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In Praise of Americanization—Solutions to What Ails International Arbitration

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International commercial arbitration has long been touted as the most efficient method of dispute resolution for cross-border business disputes. Yet the history of complaints about the lack of efficiency and speed in the international arbitration process is just as long. Businesses and commentators have routinely and for decades criticized the process as too slow and expensive and as sharing many of the downsides of litigation in formal court systems.[1] The criticisms often take the form of laments about the "Americanization" of international arbitration—a term that, in the world of

[1] *See* Dr. Anton G. Maurer, *How International Commercial Arbitration Can Be More Efficient, Speedier, and Less Costly*, JAMS ADR INSIGHTS (Oct. 25, 2023), https://www.jamsadr.com/blog/2023/how-international-commercial-arbitration-can-be-more-efficient#_ftn1 (noting that the complaint that international arbitration is too slow and expensive "was raised in all Queen Mary studies from 2006 to 2021").

international arbitration (as in so many other global arenas these days), is rarely intended as a compliment. But this article (*pace* Marc Antony) comes to praise Americanization (at least partially), not to bury it. And that is because several aspects of the American litigation system could serve as useful models in helping international arbitration reach its full potential as a better, faster, and more efficient alternative for cross-border business dispute resolution.

At the heart of any dispute resolution process lies an inherent tension between the conflicting imperatives of speed and thoroughness, efficiency and comprehensiveness. Litigants always want their disputes to be resolved efficiently (or at least say they do), and many (if not all) litigants want their disputes to be resolved quickly. At the same time, all litigants—especially those on the losing side—want to feel at the end of the day like their arguments have received a full airing and thorough consideration. It is also in the nature of such things that those who believe they have not received the process that is their "due" will complain, sometimes vociferously. And in the international arbitration context, they may seek to use the mechanisms—of varying levels of scrutiny—available to them under applicable laws for raising such challenges through national courts. Therein lies the rub—and the core conundrum for those seeking to reform the current international arbitration process.

Blame for the inefficiency of international arbitration is often placed on the parties.[2] This is fair, but only to a certain extent. International arbitration is flexible by design, allowing parties broad discretion to structure the process to further the goals of efficiency, speed, and low cost and to prosecute their causes with these objectives front of mind.[3] But criticizing businesses engaged in major commercial disputes for failing to live up to this ideal is like criticizing the scorpion for stinging the frog in the old Russian fable. It ignores that it is in their nature to do the opposite. Rare indeed is the party or counsel in a multi-million-dollar commercial dispute that is willing to sacrifice even a marginally greater chance of prevailing for the benefit of more efficient procedures—a benefit that can often seem abstract and of second-order importance. Simply put, while parties may in some respects be willing to tie themselves to the mast of procedural restraint *ex ante*, before a dispute has arisen, they are unlikely to do so afterward. Indeed, the strongest imperatives will drive them to push the procedural

[2] *See, e.g., id.*

[3] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, § 1.02[B][6] (3d ed. 2021).

envelope ever outward—toward seeking more process, more briefing, and more time for the presentation of their case.

This is a complex coordination problem, and it cannot be solved by any one party alone, despite valiant proposals suggesting just such unilateral action.[4] The coordination challenge stems from the reality that no party will want to take actions that could be viewed as unilateral disarmament, thereby potentially compromising the party's chances for success, when there is no guarantee that its opponent will exercise similar restraint. Another aspect of the challenge comes from the inherent divergence in interests between principals and agents on the same side of the "v" (between clients and their outside counsel). One does not have to be a pure cynic to note that, in the typical hourly fee arrangement, outside counsel has very little financial disincentive to pursuing more voluminous briefing, more challenges, and more process in the hope—however misguided—of marginally increasing the chance of prevailing.

