The Cost Conundrum

by NICOLAS ULMER*

ABSTRACT

The huge growth in the number, complexity and size of international arbitrations since the 1980's coupled with the rise of a veritable "arbitration industry" has been accompanied by increasing complaints that arbitration has become too costly and is out of control. Yet one of the ironies of a number of cost-focused reforms of arbitration procedure is that they also provide a further platform for additional expensive arbitral motions and practices. This article provides a practical analysis of a variety of procedural developments, arbitral trends and institutional initiatives, and critically reviews a number of proposals for simplifying arbitration. The reality is that there is no easy reform of arbitral practice; it always involves significant procedural tradeoffs. Arbitration cannot be returned to some—real or imagined—past simplicity of cooperative procedures. Although reform is possible, the excesses of the arbitration industry will be best met by a slow contagion of procedural good.

I. AN ARBITRAL RIP VAN WINKLE WAKES UP

IN WASHINGTON Irving's eighteenth century American fable, Rip Van Winkle, a young New York Dutchman on a hunting excursion, drinks a potion which causes him to fall asleep for some 20 years. When he awakes as an old man and returns to his Catskills village he recognises no one, finds new construction and old ruins, and even learns that he is now an American, rather than a loyal subject of King George III.

An arbitral Rip Van Winkle would be similarly stunned to be confronted, in one go, with the changes in arbitration practice that have taken place over the last 20 or so years. The arbitration practitioner put into deep sleep in the 1980s would still readily recognise an arbitral hearing, the New York Convention and many (not all) arbitral rules: he would find the basic structure of a commercial arbitration is quite similar. But in numerous other respects our arbitral Rip Van Winkle would be amazed and perhaps uncomprehending.

Investment arbitration, a huge reality in today's arbitral world, would almost certainly be an unknown to this newly awakened practitioner — if he had been aware of ICSID at all, he would have known of it as a quiet place that might have

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some potential. Most BITs, NAFTA, the Energy Charter and other instruments which underlie investment arbitration would be amazing discoveries for our arbitral Rip Van Winkle. The political changes in Eastern Europe and Latin America, and their profound effect on the number and type of international arbitrations, would be equally stunning.

The change in commercial arbitration would be only slightly less startling. While ICC arbitration would still be recognisable, the rules would have changed considerably; the ICC administrative ‘teams’ have grown in age, number and variety. In 1992 the ICC received 337 requests for arbitration; in 2007 some 599 new cases were filed at the ICC. Similar or greater growth can be seen in the number of arbitrations administered by the LCIA, SCC, ICDR, the ‘Swiss Chambers’ and other arbitration institutions, as well as in the rise and proliferation of all manner of regional and specialised arbitral regimes and rules.

Technology and the Internet deeply impact arbitration, as they do many other fields. Perhaps the most fundamental change, however, would be the extent to which arbitration has become a large specialised industry in its own right. This is reflected not only in the size and number of cases, but in the cadre of service providers who are now central actors in this industry. Further, the number of published awards, arbitral chat rooms, university programmes and courses in arbitration, newsletters, electronic reports, arbitral ‘scorecards’ and all manner of ...
publicly available arbitral information would stun our arbitral Rip Van Winkle, who had hitherto relied on scholarly talk and gossip for information about cases he was not involved in.

While the 1980s international arbitration world was neither small nor minor, it is a pale reflection of today's 'arbitration industry'. Arbitration, especially investment arbitration, is now largely major, public and political; it is the 'fraternal twin' of international trade disputes.\(^\text{10}\)

The *American Lawyer*’s most recent bi-annual ‘Scorecard’ of the world's largest arbitrations listed 107 commercial arbitrations with US$200 million or more in dispute, and a similar number of investment arbitrations with at least US$100 million in play. Also striking is that the *American Lawyer* found approximately 50 ongoing contract or treaty arbitrations raising claims in excess of US$1 billion.\(^\text{11}\) The ‘Yukos’ arbitration, an Energy Charter-based arbitration, involves claims in excess of US$35 billion, and perhaps double that.\(^\text{12}\)

But it is not just size which brings cost and complexity. All manner of procedural, political, jurisdictional and technological developments which were either non-existent or nascent 20 years ago are relatively commonplace today. The theories upon which one can, or cannot, join a non-signatory to an arbitration abound, motions for security of costs and arbitral disqualification are common, intervention by third parties is a recent and continuing issue,\(^\text{13}\) as are all manner of other applications that were rarely, or never, part of the arbitral landscape two decades ago. Last, but not least, despite constant efforts to control and channel it, document production (whether termed 'disclosure' or the more dreaded American appellation 'discovery') occupies a wholly outsized effort for most parties and arbitrators. Indeed, a central issue on today's arbitral horizon is the question of how international arbitration will (or won't) cope with the spectre of 'e-discovery'.\(^\text{14}\) This phenomenon, like the ubiquitous use of information technology, email and the Internet, in arbitration would perplex our arbitral Rip Van Winkle.

\(^{10}\) Ulmer, *supra* n. 1.


\(^{12}\) Winston and Strawn, ‘Briefing: What Can be Done about Arbitration Costs’ (September 2007), drafted by N. Ulmer, p. 1 (reprinted in *Linexlegal International Arbitration Alerter*, 12 September 2007, see alerter@linexlegal.com).


\(^{14}\) This said, there is a rapidly growing body of work being undertaken on the difficult task of trying to reconcile disclosure practices (especially e-discovery) with best arbitral practices: J. Barkett, ‘E-Discovery for Arbitrators under the IBA Rules for Taking Evidence’ (John M. Barkett, 2007); B. Hanotiau, ‘Document Production in International Arbitration: a Tentative Definition of Best Practices’ in ICC Special Supplement 2006, *Document Production in International Arbitration*, pp. 113–128; see also, R. Smith and T. Robinson, ‘E-Discovery in International Arbitration’ in (2008) 24 *Arbitration International* 105; (2006) ICC Bulletin, Special Supplement; J. Carter, J. Hardiman and J. Neuhaus, ‘Discovery in Arbitration: Recent Developments’ in (2009) *Arbitration Review of the Americas* 8. The immense outpouring of emails which this issue provoked amongst participants in the IBA arbitration committee in the weeks leading to the IBAs 2009 annual meeting in Buenos Aires is ample testimony to the contentious and difficult nature of this issue which, fortunately, is beyond the scope of this article!
The growth of arbitration, in both numbers and complexity, has been accompanied by the rise, or importation, of all manner of procedural motions and issues into arbitration. But there is more: arbitration itself has become a profitable industry. Arbitration institutions vie for their market share of disputes, legislatures pass arbitration-friendly measures to attract this business, various conferences and workshops are held year round, a class of essentially full-time arbitrators has developed, and a highly specialised 'international arbitration bar' pursues large cases avidly. A veritable ‘arbitration industry’ has arisen.

Ultimately all of this translates into a rise of costs, and a greater emphasis on recovering them, a dismay about how arbitration is 'out of control', together with a variety of efforts at reforms designed to reduce costs and foster efficiency. What I term the ‘cost conundrum’ arises from a number of interconnected factors. First, a large part of the perceived complexity and increased expense of arbitration is a reflection of a more complex interconnected commercial and investment world; and there is not a simple, or a single, solution to it. Secondly, many putative reforms in arbitration procedure do little to reduce costs, and not a few add to them. The further element of the conundrum is that procedures cannot be shortened without the acceptance of procedural trade-offs – which are often agreed in theory, but avoided in practice. While the cost conundrum cannot be eliminated entirely, it is true that arbitral participants are increasingly aware of the need to make more cost-effective decisions, and that meaningful, if incremental, reform of the arbitration industry is possible.

II. COSTS AS A PARADIGM

My primary focus here is to address the reality, and the real complaints, that arbitration’s complexity now results in excess time and costs. It is interesting to note that not all the developments confronting our arbitral Rip Van Winkle would, logically, result in higher arbitration costs. A specialised bar with common experience and principles could, in theory, result in greater consensus and procedural harmony, but that doesn’t appear evident in practice. The same can be said of various reforms in the general rules of arbitration institutions. Likewise highly experienced full-time arbitrators might be expected to be more efficient and professional in their running of cases and, presumably, more confident in cutting off unnecessary procedure and argument. New technologies and electronic communication can, and should, lead to efficiencies. Furthermore, some developments discussed below, like ‘fast track’ or expedited procedures are, of course, deliberately designed to address complaints about the excessive time and cost of arbitration procedures.

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15 Winston and Strawn, supra n. 12; cf. S. Pfisterer 'The Swiss Rules of International Arbitration: Five Years of Experience' in (2009) 27(3) ASA Bulletin 611, 612 (commenting that 'strong marketing factors' are key to successful arbitration centres and lamenting that highly federal Switzerland has failed to establish a fully professional or full-time marketing committee under one institution) ('SRIA Report').

16 Winston and Strawn, supra n. 12.
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But the reality — or at least the perceived reality — of arbitral users is that the cost of arbitration has relentlessly increased and that more meaningful reform is necessary. This perception is probably not capable of full empirical verification, but available information, anecdotal evidence and some statistics do suggest that current cost complaints have many sources, but not a single solution.

I was counsel in a 2007 SCC arbitration where the opposing respondent requested (but was not awarded) more than US$12 million in lawyer and expert fees, and was arbitrator in an ad hoc case where more than US$15 million in legal and expert costs were claimed (and a portion awarded). In a large and complex arbitration between European and North American parties that concluded in late 2006, total cost claims were approximately US$60 million, and US$21 million in costs were actually awarded to one party. In short, cost claims in the millions of dollars are not rare;17 this would indeed have surprised our 1980s Rip Van Winkle arbitrator.

