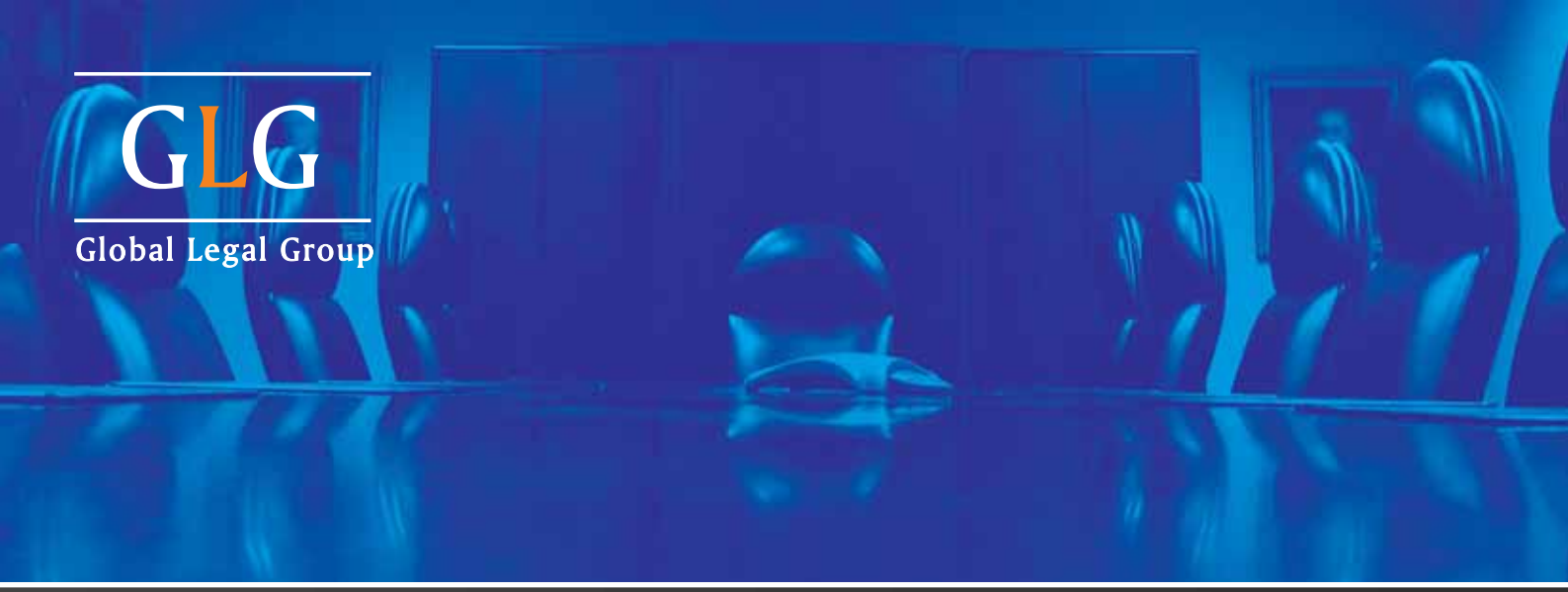

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The International Comparative Legal Guide to:
International Arbitration 2011
A practical cross-border insight into international arbitration work

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Preface:

General Chapters:

Asia Pacific:

Central and Eastern Europe:

Western Europe:

Continued Overleaf →

The International Comparative Legal Guide to: International Arbitration 2011

Chapter 1

Meeting the Challenge: Efficiency and Flexibility in International Commercial Arbitration

Wilmer Cutler Pickering Hale and Dorr LLP

Kate Davies

1. The popularity of international arbitration continues to grow and it is, according to the 2010 International Arbitration Survey ("Survey"),[1] the dispute resolution mechanism of choice for many corporations, a substantial number of whom are reported to take a strict approach to their preference for arbitration over state Court litigation. Of the many choices that drive arbitration, the most important were, according to the Survey, the seat of the arbitration, the substantive law and the institutional rules.

2. The importance of last year's Survey lies not just in the choices it reveals as being the driving forces behind the increasing use and popularity of international arbitration. It also highlights some of the pitfalls and drawbacks from which arbitration is nonetheless increasingly said to suffer. In this regard, the Survey reports that corporate interviewees "feel that arbitration must become more streamlined and disciplined to provide an entirely effective form of dispute resolution" and that they "prefer pro-active arbitrators who take control of proceedings."[2]

3. This sentiment is reflected in other studies carried out of corporate users of international arbitration. In particular, the results of an informal survey of members of the Corporate Counsel International Arbitration Group in 2010 reveals similarly disquieting views.[3] The results show unanimous support for the proposition that arbitration takes too long and costs too much and that the lack of availability of arbitrators is a significant factor causing unnecessary delays. Furthermore, the overwhelming majority blamed the tribunal for failure to enforce the agreed timetable and felt that arbitrators prioritised procedure over efficiency.

