

A new path forward: efficiency through transparency

Professor Doug Jones AO*

1. Introduction

It is with great pleasure that I present this keynote address for a conference that promises to be a fascinating introduction to the IBA conference commencing this weekend. The issues of efficiency and legitimacy in international arbitration are vexed ones and have generated significant discussion in recent years.

Legitimacy has been a major area of debate in investor-state dispute settlement, which is inextricably linked with issues of policy and the rights and obligations placed upon States.¹ Many agree that these matters of public interest should not be decided behind closed doors by mysterious tribunals that are capable of binding governments and are not subject to review by state courts.² The perceived panacea to this legitimacy crisis is said to be greater transparency. Calls for transparency have trickled down into international commercial arbitration, prompting efforts to increase transparency in all aspects of commercial arbitration, from the process, to the awards, to the arbitrators themselves.

The topic that I would like to address in this speech is the impact of transparency on the efficiency of international commercial arbitration. I will leave it to others to continue the debate relating to legitimacy in ISDS.

Let me clarify what I mean when I talk of transparency and efficiency. I do not mean by transparency to refer only to the public availability of hearings or indeed of arbitral proceedings themselves. While this may prove useful in illuminating the arbitral process, what I am seeking to focus on today is the availability of information about the process and those who participate in it, which occurs both before and after the hearing, and is,

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¹ UNCITRAL Working Group III Draft Paper, "Possible reform of investor-State dispute settlement (ISDS)", 7 September 2018, 2.

² Janet Walker, 'International Commercial Arbitration in an Era of Transparency' (Jean Gabriel Castel Lecture Series, Glendon College, Toronto, 2019).

by and large, only known to the participants themselves. The availability of this information can usefully inform debate about increasing the quality, efficiency and legitimacy of the process of international commercial arbitration. Arguably, increased transparency can also redress longstanding complaints associated with international commercial arbitration, including unnecessary cost and delay. Greater information will result in predictability of outcome and the development of law, allowing parties to make informed decisions on a variety of issues: selecting arbitration as a form of dispute resolution; appointing proficient arbitrators; or deciding which arguments to run in their submissions. These decisions, made easier by the availability of information, will allow parties to efficiently dispose of their dispute, either through a binding dispute process, or by settlement.

The use of international commercial arbitration is widespread and has been considered for many years as the preferred method of resolving disputes between parties from different jurisdictions undertaking international commercial transactions. Thus one can assert without fear of contradiction that international commercial arbitration assumes a critical role in the resolution of international commercial disputes, likely to be challenged only by the development of international commercial courts of which in this region the Singapore International Commercial Court is the outstanding example.

International commercial arbitration exists in an information age, where access to material about virtually everything is a mere click away. For arbitration, this means its users demand more and more data on the process, the arbitrators and their decisions, than ever before. There is uncertainty as to whether the current practices in international commercial arbitration will remain satisfactory to users as time goes on.³ Indeed, the 2018 QMUL survey results confirmed that participants would like to "have access to arbitrators' previous awards, know more about their approach to procedural and substantive issues and have a clear picture of their availability to take on new cases."⁴ Evidently, the issue of transparency is yet to be adequately addressed. To retain its position as the preferred method of international dispute resolution, arbitration must not only respond to these calls for transparency, but do so in a way that promotes efficiency, thus increasing the legitimacy of the overall process.

³ Emily Hay, 'Winds of Chance, Confidentiality and International Commercial Arbitration' (2018) in Carlos Gonzalez-Bueno (ed), *40 under 40 International Arbitration* [3.3].

⁴ QMUL White & Case 2018 International Arbitration Survey: The Evolution of International Arbitration, 16.

I propose to discuss the interplay between transparency and efficiency by addressing three key topics. First, the publication of arbitral awards as a mechanism for improving transparency and efficiency. I will then consider areas in need of elucidation with respect to arbitral procedure, which is often only known to the participants of each arbitration. Finally, I will turn to arbitrators themselves and the need for more objective material on their capabilities, as efficiency is inherently linked with arbitrator performance. But prior to doing so, it is important to pause momentarily to understand the fundamental difference between commercial arbitration, which is generally between two private parties (albeit sometimes between private parties and states) on the one hand and ISDS on the other.

1.1 Differences between ISDS and ICA

The process that has been adopted to-date in ISDS has followed processes akin to those generally used in commercial arbitration and thus some of the criticisms which one sees in the ISDS debate are framed around procedures that are commonly adopted in international commercial arbitration.

Nevertheless, there are fundamental differences between the two forms of dispute resolution, based on their distinct purposes and audiences. Generally speaking, the fundamental concept of international commercial arbitration arises from party autonomy, having its very existence dependent upon the agreement of two or more parties to have their disputes resolved by independent arbitrators. Its purpose is to resolve disputes between private parties, arising out of commercial transactions.⁵ The private nature of this process remains even if the one of the parties is a state entity.

This form of arbitration differs from the juridical concept of ISDS, although there exist theories which emphasise some commonality of source of jurisdiction. Investor-state arbitration arises out of an investment treaty existing in public international law. The claimant is an investor while the respondent is a state. ISDS decisions therefore often have heavy public interest implications, due to questions of sovereignty, domestic issues, the expenditure of public funds and governmental decision-making processes. These are all features that militate towards greater transparency. As the former Chief

⁵ Chief Justice James Allsop, "Commercial and investor-state arbitration: The importance of recognising their differences" (Speech, ICCA Congress Sydney 2018, 16 April 2018) [21].

