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Chapter II: The Arbitrator and the Arbitration Procedure, An Arbitrator's Imperative – How to Avoid Disappointing the Parties, Preventing Surprises and Enabling Efficient and Progressive Arbitral Proceedings

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I Introduction

International arbitration continues to be a popular method of international dispute settlement with high rates of satisfaction expressed by all participants in the arbitral process and near universal interest in re-engagement in arbitration for the settling of future disputes. (1)) Alongside the increased recourse to arbitration, scrutiny of the system has also increased. Th is scrutiny has predominantly been focused on the mounting costs parties are experiencing in attempting to engage in arbitral proceedings, but it is not limited thereto. In the context of the work currently being done toward the revision of the UNCITRAL Arbitration Rules, the Second Working Group has forwarded a number of proposals to the UN Commission on International Trade Law, which include both rules for expedited procedures (2)) and on the conduct of arbitrators. (3)) Both of these measures are intended to increase the efficiency (in terms of time and cost) of arbitration and to promote the regard held for international arbitration as a whole. (4))

The revision of the UNCITRAL Arbitration Rules is currently ongoing and, like all other institutional rule revisions, presents a significant moment in the development of international arbitration and international arbitral practice. The importance of such rule revisions is exemplified by the general belief held by many in the community that arbitration institutions should take P 128 a leading role in the development of international arbitration. According to the 2018 Queen Mary international arbitration survey, the majority of respondents were of the opinion that arbitral institutions (80%) and interest groups (such as CIArb and the IBA) (56 %) were best placed to influence the future of international arbitration. (5)) Less than half of the respondents (42 %) to that survey were of the opinion that it is arbitrators who are "best placed" to lead such a development.

While the question asked of those respondents (6)) might have influenced the responses received, the overall impression created by the survey is that arbitrators actually play a secondary role in influencing this development. The truth of this impression is, in the view of the authors, questionable. As the arbiters of justice and fairness, arbitrators play a considerable role in the furthering of international arbitration and enhancing the regard in which it is held. After all, arbitration is a procedure based very much on personal trust, trust in the arbitrators that have been nominated and appointed. The parties' right to appoint "their" arbitrator is one of, if not **the** key feature of international arbitration. (7)) Arbitrator questioning (8)) has become more and more important and respective best practices have been established.

Therefore, in times when the applicable arbitration rules tend to become more and more comparable (or more and more alike), it is the arbitrators and their personalities who are ultimately the most decisive element in shaping the proceedings. The arbitrators guide arbitral procedure and enforce procedural rules and safeguards as appropriate. As such, the manner in which arbitral proceedings are actually conducted is, in large part, dependent on the will of the arbitrators presiding over those proceedings. The community's reliance on arbitrators to fulfi l this purpose is also very clearly expressed in the scope of authority granted to arbitrators. Most, if not all, arbitral rules provide arbitrators with broad discretion as regards the conduct of arbitral proceedings. (9))

With this control and discretion, it should be uncontroversial that arbitrators are in a prime position to determine both how arbitral proceedings are to be conducted and how they are to develop in the future. It is one of the great P 129 advantages of arbitration that, unlike national courts, arbitrators are in a position to adapt and shape international arbitral procedures. Naturally, arbitrators cannot be over-indulgent in the discretion afforded to them as they may deviate from the expectations of the parties and unduly restrict the parties' reasonable opportunities to present their respective cases. The over-indulgent use of arbitral discretion is, fortunately, not the norm.

Despite the extensive authority and discretion due to arbitrators, they are also faced with the ever-present threat of challenges to their appointment and the potential of non-enforcement of their final awards. The realization of these risks can be exacerbated or perceived to be exacerbated when arbitrators depart from convention and seek to direct their discretion toward the more efficient conduct of proceedings. This is particularly true in difficult times such as those of the present global pandemic, (10)) where it is, for example, in the hands of the arbitrators to decide on the manner in which the hearings are to be conducted – virtually, in-person or in a hybrid form. A decision which can, in

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many cases, be a relevant factor in the outcome of the proceedings.

As a consequence of that broad authority, arbitrators may give in to caution and fail to take full advantage of the authority bestowed upon them. This approach can cause them to be overly cautious. It could result in the granting of too many of the parties' requests, even if doing so might seriously delay or affect the efficiency and efficacy of the arbitration as a whole.

Both approaches, the over-indulgent and the complacent, are prone to giving rise to avoidable disappointment on the part of the parties. Disappointment is always going to play a role in arbitral proceedings, as there will be winners and losers once a final award is issued. Such disappointment is unavoidable. Disappointment can start at an even earlier point, however. As soon as the parties rely on the arbitral tribunal to take procedural decisions and the tribunal either does not take them or does so in a manner that is not in line with the parties' expectations, international arbitral practice or in any other way that unnecessarily restricts the parties in the presentation of their case, arbitrators will have exposed themselves to disappointing the parties.

Avoidable disappointment arises out of a variety of situations such as cases where the parties expect to be afforded specific kinds of consideration, but are ultimately left wanting or without a comprehensible explanation as to why the arbitral tribunal made certain (substantive or procedural) decisions.

With this contribution, the authors aim to examine the manner in which parties might be disappointed in their arbitrators or the arbitral proceedings in which they play a part and ways to avoid such disappointment. In the course of this exploration, the expectations of the parties will be highlighted and practical suggestions will be provided in order to make effective use of the P 130 discretion afforded to arbitrators. In so doing, the intention is to assist in the development of proactive arbitration, where the development of international arbitration is not left to the purview of the institutions or interest groups, but where the practitioners (specifically arbitrators) are promoted as experts that both can and should play a vital role. These suggestions should assist in both the effective and efficient conduct of arbitration, which also contributes to reducing the overall cost of arbitration. By emboldening arbitrators to make full use of the tools they have been given (within reason), international arbitration will be able to continue to develop alongside the advancements made in the commercial sector and maintain its status as an exceedingly popular method of international dispute resolution.

II Party Disappointment Arising out of the Conduct of Arbitrators

A Avoidable and Unavoidable Disappointment

At the outset, it is important to stress the distinction between avoidable and unavoidable disappointment. Unavoidable disappointment, such as that inherent in being unsuccessful in (part of) one's claim or defense, is not the topic of this contribution. While it is possible to mitigate that disappointment (an aspect that will be explored), it is impossible to do away with it entirely. Avoidable disappointment, on the other hand, is a negative response experienced by one or even both of the parties as a consequence of an expectation that party or those parties had at the outset of the arbitral proceedings that is subsequently left unfulfilled. In order to avoid confusion, from here on out, whenever the term ‘disappointment’ is used, it refers to *avoidable disappointment*.

Furthermore, the duties and obligations imposed on arbitrators by arbitral institutions and arbitration agreements will often be reflective of the parties' expectations. Much work has been done to explore the obligations incumbent upon arbitrators, (11)) but party expectations will oft en be farther reaching than the duties actually imposed upon them. As such, while certain expectations may include corresponding duties, the practical implications of the expectation may be broader than what an arbitrator is specifically expected and required to do in satisfying his or her arbitral mandate.

