Two Cheers for Americanization: Helping International Arbitration Reach Its Full Potential

By Michael Paisner

International commercial arbitration has long been touted as the most efficient method of dispute resolution for cross-border business disputes. Yet, for decades, businesses and commentators have criticized the process as too slow and expensive and for sharing many of the downsides of litigation in formal court systems. These criticisms often take the form of laments about the "Americanization" of international arbitration – a term that, in the world of international arbitration, 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 expanded adoption of several aspects of the American litigation system could help 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 say they want their disputes to be resolved efficiently, and many litigants want their disputes to be resolved quickly. At the same time, at the end of the day, all litigants – especially those on the losing side – want to feel that their arguments have received a full airing and thorough consideration. 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 available mechanisms for raising challenges through national courts. This tension creates a conundrum for those seeking to reform the current international arbitration process.

Blame for the inefficiency of international arbitration is often placed on the parties. This is fair, but only to a certain extent. Criticizing businesses engaged in major commercial disputes for failing to live up to an ideal of efficient and restrained advocacy 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 multimillion dollar commercial dispute that is willing to sacrifice even a marginally greater chance of prevailing for the benefit of more efficient procedures – which can often seem abstract and of second-order importance. Simply put, while parties may in some respects be willing to tie themselves to procedural restraint *ex ante*, before a dispute has arisen, they are unlikely to do so afterward. Indeed, once dispute proceedings begin, the imperatives will inherently drive them toward seeking more process, more submissions 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. 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 that party's chances of success, when there is no guarantee that its opponent will be similarly restrained. Another aspect of the challenge comes from the in-

herent divergence in interests between even those principals and agents on the same side of the "v," i.e., 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 pursue more process in the hopes of marginally increasing the chance of prevailing.

The only viable solution to a coordination problem is a coordinated response, which means that it is up to arbitral institutions – and to arbitrators themselves – to take the lead in driving change. Some institutions have made significant strides in this regard 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. For these arbitrators, ample tools are available to keep counsel in check and prevent the proceedings from spinning out of control. This article's plea to the international arbitration community is to expand use of these tools, and to treat them as the norm rather than the exception. Otherwise, unrestrained adherence to the principle of party control risks having the continuing perverse effect of eroding the very qualities that make international arbitration attractive to begin with.

Submissions

Submissions are too long and all too frequently address at length issues tangential to the ultimate outcome and not subject to serious contestation. 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 a hundred pages – sometimes running to several hundred pages or more. It is hard to imagine that all of these dead trees do not result in 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."[1] While perhaps somewhat on the extreme end, this is hardly an isolated occurrence.

Page Limits

Blaise Pascal once lamented that he had written a long letter because he "didn't have time" to write a short one. Parties in major arbitrations, however, 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.

Some have proposed that parties choose unilaterally to limit the length of their briefs, but isolated self-restraint will not solve a systemic problem. 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 frequent 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 in the courts of many other jurisdictions), and they have bite. 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 30 pages using standard font and double spacing. Requests to exceed the limit must be made in advance and are disfavored.

In a complex case, summarizing the law and facts relevant to summary judgment in 30 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 for 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:

> 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.[2]

The same is true of submissions in international arbitration. And imposing page limits in arbitration would similarly benefit the process.

This article is hardly the first to note the desirability of page limits. 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."[3] Thus, for example, the International Chamber of Commerce Arbitration 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)."[4] And while the rules of many major institutions are not quite as express, the imposition – or at least strong encouragement – of page limits would appear to lie within the tribunal's general discretion to manage the conduct of proceedings. Some have suggested that due process concerns may be holding back arbitrators from imposing more rigorous page limits. But if so, the concerns are misguided. Any due process objection to the imposition of anything but the most unreasonable page limits would be borderline frivolous, and so should pose no obstacle to the more widespread adoption of this simple improvement.