Justice of the Australian High Court observed, the significant impact of ISDS awards on national economies has "raised questions about the consistency, openness and impartiality of decisions made in ISDS arbitrations".⁶ This movement has paved the way for key developments such as the Mauritius Convention and the work undertaken by UNCITRAL Working Group III.

Many argue that different, but equally important public policy concerns exist in international commercial arbitration. There is judicial support for the notion that there may be circumstances in which "the public has a legitimate interest in knowing what has transpired in arbitration",⁷ a statement which was met with criticism at the time. Demands for greater transparency with respect to the arbitrators, procedure and awards have grown louder, with many believing that greater transparency will increase the legitimacy of the process. Others believe transparency is needed to assist in the development of the law, as arbitral awards have the potential to contribute to law-making by creating a soft form of precedent. In addition to this, I will be suggesting that transparency may promote greater efficiency in international commercial arbitration, addressing existing complaints of cost and delay. Whatever the motivation, it is clear that a shift towards greater transparency is needed in order to ensure arbitration remains the preferred method of international dispute resolution.

2. Arbitral awards

Somewhat ironically, the starting point in the shift toward transparency may be found at the end of the arbitration. By this I am referring to the arbitral award itself, the publication of which is said to be a useful mechanism to address the information deficit in international commercial arbitration. While the publication of awards has obvious benefits with respect to transparency, I am of the view that it will also increase the overall efficiency of the arbitration. This is because access to information about the decision-making process undertaken by the tribunal will allow the parties to make decisions, based on previous awards, that best suit their dispute and will facilitate its efficient disposition. It will also hold arbitrators accountable, incentivising them to render well-reasoned and timely awards. This topic begs consideration of two questions: first,

⁶ Chief Justice Robert French "Investor-State Dispute Settlement - A Cut Above the Courts?" (Speech, Supreme and Federal Court Judges' Conference, 9 July 2014). *Note*: Chief Justice French (as he then was) presided over the High Court, being the final court of appeal in Australia.

⁷ *Esso Australia Resources v Plowman* (1995) 183 CLR 10, 31 (Mason CJ).

what value can be derived from publishing awards?; and second, what has been achieved in this space to-date?

2.1 Why publish awards?

Awards are the product of the arbitral process. Their publication is therefore an important means of providing the public with insight into the decision-making process undertaken by the arbitrators, which is usually cloaked by confidentiality. Most awards detail the Tribunal's reasons, the facts, the parties' submissions and the evidence considered, thus providing users with a roadmap of the steps taken by the arbitrators to reach their decision. Awards also provide parties with the views of Tribunals on matters of law and practice, which might inform them in the process of predicting the outcome of disputes.

An oft-cited criticism of the confidentiality of international commercial arbitration is its impact on the development of the common law. Many areas of law are almost entirely dealt with by arbitration, of which the maritime and construction industries are prime examples. This issue has generated significant controversy in the international arbitration community and has prompted some to question the legitimacy of international commercial arbitration. In 2016, the Lord Chief Justice of England and Wales at the time contentiously described arbitration as being a "serious impediment" to the development of English law and called for a reform of award appeal mechanisms to allow English courts power to review questions of public importance decided in arbitration.⁸ His Lordship expressed his dissatisfaction toward the status quo where "great legal minds...retired from the bench, are giving awards and setting out principles which are known only to the cognoscenti".⁹ Without commenting on the correctness of his Lordship's proposed solution, it is clear that great benefit can be derived from accessing the awards in which arbitrators decide issues of law, related in many cases to commercial practices. In addition to contributing to legitimacy, the development of arbitral law will be a useful reference point for arbitrators, potentially reducing the time taken to render an award. Parties can use the law decided in earlier awards to understand their own prospects of success. They can devise their strategy effectively and deal with the process efficiently, knowing what has succeeded in previous

⁸ Lord Chief Justice John Thomas, "Developing commercial law through the courts: rebalancing the relationship between the courts and arbitration" (Bailli Lecture, 9 March 2016) 2, available at: <https://www.judiciary.gov.uk/wp-content/uploads/2016/03/lcj-speech-bailli-lecture-20160309.pdf>.

⁹ Ibid [16].

arbitrations, rather than floundering in the dark trying to run a case, the outcome of which is unpredictable and uncertain.

Arbitration is not always as simple as interpreting contracts and applying the facts to reach a conclusion on the dispute. It will often require the development of relevant principles, commercial terms to be fixed for the future, and applying those principles to the contract in question, in conjunction with the facts.¹⁰ As a result, arbitrators have decided issues at the forefront of many areas of commercial activity (for example infrastructure, shipping, commodities, resources, insurance, and capital markets), which could inform the way in which parties conduct their commercial activities in the future.

