

Int'l Arbitration Doesn't Have To Be Slow And Expensive

By **Dr. Anton G. Maurer, LL.M., FCI Arb** (November 17, 2023, 5:06 PM EST)

International commercial arbitration is often criticized as being slow and very expensive.

This complaint was raised in the 2006 Queen Mary International Arbitration Survey, and it referred predominantly to attorney fees.[1] The 2010 survey found that the delay in arbitration is caused especially by the documents discovery procedure, lengthy written submissions, and the selection, preparation and hearing of witnesses.[2]

This was confirmed in the 2015, 2018 and 2021 surveys.[3] In the 2021 survey, users evaluated the length of written submissions, and the documents discovery procedure was seen as very costly and time-consuming and often disproportionate to the benefits that a party may hope to derive from these processes.[4]

However, delays and exorbitant costs are not inevitable. Generally, they result from intentional, but frequently mistaken, choices by the parties.

Even despite the fact that the [London Court of International Arbitration](#) will increase the fees and the hourly rates for the secretariat and arbitrators for new cases filed after Dec 1, by up to 30%, these costs are not really relevant overall considering the total cost structure.[5]

The next Queen Mary survey will be conducted in 2024, and parties to international arbitration can take the following steps to ensure better results.

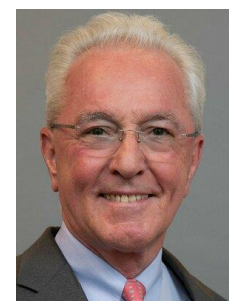
International Commercial Arbitration Doesn't Have to Be Slow, Expensive

Flexibility is one of the key benefits of international arbitration.[6] International commercial arbitration can be efficient; it does not have to be slow and expensive. The parties can create and structure the arbitral procedure by amending the applicable procedural rules, thereby tailoring them to the needs of the dispute while achieving a faster, less expensive resolution.

Four Factors That Cause Unnecessary Delays

The length of the arbitration procedure is generally determined by four factors:

- The time frames requested by counsel to prepare and file their briefs;



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- The time taken to resolve disputes regarding discovery requests, and to produce documents;
- The time taken to select and prepare fact witnesses; and
- The time taken by the arbitral tribunal to decide the case and to finalize the award.

However, it is possible to reduce cost and delays without harming the result of the arbitral proceeding.

Concentrating Submissions on the Important Issues

Because there is generally no appeal process, many parties file very lengthy briefs covering every potential aspect.

But generally, it would be sufficient to concentrate on the important factual and legal disputes.

After having studied the first round of briefs, with the permission of the parties, the arbitral tribunal could let the parties know any issues it regards as relevant to the case and material to its outcome; this is also encouraged in Article 2, Paragraph 3 of the 2020 [International Bar Association Rules](#) on Taking Evidence in International Commercial Arbitration.[7]

Thereafter, without limiting the right to argue other issues, the parties could concentrate their briefs on the relevant aspects.

Further, counsel often ask for time frames that generally exceed by several months the time frames permitted for parties in litigation. Most of these delays could be avoided by requesting less time for filing briefs.

Overbroad Discovery of Documents Seldom Worth High Cost

The parties in international commercial arbitration often agree to be guided by the IBA Rules. Under Article 3, each party may submit to the tribunal and the other party a request to produce documents.

Article 3, Paragraph 3 stipulates that the request shall contain a description of the requested document sufficient to identify it or a narrow and specific category of documents, as well as a statement of why each of the requested documents is relevant to the case and material to its outcome.

All too often, however, both parties deliberately submit discovery requests that do not comply with Article 3, Paragraph 2. By filing such an overbroad request, both parties will object and spend a lot of time opposing such requests.

Thereafter, the arbitral tribunal must decide which requests will be permitted. The time and expense related to whether a discovery request is narrow, specific, relevant, and material could clearly be avoided or reduced if the parties would agree in advance on a discovery procedure.

The arbitral tribunal should encourage the parties to agree upon a discovery standard before document requests are prepared.

Therefore, document discovery requests should be more targeted or not used at all. Most parties do not find a smoking gun that shifts the case in their favor.

Some Suggestions to Make Discovery Requests More Efficient and Cost-Effective

If the parties, despite the high cost, prefer to allow discovery, the parties or the arbitral tribunal could be inspired by the JAMS Recommended Arbitration Discovery Protocols [JAMS Recommended Arbitration Discovery Protocols](#) [8] and amend the IBA Rules.

To save time and increase cost-effectiveness, the tribunal and the parties should agree in Procedural Order No. 1 that the party that requests discovery shall advance the reasonable cost of production, including attorney fees, of the other side, subject to the allocation of costs in the final award.

This will force the requesting party to consider whether it really needs particular documents to prove its case. And the costs should be reimbursed in the award only if the produced documents were filed and the tribunal considered them relevant and material when making its decision.

Additionally, as suggested in the JAMS discovery protocols, electronic documents should be produced only from sources used in the ordinary course of business absent a compelling reason to dig deeper.