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B Choice of Arbitrator

This contribution is not specifically focused on the parties' search for their arbitrator. The myriad of factors that come into play in choosing one's arbitrator will not be dealt with or considered in any great depth. (12)) It must be stressed, however, that in the authors' experience, one can never truly assess the capabilities of an arbitrator before having personally experienced that arbitrator in practice. Even arbitrators with excellent academic and professional reputations may have personal styles or preferences that clash with a party's preference for a given proceeding. Unfortunately, brief interactions in the context of professional gatherings or international conferences do no offer sufficient proof of a potential arbitrator's professional style to permit an informed decision as to his or her suitability for a given proceeding.

While expectations and interests do play a considerable role in a party's decision toward their party-appointed arbitrator, this contribution is focused on the expectations pertaining to the arbitral process itself and not necessarily the more case specific considerations that play a pivotal role in the selection of arbitrators. Since the

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expectations of the parties play such an important role in determining the types of disappointment that might subsequently be felt, the parties' expectations must first be ascertained.

C What do Parties Expect?

1 Who are the Entities Involved?

Parties to international arbitration are diverse and will have an extensive array of interests that may give rise to expectations that differ substantially. For instance, international commercial arbitration is often seen as a dispute resolution mechanism that caters to the needs of commercial entities, but when assessing the types of parties that participate in such proceedings, it cannot be ignored that states are also users of international commercial arbitration. (13)) Even within the category of commercial entities (narrowly construed as companies), consideration should be given to the size of the enterprise, their means and, to an extent, even their cultural background. The personalities of the party's in-house counsel or party representative may exert significant influence on the interests that are deemed of particular importance. Whether a party is a claimant or a respondent may also influence their expectations (although this may also find expression in the order in which it prioritizes its expectations). Lastly, the type of and value in dispute can also cause such a shift in priority. All of these factors need to be borne in mind when exploring what it is the parties want from an arbitration in order to find a way to satisfy them.

How does one define "expectations"? Should it be construed narrowly or broadly, should it be examined from a general or more practical perspective? If taken broadly and generally, it is probably agreeable that it is possible to identify party expectations that will apply universally. Parties to an arbitration always have the same general interest, which is the resolution of a dispute (leaving aside whether this is done through settlement or a final award and considerations such as potentially advantageous delays in obtaining such a resolution). The general expectation could be defined as a cost-effective, timely and fair (with fair including the protection of procedural rights and safeguards) proceeding that results in an award that is so reasoned to be able to provide an understandable resolution to the dispute that is not open for challenge and considered objectively just.

2 The Relevance of the Arbitral Rules

While this general view is a useful guide, for practical purposes the entire definition is far too vague and does not satisfactorily address nuances in individual arbitral proceedings. In order to explore practical expectations, a good starting point is an assessment of arbitral rules since they are designed to align themselves with the types of parties expected to engage in arbitration under the auspices of the respective arbitral institution. Naturally, arbitral rules do not identify party expectations per se, but they can be helpful to identify how an arbitrator should conduct him or herself.

Few arbitral institutions provide detailed requirements for their arbitrators, a decision likely reflective of both the desire to leave the discretion as to a choice of arbitrator to the parties as well as the desire not to unduly restrict the pool of potential arbitrators. The ICSID Convention, by contrast, requires their arbitrators to be "*persons of high moral character and recognized competence in the fi elds of law, commerce, industry or finance, who may be relied upon to exercise* ***independent judgment***". (14)) The LCIA also provides a slightly more descriptive set of requirements for its arbitrators, arising out of the reasons for which arbitrators might be challenged in LCIA procedures. According to Article 10.2 of the LCIA Arbitration Rules:

> "The LCIA Court may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: (i) acts in **deliberate violation of the Arbitration Agreement**; (ii) does not act **fairly or impartially** as between the parties; or (iii) does not conduct or participate in the arbitration with **reasonable efficiency, diligence and industry**."

The combination of these passages provides a good general reference for the type of person parties might be looking for when appointing arbitrators and the inherent expectations that are derived therefrom as a result. They clearly identify the two fundamental qualities required of all arbitrators: impartiality and independence. (15)) These qualities are required by all leading arbitral institutions, and adherence to these qualities is uncompromising (their absence being an express ground for challenging an arbitrator (16))). They form the bedrock on which the entire arbitral process is built and thus a key factor in determining the expectations of the parties.

3 The True Expectation of Impartiality and Independence

Impartiality and independence find expression in the fact that the parties expect tribunals to be even-handed and consistent in their application of the arbitral rules. While parties may dislike having a procedural decision go against them, this will not impinge on their general expectation for the arbitral procedure as long as the underlying rationale for the adverse decision is understandable, fair and, importantly, applied in

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equal measure to the opposing side. Thus, the “fair” arbitrator must, just as much as the requirements of impartiality and independence are key to the arbitral mandate, be seen as the foundation for the parties' expectation for any arbitral process.

At the same time, and while fully having to respect the need on the part of the arbitrators to remain impartial, a party who has appointed an arbitrator is going to expect that “its” arbitrator will ensure that its legal arguments are fully and sufficiently considered by the arbitral tribunal in the course of their deliberations. The party's expectation here is not one of partiality, it is akin to that of an assurance that the propriety of the process is maintained by having all arguments represented in full in the deliberations of the tribunal. Furthermore, it is not improper for an arbitrator to engage in such activities, in fact, if both of the party-appointed arbitrators adopt this approach, the effect is simply that all of the parties' arguments are put up for discussion and considered. This does not require (and should not involve) the arbitrators develop any kind of affinity for the arguments raised by the party to have P 134 appointed them, it should merely extend to the procedural guarantee that at least one member of the arbitral tribunal will ensure every argument is discussed and no stone is left unturned.

4 Expectations Derived from the Arbitration Agreement

The parties do expect a degree of deference to their mutually expressed preferences and this too is provided for as an obligation for arbitrators. The LCIA requirements set out in Article 10.2 clearly identify a need for arbitrators to abide by the parties' arbitration agreement and a failure to do so is also an express ground for refusal of the final award's recognition and enforcement. (17)) In essence, this requirement is an expression of the party autonomy that lies at the very heart of arbitration. As such, the parties expect the arbitrators to be accommodating to the mutual positions of the parties and this expectation, of course, persists after the initiation of arbitration. Arbitration is naturally a party driven proceedings as distinct from court procedures, and the parties expect to be involved in the development and procedure of the case to a far greater degree.

The obligation imposed on arbitrators that they adhere to the arbitration agreement also includes the application and safeguarding of the parties' respective procedural rights such as, but not limited to, the abovementioned right to be heard, equal treatment and to be offered the opportunity to present their respective cases. These are obligations imposed on all of the arbitrators and can often be found expressly enumerated in arbitral rules, (18)) but they also carry with them certain expectations on the part of the parties. An example of such an expectation (that has morphed into something akin to a right) is the practice of cross-examining witnesses in arbitral proceedings. This practice is often seen as indispensable part of the arbitral procedure, but it rarely forms an express part of the arbitral rules and instead emerges from international scholars and practitioners recording their experience of international practice. (19)) Notwithstanding the fact that it is not a right per se, it is unlikely any experienced counsel would go into an arbitration without the expectation that they would be entitled to cross-examine the opposing party's witnesses at an oral hearing.