One result is that costs themselves have been the subject of targeted attention and study, including ‘funding solutions’.18 In short, there are services that may ‘invest’ by providing for the funding of international arbitration cases — yet another development in the arbitration industry in recent years.

Arbitral costs are also receiving more academic attention,19 as well as attention from arbitral institutions.20 An industry group, Corporate Counsel International Arbitration Group,21 has formed to promote the best practices in international arbitration including, of course, cost control.

Certainly a major source of higher costs and time expenditure is the incredible size and complexity of some matters submitted to arbitration today. A far more complex globalised world of investment and commerce has led to more and more complex global disputes. The elements that led to the ‘Yukos’ case (legal, economic and political) were not only unimagined, but impossible, 20 years ago. Similar, if less dramatic, statements can be made for the raft of investment disputes arising from Latin American ‘expropriations’ and devaluations. But there is more to it than that: the potential procedural complexity of arbitration itself has augmented considerably, and specialised arbitral counsel seize on these procedural possibilities. Klaus Sachs summarised it well:

17 Ibid.
18 See www.globalarbitrationlitigationservices.com/bulletin/GALS_bulletin_01.pdf. It is edited by Nina Hall and contributions, enquiries and subscription requests can be sent to hall@globalarbitrationlitigationservices.com.
19 See e.g., G. Howarth, C. Konrad and J. Power (eds.), Costs in International Arbitration: a Central Eastern and Southern European Perspective (Linde Verlag, 2008); K. Sachs, ‘Time and Money Cost Control and Effective Case Management’ in Mistelis and Law (eds.), Pervasive Problems in International Arbitration (2003), ch. 5; see also, Winston and Strawn, supra n. 12. There has also been significant attention to arbitral costs in Eastern Europe, see e.g P. Pietkiewicz, ‘Kosty postępowania przed sadem polubownym’ in A. Szumanski (ed.), System Prawa Handlowego (2010), Tom 8, pp. 521–557.
21 Known as CCIAG, the Group was in large part founded by Jean-Claude Najar, a senior counsel and head of compliance at GE, and includes in-house counsel from 30 or more leading multinationals. See ‘CCIAG founder promotes role of in-house counsel’, Global Arbitration Review, 17 October 2008; see also, Winston and Strawn, supra n. 12; Appel, supra n. 6 at p. 1.
one can also observe that parties' counsel spend more and more often much energy and time on fierce battles on procedural issues: they challenge the jurisdiction of the tribunal; they claim the extension of the arbitration clause to a non-signatory party; they make challenges against an arbitrator; they introduce requests for various interim relief; they request the production of documents; they file applications for the exclusion from the file of privileged documents; they submit applications for security costs; and so forth. In some cases, these actions may be legitimate for the proper defence of the case, but often they are used as tactical manoeuvres. Whatever the motives, these procedural battles resemble more and more traditional litigation and are a serious challenge to the smooth conduct of arbitration proceedings.²²

Skilled arbitral practitioners build on their (and others') constant ingenuity, and motions unthought-of a score of years ago become commonplace today. The larger amounts in dispute also lead to higher arbitration fees paid to arbitral institutions. Study suggests that there are differences in arbitration costs between arbitral institutions, notably that arbitrations charged on an hourly basis tend to be more expensive than fees based on the amount in dispute. But the fees of arbitral institutions and arbitrators are not the real driver of higher costs. Studies of ICC arbitrations demonstrate that the parties' costs were between 81 and 94 per cent of total arbitration expense and that it was these costs, rather than arbitral procedural costs per se, that were largely responsible for the increase in the expense of arbitration; these figures are consistent with the ICC's own findings.²³

These party costs include not only attorneys’ fees, but expert and other party-born arbitration expenses. Experts today are not limited to traditional professors, scientists or engineers; rather, many areas of expertise (notably ‘delay’ and ‘quantum’ experts and ‘litigation support boutiques’) have developed, and are built, around the needs of litigation and arbitration. In one recent arbitration in which I sat as arbitrator, the cost of the quantum and delay experts alone exceeded US$3 million;²⁴ anecdotal evidence suggests that this is not particularly unusual. Even in many more modest arbitrations the expert costs are huge, frequently more than one-third of the total costs. With experts, as with high-priced counsel or the ‘top’ arbitrator, an expensive and often destructive escalation sets in as each party feels they need to match the other.

Now, complaints about arbitration costs are hardly new, and our Rip Van Winkle practitioner would be familiar with them. Certainly, complex and big cases existed in the 1980s, but there were fewer of them, they were less complex and the same panoply of procedural motions was not available.

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²² Sachs, supra n. 19 at p. 113, para. 5–37.
²³ Ibid.; accord, ICC Costs Report, supra n. 20 at p. 11 (the ICC finding was that arbitrator’s fees and expenses average 16 per cent of total costs, administrative expenses 2 per cent, and the remaining 82 per cent was ‘cost borne by the Parties to present their case’).
²⁴ There were also a number of more ‘traditional’ experts from specific disciplines in the case, such as geologists and engineers, although their fees were much more modest as their role was much more specific to particular technical issues.
It is revelatory that the recent survey of international corporate counsel by Queen Mary College and Price Waterhouse Cooper, while containing complaints about costs, also suggests that these companies will continue to use arbitration to resolve international disputes, and that the expansion of international trade will increase the volume of arbitration. Indeed, the survey recited that 86 per cent of corporate counsel stated they were very satisfied with international arbitration, and that the overwhelming majority of arbitration awards were complied with voluntarily. Thus, while the cost and delay issues in international arbitration should not be gainsayed, it also cannot be said that the international arbitration system is broken or subject to replacement.25

Indeed, the entire arbitral cost debate is a bit skewed in the sense that if one is to complain about costs for a necessary service, then the complaint has, in some sense, to be compared to an alternative service. That is to say that complaints about arbitral costs, however sincere, should also be compared against the time and costs of resolving a dispute of like complexity elsewhere. I have great respect for the quality of the English commercial courts and bar, but I know of no more expensive place to litigate a major dispute, especially one with a large international dimension. A cost argument favouring New York litigation over international arbitration would also have little credibility. Likewise, parties who are the victim of an arbitration gone awry should look realistically as to whether all the problems that arose are endemic to arbitration, or whether a good number might well have been prevented had they acted with more care and planning – starting with the arbitration clause itself.26 None of this is to excuse indefensibly high arbitration costs, but only to point out that discussion of them has to be suffused with reality, and not only an abstract yearning for the brief, efficient, ‘gentlemanly’ and issue-oriented arbitration which may never have really existed, and certainly does not exist now. The other reality is that there is no real alternative to international parties resorting to international arbitration to solve disputes, parties rarely agree to litigate in their foreign counter-party’s courts.27 As Stephen Bond, then Secretary General of the ICC Court of Arbitration, once put it to me: ‘arbitration may be nobody’s first choice, but it is everybody’s second choice’.28 So if arbitration is inevitable, but too long and expensive, what reforms are useful and realistic?


27 Ulmer, supra n. 1.

28 I have been quoting Stephen Bond shamelessly on this ever since, see e.g., N. Ulmer, ‘Winning by Being Clear, Consistent and Credible’ in Inside the Minds: Best Practices for International Alternative Dispute Resolution (Aspatore Books, 2007), p. 70.
III. REFORM AND REALITY

(a) Irony and Contradiction

Reform often takes the form of new or ‘improved’ arbitration rules, but the irony is that many new provisions intended to reduce costs and increase efficiency can also create the basis for further costly battles. This is more than just the law of unintended consequences. It is an important role of clever counsel to make use of new provisions tactically, even if that was far from the drafter’s intent. I provide some telling examples from experience.

(i) Some Swiss lessons

Switzerland, where I live and practice, provides some good examples of both the increasing standardisation and competition in the ‘arbitration industry’, and the difficulty of reform. A small neutral country with a long history of arbitration, and many sought-after arbitrators, Switzerland’s arbitration community is anxious not to undermine its reputation as a stable and reliable place to hold international arbitration, and the Swiss arbitration community has been known to lobby for measures designed to maintain their country’s ‘arbitration friendly’ status.29

Another, albeit private, attempt to make Swiss arbitration more attractive was the long-negotiated unification of the individual arbitration rules of the various Swiss Chambers of Commerce into what are now commonly known as the ‘Swiss Rules’.30 The objective, again, was to comfort arbitration users considering Switzerland as a place of arbitration by providing for a common and readily understood set of rules to apply, whatever Swiss city was chosen as the place of arbitration. The Swiss Rules are largely based on the UNCITRAL Rules, and so most provisions will be familiar to arbitration practitioners. But there were at least two Helvetic additions that illustrate the dangers and irony of arbitral rule reform. One of these is the extensive consolidation and third party joinder procedure envisioned by article 4 of the Swiss Rules.31 Another, even more

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29 This was particularly evident in the successful lobbying effort to have art. 186(1)bis of the Private International Law Statute adapted so as to counter the threat that the Swiss Supreme Court’s decision in Fomento de Construcciones & Contratas SA v. Colon Container Terminal SA, ATF 12 III (2001), posed to having lis pendens rules from the other chapters of the Swiss Private International Law Statute apply to arbitrations in Switzerland. See N. Ulmer ‘Swiss Arbitration Update: First Amendments of International Arbitration Law’ in (2006) 21 Mealey’s International Arbitration Report, pp. 1–5; see also, E. Gaillard, ‘Switzerland Says Lis Pendens not Applicable to Arbitration’, 3 New York Law Journal, 7 August 2006. The scramble of European countries to establish arbitration laws attractive to potential parties demonstrates the significant financial stakes involved. See e.g., W. Park, ‘National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration’ in (1989) 63 Tulane Law Review 647 at p. 680.

