“Efficiency and Effectiveness of Arbitration”

1. Have we sacrificed quality in the interest of reducing time and cost?

2. Is due process paranoia a real concern or just the latest buzz word?

3. Should arbitral institutions adopt financial incentives for arbitrators to timely complete an award?

4. Cheap, cheaper, cheapest - is this really what the parties want? Or are arbitral institutions getting it wrong?

5. Summary dispositions that can resolve or at least narrow the proceedings have been the subject of extensive commentary in recent years. Has there really been a shift in the willingness of arbitrators to grant summary dispositions on material aspects of the case? Have we seen an increase in applications for summary dispositions that have actually had the opposite effect and have instead increased the time and cost?


7. Arbitral institutions have introduced various measures of late to enhance efficiency – summary judgment procedures, expedited arbitration etc. For many of these initiatives it is too early to assess the impact of the measures, but are we in danger of promoting speed and efficiency over quality? Is there a danger that a race to run a ‘quick’ arbitration achieves ‘a’ result rather than ‘the right’ result?
8. The SCC Rules in their 2017 version contain a rule (Art 39) on Summary Procedure. The two first paragraphs read as follows:

(1) A party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration.
(2) A request for summary procedure may concern issues of jurisdiction, admissibility or the merits. It may include, for example, an assertion that:
(i) an allegation of fact or law material to the outcome of the case is manifestly unsustainable;
(ii) even if the facts alleged by the other party are assumed to be true, no award could be rendered in favour of that party under the applicable law; or
(iii) any issue of fact or law material to the outcome of the case is, for any other reason, suitable to determination by way of summary procedure.

Is this a good rule and do you think it will be put to frequent use?

9. Do arbitral tribunals conducting the arbitration under Rules not containing a corresponding Article nevertheless have authority to order summary treatment of particular issues by virtue of their general power to direct proceedings expeditiously?

10. It appears that emergency arbitration under the LCIA Rules has not been very popular when compared to the increase of emergency arbitration under the ICC and SIAC Rules.

What are the reasons?

11. Can any of the procedural features of expedited arbitrations be adapted to improve the efficiency of arbitrations more generally?

12. Would 'expedited procedures' make the proceedings more efficient? Do 'expedited procedures' suit all types of proceedings or disputes?

13. How helpful would the "first hearing" or "interim hearing" after the first round of submissions but before the document production for the parties to meet with the tribunal to discuss what the major disputed issues be to make arbitration less costly?
14. Should arbitral tribunals be more willing to draw adverse inferences (or more explicit in the 
award if they have actually done so) from a party’s failure to comply with a document 
production order? To what extent should the tribunal’s authority to draw adverse inferences 
be based on the law of the seat, as opposed to soft law sources typically adopted as 
guidelines in terms of reference or a procedural order?

15. There are cases where document production phase precedes the first round of submissions of 
the pleadings. Would that make the arbitration proceedings more efficient by shortening the 
entire schedule, or less efficient by inducing unnecessary document production before the 
parties and the tribunal know what are the issues in disputes?

16. Have we succeeded in responding to the demand for faster and more efficient arbitration 
proceedings? If so, what has been the single change that has contributed most to this result?

17. Is a detailed procedural order with a procedural timetable fixing all procedural steps and 
timelines up to and including the hearing at the outset of the arbitration more conducive to 
an efficient and effective conduct of the arbitration or would procedural directions fixing 
procedural steps in phases as the arbitration progresses be more appropriate?

18. Is there a tension between ‘due process’ and ‘efficiency’, with respect to:
   (i) Time limits and applications for extensions?
   (ii) ‘full’ and ‘reasonable’ opportunity to present one’s case?
   (iii) Considering new evidence, claims, and/or defenses at different stages of the 
proceedings?

19. One measure of the effectiveness of arbitration is the enforceability of arbitral awards. The 
2008 Queen Mary’s Arbitration Survey found that 84% of participating counsel indicated that, 
in more than 76% of their arbitration proceedings, the non-prevailing party voluntarily 
complied with the arbitral award. Similarly, in 2014, in relation to ICSID Reports, the UNCTAD 
reported in 2014 that most States had honoured their obligations in this regard. Is this a 
function of the strength of the New York Convention, the high quality of arbitral awards (such 
that parties feel they have had their day and a fair, robust judgment has been made on them) 
or the identity of the Arbitral Institution?
20. Who is more efficient, regional or international arbitral institutions, when it comes to:
   (i) administering proceedings?
   (ii) appointing arbitrators?
   (iii) handling challenges?

21. Is common law disclosure even as commonly ordered in international arbitral practice a help or a hindrance to (a) efficient and (b) fair resolution of disputes in commercial arbitration?

22. With the additional information that is increasingly becoming available about arbitrators’ procedural preferences, (e.g. GAR ART and Arbitrator Intelligence) will it become easier for parties and counsel to select arbitrators who will conduct the arbitration in a manner consistent with their preferences as to time and cost with respect to a particular arbitration?

23. Would a move away from party appointments improve the arbitral process thereby saving time and costs? A significant amount of time is put into identifying the right arbitrator for the case, a process that inevitably incurs costs for the client. This ties into a point raised in a recent interview with Toby Landau QC in which he said, no matter the integrity and independence of the arbitrator, a party appointed arbitrator is in a position of having to resist the temptation to be nice to the person that appointed them. This is not going so far as to say that they would do anything impartial, but in his view they should not be put in that position at all. Given this, are we at a point where party-appointments should no longer be the norm and the appointments would be more fair and impartially made by the relevant institution?