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These expectations are a particular hot topic as the global pandemic has forced arbitrators and parties to react to a sudden change in circumstances. Parties may have had expectations for the proceedings that have become more difficult to implement due to external factors, such as whether a hearing should be held in person or done remotely. Notwithstanding the existence of difficulties, arbitrators should remain cognizant of these expectations and seek to accommodate them as appropriate.

In addition to cross-examination, the majority of standard practice arises not by virtue of arbitral rules but a shared understanding and expectation of how international arbitration is supposed to be conducted. The arbitration agreement and the inherent procedural protections are therefore a clear source of party expectations that should be borne in mind by arbitrators. The precise nature of these expectations can be ascertained more easily once arbitral procedures have started by including these specific procedural steps and rules in the first procedural order or otherwise commonly agree on them with the parties at the outset of the arbitration. This will be dealt with in more detail in the next chapter.

The arbitration agreement may also serve as a source of specifying certain expectations the parties might have and the parties are naturally free to impose further duties or requirements on their arbitrators that can more precisely define the arbitrator's mandate for the associated proceeding. The parties (and arbitrators) should bear in mind, however, that including expectations in the arbitration agreement or in procedural order signed by the parties will transform them into arbitral duties and a breach of those duties will imperil the recognition and enforceability of any final award. (20)) Many third party sources on such duties, such as codes of ethics, (21)) are limited in their scope and often involve general standards that are not ready for concrete implementation and are therefore ill suited to such inclusion in arbitration agreements. Like the specification of safeguards, it is advisable that the majority of the concrete clarification of party expectations occurs not in the arbitration agreement, but in the drafting and conclusion of the first procedural order or orally at a case management conference. (22))

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5 Efficiency and Diligence

The LCIA reference to "*reasonable efficiency, diligence and industry*" gives voice to the hot topic in international arbitration of recent years, the need for procedural economy in both time and financial cost. This has begun to emerge as a key duty imposed on arbitrators (23)) by arbitral institutions, (24)) and the need to avoid such increases is clearly not only in the interest of justice, but also in the interest of all parties to an arbitration. The specific references to "*diligence and industry*" are related to this concept of efficiency, as it is difficult to be truly efficient if arbitrators are not sufficiently hard working when it comes to their mandate (or are, but do not possess of the time to dedicate to the mandate due to an excessive caseload).

This diligence can express itself both in the more mundane dedication to reading and processing all of the submissions and communications received by the parties, but also in doing so in a prompt manner to provide timely responses or guidance to the parties where it may be needed. Arbitration has been said to have experienced "judicialisation", whereby arbitrators have been required to dedicate more time to procedure and formal requirements akin to the domestic court procedures. (25)) While the precise reasons for this remain subject to discussion, (26)) it is clear that procedural aspects of arbitration have come to play a pivotal role in the arbitrator's mandate and require the dedication of the arbitrator's industry to its resolution.

With this increased role comes an increased expectation among the parties that the arbitrators will effectively and efficiently deal with the plethora of procedural issues that may arise in the course of the proceedings. Like the variety of such issues with which an arbitrator might be confronted, there are also a variety of ways in which the handling of those matters can express themselves in the parties' expectations as well as their potential for disappointment.

6 Avoidance of Undue Delay

A failure to promptly address procedural disputes can result in a failure to properly execute the arbitral mandate, but it can also simply lead to an increased need for further exchanges of a procedural nature which only P 137 compound the problem. Merely by way of an example, a delay in dealing with a late or incomplete submission or requests for admission of document to the record can result in the opposing party being left short on time to process these documents prior to an upcoming submission deadline or a hearing. This, in turn, will likely generate additional procedural challenges or requests for extension. All of this can be avoided as long as the arbitrators diligently undertake their mandate and conscientiously assess the exchange of communications between the parties.

That is not to say that *any* delay or simply the taking of an *appropriate* amount of time to consider the parties' respective positions is bad practice, quite the opposite, arbitrators should take the time that is necessary to reach their decisions. "Success in arbitration is not measured by a stop watch alone" (27)) after all. The relevance and impact of undue delay by arbitrators should be borne in mind as it can find expression as a detriment to the arbitral process in more ways than merely leaving the parties short on time. Furthermore, such detriments, even if they do not give rise to a sufficiently serious breach of procedure that is subject to challenge, are undoubtedly going to leave the party disappointed with the arbitrator's handing of the matter.

7 The Need to Take Procedural Decisions

The expectation of diligence, in combination with the fundamental requirements of impartiality and fairness, will also find expression in the parties' expectation that the arbitrators will, when confronted with such procedural issues, reach balanced and fair decisions on such matters. Time and cost considerations will not always be the primary interest of a party to an arbitration, the underlying rationale of a decision can also be an important element the parties seek to obtain from the arbitral process. (28)) In this aspect of the arbitrator's duties lies further potential for party disappointment, specifically concerning adverse procedural decision. Like in the context of unavoidable disappointment, there will always be decisions that need to be made that will conflict with a party's procedural preference. There are two primary ways in which procedural decisions can also lead to avoidable disappointment, however.

The first is in the nature of the procedural rules themselves. These rules may not have been specified clearly enough at the outset of the arbitration to ensure the parties were fully aware of the approach the arbitral tribunal was going to adopt during the arbitral process. As a result, parties may have views on those procedural rules that diverge not only between them, but also with P 138 those of the arbitral tribunal. In those circumstances, a party may be caught off guard by a procedural decision on the basis that it had a different understanding of the manner in which the procedural rules were to apply. This can, in part, be avoided by involving the parties more closely in the process toward the decision (although not in the final deliberations themselves) *before* the procedural decision is actually taken. This may be done by, for instance, holding a conference call or the provision of a short statement by each party. In such cases, the

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arbitrators would be well advised to provide the parties with clear directions or even questions so as to ensure any such statements or oral discussions stay on track and both parties are fully informed as the arbitral tribunal's approach to the matter. This also eliminates the threat of procedural bloat that might result from the provision of unguided opportunities to plead. In case of a negative decision despite such involvement, the measure of a party's disappointment is likely to be limited, but can be exacerbated when combined with a second factor.

This second source of disappointment arises out of the need for the procedural decision in the first place. While it is fair to say that procedural decisions must be taken, as mentioned previously, it is possible for procedural issues to arise by virtue of delayed or an absence of action on the part of the arbitral tribunal. Delayed procedural orders on time sensitive matters can have signi ficant procedural ramifications that elevate the severity of the consequences attached to the subsequent order. A procedural decision as to the admissibility of evidence will be less controversial several months in advance of a hearing, but can give rise to serious due process implications if arbitral tribunals delay such an order (whether by internal disagreement or oversight) to within a week or a few days of a hearing (as it may affect the parties' ability to prepare their cases). (29)) The increased severity of the procedural issue can then, itself, give rise to further procedural disputes requiring their own decisions. Those subsequent procedural decisions and their inherent “winner/ loser” dynamic thereby result in avoidable disappointment.