30 See www.swissarbitration.ch. The Swiss Rules are now five years old and have by and large been successful with more than 50 cases carried out under them since 2004; Swiss Chambers’ Court of Arbitration and Mediation Newsletter 1/2009; see also, SRIA Report, supra n. 15.

31 The consolidation itself is declared by the Special Committee which, reportedly, has developed a ‘consolidation friendly’ attitude. SRIA Report, supra n. 15 at p. 612. For a detailed description of the Swiss Rules, see T. Zuberbühler, K. Müller and P. Habegger (eds.), Swiss Rules of International Arbitration: Commentary (Schulthess, 2005).
questionable, provision is the broad ‘set-off’ jurisdiction provision of article 21(5) of the Swiss Rules, which permits an arbitral tribunal to hear set-off defences even when they arise from a different legal relationship subject to another forum selection clause. Both provisions were intended to foster efficiency in resolving all disputes before one forum. In practice they have proved difficult to apply and can aggravate complex multi-jurisdictional, multi-contract disputes.  

Indeed, both provisions already seem to have spawned more arguments and complexity, rather than accomplish their intended purpose of simplifying matters by getting all disputes, claims and set-offs before one (Swiss) tribunal. They have already created a number of collateral debates as to whether these special rules should be applied in specific contexts. The reality, of course, is that once a dispute has arisen, there will likely not be agreement on whether certain consolidations or set-offs are appropriate or even ‘efficient’. As to set-offs, the situation is particularly stark: few claimants will desire the ‘efficiency’ of having a (very likely) disputed set-off from another contract or legal relationship inserted to reduce or expunge their claim. I faced this specific situation in representing a claimant in the enforcement of a loan agreement in a recent Swiss Rules case. In such a situation the claimant seeks efficiency in the rapid declaration and enforcement of its unpaid loan; the respondent, of course, wishes to raise claims and set-offs from other contracts being separately arbitrated. Both sides argued that the other was inefficient, and both sides had strong tactical reasons to submit such arguments.

(ii) The IBA Rules and material issues

Even generally salutory developments such as the introduction of the IBA Rules on the Taking of Evidence in International Commercial Arbitration have occasionally proven to be two-edged swords. While the IBA Evidence Rules are a helpful document setting forth compromise positions on evidentiary and document production issues, they also provoke controversy in their own right. Notably there are often threshold arguments as to whether the IBA Rules should apply at all and/or whether they should just be referred to for guidance. Secondly, of course, the very provisions of the IBA Rules provide further language and material for lawyers to argue about, all the more so if they are hortatory ‘guidance’ rather than strictly to be applied. Crudely put, everyone wants to cite the IBA Rules when it suits them, but few want them to apply as strict rules; more

32 It is also potentially relevant that neither of these broad provisions are in the ongoing draft revision of the UNCITRAL Rules, on which the Swiss Rules were based. See D. Wehrli, ‘The Swiss Rules and the Revision of the UNCITRAL Arbitration Rules’ in Swiss Rules Report, supra n. 7 at pp. 88–92.

33 This provision, art. 21(5) of the Swiss Rules, has been accurately described as ‘one of the more far-reaching rules on jurisdiction for set-off defences’, D. Girberger and N. Voser (eds.), International Arbitration in Switzerland (Schulthess, 2008), p. 63, para. 247. The broad, or overbroad, Swiss Rules provision for set-off was likely inspired by the broad set-off rules of Swiss substantive law, enunciated in art. 120 of the Code of Obligations, which essentially permits set-off by means of a ‘self-help’ declaration – an illustration of the danger of importing international rules into an opique of substantive national law. For an interesting discussion of the complexity of applying set-off in international arbitration, see A. Mourre, ‘La Paradoja de la Compensaci6n en el Arbitraje Internacional’ in (2008) 1 Revista de Club Espanol del Arbitraje 97.

34 See www.ibanet.org/.
argument ensues. Little applied and discussed are the provisions of section 3 of the Preamble to the IBA Rules of Evidence\textsuperscript{35} that encourage the ‘arbitrator to identify to the Parties, as soon as it considers to be appropriate, the issues that it may regard as relevant and material to the outcome of the case’; this is a provision that could profitably be applied by arbitrators but that would require much more early analysis by them than is often the case. The IBA’s more recent guidelines on Conflicts of Interest in International Arbitration, while in my view a good attempt to address a real problem, may be the source of yet greater controversy.\textsuperscript{36}

(iii) Security for costs

Security for costs motions provide another excellent example of a controversial innovation in international arbitration. Security for costs applications in arbitration appear to have come to life in the 1995 English Ken-Ren case,\textsuperscript{37} but have now come to be widespread, and it is widely accepted that the ordering of security for costs is within the power of arbitrators to order interim measures.\textsuperscript{38}

While security for costs measures are a useful and valid tool, particularly to combat impecunious or bad faith claimants (generally uncapitalised ‘offshore’ companies), they have also become a common, and perhaps overworked, tactic to dissuade a party from continuing arbitration, and even to ‘price them out of the case’. The result is that security for costs, a putatively exceptional measure, is quite frequently solicited, but relatively rarely granted.\textsuperscript{39}

In an interesting related development, a recent revision to the Stockholm Chamber of Commerce Institute Rules has introduced a specific provision whereby an arbitral tribunal may make a separate award ordering a party to reimburse another party for an advance on costs that it has been required to make on behalf of its cost-defaulting adversary.\textsuperscript{40} This useful, but extraordinary, measure has in the two years since its implementation apparently already resulted in five costs awards!\textsuperscript{41} There are strong indications that this tool to counter disloyal or abusive non-payment will become a relatively common motion and tactical tool; I would predict pressure for like costs awards authority under other rules, and in other settings.

\textsuperscript{35} Accord, Rivkin, supra n. 3 at p. 380.
\textsuperscript{38} For Switzerland, see M. Wirth, ‘Interim or Preventive Measures in Support of International Arbitration in Switzerland’ in (2000) 12 ASA Bulletin 31 at p. 36; accord, G. Segeser and C. Kurth, ‘Interim Measures’ in (2004) G. Kaufmann-Kohler and B. Snicki (eds.), International Arbitration in Switzerland, p. 76 (‘Under Swiss law it is generally accepted that arbitral tribunals have the power to order a party to provide such security for costs under Article 183 of PILA’).
\textsuperscript{39} See Wirth, supra n. 38. Indeed it is likely that the relative popularity of security for costs applications has made arbitrators more sceptical of using this power in the abusive cases where it is truly appropriate; accord, Webster, supra n. 1 at p. 473.
\textsuperscript{40} SCC Rules, art. 45(4); see also, Stockholm International Arbitration Newsletter 2/2006.
\textsuperscript{41} Stockholm International Arbitration Newsletter 2/2008.
(iv) Institutional initiatives

Arbitral institutions have also engaged in broader efforts to tackle the problem of increasing costs and time in arbitration.\(^{42}\) The most salient example of this is the ICC’s recent Task Force on Reducing Time and Cost in Arbitration, which was co-chaired by Yves Derains and Christopher Newmark. The Task Force published a Report, which the ICC has bound and widely distributed.\(^{43}\) It is a useful study, but it did not make any major across-the-board recommendations or suggestions for fundamental reforms. Rather, the ICC study listed numerous practical suggestions such as considering a sole arbitrator, avoiding duplicative witnesses and unnecessary expert reports, considering witness ‘conferencing’, ensuring true arbitrator availability, and so forth. Many, if not all, of these suggestions are known to experienced practitioners and have been written about.\(^{44}\) The suggestions are good, but they are just that. Most of the suggestions depend on agreement between the parties and/or particularly proactive and well-organised arbitrators. But these are precisely the factors that are frequently missing once the arbitration had commenced.

This is illustrated by the straightforward example of a sole arbitrator. It is true that a sole arbitrator will result in lower expenses, and will certainly facilitate case scheduling. But few parties are prepared to have their arbitration clause stipulate a sole arbitrator, except in quite small contracts. It has been my experience that once an arbitration is commenced, even a relatively small one, one of the parties will usually insist on a three-person panel, even where one arbitrator would suffice. Specifying a sole arbitrator in the arbitration clause is a cost-efficient measure most parties are reluctant to take.

In simplest terms, if the parties always cooperated rationally and arbitrators could always be properly proactive and organised, it is clear that costs could be reduced significantly, and solutions would probably not be sought by tinkering with arbitration rules. But it is the nature of contentious proceedings (and arbitration is more and more contentious) that those are precisely the objectives that are difficult to achieve, and that precative encouragements have limited impact.

Nevertheless, the ICC is making an effort to institutionalise the commitment to fighting delay and finding cost efficiencies, and it has long considered the arbitrator’s diligence as an important factor in determining remuneration.\(^{45}\) As part of the ongoing, but confidential, revision of the ICC Rules of Arbitration, new clauses are being proposed expressly to encourage ‘case management’. It is likely

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\(^{43}\) Technique for Controlling Time and Costs in Arbitration (ICC Publication No. 843, November 2007).

\(^{44}\) See e.g., Rivkin, supra n. 3 at p. 378; Winston and Strawn, supra n. 12 at pp. 3–4; N. Ulmer, ‘Bullet Proofing Your Arbitration’ in World Trade (July and August 2000), pp. 70–72, 68–70.

that arbitrators will also expressly be encouraged to consider case management techniques such as those listed in the ICC Costs Report. Such reforms of institutional rules are helpful, in part because they provide the party seeking celerity with a clause to cite and argue, but it would be naive to consider them a full solution. As to the injunction to the arbitrators to adopt efficient case management techniques, this, like similar reforms, only works properly if the arbitrators are sufficiently on top of the case early enough to apply such techniques with intelligence and confidence, something rarely seen.