Although awards are not subject to a system of common law precedent, the decisions of arbitral tribunals may certainly have persuasive value insofar as they can usefully contribute to the development of law in a range of areas, and they can act as a reference point for law-makers and parties alike. Take for example, the ICC Dow Chemical award, a leading decision that recognised the group of companies doctrine, which was upheld by French courts.¹¹

Substantive issues may be clarified by the publication of awards, as arbitrators are often tasked with deciding questions of law, ranging from novel questions in particular factual scenarios to substantial issues of law.¹² One industry where commercial arbitration remains the preferred method of dispute resolution is construction, and thus arbitrators are well-positioned to contribute to the development of law in this area. Awards dealing with topical issues such as good faith, penalties or liquidated damages provide guidance for construction law decision-makers. Had these cases been decided by national courts, they would be regarded as major developments in the law. Arbitrators are also uniquely placed to make decisions on arbitration law issues such as jurisdiction questions, choice of law and arbitrability. Accordingly, if these awards were systemically published, greater guidance could be provided to arbitrators, parties and national courts alike.

The award may also provide suggestions for procedural options. The majority of arbitral awards contain a procedural history, giving insight into the procedural issues raised and the arbitrator's decision on these issues. Decisions on costs and interest are also

¹⁰ Doug Jones, 'Arbitrators as Law Makers' (2017) 6(2) *Indian Journal of Arbitration Law*, 3.

¹¹ *Dow Chemical France, The Dow Chemical Company and others v. Isover Saint Gobain*, *Zwischenschiedsspruch v. 23.09.1982*, ICC Case No. 4131, Y. Comm. Arb. 1984, 131. See decision of Paris Court of Appeal, 21 October 1983, Rev. Arb. 1984, p. 98.

¹² Jones (n 10), 1. See Dolores Bentolia, 'Arbitrators as Law Makers' 1 (2017).

published, which may give future tribunals guidance on contested questions such as the calculation of post-award interest. These procedural questions arise time and time again in arbitrations, and thus, it is in the interests of transparency and efficiency to have them aired in the public arena. Later on, these questions can be dealt with quickly, assisted by reference to earlier arbitral awards.

The publication of awards is therefore an important step in increasing the legitimacy of international commercial arbitration. However, the question is whether the publication of awards effectively promotes greater transparency *and efficiency* in international commercial arbitration?

The information that can be gleaned from awards can also be used to address longstanding challenges including time, cost and efficiency. Sometimes the efficiency of an arbitration is hindered by diligent advocates who, in seeking to advance their client's case persist with submissions that are marginally relevant or peripheral to the main issues in dispute. If awards are increasingly made available to the public, this may change. An informed party could rely on previous awards to ascertain which lines of argument have been most successful, and deploy those that are persuasive and relevantly address the issues genuinely in dispute. The analysis of previous decisions in awards will allow parties to see what arguments have succeeded and how issues have been dealt with. Not only will this make the party's case far more persuasive, but it will increase the efficiency of the arbitration, reducing cost and time. Further, access to previous awards will provide parties with insight into arbitrators' case management skills (including their level of proactiveness) and an understanding of how they dealt with procedural and substantive issues.¹³ As I will later elaborate on, these insights will allow users to make an informed decision in selecting their arbitrator - a player who will ultimately prove critical in enabling efficiency.

Increased transparency in respect of awards provides greater certainty and predictability for parties. This will also increase the efficiency and legitimacy of the process as information about the manner and quality of an arbitrator's decision-making will be publicly accessible. The more information available about an arbitrator's capabilities, the better equipped parties are to appoint arbitrators that are well placed to fairly and efficiently dispose of their dispute.

¹³ QMUL White & Case (n 4) 21.

For these reasons, in my view, the publication of arbitral awards is one method that will address this issue and contribute to the overall efficiency and legitimacy of the process.

2.2 Developments in publication of awards

That being said, there have been some developments with respect to the publication of awards that have paved the way for further reform. This is a topic that has generated significant discussion, and while no panacea has yet emerged insofar as the systematic publication of awards is concerned, due consideration has been given to this important topic.

Commentators are divided on how to best increase transparency through publication, with many calling for the organised publication of arbitral awards by institutions, while some go further and say the states should publish awards and enshrine such a principle into their national law.¹⁴ Irrespective of the school of thought to which you subscribe, institutions are undeniably a key player in this discussion. Generally, arbitral institutions have taken up the important role of promoting efficiency and transparency in international commercial arbitration. The legitimacy of the arbitral process is aided by developments pioneered by these institutions, particularly in relation to the publication of awards.

I will briefly cover some of the responses of institutions to the legitimacy “crisis”, which vary across each institution. The movement to publish awards has most comprehensively been implemented by the ICC. In addition to articles and statistical reports, the ICC has published 635 awards and a number of procedural decisions on its Dispute Resolution Library.¹⁵ The institution introduced changes in December 2018 providing for the publication of awards on an opt-out basis, in the hope that this will increase the dissemination of information on international commercial arbitration over time.¹⁶ Although these decisions are published several years after the arbitration and are only available to ICC Digital Library subscribers, they serve as an important reference point for users seeking to understand the process undertaken by arbitrators.

¹⁴ Paul Comrie-Thomson, 'A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards' (2017) 34 *Journal of International Arbitration*, 275-302.

¹⁵ 635 awards as at September 2019, according to the International Chamber of Commerce Library https://library.iccwbo.org/dr.htm?AGENT=ICC_HQ&AGENT=ICC_HQ

¹⁶ Ibid.

