CHAPTER 9

Speeding up the Arbitration Process: Dos and Don'ts

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The criticism against international arbitration that one repeatedly hears relates to time and costs. These two are interlinked in that the longer the proceedings take, the higher is usually the cost. All major arbitration institutes have sought to address these concerns by putting in place mechanisms for the purposes of ensuring efficient conduct of the proceedings and by offering new, speedier alternatives.

Seeking a speedy resolution of a conflict must always be balanced against other considerations. There are conflicts with regard to which the stakes involved and/or the complexity of the issues are such that a very speedy resolution simply is not an option. Due process, the right to be heard, and sufficient opportunity for the arbitral tribunal to consider the merits of the case cannot be sacrificed just to achieve a swift resolution of the dispute.

However, I believe that most readers of this review are familiar with cases that could have been dealt with much faster than they were but were not because the parties and the arbitral tribunal opted for a procedure applied in most other cases without critical consideration of expediency and efficiency of the proceedings. I had the privilege of serving as the presiding arbitrator in proceedings that took more than two years to complete and thereafter as a sole arbitrator in another case of comparable scope and complexity, in which the Final Award had to be—and was—rendered within three months of my appointment because of a fixed time limit set forth in the arbitration clause. This experience gave me some food for thought as to the ways in which the proceedings could—in appropriate circumstances—be expedited.

The topic of this chapter is to examine what could work to speed up the process when all parties to the arbitration are sufficiently willing to commit to contributing to a swift process and which features and techniques perhaps should be avoided. In the following, I will discuss first questions relating to the composition of the arbitral

tribunal (1), second the early stages of the proceedings (2), third the features of the arbitration proceedings that are conducive to a swift process (3) and fourth the drafting process of the arbitral award (4). In the last section, I will describe the timeline applied in the arbitration with the fixed three-month time limit mentioned above and discuss the prerequisites that made rendering the final award within the three-month time limit possible for me as the arbitrator (5).

§9.01 COMPOSITION OF THE ARBITRAL TRIBUNAL

[A] On the Benefits of Appointing Jointly a Sole Arbitrator

Without an agreement with the adverse party, the possibility of appointing one of the arbitrators is the only way of making sure that there is at least one person in the arbitral tribunal whose integrity and judgment have the full confidence of the nominating party. Furthermore, the risk of an error of law or fact by a three-member tribunal is likely to be generally lower than it is with a sole arbitrator.[1] Discussion and deliberation between arbitrators, especially when they are from different legal and cultural backgrounds, enriches the reflection on the issues at stake in the matter. However, having a three-member instead of a sole arbitrator tribunal inevitably prolongs the arbitration process. This is due, *inter alia*, to the following factors.

The mechanics of the appointment process. Appointing first one arbitrator for each party, followed by the steps needed to have a suitable presiding arbitrator in place, takes time and could add several months to the formation of the arbitral tribunal. The difference between the parties agreeing directly on a mutually acceptable sole arbitrator and completing the appointment process of a three-member tribunal could, in the case of procedural complications, such as a challenge of a member of the arbitral tribunal, be four to five months or even longer.

Scheduling. It is sometimes challenging to find hearing dates that suit all three members of an arbitral tribunal, as well as all counsel and other necessary participants in the hearing. This is especially true in cases where the hearing requires a week or more and the arbitrators reside in different jurisdictions. Any need to reschedule the hearing at a late stage may seriously exacerbate the problem. In my abovementioned arbitration that took more than two years to complete, a significant part of the delay was caused by scheduling difficulties in a situation where the hearing first had to be changed from the originally decided virtual hearing to an in-person hearing due to an agreement to this effect between the parties, and later had to be postponed one more time. All in all, the oral hearing ended up being postponed by more than ten months from the dates reserved for the hearing in the original procedural timetable, much because of the difficulties in finding dates that suited all arbitrators and counsel located in different jurisdictions.

1. *See*, *e.g.*, Nigel Blackaby KC, Constantine Partasides KC, and Alan Redfern, *Redfern and Hunter on International Arbitration*, Seventh Edition, 4.23.

The dynamics of decision-making. A three-member tribunal obviously needs to deliberate not only on the outcome of the case but also on various procedural decisions, and sometimes, this takes time simply because of lack of simultaneous availability of the members. The more decisions are to be made, the longer usually the additional time needed, as compared to a sole arbitrator. It is essential to ensure that all members of the arbitral tribunal have a meaningful opportunity to contribute to deliberations and give input on the contents of the decisions taken by the arbitral tribunal. For this to be possible, the time needed for three arbitrators to complete the final award could be significantly longer than for a sole arbitrator. Sometimes, difficulties in reaching a consensus on key issues or dissenting opinions may cause additional delay in the deliberations.

To conclude, a three-member tribunal has obvious advantages but brings with it inherent delay that can, at times, be significant compared to a one-member tribunal. The optimal solution, when expediency is a key factor, is to agree on a sole arbitrator who has the trust of both parties. Where this is not possible, the choice of the sole arbitrator can be entrusted to an arbitral institution with specific knowledge of suitable arbitrators in relevant jurisdictions, possibly with mutually agreed guidance on the qualifications of the sole arbitrator to be nominated.