An institutional change that has been largely successful in cutting costs is the Swiss Rules on ‘expedited procedure’. 46 This procedure provides for shortened time limits, only one exchange of responsive pleadings to claims/counterclaims, a single hearing (if required) and the award to be rendered, in theory, within six months from transmission of the file to the arbitrators. The procedure has been fairly successful in limiting costs and delay, with cases under the expedited procedures constituting about one-third of the Swiss Chambers’ caseload and averaging 240 days for completion. 47 This is far from insignificant as the possibility to arbitrate a small case at a proportionate cost is a major problem. A central reason for the success of the Swiss Rules expedited procedure is that it is mandatory if the amount in dispute does not exceed CHF1 million (€663,354, US$988,152), and the Swiss Chambers do not decide otherwise. 48 The parties can also voluntarily agree to submit a larger dispute to the expedited procedure, but this rarely happens in practice — further demonstration that once a dispute begins, the parties are unlikely to have the same view of the need for economy and speed.

Another institutional initiative which has received favourable comment is the ICDR procedures 50 to name arbitrators almost instantly when emergency measures are sought; these procedures have apparently already been used successfully on a few occasions. 51

Changes and reforms in both the UNCITRAL 52 and, as noted above, the ICC Rules are currently under study and comment. 53 The objectives include both measures expressly aimed at diminishing cost and delay, and measures designed to address the new issues, such as third party intervention, 54 that have arisen in arbitration. The results will be studied with interest, but experience strongly suggests

47 See Swiss Chambers’ Court of Arbitration and Mediation Newsletter 1/2009; accord, T. Lorcher, ‘The Swiss Rules of International Arbitration Seen from Abroad’ in Swiss Rules Report, supra n. 7 at p. 75 (Lorcher also reports a generally positive experience with the expedited procedure); cf. G. Nater-Bass, ‘How to Work with the Swiss Rules: the Counsel’s Perspective’ in Swiss Rules Report, supra n. 7 p. 60 (high level of client satisfaction with expedited rules). The Swiss Chambers most recent statistics show that in 2009, 27% of the new cases followed expedited procedures, see Swiss Chambers’ Court of Arbitration and Mediation Newsletter 1/2010.
48 With respect to the calculation of the amount in dispute, see M. Scherer, Schieds VZ, 2005, 229 at 232.
49 Swiss International Rules, art. 42(1).
50 ICDR Rules, see www.adr.org/sp.asp?id=33994.
51 Rivkin, supra n. 3 at p. 379; see also, Appel, supra n. 6 at p. 2.
52 See www.uncitral.org/.
53 See www.iccwbo.org/. Major cost-driven changes are also proposed by the CEDR; see Baksi, supra n. 25.
54 For an excellent study on that topic, see Bevilacqua, supra n. 13.
that some new and 'innovative' provisions will have unintended consequences that will not lessen the time and costs in international arbitration.

Ultimately, experienced practitioners know that arbitral reforms face not one, but two ironies: (i) the very 'reform' sought to be implemented may be fodder for new applications and procedural jousting; and (ii) so many proposed reforms (and virtually all the suggestions in the ICC Task Force Report) depend on some level of agreement on cooperation in the 'efficient' handling of the 'true issues' in an ongoing procedure, but it is precisely this agreement and cooperation that is by then lacking.

(b) Reform and Resistance

There is much work ongoing to reform and better understand arbitration.55 Some suggested reforms are attempts to bring arbitration back to its (real or imagined) roots as wise men cutting through dissension to decide disputes rapidly but fairly, other reforms concentrate on inserting mechanisms to enforce greater discipline in arbitral procedure. These are laudable goals, but the devil is in the appreciation of the so many 'details' to be interposed. I review below a number of problems and proposals in this light.

(i) Town elders and Mini Coopers

David Rivkin has written a provocative article advocating a 'town elder' style arbitrator. The 'town elder' paradigm seeks, notably, to counter the distension that modern arbitration suffers with a more aggressive use of 'promising innovations' in arbitral procedure and, especially, more diligent efforts by alert arbitrators to distil and, where possible, early-on decide the issues.56

It is indeed true that there already exist a number of rules and techniques which when judiciously used by a hard-working arbitrator can help reduce the unnecessary delay and costs from which arbitration often suffers. For example, article 19.3 of the LCIA Rules provides that the 'Arbitral Tribunal may in advance of any hearing submit to the parties a list of questions which it wishes them to answer with special attention'. Article 22.1(c) of the LCIA Rules even permits, under certain conditions, that 'the Arbitral Tribunal should itself take the initiative in identifying the issues and ascertaining the relevant facts and law(s) or rules of law applicable'.57 Article 16.3 of the AAA International Rules similarly provides that the arbitrators may 'direct the parties to focus the presentations on issues the decision of which could dispose of all or part of the case'.58

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55 See e.g., Barry Leon, 'Current Initiatives to Improve International Arbitration' (Handout ILA International Law Weekend, 26 October 2007).
56 Rivkin, supra n. 3.
57 LCIA Rules, available at www.lcia.org/ARB_folder/arb_english_main.htm; see also, Hacking and Schneider, supra n. 42 at p. 28 (welcoming these provisions in the interest of a more 'interactive' and efficient conduct of arbitration proceedings).
58 AAA International Rules, available at www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES.
above, the Preamble to the IBA Rules of Evidence also enjoins the arbitral tribunal to identify to the parties the issues that it views as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate, even if this provision is rarely used. The ‘town elder’ arbitrator is summoned to make aggressive use of all of these types of provisions.

What Rivkin is advocating is some genre of real or hypothetical return to the sources of arbitration where the ‘town elder’ or eminence grise can aggressively cut through the parties’ pleadings to expose and narrow the real issues. This raises the question of whether all the sharp procedural tools necessary for such ‘town elder’ wisdom are available; arbitration does not have the equivalent of an American ‘motion to dismiss’ or ‘motion for summary judgment’. Indeed, one of the perceived problems with arbitration is that it has imported many litigation tactics but without the arbitrator having the same possibilities and powers to limit the proceeding.

One potential ‘town elder’ role not mentioned by Rivkin is the arbitrator’s active promotion of settlement. While this is overstepping to some, it holds out real promise of efficient dispute resolution in cases where the arbitrator is informed and bold enough to propose and push solutions. Such arbitrator involvement is much more common, and more accepted, in Austria, Germany and Switzerland (especially Zurich where many arbitrators carry over this practice from the local courts); it finds much less acceptance in the common law world. This lack of general acceptance of the arbitrator assuming the role of settlement facilitator may be the reason that the ICC Costs Report limits itself to the very anaemic suggestion that ‘[t]he arbitral tribunal should consider informing the parties that they are free to settle all or part of their dispute [directly or through separate ADB proceedings]’. If the arbitrator is to be an

59 IBA Rules of Evidence, Preamble, para. 3. It bears noting that the IBA standard on disclosure is the same: ‘relevant and material to the outcome of the case’. Thus, arbitrators who had made prior determinations under para. 3 of the Preamble would be far better placed to rule on disclosure.
60 Rivkin, supra n. 3 at p. 380; accord, Sachs, supra n. 19 at p. 114.
61 Rivkin, supra n. 3 at p. 378.
62 Ibid.; see also, Winston and Strawn, supra n. 12 at p. 4.
63 But cf. Webster, supra n. 1 at pp. 490–492 (discussion of new ICSID Rules, art. 41(5) and (6) dealing with preliminary (primarily jurisdictional) objections that ‘a claim is manifestly without legal merit’).
64 See Sachs, supra n. 19 at p. 114; but see G. Kaufmann-Kohler, ‘When Arbitrators Facilitate Settlement: Towards a Transnational Standard’ in (2009) 25 Arbitration International 202. For two excellent studies of the situation see C. Koch and E. Schäfer, ‘Can it be Sinful for an Arbitrator Actively to Promote Settlement?’ in (1999) ADRILJ 153 and H. Raeschke-Kessler, ‘The Arbitrator as Settlement Facilitator’ in (2005) 21 Arbitration International 523. It bears noting that art. 32.1 of the Arbitration Rules of the Deutsche Institution für Schiedsgerichtbarkeit (DIS) provides: ‘[a]t every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute’. Marc Blessing, a highly experienced Zurich-based arbitrator and mediator, is of the view that the arbitrator should aggressively push for settlement including, where appropriate, in separate caucuses with the Parties, M. Blessing, Speech at the ICG Swiss Arbitration Commission Meeting, 13 January 2010, see generally M. Blessing, ‘Types of Cases Handled in 30 Years of Practice’ 13 January 2010, Handout.
65 ICC Costs Report, supra n. 20 at p. 28, para. 43; cf. Baksi, supra n. 25 (CEDR more robust as parties ‘encouraged to speak directly to the tribunal on matters related to settlement’), accord CEDR Rules for the Facilitation of Settlement in International Arbitration, Article 5 (CEDR November 2009).
effective ‘town elder’, there should be a framework for him to propose and push settlement in appropriate cases. One problem with this suggestion is that it is often only after having heard all the evidence that the arbitrator is sufficiently educated, and has the logistical opportunity, to advance a view of the case and its proper settlement.