While the LCIA does not publish awards, even in redacted form, it may publish abstracts of decisions by the LCIA Court on challenges to arbitrators and caseload statistics.¹⁷ In a similar vein, anonymised decisions on arbitrator challenges are also published by the SCC. Here in Seoul, the KCAB have taken steps to promote efficiency and transparency by implementing provisions in the 2016 KCAB Rules that allow the KCAB Secretariat to publish redacted arbitral awards, if the parties do not explicitly object to such disclosure.¹⁸

The SIAC has, for some time, indicated to newly appointed arbitrators that it intends to publish awards and has asked them to indicate whether they consent to having their name noted in the published award.

The award scrutiny process, undertaken by leading institutions including the ICC, SIAC, KCAB, and HKIAC deserves mention. This process increases the legitimacy and efficiency of the arbitral process. The confidential review undertaken by the institution ensures that arbitrators conduct the arbitration and render an award to a certain standard, knowing that it will be rigorously reviewed by their peers at leading arbitral institutions.¹⁹

The publication of arbitral awards is commonplace in investor-state arbitration. The parties to an ICSID arbitration may agree to publish the award on the ICSID website. If the parties do not agree, then ICSID will publish excerpts of the legal reasoning contained in the award and other case material (with the parties' consent). Evidently, even absent party agreement to publish the award, information can be accessed that gives interested third parties access to important legal reasoning. The *UNCITRAL Rules on Transparency*²⁰ enhance legitimacy by requiring the publication of documents,²¹ open hearings²² and by allowing third parties to file and make submissions.²³ Perhaps similar transparency practices can be adopted in international commercial arbitration, with necessary changes to account for the distinct purposes and provenance of ISDS, and international commercial arbitration.

¹⁷ London Court of International Arbitration, 'LCIA Notes for Parties', 19. *Confidentiality and Publication of Awards*, available at: <https://www.lcia.org//adr-services/lcia-notes-for-parties.aspx#19>.

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¹⁸ KCAB Rules 2016 Art 57(3).

¹⁹ Walker (n 2) 9.

²⁰ UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (New York, 1 April 2014).

²¹ Ibid, Article 3.

²² Ibid, Article 6.

²³ Ibid, Article 4-5.

It is clear that there is no simple solution to the legitimacy challenges that have flowed from investor-state arbitration into international commercial arbitration. A careful balance must be struck between the private interests of parties seeking confidentiality and the public interest in seeing increased transparency with respect to the process, arbitral awards and the arbitrators themselves. Confidentiality, not to be confused with privacy, varies across jurisdictions. In many, including the US and Sweden, the presumption that confidentiality in international commercial arbitration applies as a blanket rule has come under fire.²⁴ Regardless of the outcome of this continuing debate, it is clear that confidentiality remains important to users. This is reflected in the results of the 2018 QMUL survey on international arbitration, with the majority of respondents saying confidentiality should apply on an opt-out basis.²⁵ With this in mind, arbitration must respond to calls for greater transparency, whilst still preserving the features that make it a desirable form of dispute resolution. In finding this balance, it should be noted that securing legitimacy does not require a blanket approach to transparency: measures can still be taken to protect the legitimate needs of parties for confidentiality, including preserving it intact when this is agreed, redacting sensitive information or protecting the identities of the parties where necessary.

Evidently, published awards can offer persuasive value and may address criticisms that arbitration undermines the development of law. While the trend is gaining momentum, further work is needed to determine the best path forward. For the publication of awards to achieve its desired effect, support from the parties, institutions and arbitrators will be necessary. It remains to be seen whether parties will encourage further transparency by consenting to the systematic publication of awards. Greater efforts from arbitral institutions will also be required to devise a uniform approach to publication across institutions. If some of the larger institutions engage in regular publication of redacted awards, many of the smaller, regional institutions will do so too in order to remain competitive. Finally, the publication of awards poses many challenges in balancing the confidentiality required by the parties and the need to release an award of sufficient value to be a soft form of precedent.²⁶ Due consideration must therefore be given to the manner in which publication occurs. By making these decisions publicly

²⁴ Hay (n 3).

²⁵ QMUL White & Case (n 4), 3: "87% of respondents believe that confidentiality in international commercial arbitration is of importance. Most respondents think that confidentiality should be an opt-out, rather than an opt-in, feature."

²⁶ Doug Jones, 'Confidentiality: A Slippery Slope' (Speech, *Australian Disputes Centre Presentation* 2017).

available and attaching to the award the names of arbitrators and counsel, efficiency is encouraged. These developments will also serve to enhance the quality of arbitral awards, as arbitrators are incentivised to handle the parties' dispute effectively and efficiently, in anticipation that the award will be published. As the database of published awards grows, there will emerge a benchmark or standard against which new awards can be compared, increasing the overall quality of the process.