The only viable solution to a coordination challenge is a coordinated response, which means that it is up to arbitral institutions—and to arbitrators themselves—to take the lead in driving change. Of course, here, the challenge is the inherently party-driven nature of the arbitration process and the structural forces that necessarily bias those involved in providing arbitration services in favor of more rather than less process.[5] Some institutions have made significant strides in pushing back against these forces, through rule revisions and other reforms, as described in greater detail below. And there are many strong-willed, competent arbitrators who are prepared to maintain a firm hand on the tiller, keep counsel in check, and prevent the proceedings from spinning out of control. For these arbitrators, ample (if underutilized) tools are available to achieve the objectives of greater efficiency, greater speed, and lower cost. This article's plea to the international arbitration community is to expand the use of these tools, and to treat them as the norm rather than the exception. Otherwise,

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[4] *See* PerkinsCoie, *Arbitration 2.0: A Manifesto for Efficiency in International Dispute Resolution* (2014), https://www.perkinscoie.com/images/content/9/7/v3/97728/Arbitration2point0.pdf.

[5] Marc J. Goldstein, *Efficiency with Dignity: Early Dispositions and the Beleaguered Arbitrator*, at 1 (unpublished manuscript in draft May 16, 2018), https://torontocommercialarbitrationsociety.com/wp-content/uploads/2017/06/Preliminary-Issues-Article.pdf ("Process (lots of it) seems to be more or less our main product, and when we deliver it within the generous confines of the time frames the parties and the provider institutions specify (for proceedings and decisions), we meet expectations.").

unrestrained adherence to the principle of party control risks, perversely, having the continuing effect of eroding the very qualities that make international arbitration attractive to begin with.

I. Submissions

It is a common refrain in international arbitration circles—almost a banality—that submissions are too long and frequently address issues tangential (at best) to the ultimate outcome and beyond serious contestation. These complaints are hardly new, and mechanisms exist to at least begin to address them; yet the challenge remains unresolved, briefs continue to be far too long, and briefing on frivolous issues abounds.

The amount of paper filed in any arbitration of a reasonable size, let alone major cases with hundreds of millions and sometimes billions of dollars at stake, is staggering. Initial written submissions accompanying the constitution of the tribunal are sometimes followed by two or even three rounds of full written submissions, a skeleton, and two rounds of post-hearing briefs. These briefs can exceed one hundred pages—sometimes running to several hundred pages or more. Without doubt, all these dead trees are yielding severely diminishing marginal returns. And indeed, that is the view of at least some arbitrators themselves, one of whom recently noted with "guilt and shame" having participated in a tribunal that "issued a Final Award, upon what was essentially a dispositive question of law or contract interpretation, after the parties had expended probably more than $20 million to present to the Tribunal what turned out to be completely superfluous issues."[6] While perhaps somewhat on the extreme end, this is hardly an isolated occurrence, and the arbitrator himself did not expect that it was.[7]

A. Page Limits

Blaise Pascal once lamented that he had written a long letter because he "didn't have time" to write a short one. But even if 17th-century French men of letters were pressed for time, that is not the problem confronting international arbitration practitioners in the 21st. Parties in major arbitrations typically have many months to prepare their briefing—more than enough time to craft shorter and tighter briefs, if there were a desire or impetus to do so. It would seem, however, that in the world of

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[6] *Id.*

[7] *See id.* ("To those reading this article who are arbitrators, I dare say many of you have comparable culpability and could cite statistics at least as distressing.").

international arbitration, extravagantly long briefs—often covering the waterfront of every issue, even the most tangential, that could conceivably affect the ultimate outcome—are viewed by many practitioners as essential to effective advocacy.

Some have proposed that parties choose unilaterally to limit the length of their briefs. For example, the author's own firm's 2014 manifesto declares that it "will strive, except in the most complex of cases, to limit any Statement of Claim [or Defense] to 100 pages, double-spaced, in length," and to limit post-hearing briefs to "no longer than 30 pages, double-spaced" "in most proceedings."[8] Such commitments (even if heavily caveated) are noble, and the self-restraint they embody may well prove advantageous to clients in individual cases. But they are ultimately hopeless as a systemic approach to the problem, as they rely on an unrealistic level of self-abnegation in the face of potentially less-restrained (or less-enlightened) counterparties.