All of these considerations arise out of the parties' expectation that an arbitrator be efficient, diligent and industrious. This is a not an insignificant expectation and each of the three elements should be accorded specific regard by arbitrators both prior to and over the course of their arbitral mandates. Arbitrators are expected to make decisions and not merely in the final award. (30))

8 Do Not Succumb to “Due Process Paranoia”

One final note in this regard is that the increase in the need for procedural involvement by arbitrators has also given rise to an augmented sense of caution in some practitioners. This phenomenon also referred to as “due process paranoia” (31)) continues to distress some arbitrators and results in a perhaps more passive or understanding approach to procedural issues so as to not risk any complaint on the part of the parties in relation to their procedural rights. In the view of the authors, this more cautious approach is ill-advised. Not only do the parties not honestly or legitimately expect to have all procedural decisions decided in their favor, it would also appear exceedingly unlikely that any real challenge could be sustained against an unequivocal denial of procedural requests that are predominantly designed to delay proceedings or otherwise do not contribute to the conducting of fair and effective proceedings.

It is readily apparent that an arbitrator will not be obliged to give in to requests for unnecessary submissions or pleadings. (32)) Arbitrators who pursue their mandates efficiently and diligently will readily find themselves capable of balancing the respective parties' rights and interests in order to find solutions to procedural disputes that preserve both parties' procedural rights, even if this means certain procedural decisions require an unequivocal dismissal of certain requests. Parties will undoubtedly expect to be given the opportunity to comment on submissions, applications or requests introduced by the other party and in such cases, the receiving party should often be given the opportunity to respond. In some cases, however, where the answer is clear (especially when the application has little to no merit), the arbitrators do not need to adhere to strict formal requirements to invite the receiving party to comment on the issue merely because it is customary or expected of them. While the receiving party undoubtedly expects to be able to comment, that party is not going to insist on this expectation where an arbitrator's diligence can obviate the need for a response by the receiving party in the first place. The exercise of balancing expectations is one that must be frequently performed by arbitrators and it may not always be easy.

In addition to these generally applicable expectations, there is some disagreement as to whether the rendering of an enforceable award is an obligation incumbent upon arbitrators, with arguments against such an imposition premised on the unreasonable nature of such a burden since arbitrators cannot be expected to verify the national arbitration laws for every country in which the award might potentially be enforced. (33)) While the existence of an obligation may be contentious, it should be beyond question that the parties to an arbitration do expect to receive an enforceable award. This expectation can be said to exist as an “umbrella expectation” that necessitates an arbitrator adequately perform its duties (as distinct from the broader amalgamation of party expectations) throughout the arbitral process in order to achieve a result that will conclusively settle the parties' dispute.

9 Trust Will Avoid Disappointment

Derains has opined that one of the primary qualities an arbitrator must possess (thus a quality parties may expect) is the ability to inspire trust in the parties and his or her arbitral colleagues. (34)) It is the opinion of the arbitrators that this perception is best achieved by meeting the parties' expectations. What the parties expect from their

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arbitrators is not insignificant and it includes the ability to show deference to the parties' mutual wishes, but also the fortitude and assertiveness to take charge where needed in order to ensure a fair, prudent, efficient and understandable proceeding and final award. Arbitrators should be conscious of this high-bar when they assume an arbitral mandate. In order to assist, in particular, the more junior arbitrator and perhaps provide the experienced practitioners with some new ideas, the authors will proceed to setting out some practical recommendations aimed at allowing arbitrators to meet or even exceed the parties' expectations.

III Practical Recommendations for Effective and Certain Arbitration

Having defined the general expectations the parties will have of any chosen arbitrator, it is important to consider what those expectations will mean in practice. In this context, some suggestions of practical solutions that may assist in further prompting arbitral efficiency, certainty and accountability will be offered.

A Practical Recommendations for the Early Stages of Arbitral Proceedings

Many of the expectations identified in the foregoing chapter have focused on the manner in which the arbitrator ought to be involved in the proceeding. Some of those expectations would also appear to favor an active and thoroughly engaged arbitrator. It is worth noting that, despite this being a boon to the arbitral procedure as a whole, it may not necessarily be the experience all P 141 parties have had in arbitral proceedings. As a result, while the e fficient and diligent conduct of arbitration is an expectation of the parties (and the arbitral institution), the exact nature of that diligence may differ depending on the experience of the counsel for the parties. It is therefore advisable to set the tone of the arbitral procedure at an early stage of the process (either at or prior to the first case management conference, but in any event prior to the preparation of the first procedural order). That way, the parties cannot be caught off-guard by the approach adopted by the arbitral tribunal and counsel will be able to properly focus their case strategy. (35))

In setting this tone, it is important to unequivocally demonstrate an openness for frank communication as to the expectations and intentions the parties have for the arbitral proceedings. Specifically, this might include considerations as to the importance of time efficiency in the proceedings. It is also advisable that the arbitrator actively prompts the parties to consider, at an early stage, their side's procedural needs for the later stages of the proceedings. This will not always be possible, and the parties should be assured that they will not be inflexibly bound to their position at this time, but obtaining such concrete information will be an indisputable advantage when it comes to preparing the procedural timetable and the procedural rules. It is also at this time that the parties' (legal) cultural preferences can be identified and accommodated. (36))

A further consideration that should be clarified in the early stages of the proceeding is the extent to which the parties are content to rely on the arbitral tribunal's power to exercise its discretion in almost all matters of procedure. While it is undisputed that the arbitral tribunal has broad powers in this regard, the application of discretion is an inherently uncertain method of conducting the arbitration. Relying excessively on an arbitrator's discretion in procedural matters comes at the cost of the predictability of the procedure, which in turn can make it more difficult for the parties' legal counsel to advise their clients on matters of strategy and case management. Any expression by the parties as to their desire for or against the exercise of extensive arbitral discretion will not diminish the tribunal's entitlement to invoke such powers, but it can serve to align everyone's expectations and assist in the preparation of suitable and appropriate procedural rules.

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Lastly, extensive questions after the parties' expectations should not be done in the spur of the moment. They should be announced ahead of time and the parties should be given the opportunity to thoughtfully consider their stances. This is especially true since an in-depth exploration of their expectations will not necessarily form part of their standard practice and parties may not be prepared to engage with the substance of the question in the moment, nor should the arbitrators wish for the parties to do so. Consequently, while a discussion on these issues is suitable for a case management conference, this should be framed in advance and the parties should be made aware what is expected of them by way of clear instructions by the arbitral tribunal.

The prior communication of expectations seems a self-evident recommendation for a contribution focused on assisting arbitrator's meeting the parties' expectations, but the recommendation is slightly more nuanced. It is insufficient to merely ask the parties after their expectations, they should be actively prompted to consider concrete scenarios and be asked after their preferences for pro-active arbitrators and which parts of the procedure should be treated flexibly or inflexibly. Communication is a powerful tool, (37)) but it remains a tool that must be put to use effectively. It is insufficient to rely on parties to simply provide complete information through a general prompting by the arbitrators. Oft en a mere general invitation to clarify expectations will fall short of the mark as parties will not be likely to provide a comprehensive picture of what it is they really

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expect. Many expectations may also be so self-evident for the parties that they will not be mentioned, but they may not be so obvious for all the other parties involved. General communications on this topic are therefore prone to receiving general and ineffectual answers. This result rids engaging in this thoughtful exercise at the outset of the procedure of its underlying purpose to the point that it merely becomes a further contributor to increasing the time and cost of the arbitration.

