resolution choice of merchants for hundreds of years. While it has never been perfect, arbitration grew out of free markets and promotes rule of law and private justice. Procedural workability and reasonable substantive fairness have trumped the need for a full-blown, court-like procedure.

Even so, arbitration should not be exempt from criticism. In the past, arbitration has been attacked on the false assumption that it usurps the courts' inherent prerogatives. Some argue that party-appointed arbitrators take justice in their own hands, and overriding the twin goals of fairness and justice. We disagree. Arbitration has not usurped the role of judges. The arbitral procedure merely

provides for an *alternative* to court litigation—not a *complement* to the courts. The free choice of expert arbitrators enhances private justice and overall freedom. Like free and open markets, the desire for private justice through arbitration is evidenced by arbitration clauses in international commercial agreements. The bottom line is this: arbitration's workability has been demonstrated by the test of time.

These days, most of the debate on the efficacy of arbitration involves a discussion of potential changes that can improve an already efficient arbitral procedure. Most current debate focuses on procedural efficiency and cost-reduction and how these two features can be balanced in light of substantive quality. Spotting the contemporary issue with respect to increased costs and lengthier procedures is easy. Proposing possible solutions is more difficult. One recent proposal that is gaining traction—and is to be applauded—is that of "expedited procedures" (e.g. fast-track arbitration).

There is another procedural reform that we find both provocative and intellectually stimulating. We propose one significant change for appointment and composition of arbitral tribunals. In an arbitration with three arbitrators, the presiding arbitrator could be selected subsequent to the exchange of written submissions, or, perhaps, subsequent to the case management conference. Appointing the presiding arbitrator before the case review conference, or before the first procedural order, would reduce costs and allow the third arbitrator to be appointed based on his or her relevant experience and expertise vis-á-vis the issues at hand—or, put a bit differently, the presiding arbitrator will be appointed only after a showing of demonstrated experience and expertise.

ARBITRATOR EXPERTISE

Traditional practice among international merchants is to refer disputes to a tribunal comprised of three arbitrators under the supervision of a recognized arbitration institution. Usually each party nominates one arbitrator and the party-appointed arbitrators choose the presiding arbitrator. Much less frequently, an arbitral institution (or national court) may be the final appointing authority. The freedom to choose one's own arbitrator is considered a major advantage and central hallmark of arbitration. But there is frequently a great deal of disagreement and contentiousness when the two party-appointed arbitrators begin the selection process for the presiding arbitrator. We urge two changes: first, the credentials of

the presiding arbitrator should include not only competence as an arbitrator but also significant expertise and relevant education in the subject matter of the dispute. Second, if the presiding arbitrator is appointed later in the process, it will be much easier to identify the specific expertise necessary to resolve the dispute. These two innovations may reduce excessive hostility and contentiousness and the parties may be more prone to settle. If the presiding arbitrator is appointed subsequent to the exchange of written submissions—the parties can appoint an acknowledged expert in the relevant subject matter. Moreover, this procedural reform would potentially allow parties to save money since the presiding arbitrator will be a qualified expert by experience, expertise, and relevant educational background. With this "built-in" expertise parties might be willing to forego the expense and hassle of appointing their own expert.

COST-REDUCTION AND PROCEDURAL EFFICIENCY

Lack of speed and excessive costs are among the worst perceived features of international commercial arbitration. [fn]White & Case, 2018 International Arbitration Survey: The Evolution of International Arbitration, 2 (2018)[/fn] As has been said in this blog: "the key to efficiency is to identify when resources are being invested and when they are being wasted." Reducing costs and minimizing procedural intricacies while at the same time delivering on procedural workability and substantive fairness is a tough task. Conducting a preliminary case assessment is a good practice prior to selecting the tribunal. In a "best case" scenario a dispute might settle subsequent to a preliminary case assessment. At the very least the important issues might be identified and narrowed with some certainty. Similarly, letting the parties work out the crux of the matter and the time table with their own party-appointed arbitrator might reduce adverserialism and hostility and promote cooperation leading to, hopefully, early settlement. If not, at least costs will be significantly reduced and appointing a true expert might be an easier task.

One step in implementing our proposal will require arbitral institutions to investigate the credentials of their arbitrators in terms of both arbitration experience and subject matter expertise and to provide lists of potential arbitrators that are broken down into various subject matter areas. So, for example, the institution could provide a list of experienced arbitrators who have a minimum of, say, ten years' experience in international energy matters.[fn]We acknowledge that our proposal is a work in progress. We believe a ten-year level of expertise

(while perhaps a bit arbitrary) to be close to the minimum necessary to achieve our ultimate goal of dispensing with party-appointed expert witnesses[/fn]. A similar list could be compiled from arbitrators with significant expertise in communications law or securities regulation or employment law. Diligent parties may be able to identify experts on their own with no assistance from the arbitral institution. The second step is drafting an arbitration agreement that reflects the requirement of presiding member expertise.

PROPOSED LANGUAGE IN AN ARBITRATION CLAUSE

The following language, based heavily on language suggested by the London Court of International Arbitration (LCIA) in its Model Arbitration Clause, could be added to arbitration clauses and submission agreements:

"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause, except for the establishment of the Tribunal.

The number of arbitrators shall be three. One arbitrator shall be chosen by each party and the two shall chose the presiding arbitrator within 30 days after the exchange of written submissions. The choice of the presiding arbitrator shall be based on both demonstrated experience as an arbitrator and specific expertise in the subject matter of the underlying agreement. If an agreement cannot be reached, the [arbitral institution] shall appoint the presiding arbitrator by identifying presiding members who have both arbitration experience and subject matter expertise. If a provisional measure is sought, an emergency arbitrator will be appointed by the LCIA to issue an order. The seat, or legal place, of arbitration shall be Washington DC, United States. The language to be used in the arbitral proceedings shall be English. The governing law of the contract shall be the substantive law of the State of New York, United States."

We recognize that inserting the "expertise" element in the choice of the presiding member can seriously complicate the search for an appropriate person. But if our prediction bears out–that a presiding member with bona fide subject matter credentials will eliminate the need for party-appointed expert witnesses—such additional time and expense will be well-justified.

While arbitral institutions have an important role in shaping arbitral procedure, the users of international arbitration should make the final decisions on procedure. Arbitration is after all a reflection of party autonomy. As has been said here, institutional reform "should never be a substitute for meaningful self-reflection and self-discipline by the parties, their counsel and the arbitrators that they themselves select."

CONCLUSION

We believe our proposal is consistent with the main theoretical advantages of arbitration: flexibility, procedural efficiency, cost-reduction, and expertise, reflecting best practices, legal theory, and rational doctrine. Most importantly, the proposal like arbitration itself, is grounded in party autonomy and that classic expression of freedom—Liberté, Egalité, and Fraternité. Giving parties the autonomy to tailor the procedure and choose their expert presiding member is directly related to the broader goal of freedom. We believe our proposal will fulfil the purpose and destiny of arbitration without disturbing its underlying mandate. It keeps the process in the hands of and under the control of the users.