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# Efficiency in International Arbitration: Whose Duty Is It?

Jennifer KIRBY<sup>\*</sup>

*This article tracks a talk the author gave at Helsinki Arbitration Day 2015. The author notes that the issue of efficiency in international arbitration is often misunderstood to be a matter of time and cost, when it is really a question of the relationship between time, cost, and quality. Anyone who thinks that arbitration can be fast, cheap and good should think again. While parties and their counsel and arbitral institutions can help to reduce time and cost, it ultimately falls to the arbitrator to make arbitration more efficient. But any effort to increase efficiency amounts to nothing more than tinkering with a well-oiled prosperity machine.*

When I was a girl growing up in California, I liked unicorns. Actually, I didn't like unicorns—I *loved* unicorns. I had unicorns all over my room—posters of unicorns, books on unicorns, tons of unicorn stuffed animals. I also had unicorns all over me—unicorn earrings, unicorn t-shirts, jeans with unicorns on the pockets. I even had unicorns on my shoelaces. And when people asked me what I wanted to be when I grew up, I said, “A unicorn.” But even though I really, really loved unicorns, I never believed in unicorns.

When we talk about efficiency in international arbitration, people sometimes think we're talking about two things: time and cost.<sup>1</sup> The question of how to make arbitration more efficient is often understood to be a question of how we can make it faster and cheaper. In fact, however, when we talk about efficiency in arbitration, we're actually talking about the relationship between three things: time, cost, and quality.<sup>2</sup>

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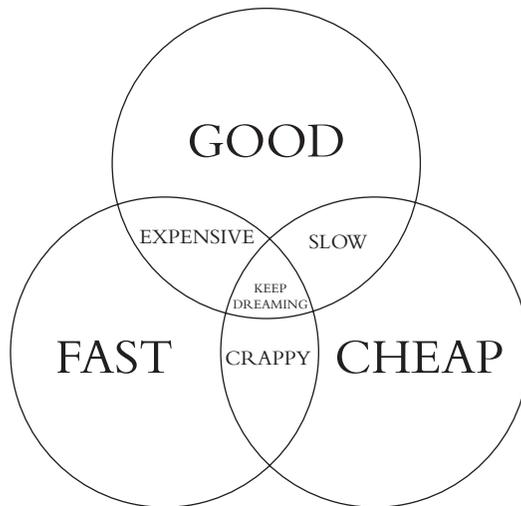
<sup>1</sup> See, e.g., *The Dynamic of Time and Cost*, 4(2) *Global Arb. Rev.* 10, 13–15 (2009) (“GAR, Part 1”) (Andrew Clarke setting out the concerns of in-house counsel with respect to time and cost in international arbitration without any consideration of the relationship between time, cost, and quality). See also William W. Park, *Arbitrators and Accuracy*, 1(1) *J. Int'l Disp. Settlement* 25, 28–32 (2010) (noting that critics of arbitration often devote little energy to “grappling with how to achieve efficiency without sacrificing accuracy”).

<sup>2</sup> Jacques Werner, *The Arbitrator as Master of Time*, 12(2) *J. World Inv. & Trade* 299 (2011) (explaining that an efficient arbitrator has to “balance the requirement of speed—justice delayed is justice denied—with the opposite necessities that due process be upheld, that the parties have their day in court and are able to fully argue their case, and that the arbitrator takes the time necessary to reach the right decision”); Park, *supra* n. 1, at 33 (noting that any discussion about efficiency in international

Those of you who have been to a dry cleaner in the United States may have seen a sign that says, “Fast. Good. Cheap. Pick two.”<sup>3</sup> What this means is that you can have your dry cleaning good and fast, but it won’t be cheap. Or you can have it good and cheap, but it won’t be fast. Or you can have it fast and cheap, but in that case it won’t be good. What you can’t have is all three. You can’t have your dry cleaning good and fast and cheap.

In certain business circles, this relationship between time, cost and quality is known as the Iron Triangle (see Figure 1).