B Practical Recommendations toward Establishing the Procedural Rules

Once the parties' expectations have been discussed (or even if they have not), it is important to consider how they can be managed or reflected in the procedural rules themselves.

It can be tempting, especially for arbitrators who have already conducted many arbitral proceedings, to use a kind of "standard form" of procedural order no. 1 and its arbitral rules. When talking about "standard forms", they are not just documents obtained from the arbitral institution or downloaded from the internet, instead they are documents that P 143 are frequently put to use in arbitration proceedings by the arbitrator in question and which have been amended and supplemented as practice and experience have dictated. These documents tend to be comprehensive and provide for many eventualities, but they also tend to be generally (or even cumbersomely) drafted so they can be applied to a wide variety of arbitrations with only minor changes. While applying such forms can be a sign of the arbitrator's experience, they can also cause arbitrators to work on "auto-pilot mode". (38))

The use of such forms is, of course, not inherently a bad thing, but it is key for arbitrators to be open to adapting the procedural rules (even if they have grown accustomed to a particular style or procedure) to the parties' needs and the needs of the given case (in light of its particulars such as time sensitivity, complexity, use of witnesses and document production), including the removal of unnecessary provisions. This adaptation is made easier if the foregoing sub-chapter's recommendations have also been applied in order to ascertain precisely what it is that the arbitral procedure is going to require and what the parties expect. Dogmatic adherence to overly general procedural rules and the use of boiler-plate procedural orders, without regard for the particulars of the case, may save time in preparing the form and guarantees a general coverage of all the key stages and matters of an arbitration, but runs the risk of failing to seize the opportunity that exists to save time at a later stage of the proceeding by more concretely prescribing the process for the parties.

The use of standard general procedural rules, in particular with a greater emphasis or reliance on the arbitrator's discretion, has a number of undesirable consequences. The over-emphasis of the arbitrator's right to decide either in the absence or even contrary to the rules, could result in the parties seeing the procedural rules as mere guidelines that can support a legal argument, but that do not prevent conduct contrary to those rules since ultimately it is the arbitrator's discretion that reigns supreme. (39))

Ready reliance on arbitrators in this way to resolve procedural issues can thus detract from the authority of the procedural rules, which in turn can lead to an increase in unsolicited submissions or practices by the parties that conflict with those procedural rules and which have a high potential to give rise to a disappointment of the parties' expectations. This can affect both the party engaging in the impermissible or unintended practice as well as the opposing party. The former might be disappointed in the decisions reached by the arbitrators, especially where they honestly believed in the P 144 correctness of the original application, as they relied on the express indication that the arbitrators were willing to apply their discretion. The latter party will likely be disappointed if the arbitrators permit such applications or practices contrary to the express rules or may simply be annoyed by the more chaotic nature of the manner in which the case is managed by the tribunal. (40))

In addition to clarifying the extent of the procedural rules' flexibility, arbitrators should also be keenly aware of the importance of drafting *clear* procedural rules. This requirement is closely tied to whether procedural rules can be strictly applied in the first place as ambiguous provisions necessarily leave the door open to variation in the manner in which the rules may be interpreted. A lack of clarity also gives rise to unpredictability and room for parties to perceive a lack of fairness where their interpretation of an imprecise provision is not adopted by the arbitral tribunal (even though there might be no inherent problem with that party's interpretation). Imprecise drafting of procedural rules is major contributor to the potential for disappointing the parties and should be avoided at all costs.

At present, with the existence of extensive external factors (such as lockdowns and travel restrictions) that may impact an arbitral procedure, it is especially important to openly discuss the modalities of the procedure with the parties. In so doing, their expectations and demands can be considered and incorporated. Standard procedures that applied prior to the outbreak of a global pandemic may need to be revised or left behind.

The need to avoid ambiguity in favor of clarity does not necessitate the rules be complex (41)) or that every eventuality must be associated with specific rules. Once the parties agree on the very basic manner in which to proceed (or where there is no agreement, the

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arbitrators can draw the parties to an acceptable middle ground), the procedural rules can be drafted to accommodate those expectations. Where no compromise is possible and the arbitrators are required to decide one way or the other, that decision should be explained to the parties and the rationale behind the decision should be consistent with the arbitrators' approach to that specific arbitration. In this way, even if unforeseen situations arise or an interpretation is mildly ambiguous, the parties have prior notice of the attitude of the arbitral tribunal to the procedure as a whole.

Predictability of both the procedural rules themselves as well as the arbitrators' position on those rules is always of the essence. Not only will this greatly enhance procedural certainty for the parties and thereby eliminate many potential causes for disappointment, it should also serve to heighten the P 145 regard for the procedure as a whole as it can be seen to proceed logically, consistently and, above all, fairly.

C Practical Recommendations for Once the Rules Have Been Established

1 Staying on Track

Once the parties' expectations have been identi fied and have been, so far as possible, incorporated into the procedural rules, arbitrators should have a much easier time conducting the arbitrations in a manner that fosters a sense of fairness. That is not to say that there is no room for further complications to arise during the more substantive part of the arbitral proceedings.

Any practitioner with more than but a few cases under his or her belt will have run into situations where party submissions contain a plethora of factual or legal allegations that stand in little or no relation to the questions actually in dispute between the parties. This could include historical information, perhaps intending to create impressions with the arbitral tribunal of deceptiveness or deviousness on the part of the opposing party arising out of past misdeeds, or simply be an attempt to "bury" potentially harmful information (this practice can also occur across submissions and need not be confined to individual documents). (42)) Irrespective of the intent of the party employing such practices (and it may well form part of a party's legitimate strategy), it is undeniable that they tend to have a considerable bloating effect on the size of submissions, which in turn frequently causes the opposing party to respond in kind to ensure the marginally relevant or irrelevant factual allegations of the instigating party are not left unanswered. The time and cost investment that becomes needed to conclude the arbitration can multiply due to such practices. Such practice has even been described by the English House of Lords as "*the bane of commercial litigation*", explaining "*it does nothing to clarify and simplify the issues or to shorten proceedings, which aims should be the objectives of both pleadings and written submissions*". (43))

Consequently, it is advisable to develop mechanisms to curtail such practices. This can be challenging, however, since the parties are entitled to decide on the manner in which they plead their cases. The parties are quick to invoke the procedural safeguard that the arbitral tribunal is required to afford P 146 them the reasonable opportunity to present their respective cases. (44)) It can therefore become very difficult to prevent or limit the effects of such bloating after one of the parties has already employed the tactic. Any attempt to restrict future submissions in their scope will be met with objections by the parties, as it is likely to result in allegations having been raised by one side going unanswered by the other. (45)) This would be so even if the arbitral tribunal informs the parties that it will not consider or strike the offending part of a bloated submission. After all, the arbitrators will still have read everything and may have subconsciously processed the information as part of the pleading as a whole. Furthermore, to strike sections of a submission filed in accordance with the procedural rules is fraught with peril and will be a measure arbitrators are unlikely to want to undertake. (46))

It is, of course, difficult to restrict the parties in the scope of their future submissions (especially the main substantive submissions) at the time of the drafting of the procedural rules as the ultimate course of the case and the associated pleadings may not be entirely clear to the participants. Thus, imposing limits on the scope of pleadings or the admissible number of pages for their submissions before knowing what the case will ultimately entail may be, rightly, considered an undue burden on the parties and an entirely arbitrary measure (a perception that does considerable harm to the perception of justice). Page limits are more regularly placed on post-hearing briefs, precisely because the scope of the case is more well-defined and evident, but it remains difficult to apply a reasonable limitation on substantive submissions, especially when commercial litigation will often involve complex fact patterns and varied legal issues.