3. Procedure

The publication of arbitral awards alone, while important, is not enough to address the challenges of transparency and efficiency. No single document, including the award, provides a roadmap or toolbox for procedure of international commercial arbitration. This is in stark contrast to domestic court proceedings, in which court procedure is usually clearly defined by a uniform set of rules. The flexibility of procedure in arbitration can, if skilfully handled, ensure that a dispute is resolved both fairly and efficiently, and indeed is a quality of arbitration that parties value highly. In the 2018 QMUL survey, flexibility was ranked the third most valuable characteristic of arbitration.²⁷ This flexibility provides scope for innovation, as arbitrators can create unique procedures tailored on a case-by-case basis. However, confidentiality is an equally important tenet in arbitration and a similar number of respondents placed confidentiality and privacy as their most valuable characteristic of arbitration.²⁸ The challenge posed by confidentiality is that the procedural innovations developed for one case are inaccessible to the next. While confidentiality is an important tenet, it should not operate to prevent the dissemination of procedural innovations which have proved successful in efficiently resolving disputes. Drawing on the framework provided by existing soft law instruments, arbitrators still need to fill in the gaps and tailor the procedure to the dispute. Greater transparency is needed with respect to this process, as increasingly efficient procedure cannot continue to benefit all users if innovation is occurring behind closed doors.

3.1 Soft law

It is instructive to first consider the major soft law instruments used by arbitrators as a starting point for setting the procedure. The UNCITRAL Notes on Organising Arbitral

²⁷ QMUL White & Case (n 4), 7.

²⁸ Ibid.

Proceedings is an exceptionally useful “toolbox”, providing an array of options for consideration.²⁹ There is also a developing array of soft law instruments that have, to some degree, elucidated the arbitration process. Soft law guidelines continue to inform the development of best practice and can aid in the development of a procedural framework. In the interests of brevity, I will discuss two: the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration (“IBA Rules”),³⁰ as well as the recently developed Rules of the Efficient Conduct of Proceedings in International Arbitration (“Prague Rules”).³¹ Some of the respective procedural features offered by each will be highlighted, as well as areas requiring further reform.

International commercial arbitration provides a forum for resolving disputes between parties from around the globe. In addition to the physical geography which often separates parties and lawyers, so too are they separated by legal geography. The particular domestic legal history and culture from which participants and practitioners come often informs their procedural approaches to international arbitration. One broad distinction in this field is between the common law system and the civil law system. While the common law traditionally favours an adversarial system, the civil law prefers, generally, an inquisitorial approach. In order to craft a successful arbitral procedure, attempts are often made to form an amalgam of common law and civil law procedural traditions, drawing together the best aspects of both systems.

The IBA Rules 1999, as revised in 2010, are the commonly adopted benchmark for dealing with evidence in arbitral proceedings. The IBA Rules attempt to strike a balance between the common law and civil law traditions. They affirm the Tribunal's broad discretion to decide procedural matters but go some way in providing predictability in the taking of evidence. The IBA Rules provide mechanisms for the presentation of documents, the handling of lay and expert evidence, as well as the conduct of evidentiary hearings.³² The 2010 revisions have modernised the rules and enhanced the efficiency of procedure, particularly making changes which account for advances in technology.

²⁹ United Nations Commission on International Trade Law, Notes on Organising Arbitral Proceedings (2016).

³⁰ International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010) (“IBA Rules”).

³¹ Prague Rules on the Efficient Conduct of Proceedings in International Arbitration (2018) (“Prague Rules”).

³² Prague Rules, Note from the Working Group, 2.

There has, however, been criticism of the absence of soft law instruments which offer civil law procedural options. Historically, this may have been the result of the tendency for common law practitioners to form the majority of those practicing in the field of international commercial arbitration. However, with the growing use in the Asia Pacific region of arbitration between participants both from civil law and common law countries, there has been an increasing demand for more arbitral procedural options suited to the traditions of their participants. The civil code, inspired by Roman law principles,³³ has survived since Napoleon's time to become the most widely practised system of law. Indeed, the civil law system represents over 60% of the world's population.³⁴ The civil law tradition is proudly practised here in Asia, in some of the largest economies in the world, including Korea, Japan and China.

Against this backdrop, a working group of predominantly civil law lawyers conducted a survey on procedural traditions in international arbitration in their respective countries, in order to develop soft law guidelines on arbitral procedure, oriented on the civil law tradition.³⁵ Following a rigorous review process in which the draft rules were debated at conferences held around the world, on 14 December 2018, the working group released the Prague Rules.³⁶ The Prague Rules provide a procedural system with a range of tools derived from the inquisitorial system adopted in the civil law. The Prague Rules actively encourage the Tribunal to adopt a proactive approach to case management.³⁷ In line with the inquisitorial approach, greater powers of case management are granted. In particular, the Prague Rules provide greater scope for the Tribunal to provide preliminary views on the issues in dispute,³⁸ and greater powers for the Tribunal to assist the parties to reach an amicable settlement, subject to objection by either party.³⁹ The Prague Rules further recommend the use of tribunal-appointed experts rather than party-appointed experts.⁴⁰

These are just some of the many respects in which the Prague Rules differ from the IBA Rules and standard international arbitral practice more broadly. However, the way for arbitrators to get the most from these soft law instruments is not by considering them in competition with each other but rather as complementary to one another. Each

³³ David Bell, *Napoleon: a Concise Biography* (Oxford University Press, 2015) 45.

³⁴ University of Ottawa, *Percentage of the World Population, Civil Law and Common Law Systems*, available at: <http://www.juriglobe.ca/eng/syst-demo/tableau-dcivil-claw.php>

³⁵ Prague Rules, Note from the Working Group, 2.