Figure 1 The Iron Triangle



It’s known as the Iron Triangle because there’s no escaping it. It’s not the Tin Triangle or the Glass Triangle or the Balsa Wood Triangle. It’s the Iron Triangle. When you spend less time and less money on a product, quality suffers.

Some people, however, seem to think that what applies to dry cleaning doesn’t apply to international arbitration. Much has already been said about the need to reduce time and cost in arbitration.<sup>4</sup> And some of the comments seem to assume that it’s possible to have it all. That arbitration can be fast and cheap and

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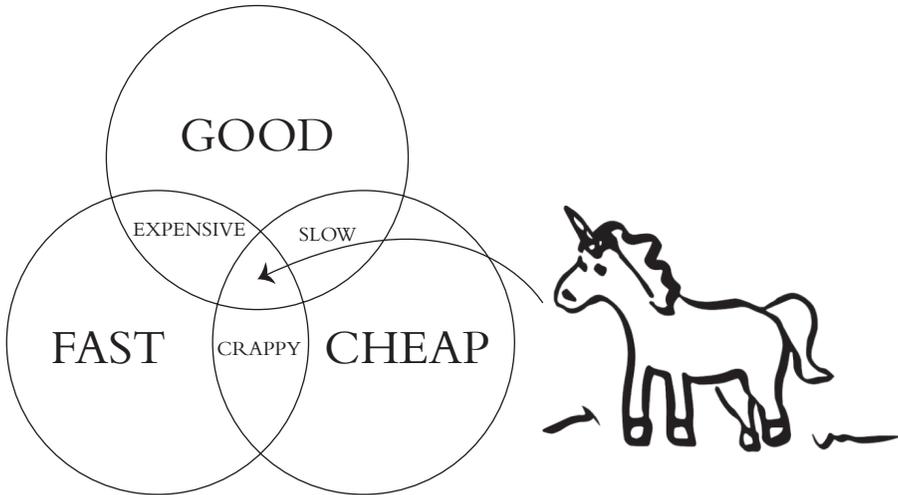
arbitration necessarily concerns “shades of grey in balancing truth-seeking against added time and expense”).

<sup>3</sup> This sign also appears in a shoe repair shop in Boston. Park, *supra* n. 1, at 28.

<sup>4</sup> See Robert B. Kovacs, *Efficiency in International Arbitration: An Economic Approach*, 23(1) Am. Rev. Int’l Arb. 155, n. 3 (2012) (cataloguing the “growing chorus of discontent from the users or ‘consumers’ of international arbitration regarding the time (and associated cost) it takes to conduct international arbitrations”); Park, *supra* n. 1, at 28–32 (drawing together commentators’ laments about the time and cost associated with international arbitration).

good. That it exists in a magical place where the Iron Triangle doesn't apply.<sup>5</sup> Well, I'm here to tell you that that paradise is where the unicorn lives (see Figure 2).<sup>6</sup>

Figure 2 *Where the Unicorn Lives*



Having said this, it's important to note that the time and money at issue in the Iron Triangle is time and money that's being spent on the product. To the extent time and money is being spent on things that don't go towards making the product better, that time and expense could be eliminated without reducing quality. If my dry cleaner is in part charging me for time he spends chatting on the phone to his girlfriend, that time and cost could be cut without affecting how my clothes look. The same applies in arbitration.

What defines a quality arbitration may be a bit more difficult to pin down than what defines quality dry cleaning. Different parties might articulate differently what they consider a quality arbitration to be. Some might focus more on the

<sup>5</sup> *The Dynamic of Time and Cost: The Sequel*, 4(3) Global Arb. Rev. 12, 17 (2009) (David Brynmor Thomas noting that, among in-house counsel, there is an "unwillingness to balance procedural efficiency and cost savings against any risk in the outcome").