The only realistic solution, therefore, is for arbitrators to use the tools available to them to impose sensible page limits on briefing. To a U.S. litigator, the absence of page limits in international arbitration is among the most jarring aspects of the process. Page limits are ubiquitous in U.S. litigation, and they have bite.[9] Summary judgment briefs in state and federal court in Seattle, Washington—where the author practices—are typically limited to 8,400 words, which is a little over thirty pages using standard font and double spacing. Requests to exceed the limit must be made in advance and are disfavored. Restraining one's natural loquaciousness to fit the constraints imposed by hard-and-fast page limits is second nature for a U.S. litigator—just a part of the mental furniture.

In a complex case, summarizing the law and facts relevant to summary judgment in thirty pages (or somewhat more if an exception is granted) is a huge challenge, but litigants routinely do it. And page limits bring many advantages—including to the quality and effectiveness of advocacy. As Judge Richard Posner, a legendary jurist of the U.S. Court of Appeals for the Seventh Circuit, once explained:

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[8] *See* PerkinsCoie, *supra* note 4, at 2.

[9] And in the courts of other jurisdictions as well. *See* Constantine Partasides QC, *A Few Words on Prolixity in International Arbitration*, at 3–5, *in* INTERNATIONAL ARBITRATION UNDER REVIEW: ESSAYS IN HONOUR OF JOHN BEECHEY (Andrea Carlevaris, Laurent Lévy, Alexis Mourre & Eric A. Schwartz eds., International Chamber of Commerce 2015).

> Page limitations are important, not merely to regulate the Court's workload . . . but also to encourage litigants to hone their arguments. . . . The fifty-page limit induces the advocate to write tight prose, which helps his client's cause. . . . [L]itigants frequently assert the necessity of additional pages to represent their clients adequately. Overly long briefs, however, may actually hurt a party's case, making it far more likely that meritorious arguments will be lost amid the mass of detail.[10]

The same is equally true of submissions in international arbitration—effective advocacy is effective advocacy, no matter what the location or forum. And it seems an obvious conclusion that imposing page limits in the arbitration context would benefit the quality and effectiveness of advocacy, not to mention helping to manage costs.

This article is hardly the first to note the desirability of page limits.[11] And those voices have been heard by the arbitration community, at least to some extent. As one prominent treatise notes, "[i]ncreasingly . . . arbitral tribunals (empowered by certain institutional rules) are now considering the imposition of page limits on the parties' written submissions."[12] Thus, for example, the International Chamber of Commerce Arbitration Rules (ICC Rules) provide that "[t]he arbitral tribunal shall have discretion to adopt such procedural measures as it considers appropriate," and may in particular, "after consultation with the parties, decide . . . to limit the number, length and scope of written submissions and written witness evidence (both fact witnesses and experts)."[13] And while many major institutions have not expressly authorized the application of page limits, the imposition—or at least strong encouragement—of such limits should lie within the tribunal's general discretion to manage the conduct of proceedings.

Notwithstanding the availability of this simple and straightforward mechanism, the problem persists. Are due process concerns holding back arbitrators from imposing more rigorous page limits? If so, the concern is misguided. Any objection that a modest

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[10] Fleming v. County of Kane, State of Illinois, 855 F.2d 496, 497 (7th Cir. 1988).

[11] *See, e.g.*, Partasides, *supra* note 9.

[12] *See* NIGEL BLACKABY, CONSTANTINE PARTASIDES, ALAN REDFERN & J. MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 6.73 (7th ed. 2022) [hereinafter REDFERN & HUNTER].

[13] ICC Rules Appendix VI, art. 3.4; *see also* REDFERN & HUNTER, *supra* note 12, at ¶ 6.73 n.73.

page limit functions to deprive a party of a full opportunity to be heard seems—except perhaps in the most extraordinary and extreme case—borderline frivolous and exceedingly unlikely to succeed. The commitment of the international arbitration process to ensuring due process is laudable and among the reasons why businesses are comfortable entrusting their most important and significant disputes to arbitration. But to the extent adherence to that commitment is what has prevented the wider and more aggressive use of page limits, it has gone too far.