4. The message that arbitration needs to adapt into a more efficient process with arbitrators prepared to take the lead in controlling time and costs is hardly new. Nor are attempts by arbitral institutions to address those concerns; it is now nearly four years since the publication of the ICC's 'Techniques for Controlling Time and Costs in Arbitration', which were designed to ensure that "the duration and cost of the arbitration are commensurate with what is at stake in the case and appropriate in light of the claims and issues presented."[4] However, it is a message that continues to dominate arbitral debate and it is one to which practitioners and institutions alike continue to seek a solution.

5. A full discussion of the many, sometimes quite subtle aspects to this debate are well beyond the scope of this article. However, one recent initiative designed to address this issue has been the updating of the rules of many of the world's leading arbitral institutions. In this regard, the last year has seen amended (or the ongoing process of amendment of) the rules of the Stockholm Chamber of Commerce ("SCC"), UNCITRAL, the Singapore International Arbitration Centre ("SIAC") and the ICC (in addition to the IBA's updated Rules on the Taking of Evidence). Many of the changes have as their origin and purpose the need to address the very real concerns expressed by users (and, for that matter, institutions, practitioners and tribunals) that arbitration has become an overly cumbersome, timely and costly process.

6. This article reviews these recent rule changes to highlight some of the steps being taken in the quest for efficiency and to ask whether they are meeting their stated aims. This article also considers these rule changes in the context of other, perhaps more simple, measures that can be used to combat efficiency.

A. What do we mean by efficiency?

7. It is perhaps axiomatic that a complex dispute involving detailed issues of fact and law across multiple jurisdictions and involving several parties will be a lengthy and costly venture for all concerned, whether in litigation or arbitration. One of the traditional hallmarks of arbitration, however, has been the ability to render even the most complex dispute subject to a procedure that is streamlined and tailored to the particular issues – and parties – in the dispute; arbitral rules provide the framework but rarely, if ever, the detailed procedures for the conduct of any one arbitration.

8. Increasingly, however, there is a perception that arbitration is as structured and pre-ordained as the Court litigation procedures it has so long fought to avoid. This is particularly true at the evidentiary stage of proceedings, where parties complain that disclosure/discovery exercises more and more seem to mirror (or even go beyond) their Court equivalents. Add to this endless rounds of written pleadings and witness statements and it is perhaps no wonder that procedural efficiency is sometimes seen to be lacking.

9. The protraction of arbitration proceedings is driven by many factors and not just tribunals unable or unwilling to control the process; dilatory, guerrilla tactics of the parties themselves, delay in the issue of awards and so on, all feature high on the list. The question is, how does arbitration and the institutions and practitioners who serve its purpose, best address the issue.

B. How do recent rule changes address concerns about efficiency?

10. One response emerges from the changes to the various institutional rules introduced during the course of 2010. In July 2010, SIAC published the fourth edition of its rules with the stated aim of addressing efficiency and reducing delay in the arbitral process.[5] The new rules include provisions for an expedited procedure (Rule 5) and for the appointment of an emergency arbitrator to grant interim relief before the

tribunal has been constituted (Rule 26 and Schedule 1).[6] In the same vein, the SCC adopted an emergency arbitrator procedure in its January 2010 rule revision and published its Rules for Expedited Arbitrations for use in "minor disputes regarding less complex issues and involving a smaller amount in dispute".[7]

11. The same aim is evident in at least some of the revisions introduced in the UNCITRAL Rules (effective as of July 2010), which include revised procedures for the replacement of an arbitrator, the requirement for reasonableness of costs and a review mechanism regarding the costs of the arbitrators. These are in addition to the new and more detailed provisions regarding the grant and availability of interim measures (Article 17) which themselves have the potential to promote efficiency (either by encouraging early settlement, by disposing of issues entirely at an interim stage of proceedings or otherwise).

12. Similarly, the revised IBA Rules on the Taking of Evidence in International Arbitration (adopted in May 2010) provide for a more prescriptive approach to the evidence gathering process and include, for the first time, a "good faith" requirement for parties conducting disclosure in arbitration. These changes have also been introduced in an effort to promote efficiency and reduce unnecessary costs.

13. The following sections outline some of these new procedures in a bid to determine whether or not they are - or are capable of - achieving enhanced efficiency.

1. Fast Track/Expedited Arbitration

14. As with attempts to meet the concerns about costs and efficiency in general, the procedure for fast track arbitration is not new and is already a feature of the rules of the AAA (Rule R-1(b) and Part E), WIPO (which has its own Expedited Rules), Japan Commercial Arbitration Association (Article 59), Swiss Chamber of Commerce ("Swiss Rules") (Article 42), Hong Kong International Arbitration Centre ("HKIAC") (Article 38) and CIETAC (Articles 50-58). With the exception of the WIPO Expedited Rules (which apply only by agreement), the common feature of all of these provisions is that they apply automatically where the amount in dispute is below a certain threshold and unless otherwise agreed by the parties. The LCIA Rules contain equivalent provisions (Article 9), allowing for the expedited formation of tribunals in cases of exceptional urgency on the application of a party. Similarly, Article 32 of the ICC Rules (which allows parties to agree to the shortening of time limits in general) has long been considered capable of adaption to fast-track procedures where necessary.

