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International Arbitration Experts Discuss Whether Arbitration Is Efficient Dispute Resolution

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Commentary

International Arbitration Experts Discuss Whether Arbitration Is Efficient Dispute Resolution

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on whether arbitration is efficient dispute resolution. We would like to thank the following individuals for sharing their thoughts on this important issue.

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Mealey's: Arbitration's aim is efficient dispute resolution. Do you feel it is currently achieving that goal? Why or why not?

Spence and Rockall: The question of efficiency in international arbitration is a subject of perpetual discussion among arbitration practitioners, commentators and academics alike.

That discussion starts with the identification of the perceived key metrics of efficiency such as time and cost. This is usually followed by a weighting of those metrics against one another, typically by reference to statistics and by comparison with court litigation. It then often proceeds to conclude that arbitration has become bogged down in procedure, making it too expensive and time consuming, and proposes ways in which it might be streamlined or improved.

Such proposals tend to focus on fine-tuning the drafting of arbitration clauses, enhancing a tribunal's case management powers, or somehow limiting the length and scope of proceedings.

While there is no doubt immense value in striving for further procedural efficiency, such proposals are unlikely to result in anything more than marginal gains.

Ultimately, the most fundamental measure of efficiency in any dispute resolution procedure is not '*how long it takes*' or '*how much it costs*'. Rather, it is '*how likely is it to resolve a dispute*'.

To illustrate this, take two hypothetical procedures:

Procedure 1: a procedure which takes one day and costs \$1 but results in an award which is difficult or impossible to enforce.

Procedure 2: a procedure which takes one month and costs \$1,000 and results in an enforceable award.

The fact that **Procedure 1** is both cheaper and less time consuming than **Procedure 2** is of little importance where it falls short in terms of certainty and enforceability. It is therefore unsurprising that parties

enforceability. It is therefore unsurprising that parties give most weight to those factors when asked about their reasons for selecting arbitration over litigation.

The New York Convention, which obliges its 173 contracting states to recognise and enforce arbitral awards, has to a large extent solved the problem of enforceability, making it arguably the most important and successful United Nations treaty in the area of international trade law. Its effect has been to promote the rule of law worldwide, facilitate international trade, and thus lift many millions out of poverty.

In that context, while marginal efficiency gains are always worth seeking, we should not lose sight of the immense impact which international arbitration's existing, inherent efficiency has already achieved.

Er: Arbitration is perhaps the most common method of alternative dispute resolution for domestic and international disputes—this by virtue of the confidentiality, flexibility, speed and finality associated with it. Impartiality is another benefit of arbitration as a form of dispute resolution, especially in cases involving international investments.

Despite all its advantages, the inefficiencies of arbitration developed throughout the years should not be overlooked. When it comes to international arbitration, this begins with cost. Simply stated, the expense of international arbitration drives many litigants to avoid the process even where they have a contractual right to it. Of course, third-party fundings—more popular today than ever before—may mitigate this issue but in many cases, the efficiencies of arbitration diminish due to cost.

Beyond expense, the duration of large-dollar proceedings can be problematic as well. In fact, many cases—mainly those with more than \$100 million at stake—are oftentimes no shorter than litigation fought out in court. As such, when considering the possible duration of certain arbitrations, together with the finality of the awards, parties may be moved to shy away from the forum. This is particularly true even when confidentiality is of concern because many secrets can be revealed when enforcing arbitration awards.

The U.S. Supreme Court's ruling in *ZF Automotive U.S., Inc. v. Luxshare, Ltd.* resulted in more challenges

for arbitration practitioners. In the wake of this 2022 decision, 28 U.S.C. § 1782 does not apply to private international tribunals, leaving parties in the U.S. to rely on state arbitration statutes and state courts to seek discovery.

Notwithstanding all of the above, international arbitration remains the most efficient platform for parties to seek resolution of their claims. Sure, arbitration is not without its issues, but none of them would seem to outweigh the problems and concerns faced by litigants in court.

Crncevic: One long-touted advantage of resolving disputes through arbitration is its “efficiency.” However, this is rarely meant as an objective efficiency but rather a comparative one—arbitration is more efficient than litigation.

Often, the “arbitration versus litigation” efficiency debate is reduced to a generalization that arbitration is more efficient because it is a faster and less costly process. Query whether this comparative efficiency still holds true (especially regarding costliness). However, this generalization also misses at least three key aspects that continue to make arbitration (more) efficient.