³⁶ *Ibid.*

³⁷ *Ibid* Art 3.1.

³⁸ *Ibid* Art 2.4(e).

³⁹ *Ibid* Art 9.

⁴⁰ *Ibid* Art 6.

arbitration presents its own set of unique procedural problems calling for the adoption of a bespoke approach to address the real issues of the dispute as efficiently as possible. When tailoring procedure, arbitrators should make use of the wide array of procedural tools at their disposal.

It is without doubt that the present range of soft law instruments has improved arbitral academic discourse on procedure. The arbitrator's toolkit grows with the addition of new materials, which both add to the currently existing range of procedural tools as well as remove those which are no longer functional. In order to move from a soft law guideline to a workable procedure, significant work must be done by arbitrators and the parties. Much of this crucial work remains largely opaque requiring skilful handling to ensure that the dispute is resolved efficiently, through a process that is often unknown to the uninitiated, and sometimes eschewed by them. Taking document production as a case study, I will discuss areas of case management where the need for transparency is at its greatest, demanding a wider dissemination of information to improve the efficiency of arbitration.

3.2 Case study: Document production

An example of where greater transparency would result in greater efficiency is in the area of document production. Document production is a procedure borne out of the common law, and is not common practice in the civil law system.⁴¹ The distinction between the two legal systems is reflected in the IBA and Prague Rules: the IBA Rules demonstrating a more common law approach, and the Prague Rules tending towards civil law practices. The problem is that neither instrument performs adequately in the uniquely hybrid legal approach in arbitration, thus leaving it to arbitrators to develop their own innovations to arbitral procedure.

The IBA Rules, on the one hand, provide that the admissibility of evidence is to be determined with reference to the relevance and materiality of the evidence which the party seeks to produce.⁴² While these rules of evidence have attempted to strike a balance between the wider approach to disclosure adopted in the common law and the generally narrower approach in civil law, in their application, document production tends

⁴¹ ALI/UNIDROIT, *Principles of Transnational Civil Procedure* 12-13 (2004) (proposed final draft of 9 March 2004); Claude Reymond, 'Civil Law and Common Law: Which Is the Most Inquisitorial? A Civil Lawyer's Response' (1989) 5(4) *Arbitration International* 357.

⁴² IBA Rules, art 9.

to be closer to that available at common law.⁴³ However, if it is not carefully handled, time delays and massive cost expenditure will result. This is perhaps a consequence of document production being of common law origin, and a challenge with which the common law world has attempted to grapple over the years.

It has further become usual practice to prescribe the use of a "Redfern Schedule", with the aim to concisely summarise document requests to narrow the disputed issues between the parties as to what should be produced and why.⁴⁴ However, this approach is often fraught with challenges.

The Prague Rules, on the other hand, adopting civil law procedural approaches, discourage document production. Under the inquisitorial system, disputes are predominately controlled by the court. Accordingly the ability for parties to demand documents from each other or third parties is virtually non-existent.⁴⁵ Where document production is necessary, the Prague Rules provide that document production should be addressed at the first Case Management Conference ("CMC"). In principle, CMCs offer a real opportunity to resolve issues much more expeditiously, and at an early stage, preventing the issue from escalating. However, this presents to the Tribunal the same temporal issue as that posed by the Redfern Schedule: that the pleadings to which these documents relate has not yet been ventilated before the Tribunal.

Arbitrators, with the challenge of having to manage parties and counsel from both civil and common law frameworks, must therefore develop their own innovative document production techniques to ensure efficiency in arbitral procedure. In my experience, short, focused hearings and teleconferences (rather than having people fly from all over the world) seem to be workable mechanisms to enhance existing practice in document production.

Despite these techniques working with some success in my practice, I am only able to speak to my own experience, having limited knowledge of the bespoke practices undertaken by other arbitrators. In the same respect, my practices will only be available to those who sit with me or who read my articles or attend events at which I may be speaking. The comparative lack of open discussion of arbitrator-driven procedural

⁴³ Prague Rules, Working Group Note, 2.

⁴⁴ Blackaby et al. (eds.), *Redfern and Hunter on International Arbitration* (Oxford University Press, 5th ed. 2009) 6.113.

⁴⁵ Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2nd ed, 2014) 2345; Borris, Common Law and Civil Law: Fundamental Differences and Their Impact on Arbitration, 2 *Arb. & Disp. Res. L.J.* 92 (1995); Rubino-Sammartano, Rules of Evidence in International Arbitration: A Need for Discipline and Harmonization, 3(2) *J. Int'l Arb.* 87 (1986); Triebel, An Outline of the Swiss/German Rules of Civil Procedure and Practice Relating to Evidence, 47 *Arb.* 221 (1982).

innovations is a hindrance to the development of arbitral procedure and indicative of a need for greater transparency. And, as a result, making much more of this information publicly available to members of the arbitral community will ultimately increase efficiency in arbitral procedure. Most obviously this can be promoted by institutions through suggested procedures always emphasising the need for the maintenance of flexibility.

3.3 Ongoing reform

For arbitral best practice to remain flexible and efficient, close attention should be paid to domestic procedural reforms. One important distinction between common law and civil law traditions is the way in which the two procedures develop. In civil law systems, legal procedure is often debated at the highest academic levels, and it is from this academic level that procedural innovation occurs. In contrast, common law practice tends to favour practitioner-led procedural developments. Arbitrators should learn from both systems, and in doing so, they may find valuable techniques to add to their toolbox of procedural options.