<sup>6</sup> See Joerg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, 29(3) Arb. Int'l 453 (2013) (explaining that parties in international arbitration need to choose between reducing time and cost, on the one hand, and quality, on the other); GAR, Part 1, *supra* n. 1, at 15 (David Brynmor Thomas noting that "truth is expensive") (internal quotation marks omitted); L. Yves Fortier, *The Minimum Requirements of Due Process in Taking Measures against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration—A Few Plain Rules and a Few Strong Instincts*, in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, 9 ICCA Congress Series 396 (Albert Jan van den Berg ed., 1999) (discussing the "never-ending battle between the interest of justice and fairness on the one hand, and finality and efficiency on the other") (internal quotation marks omitted).

quality of the process, while others might focus more on the quality of the award. It's probably safe to say, however, that many parties would consider a quality arbitration to be one that results in an award that is both correct and enforceable.<sup>7</sup> When an award is both correct and enforceable, this means that the arbitrator has managed to get to the right result while ensuring due process and otherwise avoiding any egregious procedural errors along the way. To the extent people spend time and money on things that don't go towards producing awards that are correct and enforceable, many parties would probably agree that such time and expense could be saved without reducing quality.

For example, and perhaps most obviously, there is usually no reason to spend time and money producing documents that are irrelevant to the issues the arbitrator has to decide. Similarly, if a case turns on a discrete question of law or fact, it's hard to see why time or money should be spent examining other legal or factual issues.<sup>8</sup> The time and money spent on these things could probably be cut without affecting the correctness or enforceability of the award. It's through weeding out these sorts of unnecessary costs that greater efficiency in arbitration can be got. So whose duty is it to get it?

Now, when you think about it, this question is a bit heavy. I mean, if somebody has a *duty* to do something that usually means they have a legal or moral obligation to do it. I'm not aware that anyone has a legal obligation to make arbitration more efficient. At least, I've never heard of anyone being held liable for failing to do so.<sup>9</sup> And to the extent anyone has a moral obligation to make arbitration more efficient, I hope we might be able to agree that it is a moral obligation with a very small *m*.

In my mind, the more prosaic question is: Who's in a position to make international arbitration more efficient? The usual suspects, of course, are the parties and their counsel, arbitral institutions, and arbitrators.<sup>10</sup>

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<sup>7</sup> Jennifer Kirby, *What Is an Award, Anyway?*, 31(4) J. Int'l Arb. 475 (2014) (on the importance of awards being not only enforceable, but right); Park, *supra* n. 1, at 27 (explaining that an arbitrator's primary duty lies "in delivery of an accurate award that rests on a reasonable view of what happened and what the law says").

<sup>8</sup> It can also be that deciding certain key (but not wholly dispositive) issues of fact or law may permit the parties to settle what remains of their dispute.

<sup>9</sup> Having said this, certain arbitral rules purport to impose a duty on arbitrators to run proceedings in a cost-effective manner. See, e.g., LCIA Arbitration Rules (effective Oct. 1, 2014) ("LCIA Rules"), Art. 14(4)(ii) (providing that arbitrators have a "duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute"). Such rules are meant to empower arbitrators, not to open them up to liability. See LCIA Rules, Art. 31 (limiting arbitrator liability).

<sup>10</sup> While these are the usual suspects, it should not be forgotten that legislatures and state courts can play perhaps the most important role in making arbitration more efficient by adopting and implementing laws, procedures, and practices that facilitate the efficient enforcement of arbitration agreements and arbitral awards.

Given that the largest cost in arbitration is usually legal costs,<sup>11</sup> the parties and their counsel should have a major role to play. At least in theory, the parties can agree to conduct the case in an efficient manner that keeps legal and other costs down. And when they do, efficiency skyrockets. But such agreements are not as common as we might hope. Before a dispute arises, parties are often reluctant to tie their hands because they may well regret it later. And after a dispute arises, what one party considers efficient, the other often considers a violation of due process.<sup>12</sup>

By contrast, the administrative costs associated with arbitral institutions are usually a drop in the bucket.<sup>13</sup> I don't think there's much to be gained from trying to reduce administrative costs, and any efforts in this regard would almost certainly undermine the quality of service institutions currently provide. But arbitral institutions can be helpful in increasing efficiency in other ways.