First, arbitration remains a “substance over form” process. By choosing arbitration, commercial parties can streamline the process for resolving their disputes and focus on the merits of disputes more quickly than in litigation. In the United States, arbitrating parties avoid the often convoluted (and sometimes conflicting) civil procedure rules that govern US federal and state courts. In addition, arbitration typically narrows the expansive scope of discovery that overwhelms litigants in US courts and can cause parties to spend exorbitant sums before getting to the root of their dispute. Arbitration generally avoids the procedural gamesmanship that pervades US litigation and too often mires litigants in years of expensive motion practice, discovery, and procedure without meaningfully advancing the goal of resolving the dispute (except perhaps by a war of attrition on costs).

Second, arbitration provides predictability of process. For clients who have business dealings worldwide, arbitration can provide predictability including where the arbitration will be held, what law will apply, and who will decide the dispute under what arbitral rules.

On the other hand, exposure to courts in different jurisdictions can introduce uncertainty in how a dispute will be handled, which law may apply, and who will decide the dispute. Predictability in dispute resolution has its own efficiency—by reducing the likelihood of forum shopping and procedural skirmishing across jurisdictions.

Third, arbitration generally leads to finality more quickly and sets up better prospects for enforcement. Typically, when a tribunal renders an arbitral award, that award is final and enforceable without the prospect of a lengthy appeals procedure as for a court judgment. Also, an arbitral award has greater certainty of enforcement globally through the New York Convention than a court judgment does, giving parties more options to recoup damages in case of noncompliance with the arbitral award.

Rincón and Jofré: Arbitration is widely regarded as a cost efficient and streamlined dispute resolution mechanism. Its effectiveness, however, is subject to debate. Proponents argue that a key strength of arbitration lies in the ability for parties to customize proceedings, choose expert arbitrators, and ensure confidentiality. Arbitration speeds up resolutions, saving parties from lengthy court battles and high legal costs, especially in commercial cases that require specialized industry knowledge.

Despite arbitration's many advantages, a primary concern with the process is a lack of uniformity and consistency across arbitral decisions: similar disputes could result in vastly different arbitral awards. Moreover, while arbitration is known for generally being cost-effective, arbitrations can generate substantial legal fees. Lastly, critics note that the confidentiality of the arbitral process could conceal unfair practices or biased decisions, which can undermine the integrity of the process and the legitimacy of decisions reached.

Various initiatives have been introduced to address these concerns, more broadly in the investor-state dispute resolution front. For example, new Arbitration Rules from the International Centre for Settlement of Investment Disputes (ICSID), introduced in 2022, provided greater transparency in arbitration proceedings, allowing parties to authorize ICSID to publicly disclose the award or final decision in a post-award remedy proceeding.¹ Additionally, innovative digital

platforms and recent AI developments are emerging leveraging new technologies to improve arbitration efficiency. Blockchain dispute resolution platforms, for example, propose an alternative to centralized arbitral tribunals with the aim to reduce costs and expedite the arbitral process. Also, its infrastructure records all proceedings on the blockchain, offering tamper-proof and verifiable records about arbitrations that enhance transparency and that can, in turn, increase visibility of the process.

Improvements to the arbitral process are important to ensure consistency throughout the process, cost-effectiveness, accessibility, and transparency. In this sense, standardizing arbitral rules, embracing technological advancements, and fostering transparency can be key to strengthen arbitration's position as an efficient and equitable dispute resolution mechanism.

Endnotes for Rincón and Jofré

1. CSID's Arbitration Rule 62: https://icsid.worldbank.org/sites/default/files/Arbitration_Rules.pdf. See also: <https://icsid.worldbank.org/procedures/arbitration/convention/confidentiality-transparency/2022>

Johnson, Wix and Flint: Despite historically good intentions to provide efficient, confidential resolutions for disputes that span borders and cultures, international arbitration is an inefficient dispute resolution tool in need of reform. Parties should consider whether arbitration's benefits outweigh its costs, particularly when courts—and especially bench trials—are now considered a viable, cost-effective option.

To be sure, certain aspects of international arbitration are still appealing. Unlike traditional litigation, where most filings are publicly available, international arbitrations are typically confidential. Confidentiality preserves long-term business relationships and protects brands, reputations, and sensitive information. Other advantages include the access to a neutral forum, the ease of enforcing judgments (due to the New York Convention), the ability to address cultural sensitivities, and the ability to select an arbitrator (or panel) with industry expertise or familiarity with international trade.