The Asia-Pacific region continues to enjoy some of the highest levels of economic growth. Alongside this there has been a great deal of development in the domestic commercial legal practices in these countries. Domestic legal procedures have been forced to develop to meet the challenges of massive growth in economic activity within the region. Arbitrators deciding disputes originating in the region must stay abreast of these developments in order to deploy procedures which accord with the wishes of the parties and are most efficient in the circumstances.

A feature of these is the emergence of international commercial courts. Many of these courts provide information about their processes by making judgments publicly available online, as well as procedural guides, practice notes and of course open court proceedings. The Singapore International Commercial Court is demonstrating real leadership in this area and as is China with the relatively recent introduction of the China International Commercial Court. On the SICC website,⁴⁶ users have access to extensive information on the procedures adopted by the court, as contained in the court

⁴⁶ Singapore International Commercial Court, *Guide to the SICC*, available at: <https://www.sicc.gov.sg/guide-to-the-sicc>

rules, the SICC procedural guide,⁴⁷ and court forms which provide information on court fees and services. These features provide users with an understanding of the processes used by the courts managing a case to its conclusion. The effect of this transparency is that it gives users assurance of the overall quality of international commercial dispute resolution, providing predictability for parties and accountability for judges insofar as their decisions are capable of scrutiny by the public. Although complementary to international commercial arbitration, the development of international commercial courts presents a challenge for international arbitration to learn from these developments, and to increase the transparency of its own procedural innovations.

4. Arbitrators

Unlike domestic courts or some international tribunals, arbitration does not have a fixed pool of decision-makers to whom disputes are assigned.⁴⁸ Instead, arbitration presents the opportunity for parties to have their say on who should constitute the arbitral tribunal. This choice has long formed an essential feature of arbitration. In *The Illiad*, Homer describes an 8th-century BC dispute regarding a blood debt in which the parties made a mutual choice as to a man "versed in the law" to preside over a tribunal of elders, to render reasoned oral opinions.⁴⁹ The efficiency and legitimacy of arbitration ultimately depends on the performance of arbitrators. Therefore, the availability of information upon which parties make the decision to appoint a certain arbitrator is of crucial importance. It is certainly true that the degree of transparency in relation to the quality of arbitrators has greatly increased. Indeed, merely purporting to be "versed in the law" is unlikely to yield a great number of appointments in the contemporary market place. Despite these developments, there is still insufficient objective material on arbitrators, particularly on their quality and efficiency. I will briefly touch on the information that is currently available and will then discuss the challenges that remain within the arbitrator appointment process.

⁴⁷ Singapore International Commercial Court, *SICC Procedural Guide*, available at: [https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-procedural-guide-\(20190724\)-\(pdf\).pdf](https://www.sicc.gov.sg/docs/default-source/legislation-rules-pd/sicc-procedural-guide-(20190724)-(pdf).pdf)

⁴⁸ Born (n 45) 1364.

⁴⁹ Nicholas Hammond, 'Arbitration in Ancient Greece' (1985) 1(2) *Arbitration International* 188 (citing Homer, *The Iliad* XVIII 497-508).

4.1 Information on arbitrators

There has been a massive increase in the availability of information on arbitrators, which is a step in the right direction. It takes three forms. First, there is the information provided directly by the arbitrator through publications, presentations delivered at conferences and information made available on the arbitrator's website(s). Second, there are third-party sources such as commercial directories and arbitral institution panel lists. Third, there is information arising from referrals and through word-of-mouth exchanges in the arbitral community.

There has been a substantial increase in the amount of information provided by third-parties, through commercial directories such as Who's Who Legal Arbitration⁵⁰ and Best Lawyers.⁵¹ There are also paid subscription arbitrator tools such as the Kluwer Law International "Arbitrator Tool" and the GAR "Arbitrator's Research Tool" which rely to a lesser degree on information provided by arbitrators, and provide summaries of information on arbitrators' recent work.

However, while much has been done to improve access to information, there is a paucity of objective material regarding the performance of arbitrators. Many of the metrics listed do not give a comprehensive guide as to the quality and efficiency of arbitrators.

The mechanisms introduced to increase the available information on arbitrators have achieved varying degrees of success. Institutions have attempted to address this issue through various means. One instance of this is the requirement that arbitrators provide institutions with information on their availability. However, this is raw data and may not provide meaningful insight into the ability of arbitrators to effectively deal with the challenges they will face over the course of their hearings. As has frequently been remarked, if you want something done (and done quickly), you should ask a busy person.⁵² It seems that this principle is not given weight by statistics on arbitrator availability.

⁵⁰ Who's Who Legal, see: <http://whoswholegal.com/news/analysis/article/34252/arbitration-2018-analysis/>

⁵¹ Best Lawyers, see: <https://www.bestlawyers.com/canada/international-arbitration>

⁵² Quote attributed to various people, including Benjamin Franklin, Elbert Hubbard and Lucille Ball (Oxford Dictionary of Proverbs (6 ed.)).