Many ‘town elder’ type suggestions run up against clear practical and logistical impediments. Both ruling on solicited simplification measures, and the more diri giste ‘town elder’ model arbitrator, require not only early actions and determinations by arbitrators, but also phases or stages in arbitration. Rivkin acknowledges this, stating ‘the Town Elder model also calls for more frequent phasing of arbitration’ and arguing that the arbitrators ‘have the ability to hold limited factual hearings’.66 This idea includes, but goes beyond, the often used mechanism of bifurcating between liability and damages, to include preliminary rulings on potentially central issues such as time bar, releases of liability or res iudicata.67 Similar pleas have been made with regard to arbitrators accepting and ruling on ‘dispositive motions’.68

But international arbitrations are not easily set up as ‘phased’ proceedings that winnow the issues. Nor, as we are enjoined by the ‘town elder’ paradigm, are there many occasions where the arbitrator can early on simplify the case by ‘the application of law to undisputed facts’.69 Even on a theoretically ‘clean’ issue, such as determining the application of the statute of limitations, a party will inevitably argue that fact finding and/or contractual interpretation at hearing is necessary before the issue can be decided fully and fairly – and it will be a bold or possibly reckless arbitrator who would ignore this plea.

The concept of ‘phased’ proceedings is also logistically difficult or impossible to implement in most international arbitrations. The parties, their lawyers and the arbitrators are not in the same city and cannot be convened for limited hearings and ‘dispositive’ motions on certain issues. Indeed, that is largely a model taken from municipal litigation where one has a sitting court with the purpose and authority to do this. The players in an international arbitration are, often quite literally, spread across the globe; they are generally neither able nor desirous of participating in ‘phased proceedings’. Indeed, even the more basic concepts of a bifurcation between the liability and damages or the jurisdiction and merits phases of a dispute are by no means always desirable or cost effective. Frequently there are what Markus Wirth has termed ‘doubly relevant facts’, such as witnesses whose testimony bears on both issues. Moreover, if liability is found, the liability issue is not dispositive, and the parties and the tribunal go through two trial hearings. There are significant irreducible costs each time parties and arbitrators are brought to hearing. Thus, the purported savings of ‘limited factual hearings’ have to be weighed against the typical structure of bringing all players

66 Rivkin, supra n. 3 at pp. 380, 381.
67 Ibid. p. 380.
68 Winston and Strawn, supra n. 12 at p. 4.
69 Rivkin, supra n. 3 at p. 380.
in the case together for one concentrated trial leading to a final award on all
issues.

The fact of the matter is that only large international arbitrations with distinct
preliminary issues are likely to be cost-effective candidates for a 'phased' arbitration (and the parties will often not agree as to what are distinct preliminary issues). Furthermore, even should the parties to such cases agree to separate decision(s) on 'dispositive' points, they will likely have difficulty in obtaining an appropriate schedule and prompt decisions from overbooked arbitrators.70 The phased 'town elder' paradigm necessitates arbitrators early on to separate and study key issues which might resolve part or all of the case and who are available for interim hearings at which these issues will be debated; as further discussed below, this is often precisely what is missing.71

This is not to reject the 'town elder' paradigm: most of the elements and reforms cited in support of it are intelligent and useful. But it remains just that, a paradigm. The concatenation of actions and improvements cited to reach the paradigm require modifications in behaviour by all players. For example, Rivkin cites such diverse improvements as faster confirmation of arbitrators by institutions,72 chess-clocks,73 'summary judgment' type motions, coping with e-discovery,74 and, of course, 'cooperative' parties and proactive arbitrators.75

A somewhat similar, if differently stated, approach is adopted by Peter Morton in his recent essay 'Can a World Exist where Expedited Arbitration Becomes the Default Procedure?'.76 Morton advocates not so much significant changes in arbitration rules, but rather 'a change in the habits and preconceptions of those conducting arbitration proceedings'. Specifically, the players in the case should not begin with the implicit assumption that it is acceptable for a case to take two to three years without good reason.77 Morton analogises the arbitration process to a visit to a car showroom where many clients are looking for a Mini Cooper or equivalent, a nimble, reasonably priced auto of sound quality, but arbitration counsel steers them to a far more expensive luxury saloon car.78 Often the Mini is a reliable vehicle for the intended journey, even if less spacious and with far fewer features.

Among the compromises to be made in choosing the Mini Cooper arbitration vehicle are: limited number and scope of witness testimony, picking both counsel and arbitrators based on availability as a primary consideration, and accepting

70 These scheduling issues may ultimately be reduced by greater use of video-conferencing and other
technologies if these become an acceptable norm in international arbitration.
71 Accord, Rivkin, supra n. 3 at p. 381.
72 Ibid. p. 379.
73 Ibid. p. 380; the use of the chess-clock system is discussed infra.
74 Ibid. pp. 383, 384.
75 Ibid. p. 382.
77 Ibid. p. 104.
78 Ibid. p. 104.
that there cannot be an ‘exhaustive’ disclosure process. In short, the choice of
'Mini Cooper' involves significant trade-offs that the parties and the arbitrator
have to hammer out ab initio.

In essence, Morton’s brief essay is a plea for ‘zero based budgeting’ where the
tribunal serves the interests of the parties by starting with a ‘blank sheet of paper’
and actually takes the time to ‘stop and consider first of all what steps are really
necessary’ properly to hear and decide the case.79 If it does this, a Mini Cooper
may well suffice to take the case to award in a far shorter time frame, and at far
less cost.

But the parties will not always willingly squeeze into a Mini Cooper, and will
be even less likely to do so if they are not being pushed by the arbitrator(s).
Morton largely acknowledges this and, in particular, notes that his approach
‘requires the tribunal to immerse themselves into the case, particularly in the
early stages’.80 This, he acknowledges, will mean that the parties will sometimes
need to make a threshold compromise of ‘choosing the arbitrators by reference to
their availability and not the other way around’.81

Even more controversial is Morton’s admission that ‘time expedition may end
up placing stresses and strains on counsel and the tribunal, as they may be
required to work something close to flat out on the case for some weeks’.82
Morton is correct in writing that cases crystallise due to the intensity of an
upcoming hearing, but the more extreme parts of his model would not only be
difficult for most counsel and arbitrators to accept, but for their clients as well.

Although Morton is advocating a change of attitude rather than a change in
rules, in a number of respects the ‘Mini Cooper’ approach comes close to what
has been mandated by the Swiss Rules expedited procedure, which I discussed
above. But this obligatory abbreviated procedure is only required for small cases
and, as previously noted, is rarely agreed by the parties in larger cases. This
further emphasises, if need there was, that successful ‘Mini Cooper’ and ‘town
elder’ arbitrations depend on a common will and capacity by all key players:
parties, counsel and arbitrators.

I have had some occasional successes, both as counsel and arbitrator, in
promoting some ‘Mini Cooper’ approaches to disputes under various arbitration
rules. In my experience, there has been greater success when most, or all, of
the following elements were present: (i) a relatively modest amount in dispute
between relatively reasonable commercial parties; (ii) counsel of similar arbitral
‘culture’ and experience;83 (iii) a diligent sole arbitrator trusted by the parties’
counsel; and (iv) geographical proximity. All of these elements, among others, can

79 Ibid. pp. 111; accord, Rivkin, supra n. 3 at p. 385.
80 Morton, supra n. 76 at p. 111.
81 Ibid. p. 106.
82 Ibid. p. 110.
83 By this I do not mean that they are necessarily of the same nationality or share a common ‘civil law’ or
‘common law’ background; I mean that they share a similar understanding of how arbitration works, and
have the confidence and experience necessary to agree to abbreviated procedures.
help the parties achieve a ‘town elder’ or ‘Mini Cooper’ arbitration.\(^{84}\) But, again in my experience, the more these types of elements are absent the more likely that the arbitration will escalate, ‘phased’ proceedings and narrowing of issues will be logistically or practically difficult, and the necessary cooperation will be impossible.

I disagree with few of Rivkin’s or Morton’s proposals, but I am not convinced that they effectively combine into a ‘radical solution’\(^{85}\) or revolution. The attainable objective is to recognise that the additional costs and complexity that arbitration has taken on in the last generation has multiple causes and that it is more realistic for involved parties to advocate (and practice) evolutionary reforms and recognise the trade-offs even these will imply.

(ii) Gorillas and the ‘usual suspects’

Another real problem whose solution is not evident is the propensity of parties to nominate arbitrators, and only agree to chairmen, who are recognised as being part of a small elite of ‘world class’ arbitrators. Such a relatively hermetic group of arbitrators would have been more difficult for our Rip Van Winkle to define 20 years ago, but its existence is currently indisputable. Many of these select arbitrators are indeed individuals of outstanding merit and ability who have greatly contributed to arbitration’s development, both with substantive awards and with procedural innovation (for example, the now widely used and generally useful ‘Redfern Schedules’ for disclosure).

Professor Böckstiegel, himself a distinguished scholar and arbitrator, opines that with the increase in arbitration cases, especially investment disputes, the ‘usual suspects’ may not be able to fill all the slots. The result, according to Professor Böckstiegel, is that ‘in view of the fast growing number of cases, it may be difficult to find the best possible arbitrators for each individual case’.\(^{86}\) The problem from the efficiency and costs perspective is quite different: Böckstiegel’s ‘usual suspects’ are indeed solicited, but they take on too many cases, and are a significant brake on efficiency. I am indebted to Jean-Claude Najar’s amusing but perceptive explanation:

The real concern, Mesdames et Messieurs, is arbitrators taking on much more work than they can handle. We all know that and I understand the fact that if one party chooses, pardon the expression, an 800lb gorilla you will want to choose an 800lb gorilla and certainly not a measly little baboon to fight that gorilla: the two gorillas, well they are not going to take a chimpanzee, they are going to take an even bigger gorilla and these gorillas have very busy schedules. But there are some proposals that have started to be made. For arbitrator candidates to disclose as part of their disclosure, how many cases they have. There is a further suggestion that was made

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\(^{84}\) Morton cites three important cases in which he was involved that were rapidly resolved through expedited procedures. It is, however, telling that all involved an immediate need for business certainty from the parties, involved no factual evidence, only points of pure law and construction, and one had the external deadline of being resolved before a major international cricket match! Morton, supra n. 76 at pp. 109–110.