However, international arbitration often falls short. Although considered a more expeditious approach

than litigation, arbitration is often costly and time-consuming. Delay tactics and high arbitrator fees quickly become unjustifiable, forcing settlement. Consequently, arbitration can progressively become litigious. And the benefits are diminishing, especially as courts have increased scrutiny of arbitration provisions.¹

Oftentimes, the reasons international arbitration is beneficial are the same reasons it has become so complicated. For instance, parties' ability to select governing rules provides flexibility, but also creates uncertainty. Arbitration clauses are often incomplete or ambiguous, creating confusion regarding choice of law and other governing rules.² This issue becomes particularly difficult when one party is from a common law jurisdiction, and the other is from a civil law jurisdiction.³

Thus, international arbitration's interest in providing fair and efficient dispute resolution is oftentimes hindered by its own instrumentalities. Because of this, parties must balance whether the benefits of arbitration overshadow its inefficiencies and uncertainties. Uniformity in arbitration procedures would greatly help international arbitration achieve one of its fundamental purposes—efficient dispute resolution. More certainty and predictability, parties will continue to reevaluate arbitration's benefits compared to litigation via a bench trial.

Endnotes for Johnson, Wix and Flint

1. See, e.g., Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.
2. See Craig M. Gertz, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Depeçage*, 12 N.W. J. INT'L L. & BUS. 163, 171–72 (1991).
3. See Weixia Gu, *Looking at Arbitration Through a Comparative Lens: General Principles and Specific Issues*, 13 J. COMPAR. L. 164 (2018).

Love: Arbitration is indeed achieving the goal of efficient dispute resolution. Arbitration has been

advanced by arbitral institutions and ADR practitioners as a quick, cost-effective and flexible process to resolve disputes. The efficiency of arbitration becomes particularly relevant when compared to the inefficiency of litigation throughout the United States and Europe, where even post-COVID, the backlog of cases, high volume of filings and limited resources of the courts have resulted in substantial costs and severe delays in final adjudication.

In the U.S. district courts in 2023, the median length of time from the filing of a civil complaint to trial is 35.7 months.¹ In the United Kingdom High Court of Justice in 2023, the mean time for a multi-/fast-track claim in excess of £50,000 (approximately US\$68,000) from the issuance of the claim to trial is 78.2 weeks (which is the longest in its history and 2.2 weeks longer than in 2022 and 19.1 weeks longer than in 2019²).

While the time and cost of resolving a dispute by litigation can be staggering, arbitration, which is a party-controlled process, has the ability to eliminate many of the drawbacks of litigation, especially in commercial transactions, where the prompt and timely resolution of disputes is essential (such as construction projects, investment transactions and cross-border disputes). In these situations, a thoughtful and well-drafted arbitration agreement reflecting the intention of the parties to resolve disputes quickly and efficiently will allow them to realize the benefits of arbitration.

To deal with time efficiencies, the parties should draft their arbitration agreement to incorporate procedures to fast-track and simplify the arbitration proceedings, including provisions regarding the use of expedited or simplified procedures of the selected arbitral institution, limiting the scope of discovery, requiring the use of written statements of witnesses in lieu of direct testimony, convening the arbitration hearing within a relatively short period of time after the demand for arbitration, limiting the length of hearings, determining to have standard or reasoned arbitral awards in lieu of findings of fact and conclusions of law, and shortening the period of time for issuance of the final award.

To deal with value efficiencies, the parties should incorporate provisions into the arbitration agreement providing for a sole arbitrator or a three-person panel,

with the chair ruling solely on discovery and most pre-hearing matters, such as finding a location for hearings that is convenient to all parties, scheduling virtual or hybrid proceedings to reduce travel and other costs, and streamlining the process. In addition, the parties may elect to include the internal appeal provisions that several arbitral institutions have incorporated into their rules to provide for the expedited review of any arbitral award by an appellate arbitral panel.

Despite the complexity or nature of a dispute, achieving efficiency in arbitral proceedings is attainable when the parties are committed to an efficient process, have established a framework for efficient proceedings and continue to work with the arbitrator(s)

throughout the proceedings to realize the time and value benefits of arbitration.

Endnotes for Love:

1. According to the Administrative Office of the U.S. Courts, as reported in its Federal Judicial Statistics for the 12 months ending Sept. 30, 2023. See [fcms_na_distprofile0930.2023.pdf \(uscourts.gov\)](#).
2. As reported in the Civil Justice Statistics Quarterly, published on Sept. 7, 2023. See [Civil Justice Statistics Quarterly: April to June 2023 - GOV.UK \(www.gov.uk\)](#). ■

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