4.2 Appointment process

In virtually all jurisdictions, there are obligations on arbitrators to exercise independence and impartiality. This obligation is referred to in both the New York Convention⁵³ and the UNCITRAL Model Law.⁵⁴ One issue bedeviling ISDS is perceived bias in party-appointed arbitrators. There has been a debate run in the ISDS context, by both Jan Paulsson and Albert Jan Van Den Berg, that party-appointed arbitrators almost always decide in favour of the party who appointed them. In 2010, Paulsson argued that "unilateral appointments are inconsistent with the fundamental premise of arbitration: mutual confidence in arbitrators".⁵⁵ These sentiments, as shared by Van Den Berg,⁵⁶ have been reinvigorated by growing levels of data which show the tendency for party-appointed arbitrators to find in favour of their appointor in the context of investor-state arbitration.⁵⁷

This debate has failed to distinguish international commercial arbitration. While it is certainly true that partiality remains a real and central concern for ISDS, in the international commercial arbitration sphere, this issue does not arise to the same degree. Certainly, doubts regarding the legitimacy of international commercial arbitration do not exist to the same degree as they do in the ISDS context. Instead, it remains of fundamental importance that parties retain the ability to choose their arbitrators, with the chair either selected by them or by an institution. The centrality of this right to party autonomy with regard to the appointment of arbitrators is demonstrated by Article 11 of the Model Law.⁵⁸ Results from the 2018 QMUL survey provide empirical support for the importance of this choice. The survey identified the ability to select arbitrators as respondents' fourth most-valued feature of international arbitration.⁵⁹

⁵³ The New York Convention indirectly addresses the subject in Articles II(1), II(3) and V(1)(d); see Born, (n 45) 1762.

⁵⁴ Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, GA Res 40/72, UN GAOR, 40th sess, 112th plen mtg, Supp No 17, UN Doc (A/40/17) (21 June 1985) (amended on 7 July 2006), Art 12.

⁵⁵ Jan Paulsson, 'Moral Hazard in International Dispute Resolution' (Lecture, University of Miami School of Law, 29 April 2010).

⁵⁶ Albert Jan Van Den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', in M. Arsanjani et al. (eds.), c.f. Brower & Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson—van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*.

⁵⁷ Anton Strezhnev, "Detecting Bias in International Investment Arbitration" (Speech, 57th Annual Convention of the International Studies Association, Atlanta, Georgia, 16 March 2016).

⁵⁸ UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006 23 (2008), Art 11.

⁵⁹ QMUL White & Case (n 4) 9.

In light of the debate surrounding ISDS, discussion of alternative mechanisms for appointing arbitrators has arisen in international commercial arbitration. There does exist with the ICDR's AAA, an alternative appointment mechanism, in which all of the members of the Tribunal are proposed by the institution, and are appointed following a process of consideration by the parties. While parties retain the right to agree to an alternative mechanism for the appointment of arbitrators as provided by Article 11 of the Model Law,⁶⁰ this approach does not seem to be one which has found favor in the larger arbitration community.

Thus, the devising of systems for institutional appointment, replacing the party-appointed model, does not seem to be a burning issue in the minds of users.

The present challenge is thus ensuring that the best people are appointed to the Tribunal under the existing system. The best appointees will contribute to the fairness and efficiency of the process, and therefore also to its continuing legitimacy. It is my view that more objective information must be made available, to increase transparency as to the quality and efficiency of arbitrators. This will ensure that disputes are handled by the appropriate decision-makers. Further transparency will also act as a catalyst for efficiency, as ultimately, the efficiency of an arbitral tribunal turns on the quality of its arbitrators.

5. Conclusion

The legitimacy challenge presents a unique opportunity for international commercial arbitration to achieve greater efficiency. This has been the trend in recent times with increasing levels of transparency in relation to arbitral awards, arbitral procedure and the arbitrators themselves. Parties, equipped with more information than ever before, can then make informed decisions on the seat, institution or arbitrator, that allow them to efficiently resolve their dispute. Although steps have been taken, further work must be done to ensure efficiency and legitimacy are retained.

Transparency must be balanced against the confidentiality of arbitral proceedings. As Paulsson comments, "arbitration is not a spectator sport"⁶¹ and many users select

⁶⁰ UNCITRAL, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006 23 (2008), Art 11.

⁶¹ Jan Paulsson, 'The Decision of the High Court of Australia in *Esso/BHP v Plowman*' (1995) *Arbitration International* 11.

arbitration as a form of dispute resolution due to its privacy and confidentiality. However, these important tenets may still be preserved, notwithstanding the movement towards transparency. Transparency and confidentiality are not at odds with one another. They are two distinct concepts that sit on a spectrum.⁶² It is therefore critical that a balance between both is struck, to preserve the attractiveness of arbitration and address the current legitimacy crisis.

Ultimately, improving transparency, and therefore the efficiency of arbitration, is contingent upon the elucidation of information only where it is appropriate to do so with the consent of the parties. There are important developments which should be encouraged, including: i) the publication of arbitral awards, ii) illuminating arbitral procedure and iii) improving access to objective information on arbitrator performance. It is my belief that transparency will prove to be useful in improving the legitimacy and efficiency of international commercial arbitration, ensuring that it remains the preferred method of international dispute resolution in the future.

⁶² Jones (n 26) 16.