Other means could therefore be explored to entice the parties to voluntarily restrict their submissions and focus their pleadings. Building on the foregoing ideas of communication and predictability, the authors propose P 147 the more pro-active and modified use of an often neglected or underutilized tool, the Terms of Reference. (47))

This is not a suggestion that the Terms of Reference as they apply in ICC proceedings should apply directly in all proceedings, rather a modified form of a similar document (without the need for the express approval of the document for each amendment by the arbitral institution) should be considered. Its use can also only be successful if adapted

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to the specific case with proactive involvement by the arbitrators and the parties involved. In order to make it useful, general and ambiguous statements such as "the arbitral tribunal will consider all questions and arguments submitted by the parties" must be avoided. They essentially amount to platitudes and provide no concrete basis on which the parties may base honest expectations.

2 A "Living Terms of Reference"

In accordance with Article 23 of the ICC Rules, the Terms of Reference should be a document prepared jointly by the parties and the arbitral tribunal that includes a variety of information, including in particular a summary of the parties' claims and their requested relief. According to practitioners, the section in the Terms of Reference on the "summary of disputed issues" is often left open as it is far too early to establish this at the time when the Terms of Reference need to be prepared. (48)) This fact is exacerbated by the fact that Article 23(2)–(4) cements the timing of the drawing up of the Terms of Reference as needing to take place early on in the proceedings.

It is the authors' view that this is an unfortunate restriction on an idea that arises out of the Terms of Reference, but is not cultivated by it. The Terms of Reference is a consolidation of the parties' positions that is intended to be more easily digestible and, when properly drafted, could be used to juxtapose the parties' positions on specific points more easily and effectively than separate submissions would allow. Rather than viewing the Terms of Reference as an inflexible document intended only to serve as a launching pad for the proceedings (where it is used at all), the Terms of Reference should be regarded as a living instrument that accompanies the parties and the tribunal throughout the proceedings and develops alongside the parties' submissions.

In this way, the "Living Terms of Reference" would depict a concise statement of position on the important points of each parties' case with the opposing side's answer displayed next to it (in a column or table, for instance). The document could then, in practice, be amended or supplemented as the pleadings develop (a process that should be internal to the arbitration only and, of course, not involve the need for any institutional approval). Specific references to the parties' pleadings where they elaborate further on the individual positions could be included. These lists could serve as checklists for each party as they develop their case allowing them to reference their opposing parties' concise restatements in order to plead their own cases. This comes with two benefits to the arbitral procedure. First, it ensures parties, in particular with less experienced counsel, do not inadvertently neglect to comment on specific positons that might be less well developed or identifi able in the opposing party's written pleading (for instance due to the length of that pleading). Second, it also becomes more difficult to hide or otherwise obscure essential aspects of the case since the concise restatements of position are displayed alongside each other. This obviates the perceived advantage in overloading written submissions and can contribute to naturally reducing the volume of written pleadings.

In addition to displaying the parties' positions, a "Living Terms of Reference" can also be used by the arbitral tribunal in the management and conduct of the case. Arbitral tribunals are already in the habit of reaching out to the parties in order to ask them to clarify outstanding questions they might have. In fact, it is expected that arbitral tribunals ask the parties during the oral hearing. But then, why wait? Why should the questions of the arbitral tribunal, especially on matters of law, be customarily reserved for such a late stage? If a question arises in the mind of an arbitrator following the first full substantive submission, it would seem both prudent and efficient to raise the matter either prior to the hearing or prior to any further submissions that party might be entitled to submit.

It could be contended that it would be premature to ask questions to the parties prior to the hearing since they have not yet availed of the entire opportunity to set out their cases. While this is true, a focused approach by the arbitral tribunal at an earlier stage would not appear to interfere with the parties' ability to present the case in a matter they deem appropriate. The arbitral tribunal's questions might serve to guide a party's pleadings, but it cannot act as a restriction on the potential scope of a submission. As such, even if a question is posed before all the substantive submissions are filed, it should have no bearing on the parties' ability to formulate and prepare their cases as they deem appropriate.

Furthermore, having the tribunal involved in the shaping of the "Living Terms of Reference" could further contribute to the predictability of the proceedings. While arbitrators need to maintain their impartiality over the course of the proceedings (meaning they cannot and must not disclose whether they favor one position over another), the "Living Terms of Reference" can serve as an indication of, in particular, the legal arguments on which the arbitral tribunal places an emphasis (by drawing the most questions). This will allow the parties to more effectively shape their pleadings to dedicate the majority of their time to these issues rather than needing to paint with a broad brush in order to cover ever potential area of interest for the arbitral tribunal.

This proposal requires the arbitrators and the parties be more involved in a common process of resolving a dispute. It is more labor intensive than standard proceedings, but offers to keep the parties more engaged with the progress of the procedure as a whole,

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rather than merely focusing on the next submission in a greater degree of isolation. A "Living Terms of Reference" also requires the arbitrators to be more substantively involved at an earlier stage in the proceedings, which would be expected of the more pro-active arbitrator, but could make the ultimate drafting of the final award a great deal easier. This method also reduces the risk that, once the oral hearing is over, there remain substantial parts of the parties' positions that are unclear or have gone unanswered, which complicates the drafting process of the arbitral award (or might require the proceedings to be extended with follow-up questions by the arbitral tribunal even after the oral hearing (or post-hearing briefs).

This method requires considerable "buy-in" from all the parties involved and should be openly discussed at an early stage of the proceedings, likely in the first case management conference. It is essential that the parties agree to the use of the measure as their genuine participation in the process is essential to achieving the purpose of increasing efficiency, predictability, and the perception of fairness. If properly applied and the arbitrators do not deviate from their duty to remain impartial, this mechanism will not serve as a reason to challenge the arbitrators, if there are such concerns, the parties could expressly agree to the use of the "Living Terms of Reference" and waive the mere use of the instrument as grounds for challenge (of the arbitrators or the award) in the procedural rules. This would offer a further layer of assurance for arbitrators.

The proposed "Living Terms of Reference" is a logical extrapolation of the foregoing recommendations focused on communication and predictability. The "Living Terms of Reference" requires open communication between the parties and the tribunal within the context of a shared desire to resolve a dispute. The proposal will not be suitable for every arbitration, and the additional time investiture required to engage in the process, may be less beneficial in smaller and less complex cases where the pleadings are already sufficiently concise. That being said, with the tendency toward increased time and cost in international arbitration as a whole, it would appear that any measure that can assist in potentially reducing both of those problems might be not only helpful, but also necessary. Additionally, it is a proposal that can be tailored to suit the needs of the given case and is generally applicable irrespective of specific emphasis on legal or factual complexity, documentary or witness evidence, or cultural considerations.