\(^{85}\) Rivkin, supra n. 3 at p. 378.

\(^{86}\) Böckstiegel, supra n. 1 at p. 827.
(it is not met with a lot of enthusiasm) that arbitral institutions keep a record of the current appointment of a proposed arbitrator and help the process by disclosing it in order that not too many cases are piled up on one arbitrator.\footnote{J-C. Najar, ‘A User’s View of International Arbitration’, available at www.ialecture.com/transcript_2008.html.}

Najar’s wit exposes a real problem known to most practitioners: the three ‘gorillas’ are almost impossible to schedule, and if the hearing date slips, the parties will not get another one for many, many months.\footnote{Cf. Rivkin, \textit{supra} n. 3 at p. 386 (complaint about cases where arbitral panels were unable to find a common day for a jurisdictional hearing in a six-month period or a week for hearings 18 months in the future).} It is also often true that these big ‘gorillas’ do not have, or spend, the time necessary to read pleadings well before hearing. Indeed, one prominent ICC arbitrator readily revealed in committee that he did not read any briefs until right before hearing since the case might settle and he wasn’t paid by the hour; ironically, he is deeply involved in the ICC attempts to contain costs. Another well-known ‘gorilla’ has a personal practice of pushing settlement during or at the end of evidentiary hearings; while this is not necessarily objectionable in itself, it was most evident to me that part of the motivation is to avoid the difficult and time-consuming task of writing reasoned awards while still obtaining most of the fee. Arbitrators whose business model encourages late and minimal attention to the case (and there are many) are obviously not in a position to act as ‘town elders’ who ‘must learn as much as they can about the case at an early stage’.\footnote{Rivkin, \textit{supra} n. 3 at p. 385; accord, Morton, \textit{supra} n. 76 at pp. 106–107.}

The problem goes beyond scheduling and inattention: in the last 20 years, the phenomenon of the ‘professional arbitrator’ has arisen. The typical pattern in Europe is lawyers or law professors who set up a dedicated ‘arbitration office’ (often employing one or more English-language clerks/associates for drafting and research). The office is small to avoid conflicts, as its \textit{raison d’être} is to get, process (and be paid for) arbitrations. The inexorable result of being such a full-time operator is that one wants and needs to fill the docket and assure a pipeline of cases in the future. Thus, many popular ‘usual suspects’ must either assume the discipline and economic risk of turning down cases, or run the real risk of overbooking; they usually opt for the latter. We would never accept that a full-time municipal judge be paid by the case, and run his docket as a business: but that is the reality for many ‘usual suspects’. While, I repeat, many professional arbitrators and ‘gorillas’ are very able, it must be recognised that the use of this cadre is an important part of the extra delay and hence extra cost that confronts international arbitration. While the clerks do much drafting (itself a questionable phenomenon), the ‘gorilla’ fills his schedule and keeps the shop running. This is a part of the ‘arbitration industry’ discussed above, but this business case seems a far cry from the ‘town elder’ or ‘Mini Cooper’ paradigms of the arbitrator.\footnote{Is the person who is essentially running an ‘arbitration office’ well placed to exhibit what Prof. Pierre Lalive has termed the ‘courage’ of an international arbitrator? See P. Lalive, ‘Du courage dans l’Arbitrage International’ in \textit{Mélanges en l’honneur de François Knoeffler} (Helbing & Lichtenhahn, 2005), pp. 157–160.}
But it is the arbitral users who select or agree to the arbitrators, and they often choose ‘gorillas’. When I raised the issue of ‘professional arbitrators’ with a good friend (and well-known North American ‘gorilla’) that was exactly his reaction: ‘let market forces decide’ he said. He most certainly has a point: it is the parties (or, usually, their lawyers) that choose arbitrators and, usually, agree or acquiesce in the choice of chairman. If the parties want large and busy gorillas, that is their privilege. But as Najar points out, the reflexive choice of big gorillas has become a significant impediment to the scheduling and presentation of cases within a reasonable amount of time and on a cost-effective basis.

It has always been possible to enquire of a potential arbitrator as to his workload and availability; indeed, even the ICC Report recommends this. Since then, the ICC has heeded its own concern, and followed part of Najar’s suggestion above. The Bureau of the ICC Court of International Arbitration, with approval at an ICC Court working session, has recently issued a revised acceptance form for ICC arbitrators. The ICC Statement of Acceptance is now expanded to include information and declarations as to the arbitrator’s availability as it might affect his ability to take on new cases. Specifically, the potential arbitrator must list the number of arbitrations in which he is involved (as chairman/sole arbitrator, co-arbitrator and counsel) and also answer the question: ‘[a]re you already aware of any other professional engagements or activities likely to require a substantial commitment from you in the next 12–18 months?’ I know of at least one Swiss ‘gorilla’ who refuses to fill in this information, although the ICC reports a very high level of compliance. Apparently the current form will be tested over a period of six to 12 months and then modified if necessary. Previously, parties who did enquire as to a potential arbitrator’s caseload or commitments did not always receive a straight answer, had no declaration in writing, and usually had no information as to availability of the other party-nominated arbitrator or the chairman. The new ICC form is designed both to promote greater transparency and ‘encourage arbitrators to reflect more carefully on their availability before accepting office’. The form is clearly a step in the right direction, even if some ‘usual suspects’ resent the additional disclosure.

It little behoves regular arbitrators (be they gorillas or big chimps) to oppose transparency. Our arbitral Rip Van Winkle was constrained to rely on experience, gossip and discreet phone calls to learn about an arbitrator’s record, but the world has changed. The growth in arbitration, coupled with better, generally electronic, communication and databases, is opening an era where an arbitrator’s record will be as well known as that of a municipal judge. ICSID awards are

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91 Indeed the ability to have a choice and say in the arbitrators appointed is considered one of the essential advantages and freedoms of arbitration.
92 ICC Costs Report, supra n. 20 at para. 12.
94 ICC Commission on Arbitration, Summary Record (4 October 2009), p. 3.
95 Ibid.
available on the Internet in full with the arbitrators’ names; this is also true of an increasing number of major commercial arbitration awards. There is now far more information about arbitrators ‘out there’ but it is not systematically collected. Professor Catherine Rogers, whose work focuses on ethical issues in international disputes, has proposed an arbitrator disclosure database.\footnote{See ‘Seeking Transparency, International Arbitration Users Propose to Gather Feedback’ in (2007) 25(11) Alternatives 183.} Michael McIlwrath, a senior litigation counsel at General Electric, who is an active arbitration commentator from the ‘user’ side, expressed a growing view that the time might be right for such an effort, as practitioners now largely rely on hearsay in making such appointments.\footnote{Ibid. p. 184.} The concept is not without controversy as some view the idea of such a database, complete with ‘reviews and comments’, as incompatible with the dignity or confidentiality of the arbitral process. While I suspect our arbitral Rip Van Winkle would have been surprised or shocked by an ‘arbitrator database’ proposal, he fell asleep before international arbitration became the industry it is, and technology evolved in such a way as to make such databases much easier to create and update. As Catherine Rogers put it to me in conversation, one can now read reviews of a book before making a US$20 purchase commitment on Amazon.com; how can it be aberrant to be able to access reviews and other information prior to making a potentially crucial choice as to an appropriate arbitrator for a multi-million dollar arbitration?

The growth in the importance of international arbitration, and its transformation into the ‘arbitration industry’, have and will result in the greater spread of information and databases\footnote{Further, Rogers seeks to develop the criteria for Standards of Conduct for International Arbitration, see Rogers, ‘Regulating International Arbitrators: a Functional Approach to Developing Standards of Conduct’ in (2005) 41 Stanford Journal of International Law 53; cf. Born and Scherer, ‘Introduction’ in (2009) European and Middle Eastern Arbitration Review 3 (suggests need for a code of conduct for counsel in arbitration).} about arbitrators, even if some lament the loss of a (real or imagined) dignity in the process.

(iii) Time limits, chess-clocks and hot tubs

Some commentators have suggested reform through obligatory structured time limits. The idea has an obvious surface plausibility: counter delay with time limits. But here again, it is difficult to find one size for all.

One period of time that should be subject to reduction is the long gap that institutions, and parties, take in nominating and empanelling a tribunal.\footnote{B. Vasani and K. Tallent, ‘Proportional Autonomy: Addressing Delay in International Arbitration through a Deadline for the Rendering of Final Awards’ in (2008) 2 Dispute Resolution International 255 at p. 264; accord, Rivkin, supra n. 3 at p. 379.} This is indeed a bottleneck and, as any experienced arbitration counsel can inform, the case only takes on real ‘life’ when the arbitrator(s) are in place. The bottleneck is sometimes greater in ICC arbitration with its requirement that arbitrators be ‘confirmed’ by the ICC ‘Court’ although non-controversial confirmations are now done by the Secretary General. The ICDR, on the other hand, reports that parties
can expect the appointment of all arbitrators within 60 days. The possibility of having strict and binding deadlines here is present because the applicable arbitration rules will contain and apply the obligatory fallback mechanism for causing the arbitrator to be appointed. Although not a major reform, tightening deadlines and procedures on empanelling a tribunal, including not extending time periods for a joint nomination of a chairman, would speed up and discipline many arbitrations.