15. It could be argued that all CIETAC arbitrations are fast-track. While six months from the date of constitution of the tribunal is the standard time for conclusion of most fast track awards, it is the standard under the CIETAC rules for all awards (this in part reflects culture, since oral hearings in CIETAC arbitration are by no means conducted as a matter of course).[8] Notwithstanding, Chapter IV of the CIETAC Rules contains detailed provisions allowing for a further Summary Procedure for claims which do not exceed an amount in dispute of RMB 500,000 yuan. An award under this Summary Procedure must be published within just 3 months from the date of formation of the tribunal (Article 56(1)). It remains no small wonder, however, that in 2010 alone, CIETAC managed to conduct in excess of one thousand arbitrations.

16. The new UNCITRAL Rules 2010 now include a provision which permits tribunals "at any time, after inviting the parties to express their views, [to] extend or abridge any period of time prescribed under these Rules or agreed by the parties" (Article 17(2)). The distinguishing feature of this new provision is that the tribunal may act of its own volition. Under the equivalent procedure in the ICC Rules (Article 32), time periods may be shortened only by agreement of the parties (with the Court retaining power to extend those limits where necessary to "save" the expedited proceedings).

17. The SIAC has followed the lead of the more prescriptive of the existing rules. However, the distinguishing feature of the SIAC expedited procedure is that it is not automatic by reference just to the amount in dispute and applies only on the application of a party. Thus, under the new SIAC Rule 5, any party may, prior to the full constitution of the tribunal, apply to SIAC for the arbitral proceedings to be conducted in accordance with the expedited procedure. A party may do so where (a) the total value in dispute does not exceed S$5 million, (b) the parties agree, or (c) in cases of exceptional urgency.[9] A number of consequences follow if the Chairman determines that the proceedings shall be conducted in accordance with the Expedited Procedure. These include the requirement that the case be referred to a sole arbitrator,[10] that the procedure may include shortened time limits,[11] and that the award be made within six months from the date when the tribunal was constituted.[12]

18. Whether under this or any other expedited procedure, the ability to fast track an arbitration is not just for parties with sophisticated counsel and a committed tribunal all dedicated to the speedy and efficient resolution of a particular kind of dispute; for example, where it is necessary to permit an ongoing business arrangement to proceed unfettered (as in construction projects where cash constraints are paramount) or where urgent issues of statehood/public policy/international relations are concerned (as in the Abyei arbitration). It is also not just for the resolution of small claims.

19. The "exceptional urgency" requirement is a feature unique to the SIAC and LCIA expedited procedures and it can and should be seen as a potentially useful weapon against the recalcitrant respondent. This is so, particularly as the Chairman (SIAC) and Court (LCIA) have the power to apply the fast track procedure even where opposed by one of the parties.

2. Emergency Arbitrator Procedures

20. As discussed above, the LCIA Rules (Article 9) already permit the expedited formation of a tribunal on or after the filing of a Request for Arbitration in cases of "exceptional urgency". The ICC introduced its "Pre-Arbitral Referee" procedure as long ago as 1990 and the ICDR Rules have contained an emergency arbitrator procedure since May 2006.[13] The SCC Rules now also include a procedure for the appointment of an emergency arbitrator since January 2010 (Article 32(4) and Appendix II). In July 2010, the SIAC Rules followed suit and introduced a new mechanism for parties to obtain "emergency interim relief" prior to the constitution of the tribunal (Article 26(2) and Schedule 1).

21. The expedited formation procedure under the LCIA Rules and the appointment of an emergency arbitrator under the SIAC and SCC rules applies automatically once parties select those rules. This is distinct from the present ICC procedure, which is contained in a separate set of rules and applies only when those Rules specifically are chosen by the parties (whether in addition to the main ICC Rules or not). However, it is understood that the new Rules due to be published later this year will bring the ICC in line with the ICDR, SIAC and SCC by adopting its own emergency arbitrator procedure.

22. The SIAC and SCC Rules contain strict time limits that do not appear in the LCIA Rules. Under the SIAC procedure, an emergency arbitrator may be appointed within one

business day of receipt of the application and must provide a schedule for considering the urgent application within two business days of the appointment.[14] There is no time limit for the rendering of any order or award under this - or the LCIA - procedure. This is in contrast to the new SCC procedure, where the decision on interim measures must be made not later than five days from the date on which the application was referred (Article 8(1) of Appendix II). Unlike the LCIA Rules, the arbitrator appointed under the SIAC and SCC Rules may not then sit on the tribunal unless otherwise agreed by the parties.