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When properly applied, a "Living Terms of Reference" can allow arbitrators to contribute to the predictability of proceedings and the sense of justice derived from its result. It is not the only practical recommendation, however and further considerations should be borne in mind by arbitrators during the substantive part of the arbitral proceedings.

3 Ensure Adherence to Deadlines by the Parties

While arbitrators possess of a broad discretion to in fluence the procedural timetable, they should remain particularly aware of how changes to the timetable can impact the parties (both counsel and the parties themselves). Of course, it is undoubtedly necessary to leave room for exceptional cases where a delay was unforeseeable and inevitable, but this is a discretion that should be exercised with care. The granting of extensions where both parties are in agreement is less problematic, but many extensions come about as a result of unilateral requests by parties just days (if not hours) before the deadline is set to expire. Permitting such dilatory tactics, without solid justification, offers fertile ground for party resentment as they may perceive unequal treatment if one party is afforded time beyond the mutually agreed deadlines (even if the arbitral tribunal promises equal treatment in the future to the party not presently in delay).

This consideration also applies to cut-off dates and restrictions as to the submission of new evidence. Parties will come to rely on these procedural milestones and use them to advise their clients. Allowing them to be disregarded without a compelling reason not only undermines the parties' strategic planning of their cases (in particular the party that has not requested an extension) and can also give rise to frustrations internal to the parties. A cut-off date is a discretionary tool and need not be used by the arbitral tribunal. It is therefore wise to ensure that *if* one is employed, it is *strictly adhered to* and does not give way lightly to minor changes in circumstance.

4 Do Not Be Overly Formalistic

Tailor-made rules and procedures that account for the parties' needs are vital to effective and efficient arbitration that produces a result that satisfies the parties. If the exercise of dra fting the procedural rules is taken seriously and put into practice, many of the requirements of the procedure can be specifically and expressly provided for. That is not to say that the expectation should be that no questions or issues will be left open or only tangentially addressed. A degree of nuance will always be necessary in any arbitration.

Situations will arise where a procedural rule, even if understood perfectly at the time of drafting, will have strange or unpredictable consequences in specific unforeseen circumstances. Naturally, form should be adhered to if it is a substantial issue that would leave the party not confronted by that problem P 151 with the rules suffering a serious disadvantage. There are plenty of instances, however, where one party will run up against

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a strict formal hurdle that serves no practical purpose in the given situation other than to complicate or delay the proceeding with no objective detrimental consequence for the other party. In such cases, the rules should not be adhered to literally if they in turn produce absurd results. No matter how involved the procedure leading up to that point, an inexplicable decision to adhere to form over substance will leave the disadvantaged party (if not both parties) feeling as though they have been dismissed by the arbitrators without justification. This is an issue that may be more prevalent in cases where the parties or their counsel are less familiar with international arbitration and strict adherence to form may be detrimental to the justice of the procedure as a whole.

5 Remain Impartial and Professional

This recommendation goes beyond the fundamental requirements expected of every arbitrator to remain impartial and independent. International arbitration continues to attract new practitioners, both through young lawyers entering the scene as well as the expansion of international arbitration into new industries and adoption by individual companies. This is a positive development for all practitioners of arbitration as well as dispute resolution as a whole. As a consequence of this popularity, new and inexperienced parties and counsel will become more numerous. This will need to be accounted for by the arbitrators when it comes to conducting an arbitral proceeding.

Legal counsel will bring elements of their domestic legal system and personal experience to the table and it may be that this experience includes little arbitral practice. In such cases, parties may require clearer guidance or have minor transgressions of procedure forgiven (once again, this should not come at any real cost to the other party). Arbitrators should always remain open to the possibility that a party has, in good faith, failed to understand directions in the manner in which an experienced practitioner might have understood them (no matter how self-explanatory they may seem to the arbitrators themselves). Patience should be employed, and arbitrators should avoid outward expressions of dissatisfaction or dismissal. Arbitrators are appointed because of an expectation of professionalism and given authority to match that expectation. Consequently, it is essential that arbitrators remain composed when interacting with the parties, even if they personally disagree with the substance of or strategy behind a party's pleading.

6 Ask Relevant Questions in a Timely Manner

Despite having already been addressed in the context of the “Living Terms of Reference”, it is worth reiterating the practical benefits of remaining fully informed and engaged with the case as it develops. Arbitration must be efficient P 152 and effective to ensure continued international use and arbitrators are a key player in ensuring that is possible. This is only possible if the arbitrators actively engage with the case before them in a timely manner.

The discretion afforded to arbitrators is extensive and allows them to revert to the parties to ask questions at any stage of the proceeding, even after all the submissions have been filed and hearings have been concluded. But asking questions after the parties have essentially finished pleading exposes not only the arbitrators, but the entire arbitration to Pandora's box by expressly tendering the opportunity for entirely new issues to be raised when such matters should have already been addressed. While such questions may be imperative to the preparation of a just award, failure to ask them at a more appropriate time is indisputably going to delay the proceedings and that delay may be of unforeseeable length, going far beyond what the arbitrators might expect. As such, arbitrators should ensure they are capable of addressing all the relevant issues at the appropriate stage of the proceeding to ensure delays in the procedure are not given rise to by the conduct of the arbitral tribunal.

7 Do Not Over-Emphasize the Possibility of a Settlement

A settlement is going to be the fastest and most cost-effective way to resolve a dispute and there are certainly situations where arbitration may contribute to the atmosphere within which the parties might come to an amicable solution. It is also entirely acceptable and even appropriate for an arbitral tribunal to enquire as to the parties' disposition toward a settlement, even in the course of an arbitration. That being said, arbitrators should be careful of crossing the line from a helpful inquiry as to the parties' perspectives on the feasibility and the unhelpful insistence on a settlement as an option the parties ought to pursue.

Arbitration is based on trust and confidence in the professionalism and competence of the arbitrators, frequent or needlessly detailed questioning after the possibility of a settlement (especially if raised aft er many years of contentious pleading) can give rise to doubt in the mind of the parties as to an arbitrator's interest in fulfilling the ultimate purpose of an arbitration, resolving a dispute. An absence or deterioration of confidence in the process is damning to the perception of justice and should be avoided at all costs.

8 Do Not Delay in Drafting the Final Award

In furtherance of the aforementioned ultimate purpose, arbitrators should also be prepared to produce the final award in a timely manner. While all parties to an

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arbitration, including the arbitrators, have schedules to work around in order to meet the deadlines agreed, the arbitral tribunal has the most notice of their need to produce a final award. Certainly parties can have agreed to a time for the rendering of the award that is unreasonable or practically unworkable, but practical experience indicates that it is not uncommon for arbitral tribunals to postpone their rendering of awards on more than one occasion.

It will not always be possible to avoid the need for a multitude of postponements, but arbitrators should bear in mind their own duties once the parties have rested in the context of the preparation of the procedural timetable. Experienced arbitrators are aware of the time investment a final award may represent and they should account for that investment when it comes time to set the timetable. The parties, once they have finished their part, will expect the tribunal to perform their own tasks as well and it can be difficult for counsel to explain to their clients why an arbitral award has not yet been provided once its due date has been postponed more than once.