24. What effect, if any, should an arbitrator’s failure to disclose matters have as regards appointment or challenge?

25. Can a party-appointed arbitrator be challenged by the other side on the ground that he has no knowledge of the applicable substantive law? Should the arbitral institution refrain from confirming such party-appointed arbitrator for that reason?

26. Should a potential party-appointed arbitrator disclose, with regard to appointing counsel, the personal acquaintance, the personal friendship, a student/teacher relationship, joint publications, previous unrelated joint transactions, joint memberships in boards or associations?
27. Transaction counsel as arbitration counsel as witness – “illegal”, unacceptable, unadvisable or standard practice?

28. How far-reaching is the discretion of the Arbitral Tribunal in its decision on the costs, if the applicable rules stipulate the costs-follow-the-event rule?

29. Tribunals should use costs awards during the course of the proceedings to discourage unreasonable or unnecessary applications and encourage cooperation between parties. Discuss.

30. How far-reaching is the power of the Arbitral Tribunal to oppose procedural proposals of the parties (e.g. very long time limits for written submission; calling of witnesses that the tribunal considers to be irrelevant) to assure an efficient conduct of a case?

31. If parties do not appear to be ‘in too much of a hurry’, is there nevertheless an obligation on the Tribunal to ‘rush them along’?

32. Is an in-person case management meeting at the outset of the arbitration more conducive to an efficient and effective conduct of the arbitration?

33. Delivering The Roebuck Lecture 2017, Neil Andrews referred to an opinion expressed by Michael Schneider that “the arbitral community should reflect on whether the tribunal’s essential function is to act as a detached referee, or whether it might intervene more actively, and at an early stage, to pinpoint the substance of the dispute: to act as a "problem solver". Comments?

34. In an application for joinder of a non-signatory, the tribunal is invited to apply judgments of courts and awards in tribunals in foreign jurisdictions which the parties have not selected as the applicable law. Should the tribunal cite judgments and awards on the issue from those jurisdictions?

35. When applying the law governing the merits, are arbitral tribunals generally bound by judicial precedents or decisions?
36. Is it indispensable or advisable only to conduct at least one oral hearing (e.g. the case management conference) at the formal seat of arbitration or not?

37. Would it be more efficient and effective to have multiple (short) hearings before the main hearing on the merit? For example, a hearing after the first round of submissions, another hearing before the ruling on the production of documents and another before the main hearing to sort out the issues to be handled at the main hearing? Having feedback from the tribunal on each party’s case before the main hearing may help the parties to narrow down the issues and focus on the issues that are of interest to the tribunal.

38. Meetings and Joint Statements of Experts shortly before the oral hearing can be very effective in saving time by reducing the items remaining in dispute and in summarizing the experts’ views on those items. However, if both experts have already prepared two reports, they can seem to be overkill. Are joint statements useful in international arbitration? If so, should there be a standard format in which they should be prepared? – for example, the tabular format, with a row for each issue and columns for each of (a) the issue, (b) whether it is agreed, (c) expert A’s view if it is not agreed and (d) expert B’s view if it is not agreed, with references to the experts’ reports seems to be simple and effective.

39. Joint expert memoranda: if done properly, these can be very helpful for all parties – narrowing down the issues and allowing the Parties to only focus on the key issues at stake. Should JEMS be more widespread? Is there a reluctance from tribunals to voice / order this expert process step, if the parties have not make specific submissions on this point?

40. Expert witnesses: Effective and efficient use of experts normally allows the expert the enough information to be able to provide a robust opinion, but to limit this information to that which is relevant. Has anyone seen circumstances where providing the expert with more information has been more efficient / effective (specifically in the context of expert work, rather than support services like e-Discovery or similar bulk review).

41. Why is the proper management of experts so rarely part of our case management discussions?

42. Should arbitral tribunals be more receptive to examining witnesses through videoconferencing? Should the standards for whether to permit videoconferencing depend on whether the witness is a fact witness or an expert?
43. Is cross-examination in commercial arbitration a help or a hindrance to (a) efficient and (b) fair resolution of disputes?

44. Does ‘bifurcation’ or ‘trifurcation’ of arbitral proceedings render the proceedings more efficient?

45. Bifurcation

What are the good and bad practices of the bifurcation of proceedings, in terms of liability and quantum, in commercial arbitration?

46. Cybersecurity is now an essential part of effective arbitration procedures, and it should be part of an arbitrator’s duties to ensure that she or he operates in a cyber-responsible manner irrespective of the inconvenience this may cause. Discuss.

47. Is Cybersecurity an increasing risk in arbitration, with respect to:
   (i) Access to confidential data?
   (ii) Hacked evidence and whether they are admissible or not?
   (iii) Engineered content/data?

48. What should an arbitrator hearing a case in an ad hoc arbitration do when in the middle of the proceedings and without payment of his fees, both parties abandon the arbitration and do not appear again.

49. Slating the courts - an unsatisfactory tactic.

50. Do we need greater consistency of approach in national laws as regards third party funding and, if so, how can that be achieved?

51. How do arbitral tribunals, Australian courts, or other courts from the Asia-Pacific region deal with ‘guerrilla tactics’?
52. Arbitration services - provide those which sell rather than sell those which are provided.

53. Should arbitrators consider conducting the arbitration to set the stage for settlement as part of their charge? Should the parties be asked if they want that?? Does it depend on the legal culture of the parties?

54. How efficient and effective is it possible to be when one party is unresponsive?

55. Is the choice of seat crucial to efficient and effective arbitration?