23. The LCIA Court must be persuaded of the "exceptional urgency" of the application in order to agree to the expedited formation of the tribunal. Under the SIAC procedure, the Chairman must determine whether or not the application constitutes an "emergency". There is no such requirement under the SCC Rules where the emergency arbitrator simply has the same powers as the tribunal would have to grant interim measures under Articles 32(1) to (3).

3. Controlling Evidence in International Arbitration

24. According to the 2010 International Arbitration Survey, disclosure of documents is the aspect of the arbitral process that contributes the most to the length of proceedings. Additionally, 30 percent of the respondents to the Survey believe that the tribunal is best placed to expedite the arbitral proceedings, whilst 19 percent believe it is the parties.

25. The IBA, in drafting the 2010 version of the IBA Rules on the Taking of Evidence in International Arbitration (the "2010 IBA Rules"),[15] has clearly sought to address the sentiments expressed by those statistics. The updated 2010 IBA Rules may also be taken to address concerns expressed by some who feel the Rules are applied either badly or not at all. Indeed, some would say that evidentiary procedures in international arbitration have lost all rigour and now exceed their Court counterparts in length, cost and complexity.

26. The Preamble to the 2010 IBA Rules makes it clear that the rules are intended to provide "an efficient, economical and fair process for the taking of evidence in international arbitration".[16] Importantly, the Preamble notes that the Rules "are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and the Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each arbitration".[17]

27. While not their primary aim, the revised Rules do contain some provisions relevant to the hearing. In this regard, witnesses are required to appear for oral testimony at a hearing only if their appearance has been requested by any party or the tribunal (Article 8(1)). Article 8(1) also provides for the use of videoconference or similar technology (for example, Telepresence, where all participants appear to be sitting around the same table) with respect to a particular witness.

28. In terms of documentary evidence, the new rules make provision relating to the thorny question of e-disclosure (in Articles 3(3)(a)(ii) and Article 3(12)(b)) intended to give greater guidance to the tribunal on how to address requests for documents maintained in electronic form. In particular, Article 3(12)(b) provides that documents in electronic form "shall be submitted or produced in the form most convenient or economical to [the party] that is reasonably usable by the recipients". The 2010 IBA Rules also contain much more detailed provisions relating to privilege (Article 9(2)) which are intended to enhance the degree of predictability and, thus, efficiency in the arbitral process.

29. Perhaps the greatest achievement of the new Rules is the requirement for the early involvement of the tribunal in engaging not just with the parties but also with the issues in dispute. Thus, Article 2 of the 2010 IBA Rules now endows the tribunal with greater "case management" powers. It requires the arbitral tribunal to "consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence".[18] The consultation on evidentiary matters may address matters such as the scope, timing and manner of the taking of evidence, including "the promotion of efficiency, economy, and conservation of resources in connection with the taking of evidence".[19] The tribunal is also encouraged to identify those issues that it considers "material to the outcome" of the case and/or those that may be appropriate for preliminary determination (Article 2(3)).

30. The phrase "case management" strikes fear into the heart of many whose experience of English Court litigation in the post-Woolf reforms world have involved endless trips to Court in support of meaningless procedural hearings that serve only to prolong the proceedings further. However, most would agree that in the hands of an experienced and pro-active tribunal, early case management is ultimately a force for good. A tribunal that has a good grasp of the facts and of the issues in dispute will be far better placed to identify a legitimate, issue-based approach to disclosure and to make robust decisions in relation to tactics that are plainly aimed at disrupting proceedings.

31. In this regard, the IBA Rules now require that a request to produce documents contains "a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party". In addition, the failure of parties to act in "good faith" in conducting the taking of evidence may be taken into account by the tribunal in the allocation of costs.[20] This may go some way in deterring frivolous requests for production and other dilatory tactics.

4. Arbitrators' Fees in *Ad Hoc* Arbitration

32. A feature unique to *ad hoc* arbitration is that fees are controlled not by an institution but by the arbitrators themselves. In cases involving experienced arbitrators, this rarely raises a problem. However, there have been reports of negotiations and tactics that would tend to undermine the integrity of the arbitral process in this regard. One of the aims of the 2010 revision to the UNCITRAL Rules was to address this concern and to ensure transparency in the setting of fees. This has been achieved by removing the power to determine those fees and expenses from the arbitrators.

33. Promptly after its constitution, the tribunal is now obliged to inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply.[21] Within 15 days of receiving that proposal, any party may refer the proposal for review to the appointing authority, which is empowered to make any necessary adjustments that will then be binding upon the arbitral tribunal.[22] Previously, the appointing authority had no such power and could only make comments to the tribunal.[23]

34. Additionally, when informing the parties of the arbitrators' fees and expenses, the tribunal is obliged to explain the manner in which those amounts have been calculated.[24] The parties may refer for review such calculations to the appointing authority, which is empowered to make any adjustments that are necessary to conform to the requirement of reasonableness.[25] Any such adjustment will then be binding upon the arbitral tribunal.[26]

5. Joinder and Consolidation

35. Traditional wisdom goes that consolidation and joinder were rare in international arbitration. This is perhaps reflected in the general absence of specific provisions on this issue in some of the older institutional rules.