B. Summary Disposition

In conjunction with imposing page limits, arbitral tribunals should also consider the more expansive use of their authority to identify significant issues early in the proceedings for potential summary disposition.[14] Summary disposition procedures are a broad category of mechanisms "for the resolution and disposition of claims, defenses or other issues at a preliminary stage before a full merits hearing."[15] The appropriateness of summary disposition is a subject of long-standing debate in international arbitration circles. But to a U.S.-based lawyer, the value and desirability of such mechanisms being available are self-evident, as reflected in the prevalence and importance of motions to dismiss, motions to strike, and motions for summary judgment in U.S. litigation.

The great benefit of summary disposition mechanisms, of course, is that they can enable the early disposition of meritless claims and defenses, thus reducing—in some circumstances significantly—the length and cost of the arbitration process. Skeptics of such tools generally express concern about the risk of their misuse for harassment and delay. But that risk—while certainly present—can be mitigated through appropriate case management and the imposition of strict deadlines for briefing and resolution, as borne out by the limited available empirical evidence.[16] Skepticism about summary

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[14] Summary disposition procedures are also commonly referred to as "early" disposition. This article uses the terms interchangeably.

[15] David L. Wallach, *The Emergence of Early Disposition Procedures in International Arbitration*, *in* ARBITRATION INTERNATIONAL (William W. Park ed., Oxford University Press 2021, vol. 37, issue 4), at 836.

[16] B. Ted Howes & Allison M. Stowell, *The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis*, at 1 (NYSBA New York Dispute Resolution Lawyer,

disposition may also be a function of the typical absence of an appellate right in international arbitration,[17] which raises the stakes for such pre-hearing, case-dispositive determinations, especially given the limited evidentiary record in the early stages of most arbitrations.[18]

In light of these various countervailing considerations (and similar to the situation with page limits), the international arbitration community has approached the topic of summary disposition with trepidation. "Until 2006, no major set of international arbitration rules provided an early disposition procedure."[19] Even today, summary resolution, especially of major and potentially case-dispositive issues, remains rare.[20] That is unlike the situation in U.S. litigation, where many if not most cases are resolved—or at least positioned for settlement—at the motion to dismiss and motion for summary judgment phases. Thus, as one prominent treatise notes, "[t]he time it takes to dispose of a meritless claim or defence in international arbitration is one way in which the process compares badly to litigation in the courts, where early disposition is often readily available."[21]

While the frequency of early disposition in international arbitration is low, for a party keen to seek early narrowing or dismissal of an opponent's case, tools are available—if not exactly encouraged—under the rules of most arbitral institutions. The

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Spring 2020, vol. 13, no. 1) (finding that the summary disposition process under the summary disposition rules of the International Centre for Settlement of Investment Disputes (ICSID) lasted an average of less than three and one-half months from start to finish, and that ICSID arbitrations in which summary disposition applications were made resolved, on average, over a year earlier than the average ICSID arbitration—regardless of whether the applications were successful).

[17] At least unless the parties have chosen to adopt optional appellate procedures, such as under the American Arbitration Association's Optional Appellate Arbitration Rules.

[18] *See* REDFERN & HUNTER, *supra* note 12, at ¶ 6.37.

[19] Wallach, *supra* note 15, at 835.

[20] *See* REDFERN & HUNTER, *supra* note 12, at ¶ 6.37 (noting that the use of summary determination procedures in international arbitration "has been limited"). For example, a recent study found that the ICSID's summary disposition process was invoked in only 6.1% of arbitrations. *See* Howes & Stowell, *supra* note 16, at 1.