Most obviously, they can develop arbitral rules and practices that encourage the efficient resolution of disputes.<sup>14</sup> And they can share their vast experience to help educate parties, lawyers and arbitrators about techniques to reduce time and cost.<sup>15</sup> They can also lean in favor of having sole arbitrators<sup>16</sup> and ensure that all arbitrators have the time and expertise to run their cases efficiently.<sup>17</sup> And they can exercise control over arbitrators' fees and expenses—control that might include

<sup>11</sup> See ICC Commission on Arbitration and ADR, Effective Management of Arbitration, *A Guide for In-House Counsel and Other Party Representatives* 3 (2014) (“In-House Counsel Guide”) (noting that the costs parties incur to present their cases, e.g., lawyers’ fees and expenses, expenses related to witness and expert evidence, on average amount to 82% of the total costs associated with an ICC arbitration).

<sup>12</sup> Park, *supra* n. 1, at 34 (noting that “one person’s delay is another’s due process”). For ideas on how parties and counsel can work to make arbitration more efficient, even without the cooperation of the other side, see In-House Counsel Guide, *supra* n. 11; Michael McIlwrath, *Anti-Arbitration: 10 Things to Do Before the Arbitration Gets Underway*, Kluwer Arbitration Blog (Nov. 12, 2011); College of Commercial Arbitrators, *Protocols for Expedious, Cost-Effective Commercial Arbitration* 24–42, 61–67 (2010) (“CCA Protocols”); Debevoise & Plimpton LLP, *Protocol to Promote Efficiency in International Arbitration* (2010).

<sup>13</sup> See In-House Counsel Guide, *supra* n. 11, at 11 (noting that on average administrative costs account for 2% of the total costs associated with an ICC arbitration).

<sup>14</sup> Indeed, many arbitral institutions (including the Arbitration Institute of the Finland Chamber of Commerce, Hong Kong International Arbitration Centre, International Centre for Dispute Resolution (ICDR), ICC, LCIA, Singapore International Arbitration Centre, and Swiss Chambers’ Arbitration Institution) have recently updated their rules to this end.

<sup>15</sup> Some of the most notable efforts to improve efficiency that have benefitted from the experience of arbitral institutions include the In-House Counsel Guide, the ICC Commission Report on Controlling Time and Costs in Arbitration, the ICDR’s Guidelines for Arbitrators Concerning Exchanges of Information, the IBA Rules on the Taking of Evidence in International Arbitration, and the LCIA’s General Guidelines for the Parties’ Legal Representatives.

<sup>16</sup> GAR, Part 1, *supra* n. 1, at 24 (Emmanuel Gaillard advocating that arbitral institutions be more open to having cases decided by sole arbitrators rather than three-member tribunals); Jennifer Kirby, *With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of Having Three Arbitrators May be Overrated*, 26(3) J. Int’l Arb. 337 (2009).

<sup>17</sup> In this regard, the ICC now requires arbitrators to make detailed disclosures regarding their availability, including the number of pending cases in which they are involved and any commitments that might prevent them from dedicating time to the case in which they wish to serve.

rewarding arbitrators who run proceedings efficiently, and penalizing those who don't.<sup>18</sup>

Ultimately, however, arbitral institutions are administrative bodies performing administrative functions. They're not down in the trenches deciding how particular cases should be run. That's what arbitrators do and that's why arbitrators are particularly well placed to help make arbitration more efficient.<sup>19</sup>

All major arbitral rules give arbitrators broad powers to decide how the arbitration should be run when the parties don't agree<sup>20</sup>—and often the parties don't agree. As a consequence, it's not uncommon for arbitrators to decide whether jurisdiction or other potentially dispositive issue should be carved out and decided in the first instance. Or to decide how many rounds of written submissions the parties will file and when. Or whether to permit document discovery and, if so, to what extent. Arbitrators also often decide the organization and duration of hearings, and sometimes whether a hearing will be held at all. In short, if an arbitration is to be efficient, it usually falls to the arbitrator to make it so—it's part of the job.<sup>21</sup>

<sup>18</sup> See, e.g., ICC Arbitration Rules (in force as from Jan. 1, 2012) ("ICC Rules"), App. III, Art. 2(2) (in fixing an arbitrator's fees the ICC shall take into consideration, among other things, the "diligence and efficiency of the arbitrator").