9 Do Not Draft Needlessly Detailed Procedural Histories in Your Awards

In a similar vein, and acting as a final suggestion, final awards include a large number of formal requirements that need to be present in order to satisfy both institutional and domestic law requirements. Additionally, the reasoning of the arbitral tribunal must be clear in order to ensure the parties can understand the decision of the tribunal and consider justice to have been done (even if they disagree with the particular outcome). What arbitrators should be mindful of, however, in particular in lengthy arbitrations, is that the procedural history in awards is easy to write (although possibly time intensive to record) and quick to bloat the arbitral award. The procedural history is an important element of the proceeding, but it does not require every step to be set out in excessive detail. Furthermore, in particular in cases where the ultimate decision by the arbitral tribunal is brief (irrespective of the possible difficulty within the arbitral tribunal to find accord as to the direction of that decision), it can send a somewhat skewed signal to the parties if they receive a final award that dedicates (considerably) more pages to the procedural history of the proceeding than the substantive reasoning for the arbitral tribunal's decision. This will be aggravated if the process toward the award also included a number of postponements of the final deadline.

Arbitrators know they are afforded the opportunity to perform that role by virtue of party appointment (or professional renown), and the fi nal award is the final impression given by arbitrators to the parties. It should be prepared in a manner that satisfies the parties and affords them as little reason as possible to have any lingering gripes with the procedure as it was conducted, which includes the manner in which it was decided.

IV Conclusion

Defining the expectations of the parties to an arbitration is a daunting task as a consequence of the plurality of cultures and interests at play as well as the breadth of forms those expectations could take. Irrespective of whether every expectation can be said to have been covered by this contribution or whether it is even possible to provide a general definition of party expectations in the first place, it is the authors' sincere hope that they have inspired arbitrators to give the matter some further thought. Ultimately, every party will be different and it is far more important to identify the specific expectations of the parties participating in the arbitration at hand than it is to provide some overarching definition or formula for expectations that applies to all potential (and hypothetical) parties. It is toward this end that this article is intended to contribute. By providing experienced arbitrators with food for thought and a potential instigating element to reflect on existing practice and future arbitrators with some helpful practical considerations to get them started in international arbitration, the authors hope to play a part in the continued advancement of the arbitral community as a whole.

Bearing all of this in mind, there are a number of rules that may assist arbitrators in both not disappointing the parties as well as to setting a strong example for arbitration as an effective and efficient dispute resolution mechanism:

V Ten Golden Rules On How Not To Disappoint the Parties

1. Act promptly and proactively – communicate with the parties and allow them to remain aware of the work being done by the arbitral tribunal

2. Do not lose track of the file – remain on top of new submissions and correspondence submitted by the parties (and the institution)

3. Incorporate the parties into the early stages of the decision-making process

4. Never belittle or embarrass the parties or their counsel

5. Devote sufficient time to the file – be able to ask pertinent questions in a timely manner to guide the parties toward effective pleadings

6. Decide on procedural matters in a timely manner – do not defer them

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7. Give reasons for your decision so parties may understand them

8. In the event of disagreement within the tribunal, decide by majority – if all the facts are available, points of view are unlikely to change and only time can be lost

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9. Do not allow the costs to become excessive – be cognizant of the efficiency of the arbitration

10. Issue the award as soon as possible – do not get in the habit of post-poning the delivery of the final award

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31)) T. Lim, *Protecting Arbitrator Discretion in Decision-Making: A Malaysian Take on Due Process Paranoia*, Kluwer Arbitration Blog, April 11, 2020.

32)) J. Lew, L. Mistel is etal., *supra*note 11, at 282, para 12–18.

33)) R. Wolff, *Rights and duties of Arbitrators, supra*note 23, at 2731–2732, para 34; J. Lew, L. Mist el is etal., *supra*note 11, at 275–299, 280.

34)) A. Gerdau de Borja Mercereau, *The Professionalism of Arbitrators*, Kluwer Arbitration Blog, November 30, 2018.

35)) V. Öhlberger & J. Pinkston, *Iura Novit Curia and the Non-Passive Arbitrator: A Question of Efficiency, Cultural Blinders and Misplaced Concerns About Impartiality, in* Austrian Year book on International Arbitration 2016, 101–117, 113 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser, & Zeiler eds., 2016).

36)) Complaints of cultural misalignments, especially in document production procedures, are not uncommon and an example form the Chinese perspective can be seen here: "*The Future – What Will Change? Round Table Discussion*", *supra*note 12, at 191.

37)) N. Pitkowitz et al., *The Vienna Predictability Propositions, supra*note 22, at 119.

38)) S. Wilske & C. Edworthy, *The Predictable Arbitrator: A Blessing or a Curse?, in* Austrian Year book on International Arbitration 2017, 75–90, at 84–86 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser, & Zeiler eds., 2017).

39)) Even merely the inclusion of provisions to the effect that the arbitral tribunal retains complete discretion to decide as it sees fit in relation to any procedural matter can give rise to this impression on the part of the parties, even if there are clear and detailed procedural rules that should govern specific stages of the proceeding.

40)) Chaotic management of arbitration proceedings was considered the primary culprit of delays in arbitral procedure, see M. Zachariasiewicz & M. Kocur, *Case Management in Arbitration: A View from Poland*, Kluwer Arbitration Blog, November 5, 2019.

41)) "*The Future – What Will Change? Round Table Discussion*", *supra*note 12, at 206.

42)) V. Öhlberger & J. Pinkston, *Iura Novit Curia and the Non-Passive Arbitrator, supra*note 35, at 115.

43)) *Standard Bank PLC v. Via Mat International Ltd* [2013] EWCA Civ 490, judgment by Lord Justice Aikens, at 29; see also I. Popova, *Restoring Efficiency to International Arbitration: Five Core Recommendations*, in 40 under 40 International Arbitration 123–136, 131–133 (C. González-Bueno ed., 2018).

44)) For more on such concerns, see J. Risse, *An inconvenient truth: the complexity problem and limits to justice*, in Arbitration International Volume 35, Issue 3, 291–307, 298–299 (W. Park ed., 2019).

45)) This is not an issue in and of itself as the parties are not required to answer to all of their opposing parties' allegations. The issue arises out of the removal of the party's choice as to which allegations it does and does not wish to respond. By curtailing this choice, the arbitral tribunal might (inadvertently) infringe the parties' procedural rights, which in turn could jeopardize the award. *See* for general comment G. Born, International Commercial Arbitration 3233 (2nd edition 2014) at; and for an Austrian focus F. Schwarz & C. Konrad, The Vienna Rules: A Comment aryon International Arbitration in Austria 430 (2009).

46)) There has been international recognition of the phenomenon identified by practitioners that arbitrators appear more cautious and reluctant to (firmly) rule on procedural issues, see L. Kopecký & V. Pernt, *A Bid for Strong Arbitrators*, Kluwer Arbitration Blog, April 15, 2016.

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47)) The Terms of Reference mechanism is referred to as a close parallel that already exists in practice. The broad discretion granted to arbitral tribunals as regards the conduct of the proceeding would permit them to employ an entirely novel tool with similar features, but free from its restrictions. Furthermore, that discretion also means that such a tool could be employed in arbitrations under the auspices of other arbitral institutions and with other applicable rules.

48)) N. Pitkowitz et al., *The Vienna Predictability Propositions, supra*note 22, at

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