[21] REDFERN & HUNTER, *supra* note 12, at ¶ 6.37.

spread of such summary disposition mechanisms is a fairly recent development: according to one study, between 2016 and 2021, seven major arbitral institutions added summary disposition rules.[22] Yet still, most rules authorizing summary disposition remain "cautious and restrictive."[23]

The ICC Rules are fairly typical in both the process they establish and the ambivalence they reflect. Those rules provide that, "[i]n order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."[24] While this phrasing is ambiguous, the ICC Rules go on to specify that "rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case," is among the case management techniques that the tribunal may adopt.[25] And in 2021, the ICC issued a Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration clarifying that "[a]ny party may apply to the arbitral tribunal for the expeditious determination of one or more claims or defences, on grounds that such claims or defences are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction."[26] Notably, the standard for relief on such an application is thus higher than a straightforward merits determination, requiring that the claim or defense be "manifestly devoid of merit."

A more direct and expansive approach can be found in the new framework for early disposition under the 2021 amended rules of the American Arbitration Association's International Centre for Dispute Resolution (AAA ICDR). This new Article 23

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[22] *See* Wallach, *supra* note 15, at 836. Those seven institutions were the Singapore International Arbitration Center (SIAC), JAMS, the SCC Arbitration Institute, the Hong Kong International Arbitration Centre, the London Court of International Arbitration, the ICC, and the AAA ICDR. The ICSID adopted an early disposition procedure in 2006.

[23] *Id.* at 849.

[24] ICC Rule 22(2).

[25] ICC Rules Appendix IV.

[26] ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration* (Jan. 1, 2021), https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf.

establishes a two-step process. The tribunal first determines whether to allow an early disposition application to proceed, based on a showing that the application "(a) has a reasonable possibility of succeeding, (b) will dispose of, or narrow, one or more issues in the case, and (c) that consideration of the application is likely to be more efficient or economical than leaving the issue to be determined with the merits." If permission is given, the tribunal then has broad authority to "make any order or award in connection with the early disposition of any issue presented by any claim or counterclaim that the tribunal deems necessary or appropriate." Notably, this authorization, by contrast with the ICC Note, would seem to call for a simple merits determination, not the "manifestly devoid of merit" standard.

The 2020 International Bar Association Rules on Taking Evidence in International Commercial Arbitration (IBA Rules)—a well-regarded and widely accepted source of guidance on evidentiary procedure in international arbitration—go even a step further in promoting the use of summary disposition mechanisms. Article 2, paragraph 3 of the IBA Rules "encourage[s]" the tribunal "to identify to the Parties, as soon as it considers it to be appropriate, any issues: (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or (b) for which a preliminary determination may be appropriate." The extent of this "encourage[ment]" should not be overstated, as the commentary to the Rules cautions that the goal is "not . . . to encourage litigation-style motion practice." But the IBA Rules do make clear that, where "certain issues may resolve all or part of a case," "the arbitral tribunal has the authority to address such matters first, so as to avoid potentially unnecessary work."

What is hindering tribunals from relying more on summary disposition mechanisms in practice? Consider the perspectives of each of the major actors. Arbitrators have little incentive to buck the prevailing culture of their profession, and invite a potential post-award challenge, by shortchanging the normal evidentiary process, especially over the objection of one of the parties.[27] Litigants, for their part,

[27] Michael M. Collins, *Summary Disposition in International Arbitration*, *in* 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE (Albert Jan van den Berg ed., ICCA Conference Series, vol. 14 (Kluwer Law International 2009)), at 533–34 (arbitrators "are frequently unwilling to run the risk of having their award set aside on the grounds of some procedural unfairness with what they may perceive as a consequential risk of damage to their own reputation as arbitrators. Summary disposition motions therefore represent professional banana skins for an arbitrator.").

may be reluctant to provoke arbitrator suspicion by invoking a little-used mechanism that is viewed in some quarters as an overly aggressive U.S. export. Litigants may also be dissuaded by the onerous standard typically applied in deciding summary disposition requests, with many organizations granting relief only based on a showing of "manifest" lack of merit[28]—a high bar that will preclude dismissal except in the most exceptional cases.[29] The principal-agent dynamic discussed above may come into play as well. Outside counsel seemingly would have little obvious incentive to pursue a chancy summary disposition when the cost of additional process is not theirs to shoulder, and when their clients—even sophisticated ones—do not have a baseline expectation that such mechanisms will be utilized.