<sup>19</sup> GAR, Part 1, *supra* n. 1, at 19 (Serge Lazareff observing that the only way to resolve the conundrum of time and cost "is to go to the one person who can exert some authority, and that is the arbitral tribunal"); Fortier, *supra* n. 6, at 405 (noting that the "broad discretion granted to the arbitrator to determine the conduct of proceedings arms him, in effect, with a full quiver of arrows to be deployed in the fight against dilatory tactics").

<sup>20</sup> See, e.g., ICC Rules, Arts 22, 24–26, 37(5) (together empowering the tribunal to manage the proceedings proactively, provided it does not contravene any agreement of the parties). The LCIA Rules go even farther and appear to empower the tribunal to override party agreement when necessary to run the proceedings in an efficient manner. See LCIA Rules, Arts 14(4), (5) (providing that the tribunal's "duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient and expeditious means for the final resolution of the parties' dispute" is subject only to mandatory rules of law).

<sup>21</sup> And there is now a wealth of advice on how arbitrators can do this part of their job well. See, e.g., *supra* n. 15; CCA Protocols, *supra* n. 12, at 68–76; David W. Rivkin & Samantha J. Rowe, *The Role of the Tribunal in Controlling Arbitral Costs*, 81(2) Int'l J. Arb., Mediation & Disp. Mgmt. 116 (2015); Siegfried H. Elsing, *On Babies and Bathwater: Keeping the Good (and Getting Rid of the Bad) from the Company's Perspective*, *Contemporary Issues in International Arbitration and Mediation*, Fordham Papers 2010 307, 315–318 (Arthur Rovine ed., 2011); Robert H. Smit & Tyler B. Robinson, *Cost Awards in International Commercial Arbitration: Proposed Guidelines for Promoting Time and Cost Efficiency*, 20(3) Am. Rev. Int'l Arb. 267 (2009); Karl-Heinz Böckstiegel, *Case Management by Arbitrators: Experiences and Suggestions*, in *Liber Amicorum in Honour of Robert Briner* 115 (2005). The proactive case management that these authorities recommend to reduce time and cost is consistent with what parties in international arbitration say they want from arbitrators. See Queen Mary, University of London & White & Case, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process (2012) (uncovering how arbitrators run their cases and which practices parties prefer); Queen Mary, University of London & White & Case, 2010 International Arbitration Survey: Choices in International Arbitration 32 (2010) (finding that "parties prefer proactive arbitrators who take control of proceedings" as "an effective mechanism to limit cost and delay").

Having said this, exercising these powers wisely to save time and money while ensuring that the award will be both correct and enforceable, is not always an easy task. It often involves making judgment calls that can be more art than science in situations where information is incomplete, conflicting, and evolving.<sup>22</sup> In light of this, we should perhaps cut arbitrators some slack and remember that what we're dealing with here is really a first-world problem.

Few international initiatives have been as successful as international arbitration. It has effectively brought the rule of the law to some of the most lawless places on Earth and facilitated international trade and commerce that has lifted millions out of poverty and made many who were already rich even more so. As we look for ways to make it even better, we should not lose sight of this and should approach our task with considerable humility. In trying to increase efficiency, we're at best standing on the shoulders of giants to tinker with a well-oiled prosperity machine.

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<sup>22</sup> See Fortier, *supra* n. 6, at 399 (noting that arbitrators often seek to draw the line between efficiency and due process “as circumstances on the ground change—as situations evolve”) (omitting internal quotation marks). See also GAR, Part 1, *supra* n. 1, at 17 (Emmanuel Gaillard noting that two attributes arbitrators should have are the “ability to anticipate” and “courage”).



**[A] Aim of the Journal**

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