36. In the modern world of increasingly complex disputes which sometimes involve several parties and multiple related contracts, that wisdom is changing.[27] Thus it is now not uncommon for disputes to arise between the same parties but under separate contracts containing separate arbitration agreements or between multiple parties in relation to the same overall project where not all parties are privy to the same contractual relationship.

37. For example, licensing relationships very often involve one agreement granting the licence for a product with a separate agreement by which the licensor provides support (or consultancy) services in relation to the product licensed under the first agreement. In those circumstances, a respondent to a notice for arbitration under both contracts might refuse to agree that both disputes be resolved in the same proceedings. Alternatively, the respondent might respond to a claim under one contract with a separate claim under the second contract. Either way, the motive is usually the pursuit of some tactical advantage whose aim (or effect) is to disrupt and prolong proceedings. Such tactics also often result in inconsistent awards which is unsatisfactory for all involved.

38. Many of the same situations might arise in relation to third parties. Construction disputes provide perhaps the best example, such as where a contractor sued by its employer wishes to join a sub-contractor who has no contractual relationship with the employer.

39. Either way, one way to ensure efficiency and avoid inconsistent results is an order by the tribunal to consolidate, or join a third party to, proceedings. Consolidation is a power tribunals in ICC arbitration already have where claims between the same parties all arise in relation to the same "legal relationship" (Article 4(6)). The same is true of tribunals sitting under the Swiss Rules (Article 4), which allow for consolidation even where the arbitrations concerned involve parties "that are not identical". Under the 1976 UNCITRAL Rules, the power to consolidate proceedings only arises on express agreement of both parties.

40. The Working Group on the 2010 revisions to the UNCITRAL Rules debated the topic of consolidation but declined to address it in the new rules due to concerns regarding unfairness.[28] This is perhaps to be regretted.[29] However, the 2010 Rules do now permit the joinder of third parties who are "privy to" the arbitration agreement (Article 17(5)); an advance on the 1976 Rules, at least, which were silent on this point. The power to join a third party already exists under the LCIA Rules, which perhaps provides the broadest procedural discretion in this regard (Article 22(1)(h)). There, a tribunal may join a third party but only where that third party and the party making the application for joinder both agree. Statistics and anecdotal reports on the use of this provision reveal that it is rarely used, however.

41. As noted already, the power to consolidate proceedings already exists under the ICC Rules. Furthermore, additional parties may be joined to proceedings under the ICC Rules following the introduction of rules relating to the appointment of tribunals in multi-party arbitrations (Article 10) and criticism that to allow only the Claimant to choose the parties to the arbitration created inequality of arms for the Respondent. As a result, the practice of the ICC Court is to allow joinder of parties named by either the Claimant or the Respondent, provided certain strict conditions are met. This does not help a potential party unnamed by either of the parties to the proceedings, however, and it remains to be seen in precisely what terms the new edition of the ICC Rules will address the question of joinder and consolidation.

42. Pausing to reflect on these changes just for a moment, there is one aspect of arbitral procedure that is notably absent from any of the 2010 rules and it is one which few could seriously dispute as being anything other than fundamentally efficient; the hearing itself.

43. Take a multi-party, multi-million dollar dispute involving documents in at least two languages, many tens of witnesses and several experts on separate fact and legal issues to the English or US Court and you are looking at a hearing of upwards of at *least* ten weeks where the Judge will typically only sit from 10 a.m. to 4 p.m. (certainly in the English Court). Contrast this with the same dispute resolved through arbitration, in which the tribunal will likely sit from 9.30 a.m. to 6 p.m. (and frequently beyond) in a hearing that will probably last somewhere between two to three weeks. Even the fiercest critic would have to admit that in general terms, the arbitral hearing represents a staggering achievement in efficiency on the part of all concerned, particularly when one considers the quality of the awards that follow (albeit oftentimes unforgivably late). In this light must the efficiency of arbitration also be seen.

C. Are all these rule changes addressing the concerns?

44. Hearings aside, however, all of these rule changes follow in the wake of the eternal quest to improve efficiency and drive down costs in international arbitration. Are they, or are they capable of, achieving their stated aims?

45. While no statistics exist, more detailed rules on consolidation and joinder should be a welcome addition to institutional and *ad hoc* rules alike. Both procedures as they stand create problems, for example in relation to the appointment and composition of tribunals, confidentiality and enforcement. In addition, they may achieve greater procedural efficiency but they do not necessarily lead to reduced costs. These and other issues can frequently outweigh the perceived advantages and it is to be hoped that any new rules in this area will address these problems.[30]

46. Likewise, the new IBA Rules on the Taking of Evidence rightly seek to address the increasingly unsatisfactory way in which document disclosure and other evidentiary matters are conducted in international arbitration. By emphasising the responsibilities of the parties and tribunals alike in this area, it is to be hoped that endless rounds of Redfern Schedules running to multiple sheets of A3 paper can be a thing of the past.

