Kluwer Arbitration Blog

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

Jean Kalicki (Independent Arbitrator) · Tuesday, November 22nd, 2011

In my last blog, I offered praise for the ICDR, ICC and ICSID, for taking a number of important steps over the last few years to control excessive time and costs in international arbitration. Those initiatives already have resulted in measurable reductions in the average duration of cases. But there is more that the leading institutions can do, particularly in the key areas of arbitrator availability at the outset and arbitrator diligence in rendering awards at the end. There is also much more that the users of international arbitration can do, and pressing the institutions for further reforms should never be a substitute for meaningful self-reflection and self-discipline by the parties, their counsel and the arbitrators that they themselves select.

First, what more can the institutions do to resolve proceedings more efficiently? At the outset, they must be more proactive in confirming arbitrator availability. The institutions already remind arbitrators that availability is a critical feature of their qualification to serve. The ICC now requires them to provide data about other cases in which they serve. Before proposing arbitrators to the parties, ICSID asks them to confirm sufficient availability in the next 18-24 months. The ICDR reminds its rosters that this is a requirement for accepting appointments.

But this simply isn't enough. I have never seen an arbitrator decline an appointment based on general questions like "do you have time?" or "how many other cases do you have?" Why not a more concrete requirement that candidates block out, on a simple calendar covering the periods for which hearings might be anticipated, all of the actual dates for which they are unavailable — *whatever the reason?* Arbitrators have scheduling conflicts that have nothing to do with the number of appointments they've accepted. Many of us teach, or serve as counsel, or have other professional commitments. All of us — I would hope — have families and friends, and take vacations from time to time. These priorities block out time just as surely as other arbitrations. The CPR, when asked to appoint arbitrators, often requires them to list the specific days on which they have conflicts, during the months when a hearing is anticipated. That exercise concentrates the mind, and leads to more meaningful disclosure than a general requirement to confirm availability. I urge the institutions to consider the same kind of specific disclosure. I would not expect them to ask potential arbitrators the *reasons* for unavailability, just simply the dates. But that one step will go a long way.

Indeed, I would go further, and suggest that similar questions be asked of *party*-appointed arbitrators, and not just institutional appointees, before *their* appointments are confirmed. One would hope parties themselves are asking specific questions about availability, but they may not

feel comfortable doing so. There is no reason the institutions could not distribute blank calendars as a matter of course, and circulate the responses to the parties for comment before confirming a tribunal's constitution. That would make parties think twice about appointing arbitrators whom they should know are phenomenally busy. And it would make potential arbitrators examine the parties' concrete scheduling needs, instead of falling back on a knee-jerk reaction that there is always enough time for one more appointment.

Institutions also could do more in forcing arbitrators to render decisions promptly. The ICDR Rules contain no specific deadline, the way the AAA Commercial Rules do — they just urge tribunals to be prompt. The ICC has a stated deadline of six months from the Terms of Reference, but it is honored often in the breach, although the new Rules do require tribunals to indicate when a draft award may be submitted to the ICC Court. For ICSID, there's a stated 120 day deadline, extendable by another 60, but it runs from the "close of proceedings," an all too malleable concept. I have seen ICC cases where the award was issued more than a year after final hearings. I have seen ICSID tribunals instruct the parties that no further submissions are needed, but still wait 18 months to declare the proceedings closed — coincidentally just when they are finally ready to render their ruling. This is game playing. It is a fairly transparent way to simply stop the clock even from beginning to run. There is no reason institutions should not police this more actively. They should regularly ask tribunals after the hearing whether they have requested additional submissions, and if answer is no — or as soon as the last scheduled submissions are received — they should urge tribunals to declare the record closed, reminding them of their responsibility to move quickly on the award.

But even with these changes, there is a limit to how fast the institutions can move proceedings along, unless the parties and their counsel also step up to the plate. Institutional reforms always will be a mere drop in the bucket, unless the users of the system also reform their expectations and practices.

The 2011 Chartered Institute of Arbitrators cost survey revealed that fully *three-quarters* of the costs of arbitration were spent on outside counsel. Users agree that the system takes too long, but in the same breath, they are generally determined to have three arbitrators, which invariably increases time and cost beyond using just one. They also too often revert to the easy presumption that the "safest" choice will always be to appoint the world's most prestigious arbitrators, regardless of the scheduling implications. In part this is a function of a perceived need to "race to the top," to appoint an arbitrator who is more famous than the other side's, and then to appoint a chair who is even more esteemed than the first two. But the result is predictable. No matter how much the institutions work to broaden their *own* pools of arbitrators — and they are doing this — cases will not proceed more efficiently if the parties themselves continue to appoint only those candidates whose schedules predictably are the most burdened.

But there is more involved than simply daring to think outside the box in arbitral appointments. When faced with an important dispute, many users demand — or at least acquiesce in their outside counsel's recommendation — that they leave no evidentiary stone unturned, and no remotely plausible point un-argued. There is all too often a tendency to seek every possible procedural advantage, rather than working together to achieve a result that is efficient as well as fair and reasonable.

The challenge for parties and their counsel, therefore, is to recognize that they too have a responsibility of self-discipline. Arbitration is a flexible process, and like all such processes, it

involves choices. The new ICC Rules oblige the parties, and not just the tribunal, to conduct proceedings in an expeditious and cost effective manner. But words alone will not do the trick, when parties perceive their self-interest lies in fighting every possible battle and briefing every possible issue.

There is no easy solution for this challenge. Some parties seek to tie themselves to the mast in advance of a dispute, by agreeing to arbitration clauses with extremely expedited timetables and rigid limits on document exchange. This can work, but it can also lead to regret, when the parties discover that the dispute that arose is not the one they anticipated, and the constraints they negotiated no longer suit the circumstances of the case. Another option is to leave the clause simple, but to negotiate reasonable procedures immediately after the dispute has arisen. One of the real tools arbitrators have is to promote such negotiations, asking the parties to confer on an expeditious schedule even *before* coming to a case management conference. Having the underlying clients at such conferences can help, because often delays are driven more by outside counsel's schedules than by inherent case requirements. And self-restraint by counsel also should be rewarded. The Debevoise & Plimpton Protocol to Promote Efficiency in International Arbitration is more than just good marketing. It also sends a message internally, within a counsel team, that efficiency is an important policy goal separate and apart from winning at all costs.

Where, then, do I end up, in my progress report on efforts to control time and costs? It is to recognize that the hardest tasks lie ahead. I admire the ways the ICDR, ICC and ICSID have risen to the occasion, and I hope they will do more. But there is a limit to what institutions can do to restrain a system that by its very nature is largely controlled by parties and their counsel — and by the very arbitrators they themselves select. The next chapter must involve internal reflection by the users of the system. That is essential if we are ever to move beyond the mere tightening of institutional rules, to restore the image of arbitration as efficient and cost-effective, and not just as neutral and enforceable.

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