These dynamics unquestionably pose an obstacle to more widespread invocation of summary disposition mechanisms. But to arbitrators willing to consider the use of these tools and apply them reasonably and even-handedly, plenty of authority exists to support that approach—with the potential for large gains in speed, efficiency, and earlier case resolution.

II. Red Herrings

Even while identifying these opportunities to enhance the speed and efficiency of the international arbitration process, it is also important to highlight those mechanisms that may appear initially appealing but have in practice proven less fruitful or even counterproductive.

A. Joint Expert Reports

One example of such a red herring is the use of joint expert reports, also known as expert witness conferencing. Although many variations are possible, under the basic procedure—as specifically set forth in the 2020 IBA Rules—opposing experts meet after they have prepared their written expert reports to "draw up lists of (a) matters on which they agree, and (b) matters on which they do not agree, and the reasons for their

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[28] ICSID Rules of Procedure for Arbitration Proceedings 41(5) and (6) (permitting a party to "file an objection that a claim is manifestly without legal merit" within thirty days after the arbitral tribunal is constituted and before the tribunal's "first session"); SIAC Rule 29, "Early Dismissal of Claims and Defenses" (permitting a party to apply for early dismissal of a claim or defense on the basis that it is "manifestly without legal merit").

[29] Wallach, *supra* note 15, at 844 ("The requirement that a defect must be 'manifest' appears to create a very high standard for obtaining early disposition.").

disagreement."[30] This list can then be considered by the tribunal together with the individual reports or serve as the basis for further questioning of the experts.

The underlying rationale for joint reports is the valid observation that arbitrators often lack substantive expertise in the specialist fields that are the subject of the expert opinions. Accordingly, the reasoning goes, they—and their decision-making process—can benefit from some additional assistance in sorting through the often diametrically opposed opinions of competing experts. The hope is that joint reports can effectively highlight "the points of agreement and disagreement between the experts," and lead "if not to agreement, then at least to a narrowing of the points of difference."[31]

One can certainly understand how a tribunal, confronted by an avalanche of lengthy expert reports on all manner of abstruse and technical subjects, might be tempted by the siren song of a procedure promising to streamline the review process and cut through the noise. But it is a false promise, because success depends on opposing parties reaching voluntary agreement on points about which they have every incentive to disagree. As any U.S. litigator could well predict, the outcome of such a procedure is unlikely to be clarity and narrowing of the issues, but rather further conflict and the wasteful expenditure of vast resources, with little of value to show in the end.[32]

B. Document Production

One other topic that warrants a brief mention here is document production. Many commentators focus their ire about the "Americanization" of international arbitration on document production, by which I mean the process whereby parties are required to turn over documents that they have not chosen to produce voluntarily. In U.S. litigation, this process is referred to as discovery, and it is where the most time, money, and effort is expended in the typical major commercial litigation matter in state or federal court.

This article is not the place for an extended disquisition on the oft-debated subject of the relative merits and demerits of the current document production process in

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[30] REDFERN & HUNTER, *supra* note 12, at ¶ 6.197; *see* IBA Rules, art. 5.4.

[31] REDFERN & HUNTER, *supra* note 12, at ¶ 6.194.