47. More concrete evidence can be found in support of some of the new fast-track procedures. Anecdotally, informal reports suggest that fast-track arbitrations are on the increase, particularly in certain types of dispute. This finds some support in the statistics, too. The 2010 Annual Report for SIAC shows that of the new arbitrations filed in 2010, 88 were filed after the introduction of the new Rules (i.e. after 1 July 2010). Of those 88 cases, SIAC received no less than 20 applications for the expedited procedure, of which 12 applications were accepted (8 of which were subsequently consolidated) under Rule 5.1(a) (amount in dispute is less than SD$5 million) and one was accepted under Rule 5.1(b) (the parties agree). While no case has yet adopted the procedure on the basis of the "exceptional urgency" requirement, nonetheless, this is an encouraging start in the first six months of the new SIAC Rules.

48. Similarly, by February 2011, three applications under SIAC Rule 26.2 had been received and accepted by the Chairman. Reports of those applications indicate that SIAC and the

emergency arbitrators appointed are succeeding in meeting extremely tight timetables (in one case, little over a week to render a decision).

49. The equivalent provisions under other arbitral institutions' Rules also appear to have had a significant impact. For example, 66 (or 27 percent) of the 215 SCC arbitrations filed in 2009 were filed pursuant to their new Expedited Rules. Eight of those were international arbitrations. The summaries of four decisions rendered in 2010 under the emergency arbitrator provisions pursuant to the SCC Rules earlier this year also indicate that the procedure is working well and broadly within the time limits prescribed by the rules. In addition, in one of the four cases referred to, the applicant party was granted the relief sought. Interestingly, the standard applied for the consideration of all four applications was guided not by the seat of the arbitration (Sweden, in all four cases) but by what the SCC referred to as the "choice of law", which is taken to mean the law of the underlying contract. In two cases, the "choice of law" was Swedish law; in one, English; and in one the law of Georgia.[31] A full discussion of these choice of law issues is beyond the scope of this article but it will be interesting to see how this issue is dealt with under the Rules of other institutions that have adopted, or may in the future adopt, this procedure.

50. Similarly, expedited arbitrations under Article 42 of the Swiss Rules accounted for a surprisingly high 45 percent of cases filed. This figure might reflect the fact that Article 42 applies automatically to any amount in dispute of or under CHF 1 million (approx. US$ 1.12 million) and might therefore suggest that a large number of claims under the Swiss Rules are of relatively low value (although the statistics are silent on this point). The number of expedited cases under the JCAA Article 59 procedure, where the qualifying amount for automatic application of the procedure is much lower than for the Swiss Rules (J¥20,000,000 or US$ 250,000), was 16 percent. The expedited formation of tribunals under LCIA Rules, Article 9 has gradually risen but with more modest numbers from 13 applications in 2009 and 20 in 2010.

51. The statistics indicate either popularity for these fast-track procedures, irrespective of the type of or amount in dispute, or simply the number of low-value disputes that institutions handle (because they apply automatically where the amount in dispute is below a certain threshold).

52. What these statistics sadly can't reveal is whether these procedures truly are achieving their stated aim of increasing efficiency and reducing costs. In this regard, there are a number of issues regarding emergency arbitrator procedures that need to be addressed, including their interplay with national Court procedures and questions of enforcement.[32] SIAC very recently indicated that it is currently reviewing its rules in this regard.[33]

53. In relation to fast-track arbitration, it does not necessarily follow that a procedure which renders an award in six months is more efficient (and less costly) than one where the award takes two years. Furthermore, there is no guarantee that the result is one which both parties accept and a fast track award that is the subject of lengthy challenge and/or enforcement proceedings is arguably as bad as one which took two years to render at the outset.

54. In this regard, the fast-track procedure might seem to expose awards to challenge more than awards in standard proceedings. For example, a party might argue that it was not afforded a full or proper opportunity to present its case due to the truncated nature of proceedings or that the award was insufficiently reasoned (the Swiss Rules, for example, expressly permit reasons to be in "summary form"). The Swiss Supreme Court has given such arguments fairly short shrift but the case gives a worrying indication of where unscrupulous tactics could lead.

55. The conscious attention of all those involved in arbitration to the issue of efficiency is key; it is not just being efficient but also being seen to be that may count in the eyes of arbitration's most important critic, the user. In this regard, rules which have as their aim the promotion of a more streamlined and tailored arbitral process should be a positive step.[34] The real proof of the pudding for all these rules lies, of course, in the hands of the users themselves. It is perhaps therefore a question for the International Arbitration Survey to pose to in-house counsel in its next edition; to what extent have these procedures and Rules which were designed to address efficiency and costs achieved their aim?