The situation is significantly more complex when one is suggesting mandatory deadlines for the handing down of the arbitral award, as do Baiju Vasani and Kassi Tallent. These authors posit that causes of delay in arbitration are ‘systemic ones – in other words, they do not derive from the rules of any particular institution or the circumstances of any particular arbitration proceeding, but rather are integrally related to the status quo of arbitration itself’. Their proposed remedy is ‘proportional autonomy’ in setting deadlines for rendering awards; essentially a ‘mutual collaboration between the parties and arbitrators, based on a thorough initial assessment of the case’ which permits binding deadlines to be agreed to.

The formula begs the real question of how one can create this mutual cooperation between parties and ensure the ‘thorough initial assessment’ which may be key to setting a proper and realistic deadline. Experience teaches us that the parties rarely have the same interest in celerity and, consequently, in pushing arbitrators to early assessments and firm deadlines. Furthermore, it must be acknowledged that an award deadline, however ‘firm’, cannot be absolute and one must avoid the possibility that the non-respect of the deadline renders the arbitrator functus officio, or the award subject to annulment.

Rendering award deadlines compulsory is thus likely to be unrealistic and resisted, and raises serious issues as to the validity of arbitrator action and awards that do not comply. There are also sometimes quite legitimate reasons why an award (especially of a three-person tribunal) takes longer than foreseen to be issued. The less binding, but ultimately more realistic remedies are to select efficient, and not overbooked, arbitrators in the first place and make use of appropriate institutional mechanisms to police the case schedule. For instance, the ICC Rules already provide that the arbitrator and parties must early on issue a provisional timetable; any subsequent modifications of the timetable must be communicated to the ICC committee as well as to the parties. I have also, in several ICC arbitrations, discreetly contacted the Secretariat to put

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101 Appel, supra n. 6 at p. 1.
102 Vasani and Tallent, supra n. 100 at p. 267.
103 Ibid. p. 268.
104 Ibid. p. 268.
106 ICC Rules, art. 18(4).
pressure on a lazy or overbooked arbitrator who was unacceptably slow in issuing the award.\textsuperscript{107}

The SCC guidelines state that arbitrators requesting extensions of time for rendering their award must state the reasons for the requested extension, and the parties must have the opportunity to comment on the request.\textsuperscript{108} At the end of the day, the flexibility for which arbitration is vaunted has to include the possibility of reasonable or justified extensions in rendering the award or risk damaging the system itself. This is an area where better choice of and practices by arbitrators, together with judicious institutional and party supervision, is preferable to an attempt to set absolute deadlines.

Turning to tools designed to control and prevent delay in the arbitral hearings, the increasingly popular chess-clock system merits some comments. The essence of the chess-clock system is to estimate the total amount of ‘hearing time’\textsuperscript{109} available to the parties. That time is then allocated to the parties 50/50 and they determine what they consider to be the best use of ‘their’ time. A party may, for instance, opt not to make an opening statement or, on the contrary, decide that its case is best served by an opening that discusses evidence in detail. Likewise, the parties determine the extent of time they wish to allocate as between different witnesses, and as between direct and cross-examinations.

Some commentators are strongly in favour of the chess-clock system, even going so far as to state that in their experience, it has always promoted efficiency and ‘never’ caused important evidence to be overlooked.\textsuperscript{110} I would favour the more limited and nuanced judgement that ‘the chess-clock is but an instrument in the well-stocked arsenal of techniques to administer arbitration procedures. Where this technique is utilised it is appropriate to take measures to ensure the parties a fair procedure, in form and substance’.\textsuperscript{111}

The fundamental point is that the chess-clock system is a technique for managing certain arbitration proceedings; it is not a procedure in and of itself. While I have prosecuted cases where the chess-clock system was used to good effect, and have myself employed it as an arbitrator, it is not a technique for automatic or routine application to all arbitral hearings. It works best when the parties have a roughly equal number of witnesses and are both represented by similarly sophisticated counsel who are well-prepared for the hearings and can intelligently make the difficult trade-offs required by chess-clock rules. It works badly, if at all, when the case is ‘unbalanced’, either in the strength of evidence or counsel.

\textsuperscript{107} Perhaps not surprisingly, in all such situations that I remember, I was acting for the claimant.


\textsuperscript{109} This would generally be the amount of time in which the parties’ argument or testimony is being recorded during the hearings, net of arbitrator questions and formalities.

\textsuperscript{110} Rivkin, supra n. 3 at p. 378.

Most fundamentally, however, in order to carry out many hearings fairly and properly, it is sometimes appropriate that one party's case or witnesses take more time than the other, or simply that there be more time allocated to certain issues or arguments. Thus, in certain cases, a chess-clock system can inhibit fair and proper administration of the case in favour of a rigid false 'equality' between the parties. None of which is to say that a chess-clock system is not a good technique to apply to some hearings, but it is a tool that arbitrators can use in executing their duty to administer hearings intelligently and equitably — it is not a substitute for that duty.

A similar observation must be made on the very à la mode hearing technique of expert witness conferencing, often referred to as 'hot tubbing' and/or requiring prior meetings or joint reports from experts. These techniques can save time or narrow issues, but can also result in wasted time and effort. As a general proposition, they work best when the experts are of similar culture and background (ideally experts who already know each other), and are not too directly involved as part of the 'team' for the case. In such a situation, both hearing and tribunal time may be saved as the expert meetings will generally clarify or reduce issues in dispute.112 But I have also been an arbitrator in a major case where our well-meaning requirement that the experts have a prior meeting, and establish joint reports, was a failure. The experts did not speak the same language (in every sense of that expression), and the meetings themselves were logistically complicated and contentious with no common 'expert culture'. In light of that, we dispensed with any idea of 'hot tubbing' the experts, and just permitted each to comment on the other's testimony and presentation. Witness and expert conferencing and meetings, like other procedural techniques, have to be evaluated on a case-by-case basis. The proper conduct of 'hot tubbing' and confrontational testimony, it should be noted, requires significantly greater preparation by the arbitrator so that he can intelligently question the witnesses as to areas of agreement and disagreement.113 Hot tubbing does not necessarily save hearing time as it is generally necessary that the witnesses be examined by the opposing party separately before testifying jointly.114 Arbitrators can make the mistake of distending a proceeding by applying these techniques where they will not work properly, or when the arbitrators are insufficiently prepared to exploit the techniques efficiently.

(iv) Costs, carrots and sticks

A number of writers have raised various possibilities of changing and refining the arbitrators' award of costs better to police the case and reduce costs and delay, or at least penalise them.115

112 Rivkin, Donovan and Amirfar, supra n. 11 at pp. 5–6.
113 Ibid. p. 6; Sachs, supra n. 19 at p. 114.
114 Rivkin, Donovan and Amirfar, supra n. 11 at p. 6.
One of the more radical proposals is the use in arbitration of ‘sealed offers’. Sealed offers are a mechanism used in a number of common law jurisdictions to encourage settlement by imposing cost penalties on those who continue with the proceeding in the face of a reasonable offer to settle. In part, the sealed offer mechanism has been developed to attenuate the seemingly harsh ‘English’ approach of loser pays all or ‘costs follow the event’.

The mechanism itself is basically a confidential settlement offer with potentially prejudicial cost consequences. For example, a respondent facing a, potentially inflated, claim of €20 million, makes a ‘sealed’ offer of say €5 million; should claimant only be awarded €4 million, reference is made to the sealed offer and the respondent asserts that costs should not be awarded against it as the claimant could have received that compensation without incurring such costs.

While the system has an attractive logic, it, like many innovations borrowed from municipal litigation, is difficult to apply in international arbitration. A central problem is logistical: in English and much other litigation, a case is decided and then costs are taxed. In international arbitration, costs are generally awarded in the final award; only occasionally, and in particularly large cases, are there separate cost hearings and awards. The arbitrators cannot take into account a sealed offer in assessing costs unless they are aware of the offer, and a respondent is not generally going to show the offer to the tribunal unless damages have been determined. Thus, to use the ‘sealed offer’ mechanism in international arbitration essentially requires a ‘bifurcation’ so that substantive claims are decided in an award, and then costs are fixed in a final ‘costs award’. This procedure, of course, itself means further hearings, awards and, ironically, costs.

Different problems arise with attempts to assign (again English litigation style) costs for particular unsuccessful or dilatory motions and applications during the arbitral procedure. While the threat of a cost sanction fee for unsuccessful motions is often made by the other party, it is rare that costs awards are so detailed or specific as to be broken down this way, or that there are explicit findings as to cost allocation when an arbitral application is ruled on. International arbitrators are generally reluctant to make cost decisions during the course of the procedure. They almost inevitably prefer to defer any cost issues until the end of the case, and by that time the unsuccessful application is largely forgotten in the context of much wider substantive findings, including, typically, some application of ‘costs

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116 Hacking and Schneider, supra n. 42.
118 Ibid. p. 3.
119 Ibid. p. 4; the writer suggests that, since this is not habitual, the bifurcation should if possible be stipulated in the arbitration clause.
120 Hacking and Schneider, supra n. 42 at p. 3.
follow the event'. A second problem is that the parties would have systematically to record and document their fees and costs with regard to specific motions; they rarely do this and, as noted, the arbitrators even more rarely desire this interim information.

At the end of the day, it does not seem very feasible to shoehorn cost and cost taxing mechanisms for litigation systems into international arbitration. There are many such systems and they vary widely, rendering any consensus unlikely. Arbitration typically results in one trial hearing and final award which includes costs. Importing procedures such as sealed offers or interim costs awards runs counter to the basic logistics of the arbitral process, and so might ironically raise overall costs and time expenditures.