[32] The Preamble to the IBA Rules expresses the rather optimistic expectation that "[e]xperts from the same discipline, who are likely to know each other, can identify relatively quickly the reasons for their diverging conclusions and work towards finding areas of agreement." This regrettably has not been the author's experience.

international arbitration. One idea that does warrant brief treatment, however, is the call from some in the arbitration community to eliminate required document production or at least severely restrict it. In this world, parties would prosecute or defend their cause based largely or entirely on the documents they voluntarily produce, and the tribunal would resolve the dispute based on that self-selected record. An approximation of this approach can be found in the Rules on the Efficient Conduct of Proceedings in International Arbitration (known as the "Prague Rules"), "which were developed because of a concern that international arbitration was being 'Americanised' and that there was a common law bias in the IBA Rules."[33] Again, the fact that some are drawn to this vision of streamlined dispute resolution dispensing with the worst excesses of the document production process is understandable. But the promise is again chimerical, and pursuing it would be a mistake for at least two reasons.

First, the IBA Rules already apply a relatively high bar in requiring that any documents requested must fall within a "narrow and specific" category and be "relevant to the case and material to its outcome."[34] This standard has teeth, enabling tribunals "to deny document requests where, although the requested documents would generally be relevant, they consider that their production will not affect the outcome of the proceedings."[35] Arbitral tribunals also are empowered to, and typically do, consider principles of proportionality, burden, and cost in resolving document production disputes.[36] Reasonable minds can differ about precisely the right standard to apply in requiring production, but the current approach seems well-calibrated in terms of balancing procedural efficiency against the benefits of facilitating access to important evidence.[37]

Second, the cost of denying access to the other side's documentary evidence—and the consequent risk of undermining the effectiveness and legitimacy of the decision-

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[33] REDFERN & HUNTER, *supra* note 12, at ¶ 6.106.

[34] IBA Rules, arts. 3.3.a, 3.3.b.

[35] REDFERN & HUNTER, *supra* note 12, at ¶ 6.97.

[36] *Id.* at ¶ 6.106.

[37] It also bears mentioning that parties in an international arbitration are typically severely constrained in their ability to obtain document production from third parties, especially in the wake of the U.S. Supreme Court's decision in ZF Auto. US, Inc. v. Luxshare, Ltd., 596 U.S. 619 (2022) (holding that 28 U.S.C. § 1782 does not authorize district courts to order document discovery for use in private arbitration).

making process itself—should not be understated. One does not need to accept the foundational U.S. legal principle that "the public has a right to every man's evidence"[38] to nonetheless recognize that access to at least *some* of that evidence is important to the integrity of the truth-seeking function. International arbitral tribunals themselves "generally place more reliance on contemporary documentary evidence than on witness statements"[39]—and rightly so—putting even more of a premium on their having access to a reasonably complete evidentiary record.

This is not to say that document production in international arbitration is as efficient and effective as it could and should be. Ideas for reforming the process—such as imposing and enforcing firm date cutoffs for raising document production issues and streamlining Redfern schedules[40]—warrant serious consideration. But the baby should not be thrown out with the bathwater, and document production should continue as a robust and central part of the evidentiary phase—especially in large and complex arbitrations.

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Parties, counsel, institutions, arbitrators, and commentators all have a role to play in driving the change needed for international arbitration to reach its full potential as an alternative mechanism for resolving large, complex cross-border business disputes. Reform can take many forms and derive from many different sources and models. For too long, those seeking to make arbitration speedier and more efficient have reflexively treated the notion of "Americanization" as an epithet, and the spread of U.S.-influenced procedures as part of the problem rather than the solution. But as this article has argued, those advocating for reform—or simply seeking to take advantage of the flexibility inherently available within the present rules governing arbitration—might

[38] United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 7 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. 1961)).

[39] REDFERN & HUNTER, *supra* note 12, at ¶ 6.106.

[40] The Redfern Schedule is a structured process, widely used in international arbitration, whereby the parties can identify and present the substance of document disputes to the tribunal for decision. The intent is for "[e]ach column of the schedule . . . to be completed as briefly as possible by the parties' lawyers," *id.* at ¶ 6.103—an ideal rarely accomplished in practice, as the schedules often extend to the hundreds of pages of repetitive back-and-forth.

well benefit from considering how international arbitration can more productively integrate and embrace the many positive features of the U.S. litigation system.

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