D. Are all these rule changes necessary?

56. To the extent these new rules and procedures do not adequately address the question of time and costs, where does one turn in the quest for arbitral efficiency? To put it another way and to echo the recent cry of one of arbitration's leading counsel and arbitrators, do we really need all these rule changes and guidelines? Or do the tools we need to combat inefficiency already exist?

57. The vast majority of the major institutional rules already require arbitrators to avoid unnecessary delay and expense so as to provide for an efficient resolution of the dispute in hand. Article 14.1(ii) LCIA Rules is perhaps the most comprehensive in this regard, providing that arbitrators must "adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute."[35] This broad procedural discretion (echoed in the rules of many of the institutions, including Article 15 of the ICC Rules) means that in general terms, adopting mechanisms whose aim is to rationalise the arbitral process are undoubtedly authorised.

58. There is, however, disagreement amongst practitioners on the scope of those mechanisms. One example which has received increasing attention amongst practitioners is the 'summary' disposition of claims. In April 2006, the newly amended ICSID Rules were published and included – for the first time in any institutional rules – the express power for a tribunal to dismiss claims on a summary basis that are "manifestly without legal merit" (Article 41(5)). From the cases that have considered objections under this rule so far,[36] guidelines on its application that are missing from the rules themselves begin to emerge and they reveal a procedure that is broadly akin to UK and US style summary judgment procedures.

59. A full discussion of the nature of summary disposition and its availability in international arbitration is not only beyond the scope of this article but has been addressed elsewhere in some detail. It is nonetheless interesting to note that none of the institutional rule changes introduced in 2010 followed ICSID Rule 41(5). Indeed, the ICC's Task Force on Arbitrating Competition Issues specifically recommended in their report on "Evidence, Procedure and Burden of Proof" that the ICC Rules not be amended to allow for summary judgment because it is "likely a summary judgment vehicle would not work in the ICC context and culture".[37]

60. However, in an article recently published in the ICC Court Bulletin, decisions of tribunals sitting in ICC cases reveal the existence of, and willingness of tribunals to consider, applications for the 'summary disposition' of claims (in those cases, citing Article 15 of the ICC Rules).[38] This demonstrates, both in relation to summary disposition but also more generally, the ample scope of *existing* rules to adopt procedures whose aim is to promote and achieve efficiency in resolving a dispute.[39] In other words, the tools *do* already exist.

61. So why do complaints that arbitration is costly and inefficient persist? One might argue that practitioners and tribunals have simply lost sight of the endless possibilities that lie in a rule which provides for no more than the adoption of "suitable procedures". It is also possible that parties sometimes overlook the importance of the quality of the result in their focus on the speed and cost of getting there. Another possibility is that arbitration is becoming a victim of its own success. As the demand for arbitration grows, so too does the need for counsel and arbitrators who may not have the experience or judgment to know what are "suitable procedures" for any given case *without* detailed rules and guidance.

62. The truth, in the modern world of increasingly complex disputes conducted in an environment of sustained economic constraints, is that there probably is no satisfactory answer to dealing with inefficiency. At least, no explanation that satisfactorily answers all of the concerns all of the time. This brings us full circle back to the very origin and purpose of arbitration. The bare framework of arbitration quite possibly provides none of the answers; but add to that framework specific procedures - whether or not contained in rules or guidelines - adopted and agreed by the parties, their counsel and the tribunal and you hopefully have what arbitration absolutely can and should be; an *effective* answer at one point in time to the particular issues in the particular dispute.

Endnotes

[1] Queen Mary University of London, 2010 International Arbitration Survey: Choices in International Arbitration (published 6 October 2010).

[2] Survey, at p. 32. The Survey also reports that respondents "prefer a pro-active case management style rather than a deferential or reactive style (43% vs. 21%) and an arbitrator that focuses on the commercial disposition rather than the legal determination of disputes (32% vs. 24%)". See Survey, at p. 25.

[3] See Swanton, "In-house counsel say international arbitration takes too long" (available at http://www.insidecounsel.com/News/2010/5/Pages/SuperConference-Inhouse-Counsel-Say-International-Arbitration-Takes-Too-Long.aspx). The Corporate Counsel International Arbitration Group is an alliance of more than 90 in-house attorneys from multinational companies interested in improving the way international arbitration is conducted.

[4] Report from the ICC Commission on Arbitration, "*Techniques for Controlling Time and Costs in Arbitration*", Preface, ICC Publication 843 (2007).

[5] See SIAC 2010, CEO's Annual Report, at p. 3 (available at: http://www.siac.org.sg/images/stories/documents/SIAC_Annual_Report_2010.pdf).

[6] The new rules no longer require the drafting and signing of a Memorandum of Issues (old Rule 17), akin to the ICC Terms of Reference.