Fact Witnesses in Arbitration Often Do Not Influence Decision

Fact witnesses in international commercial arbitration can be valuable if they have uncontaminated direct knowledge of the relevant facts or can explain gaps in documents. In the 2005 Respondent v. Momodou decision, the Court of Appeal of England and Wales summarized that a witness should present their own evidence, as much as possible, uninfluenced by anyone else.[9]

The present form of preparing and presenting witness testimony in international commercial arbitration is based on the Anglo-U.S. litigation model.

The parties are free to identify the witnesses on whose testimony they intend to rely. Generally, a witness is interviewed with the purpose to refresh their memory. Often, counsel will draft a witness statement and prepare the witness for examination and cross-examination at the arbitral hearing; in some cases, prior to the arbitration hearing, there will even be a mock cross-examination.

In 2010, Toby Landau KC raised the question of whether the current practice of selecting, preparing and presenting witness evidence is potentially corrupting the very evidence arbitral tribunals rely upon for the fair resolution of disputes.[10]

He argued that the selection of witnesses does not allow the arbitral tribunal to find the truth for two reasons.

First, the person with the best personal knowledge is often not offered as a witness.

Second, selection of witnesses is a highly strategic and tactical exercise aimed at selecting witnesses who are best able to present and express themselves, who support the official case, who are resilient enough to withstand cross-examination and who are able to give a favorable impression to the tribunal.

Landau further argued that witness statements often have little to do with the actual words and recollections of the witness and rarely contain the actual unassisted recollection of the witness in their own words, as well as whether drafting a witness statement and preparing the witness for examination refresh their recollection or distort their memory.

Landau concluded that the prevailing model for the preparation, adducing and testing of witness testimony can no longer be regarded as the best approach.

In 2015, inspired by Landau's Kaplan lecture, the International Chamber of Commerce created a task force regarding maximizing the probative value of witness evidence.

The conclusion of the ICC Commission Report was that the memory of an honest witness who gives evidence in international arbitration can easily become distorted by the interactions that commonly take place in the preparation and presentation of witness evidence and may therefore be less reliable.[11]

The cost associated with the presentation of witness evidence is significant. A lot of time and money is spent, and perhaps even wasted, in the selection, preparation, presentation and cross-examination of fact witnesses.

The question arises whether the testimony of a witness whose memory was refreshed or even trained in a mock cross-examination is still the uncontaminated memory of the witness. The memory of the witness is imperfect, and it can easily be distorted. Neither arbitrators nor psychologists can assess whether the testimony of a fact witness corresponds to the original memory or was tainted.

One can discuss whether the present way of handling and presenting fact witnesses in international arbitration is broken; many practitioners question whether fact witnesses actually help the arbitral tribunal to find the truth. They often have little or no influence on the tribunal's decision.

Arbitral tribunals generally recognize when witnesses don't have direct personal knowledge. Any decision maker will prefer that fact witnesses testify to the facts they still remember. Witness testimony that is not based on direct personal knowledge may not convince an arbitral tribunal, which may then decide the dispute based on the burden of proof.

Some counsel argue that they select witnesses not for their evidentiary value, but to tell the story and show the tribunal the most important documents, thereby assuming that the tribunal may not have read the whole file. Preparing witnesses who have no evidentiary value is unnecessary, the cost of which can be avoided by selecting arbitrators who will have read the files.

An alternative is for the parties to agree to longer opening statements in which each party will present in detail the crucial documents.

An Option to Make an Arbitration Quicker and Less Expensive

Generally, neither discovery nor the presentation of fact witnesses significantly influences the tribunal's decision because the discovery often does not produce important and crucial documents, and the arbitral tribunal does not know which testified facts correspond to the original memory of a witness and which were learned and memorized during preparation.

Therefore, by concentrating their briefs on the most important issues, avoiding or limiting discovery, and eliminating fact witnesses with little or no personal knowledge, the parties can speed up the arbitral process and significantly reduce its cost — without damaging their cases.

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[1] International arbitration: corporate attitudes and practices 2006, at 19.

[2] 2010 International Arbitration Survey: Choices in International Arbitration, at 32.

[3] 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, at 24; 2018 International Arbitration Survey: The Evolution of International Arbitration, at 8.

[4] 2021 International Arbitration Survey: Adapting arbitration to a changing world, at 13 seq.

[5] Other arbitration institutions like ICC, DIS, KCAB don't have plans to increase the filing fees or arbitrators' compensation, etc.

[6] Gary B. Born, International Commercial Arbitration, 2nd Ed., at 84 seqq.

[7] IBA Rules on the Taking of Evidence in International Arbitration, as adopted by the IBA Council on December 17, 2020.

[8] JAMS Recommended Arbitration Discovery Protocols (effective January 6, 2010).

[9] [2005] EWCA Crim 177 (02 February 2005).

[10] Toby Landau, Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration, The Kaplan Landau Lecture 17 November 2010, at 7 seqq.

[11] ICC Commission Report: The Accuracy of Fact Witness Memory in International Arbitration, at 5, 7.