Is arbitration losing its luster?

Furthering efficiency in international arbitration

Martin Molina – Partner

SCG Legal, Zurich, 18 May 2016
Inefficiencies in the arbitral process

Arbitration has become increasingly complex, generating inefficiencies in terms of time and costs.

Stages at which inefficiencies may occur:

- Constitution of arbitral tribunal
- Production of documents
- Award
- Written Submissions
- Evidentiary hearing
- Annulment Enforcement
Chart 30: Aspects of the arbitration that contribute most to length of proceedings

- Disclosure of documents: 24%
- Written submissions: 18%
- Constitution of tribunal: 17%
- Hearings/proceedings: 15%
- Rendering of the award: 14%
- Enforcement: 10%
- Written questions from arbitrators: 2%

weighted percentage
Possible Remedies...
Possible Remedies

Constitution of Tribunal
- Appointment of a Sole Arbitrator
- « Getting Rid of the Presiding Arbitrator »

Early Determination of [Preliminary] Issues
- Bifurcating the proceedings
- Rendering one or more partial awards
- [Also: limiting the scope of the proceedings, in particular evidentiary hearing]

Written Submissions
- Number and sequence
- Short time limits
- Page limits
Possible Remedies

Evidence

- Documents only?
- Limiting or excluding document production
- Fact witnesses: written witness statements
- Expert witnesses: list of areas of agreement

Award

- Summary reasons
- Time limit for issuing the award
- Time limit on arbitrator’s mandate?

Rules on Expedited (Fast-Track) Procedure: Art. 42 Swiss Rules; WIPO Expedited Rules
...and their perceived effectiveness

Chart 9: Rate the following methods for their effectiveness in expediting arbitral proceedings in your arbitrations over the past 5 years:

<table>
<thead>
<tr>
<th>Method</th>
<th>Most or quite effective</th>
<th>Least or less effective</th>
<th>Never done</th>
</tr>
</thead>
<tbody>
<tr>
<td>Identification by the tribunal of the issues to be determined as soon as possible after constitution</td>
<td>64%</td>
<td>29%</td>
<td>15%</td>
</tr>
<tr>
<td>Appointment of a sole arbitrator</td>
<td>57%</td>
<td>25%</td>
<td>18%</td>
</tr>
<tr>
<td>Limiting or excluding document production</td>
<td>46%</td>
<td>28%</td>
<td>26%</td>
</tr>
<tr>
<td>Short time limits for exchange of substantive written submissions</td>
<td>48%</td>
<td>42%</td>
<td>10%</td>
</tr>
<tr>
<td>Summary disposition of all or part of the issues in dispute</td>
<td>35%</td>
<td>28%</td>
<td>37%</td>
</tr>
<tr>
<td>Simultaneous exchange of substantive written submissions (rather than sequential)</td>
<td>37%</td>
<td>44%</td>
<td>19%</td>
</tr>
<tr>
<td>Page limits for substantive written submission</td>
<td>33%</td>
<td>39%</td>
<td>30%</td>
</tr>
<tr>
<td>Limiting each party to one substantive written submission (instead of two rounds)</td>
<td>28%</td>
<td>36%</td>
<td>36%</td>
</tr>
<tr>
<td>No hearing</td>
<td>21%</td>
<td>23%</td>
<td>56%</td>
</tr>
<tr>
<td>Provision for short arbitration award without extensive reasoning</td>
<td>16%</td>
<td>20%</td>
<td>64%</td>
</tr>
</tbody>
</table>

Percentage of respondents
Chart 19: How effective are each of the following innovations that could be included in arbitral rules and procedures to help control time and cost?

- Requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award
- Stronger pre-appointment scrutiny of prospective arbitrators’ availability
- Sanctions for dilatory conduct by parties or their counsel
- Requirement for early procedural conference
- Pre-hearing preparatory meeting of the arbitral tribunal
- Sanctions for dilatory conduct by arbitrators
- Deadline for rendering award
- Requirement for pre-hearing procedural conference
- Requirement for early requests for bifurcation/trial separation
- More detailed provisions for dealing with multi-party disputes
- Parties to submit list of issues early in the proceedings
- Summary disposition
- Emergency arbitrators
- Requirement for early discussions on approach to allocation of costs
- Oral opening submissions to be made by counsel for each party after the first round of written submissions

Percentage of respondents

Effective (grade score: 4 – 5)
Neutral (grade score: 3)
Not effective (grade score: 1 – 2)

Weighted average grades
Room for improvement / Proposals for innovation

Re-thinking the role of the arbitrators...

...and of the parties (and their counsel)

Innovative measures to further efficiency:

- As soon as possible after constitution:
  - Case management conference / Terms of reference
  - List of issues with “decision tree”

- After first round of written submissions:
  - Preliminary assessment
  - Settlement facilitation

- Award:
  - Incentives for expeditiousness
  - Sanctions by way of decision on costs
Conclusion

Arbitration is still – by far – the preferred method of resolving cross-border disputes.

Responsibility of the parties and their counsel, but also of arbitrators and institutions to ensure that arbitration retains one of its key assets: efficiency.
Martin Molina
lic. iur., LL.M., Attorney at Law, Partner

Rämistrasse 5
8024 Zurich

Direktwahl +41 58 200 39 00
martin.molina@kellerhals-carrard.ch