[7] The Expedited Rules are available on the SCC website at: http://www.sccinstitute.com/forenklade-regler-2.aspx.

[8] Of course, in reality, there are several issues which contribute to the perception that CIETAC arbitration can be inefficient.

[9] SIAC Rules, Article 5(1)(a)-(c).

[10] SIAC Rules, Article 5(2)(b).

[11] SIAC Rules, Article 5(2)(a).

[12] SIAC Rules, Article 5(2)(d).

[13] ICDR Rules, Article 37.

[14] SIAC Rules, Schedule 1, Article 2.

[15] IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the IBA Council on 29 May 2010 ("2010 IBA Rules").

[16] 2010 IBA Rules, Paragraph 1 of the Preamble.

[17] 2010 IBA Rules, Paragraph 2 of the Preamble.

[18] 2010 IBA Rules, Article 2(1).

[19] 2010 IBA Rules, Article 2(2)(e).

[20] 2010 IBA Rules, Article 9(7). The Preamble also emphasises the need for parties to act in "good faith" in the taking of evidence. See 2010 IBA Rules, Paragraph 3 of the Preamble.

[21] UNCITRAL Rules 2010, Article 41(3).

[22] UNCITRAL Rules 2010, Article 41(3).

[23] UNCITRAL Rules 1976, Article 39(4).

[24] UNCITRAL Rules 2010, Article 41(4)(a).

[25] UNCITRAL Rules 2010, Article 41(4)(b)-(c).

[26] UNCITRAL Rules 2010, Article 41(4)(c).

[27] Support for this can be found in the statistical reports of some arbitral institutions which show that an increasing number of arbitrations involve multiple parties.

[28] See A/CN.9/614 - Report of the Working Group on Arbitration and Conciliation on the work of its forty-fifth session, at paras. 79 – 80; Wirth, *The current revision of the UNCITRAL Rules*, at p. 10 (available at: http://www.homburger.ch/fileadmin/publications/UONO26O_01.pdf).

[29] It is acknowledged that consolidation in non-administered cases may present unique issues.

[30] For a full discussion of issues relating to multi-party/multi-contract arbitrations, see Born, *International Commercial Arbitration*, Chapter 17 (2009).

[31] See Lundstedt, *SCC Practice: Emergency Arbitrator, Decisions rendered 2010*, available on the SCC website at: http://www.sccinstitute.com/filearchive/3/39211/Emergency_arbitration_slutlig.pdf.

[32] Concerns have been expressed as to whether the existence of an emergency arbitrator provision would render a national Court which is otherwise empowered to act in support of arbitration incapable of issuing interim relief. See in this regard section 44(5) of the English Arbitration Act 1996 and section 12A(6) of the Singapore International Arbitration Act. Elsewhere, there are doubts as to whether an order or award rendered under the emergency arbitrator procedure could be enforced, for example because the emergency arbitrator is not a "tribunal" (within the meaning of section 12(6) of the Singapore International Arbitration Act).

[33] At the recent SIAF 2011 event in Singapore, the Chairman of SIAC indicated that a review of the emergency arbitrator procedure and the Singapore International Arbitration Act may be necessary to address issues relating to enforcement.

[34] See Born, *International Commercial Arbitration*, at p. 1972 (2009) (noting that rules allowing for expedited provisional measures "appear to be sensible steps towards improving the arbitral process").

[35] See also SCC Rules, Article 20(3), WIPO Rules, Article 38(c) and AAA Rules, Article 16(2).

[36] *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan* ICSID Case No. ARB/07/25, Decision on the Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008 ("*Trans-Global*"); *Partners. LP v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/3), Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (2 February 2009) ("*Brandes*"); *Global Trading Resource Corp. and Global International, Inc. v Ukraine* (ICSID Case No. ARB/09/11), Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (1

December 2010) ("*Global Trading*"); *Grynberg, Grynberg, Grynberg, and RSM Production Corporation v Grenada* (ICSID Case No. ARB/10/6), Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules (10 December 2010) ("*RSM Production*").

[37] Judith Gill, *Applications for the Early Disposition of Claims in Arbitration Proceedings* in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, 2009 Dublin Volume 14 at p. 525 (Kluwer Law International 2009).

[38] See Born & Beale, *Party Autonomy and Default Rules: Reframing the Debate over Summary Disposition in International Arbitration*, ICC International Court of Arbitration Bulletin Vol. 21 No. 2, at p. 19 (2010).

[39] As a leading practitioner has noted in this regard: "There does not seem to be a strong call for arbitration rules generally to adopt powers similar to those of national courts enabling summary disposition of issues or claims. It is perhaps more a question of the existing powers being fully utilised in appropriate cases so as to bring about the expedited resolution of issues or claims …." See Judith Gill, *Applications for the Early Disposition of Claims in Arbitration Proceedings* in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series, 2009 Dublin Volume 14 at p. 525 (Kluwer Law International 2009).

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