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. Summary disposition procedures include mechanisms "for the resolution and disposition of claims, defenses or other issues at a preliminary stage before a full merits hearing."[5] While these measures are a key feature of U.S. litigation, the appropriateness of summary disposition is a subject of long-standing debate in international arbitration circles.

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

In light of these various countervailing considerations, the international arbitration community has approached the topic of summary disposition with a measure of trepidation. "Until 2006, no major set of international arbitration rules provided an early disposition procedure."[7] Even today, summary resolution, especially of major and potentially case-dispositive issues, remains rare.[8] 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, "the time it takes to dispose of a meritless claim or defense in international arbitration is one way in which the process compares badly to litigation in the courts, where early disposition is often readily available."[9]

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 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.[10] Yet still, most rules authorizing summary disposition remain "cautious and restrictive."[11]

The International Chamber of Commerce Arbitration Rules are fairly typical in both the process they establish and the ambivalence it reflects. ICC Rule 22(2) provides 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." Appendix IV of the Rules goes 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. 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 defenses, on grounds that such claims or defenses are manifestly devoid of merit or fall manifestly outside the arbitral tribunal's jurisdiction."[12]

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. This new Article 23 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." This authorization would seem to call for a straight determination on the merits of an application, rather than applying the higher "manifestly devoid of merit" standard set forth in the ICC Note.

The 2020 IBA Rules on Taking Evidence in International Commercial Arbitration – a widely accepted source of guidance on evidentiary procedure in international arbitration – go a step further in promoting the use of summary disposition. 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." To be sure, 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 greater reliance on summary disposition mechanisms by tribunals in practice? Consider the perspectives of each of the major actors. Arbitrators have little incentive to invite a potential post-award challenge by short-changing the normal evidentiary process, especially over the objection of one of the parties.[13] Litigants, for their part, may be reluctant to provoke arbitrator suspicion by invoking a little-used mechanism that is viewed negatively 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 institutional rules authorizing relief only based on a showing of "manifest" lack of merit.[14] The principal-agent dynamic discussed above may come into play as well, with outside counsel having little obvious incentive to pursue a chancy summary disposition application when counsel does not shoulder the cost of additional process.

These dynamics unquestionably pose obstacles. But for willing arbitrators, plenty of authority supports their use of summary disposition tools to realize the potential for large gains in speed, efficiency, and earlier case resolution.

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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 procedures modeled on those employed in U.S. litigation 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 well benefit from considering how international arbitration can more productively integrate and embrace positive features of the U.S. litigation system.

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Endnotes

1. 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.
2. *Fleming v. County of Kane, State of Illinois*, 855 F.2d 496, 497 (7th Cir. 1988).
3. *See* Nigel Blackaby, Constantine Partasides, Alan Redfern, & J. Martin Hunter, *Redfern and Hunter on International Arbitration* ¶ 6.73 (7th ed. 2022) [hereinafter Redfern & Hunter].
4. ICC Rules, App'x VI, Art. 3.4; *see also* Redfern & Hunter, *supra* note 3, at ¶ 6.73 n.73.
5. 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.
6. *See, e.g.*, B. Ted Howes & Allison Stowel, *The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis*, at 1, NYSBA New York Dispute Resolution Lawyer, 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 whether the applications were successful).
7. Wallach, *supra* note 5, at 835.
8. *See* Blackaby et al, *supra* note 3, 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 6, at 1.
9. Blackaby et al, *supra* note 3, at ¶ 6.37.
10. *See* Wallach, *supra* note 5, at 836. Those seven institutions were SIAC, JAMS, SCC, HKIAC, LCIA, ICC and ICDR. The ICSID adopted an early disposition procedure in 2006.
11. *Id*. at 849.
12. 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.
13. 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, Volume 14 (Kluwer Law International 2009)), at 533-34.
14. 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 30 days after the arbitral tribunal is constituted and before the tribunal's "first session"); Singapore International Arbitration Centre (SIAC) Rule 29, "Early Dismissal of Claims and Defenses" (permitting a party to apply for early dismissal of a claim or defense in the basis that it is "manifestly without legal merit").