This is not to say that there are no ameliorations in costs awards or costs allocation that would render arbitration more efficient. The key here, as on many other issues, is more attentive arbitrators. One of the reasons all cost issues are shoved to the end of proceedings is that it is easier and because some arbitrators seem to consider issues of costs as of secondary interest. Nothing impedes an arbitrator from judiciously noting (and ruling in a procedural document) that he will take into account a party's contribution, vel non, to arbitral efficiency. Virtually all major arbitral rules readily afford the arbitrator this discretion and flexibility. It is for the parties to push the arbitrator, and for the arbitrator to be attentive. I am not sure a greater revolution in costs attribution is called for which, like many revolutions, could have unpredicted consequences.

IV. 'A SLOW CONTAGION OF GOOD'

Many parties would today say that international arbitration, far from healing itself, is afflicted by a slow contagion of bad, leading inexorably to greater expense and delay. Correctly or otherwise, the problem is not infrequently identified as the 'legalised' American practice having infected international arbitration. Whatever the source, or sources, of this litigious influence in international arbitration, it is felt and the remedies are not all at hand. Arbitration has imported many of the motions and some of the procedure of complex litigation but without the arbitrators being able, or sometimes willing, to make use of tools effectively to deal with them. As Lord Mustill put it rather colourfully, international arbitration can have 'all the elephantine laboriousness of an action in court, without the

121 M. Buhler, 'Awarding Costs in International Arbitration: an Overview' in (2004) 22 ASA Bulletin 249; accord, F. Cantuarias Salaverry, ' Pronunciamiento acerca de los costos del arbitraje en el Laudo Arbitral' in (2006) 3 Revista Peruana de Arbitraje 355 at p. 364; for a significant discussion of costs awards in the ICSID context, see Webster, supra n. 1.
122 Hacking and Schneider, supra n. 42 at p. 3.
123 A suggestion also made in the ICC Costs Report, supra n. 20 at p. 40, para. 85.
saving grace of the exacerbated judges’ power to bang together the heads of recalcitrant parties’.\textsuperscript{125}

Everyone agrees, in the abstract, that arbitration procedures should be ‘streamlined’ and ‘narrowed’ with ‘issues grouped’, and so forth. But these laudatory ideas are not easily put into practice. In some, not all, cases they will involve making more use of interim awards, procedural hearings that actually debate and define issues, and, last but not least, activist arbitrators who have the will, the possibility and the power early on to dissect and organise a case. The streamlining of arbitral disclosure by alert and informed arbitrators remains a highly desirable cost-related reform, but a virtually impossible one to reach in practice. There are few arbitrators prepared to organise, structure and limit the case early on, and the logistics and structure of international arbitration conspire against this. In particular, arbitrators running a ‘full-time arbitrator’ business model are not often in a position to do this or schedule with flexibility. But it is the parties who decide, wisely or otherwise, to nominate overbooked ‘gorillas’ to decide their cases.

The parties, and their lawyers, must also be willing to assume the risk of putting their case together, and putting it forward, early, and possess the discipline to stick with the key issues and the best evidence. Easier said than done, but there are possibilities. For example, articles 3 and 18 of the UNCITRAL Rules\textsuperscript{126} provide that a claimant has the option of initiating arbitration with a simple ‘Notice’, or to include a full ‘Statement of Claim’. If a Statement of Claim is submitted, the respondent is required to answer with a Statement of Defence of comparable detail; in the case of a mere Notice, the respondent is not required to answer at all: the meat of the case awaits the submission of a Statement of Claim. It follows that a claimant could greatly accelerate its case by the initial filing of a Statement of Claim;\textsuperscript{127} notice pleading is avoided and the case moves promptly to detailed merits. While this would require far more work and upfront expenses, it would also mean that issues are identified early on and a number of difficult decisions are made up-front. The disadvantage, of course, is that the claimant must invest far more time, effort and money before the case is started. Although this greater initial expense would, in most cases, pay off in savings later (and in far more sophisticated settlement parameters) it simply isn’t done in practice. Claimants, even strong claimants with clear cases, tend to go step by step, and do not always seize the short-cuts or simplification that arbitration may offer. This may limit expenses in the short run, but it likely increases it over the procedural


\textsuperscript{126} Articles 3 and 18 of the Swiss Rules for International Arbitration are substantively identical to the UNCITRAL provision on this point, and arts. 10 and 41 of the WIPO Arbitration Rules set up a substantially similar system.

\textsuperscript{127} Although this would, in most cases, delay the filing of the case by a significant period of time while a full Statement of Claim with evidence and documents is put together.
life of the case. This is another example of a trade-off which parties have been reluctant to enter into.

Finally, the cost-effective measures one desires in the abstract may not be in one's interest in the heat of the battle. Pleas for greater 'cooperation' between the parties are often somewhat idle once the dispute has started. Stated slightly differently: one person's efficiency becomes the other's infringement of due process.

V. CONCLUSIONS

Arbitration institutions are increasingly sensitive to complaints about the growing costs and unnecessary complexity of international arbitration, possibly in part because these institutions are desirous of keeping or increasing their 'market share' of disputes. Some promising initiatives have been undertaken or are in the works at major arbitral institutions. But all arbitral players (parties, specialised lawyers, arbitrators and institutions promoting reform) must also acknowledge that it requires 'cooperation'\textsuperscript{128} between the parties and the other actors to implement or agree to efficient procedures. This plea for cooperation cannot merely be tautological, that is, if the parties would cooperate in simplifying disputes, disputes would be simplified. Rather, it involves significant, and often uncertain, efforts by all players, and alert arbitrators in particular, to counter unnecessary complexity and contention.

There is no easy exit from the arbitral cost conundrum, just as there is no one reason that leads to the conundrum. We, no more than Rip Van Winkle, can set the clock back – arbitration cannot return to some simple cost-efficient process, if indeed it ever was one.

This said, reform is possible but depends on a true will by determined parties and dogged attention by conscientious arbitrators, and to a certain extent by arbitral institutions. Increased costs in arbitration do not arise in isolation of shifts and increased complexity in arbitration or in modern life – they are a reflection of them. Nor can the cost conundrum be defeated by mere changes in arbitral rules, although some judicious changes to give arbitrators more power and flexibility may be called for. It can, however, be argued that many statutory provisions and rules empowering an arbitrator to conduct the proceeding in an efficient manner are already in place, and that what is needed is for arbitrators to use these powers sensibly.\textsuperscript{129}

The basic argument or premise of the cost debate is mischosen: it is not that arbitration is less expensive than litigation. This may sometimes be true and may, arguably, have been more accurate at some point in the past, although I cannot remember clients in the 1980s waxing eloquently about arbitration's cost-effectiveness. Whatever the past, the reality is that arbitration is and will continue to be inevitable, and that the effort to keep it true and cost-effective is a constant trial of innovation and, sometimes, error. There will be no revolution that will

\textsuperscript{128} See e.g., Rivkin, supra n. 3 at p. 381; Sachs, supra n. 19 at pp. 113, 115.

\textsuperscript{129} Hacking and Schneider, supra n. 42 at p. 32.
convert (or return) international arbitration to some warm ancestral south where its procedures were largely consensual, cost-effective and quick. This is not to say that nothing can be done; but it is to say that, in my view, the most that realistically can be hoped for is what George Eliot termed ‘a slow contagion of good’. Even that contagion, however, does not propagate itself spontaneously, but with effort and generous patience. Reviewing the developments, factors and trends discussed above, I am able to come to the following conclusions/suggestions:

(1) The growing direct involvement of the ‘client’, notably sophisticated in-house counsel from major multinationals, in the arbitral process is salutary and necessary. It is the arbitration ‘user’ who must, ultimately, accept the trade-offs that are inevitable for shorter and more cost-efficient procedures. International arbitration is not, and cannot be seen to be, a system solely run by, and solely profiting, outside professionals.

(2) There is no ‘simplification’ of arbitral procedure without significant procedural trade-offs; it is not just a matter of ‘streamlining’ and cutting out wasteful motions. Once the dispute has started, what is viewed as a ‘simplification’ by one party is likely to be viewed as cutting an essential procedure by the other.

(3) Part of the problem with the increasing costs and complexity of arbitration is that numerous litigation-type motions and techniques have been imported into arbitration without a corresponding power (or will) in the arbitrators to control the dispute with early ‘decisions’, ‘dispositive motions’, and the like. Here, judicious reforms in arbitration rules to create and reinforce arbitral powers are appropriate, but they will not be easy.

(4) But another part of the problem with the costs and time required to resolve international disputes is due to the fact that truly large, complex, and sometimes politically contentious disputes are regularly being resolved through arbitration. These disputes also often involve important jurisdictional issues, overlapping procedures and other complications. Major simplification is unrealistic here; under any system the resolution of such disputes would, and will, be time-consuming and expensive.

(5) Clearer, better enunciated and more nuanced provisions and practices on the awarding of costs might assist in limiting costs and delay, but will be of secondary significance.

(6) One issue that does need to be addressed, by the ‘clients’ or ‘arbitral users’ in particular, is the rise of a true arbitration industry with ‘professional arbitrators’. This has sometimes served dispute resolution well, but there are now many expensive excesses to be cured. Arbitral institutions can be helpful in addressing this problem, and are attempting to do so, but the real pressure, once again, must come from the arbitration users.

Arbitration remains essential: it will not be replaced and it will not become cheap. Nor can international arbitration return to the simplicity our arbitral Rip
Van Winkle imagines he remembers. There are, however, opportunities for some reform, including changes in arbitration rules and scheduling, more rational choice of arbitrators, and continuing pressure to improve on the model. A slow contagion of procedural good is possible and the dérive of the arbitration industry is not inevitable.