The general default position under national laws on arbitration is that the number of arbitrators shall be three, as reflected in Article 10(2) of the UNCITRAL Model Law. Given the cost-efficiency benefits of having a one-member arbitral tribunal, the default position in some institutional arbitration rules today is that where the parties have not agreed on the number of arbitrators, the institute will nominate a sole arbitrator. This is the case, e.g., of the International Court of Arbitration (ICC) and the Finland Arbitration Institute (FAI).[2] In ICC Arbitration, where the parties have not agreed on the number of arbitrators, the International Court of Arbitration will normally appoint a sole arbitrator where the amount in dispute is less than USD 10 million and a three-member tribunal where the amount in dispute exceeds USD 30 million.[3]

In ICC arbitration, the time and cost benefits of a sole arbitrator have been considered to be so important that where the monetary interest at stake is relatively low, the ICC Rules on Arbitration provide for the possibility to nominate a sole arbitrator despite the parties' agreement on three arbitrators. Under Article 30 of the ICC Rules, the Expedited Procedure Provisions (EPP) apply in cases where the amount in dispute does not exceed USD 3 million, and the parties have not opted out of the EPP.[4] As to the constitution of the arbitral tribunal, under the EPP, the ICC Court of

2. Pursuant to Art. 12(2) of the ICC Rules, "Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators." A similar provision is included in Art. 17 of the FAI Rules. According to the FAI Statistics for 2023, 85.9% of the cases were referred to a sole arbitrator in 2023 (*see* the FAI February 2024 Newsletter, available at www.arbitration.fi).
3. *See* the Note to the Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration Jan. 1, 2021 # 40, available at www.iccwbo.org.
4. The EPP is regulated by the Expedited Procedure Rules set forth in Appendix VI to the ICC Rules. The USD 3 million threshold applies to arbitration agreements concluded on or after Jan. 1, 2021. The previous threshold of USD 2 million applies to arbitration agreements concluded from Mar.

Arbitration may appoint a sole arbitrator notwithstanding any contrary provision in the arbitration agreement. A vast majority of the EPP proceedings are conducted by a Sole Arbitrator.[5]

Due to the factors discussed above, it is unsurprising that a standard feature in any institutional expedited rules is the nomination of a sole arbitrator, as reflected, e.g., in Article 17 of the SCC Expedited Arbitration Rules.[6]

[B] Finding an Arbitrator with Availability

Many years ago, I acted as lead counsel for a respondent in an arbitration in which claimants were represented by an experienced and knowledgeable opposing counsel from Southern Europe. After lengthy but constructive discussions between counsel, we had managed to agree on a suitable presiding arbitrator, whom I was tasked to give a call on behalf of all parties to inquire about his availability, which I promptly did. In our call, the prospective presiding arbitrator said that he would be delighted to take on the task but asked us to consider that his calendar was quite full: in more concrete terms, the first possible window for a one-week oral hearing would be in approximately two years from our telephone conversation. In that matter, getting the desired arbitral tribunal was such an important consideration that the prospective presiding arbitrator was selected despite his extremely limited availability.

The reality is that many renowned arbitration practitioners have very full calendars. As opposed to cases taken on as counsel, the possibilities of delegating the work involved in an arbitrator assignment are very limited because of the personal nature of the assignment.[7] Nominating arbitrators who do not have the necessary availability may have a significant delaying impact.

For the arbitration procedure to move swiftly, the arbitral tribunal needs to be in a position to acquaint itself with the case and put the procedural parameters in place without delay. The tribunal also needs to have sufficient availability to be on top of the case all the way and to be able to address any procedural and practical issues as needed if and when they arise. How can the parties ensure that this will be the case?

There is nothing wrong in asking the prospective arbitrator about his or her availability when discussing his or her possible appointment as arbitrator. Many

1, 2017 to Dec. 31, 2020. EPP provides for a simplified arbitration procedure in that no Terms of Reference are required, the case may be decided on the basis of documents only and the arbitral tribunal may limit the number, length and scope of written submissions and written witness evidence. The time limit for rendering the Final Award is six months of the Case Management Conference, to be held within fifteen days of the transfer of the file to the arbitral tribunal.

5. According to ICC statistics for 2017 to 2023, there have been altogether 713 EPP cases since the introduction of the EPP in March 2017. A three-member tribunal was nominated in only 22 cases.
6. Article 17 of the SCC Expedited Arbitration Rules: "The Arbitration shall be decided by a sole Arbitrator."
7. The arbitral tribunal may engage a secretary to assist in organizational, administrative or preparative tasks. For a comprehensive overview of the role and best practises of the use of tribunal secretaries, *see* Hans-Patrick Schroeder and Wolfgang Junge, *Tribunal secretaries re-examined—comparative legal framework, best practices and terms of appointment*, Arbitration International, 2022, 38, pp. 21-41 https://doi.org/10.1093/arbint/aiac004.

arbitration institutes nowadays require arbitrators to disclose information on their other pending commitments and sometimes also information on reserved calendar dates in the next few years. In a similar manner, if information on the prospective arbitrator's availability is important for the purposes of arbitrator selection, it is entirely appropriate for counsel to inquire about these issues when communicating with the prospective arbitrator.[8] For such a discussion to be as useful as possible, it would be important for counsel to be able to communicate to the prospective arbitrator at least a rough idea of the desired timeline.

§9.02 EARLY STAGES OF THE PROCEEDINGS

A key feature of national laws on arbitration and institutional arbitration rules that are consistent with international practises is that they do not contain detailed provisions on the arbitration procedure. This is the basis for party autonomy and the flexibility of arbitration: as opposed to proceedings in state courts, the parties to arbitration proceedings have the freedom to tailor the proceedings to meet the specific needs of the case in question. In a similar manner, to the extent that the parties have not agreed on the procedure, the arbitral tribunal is at liberty to tailor the procedural features and the timetable.

The early stages of the proceedings are therefore crucial in laying the foundation for the entire arbitration all the way until the final award. As the arbitrator, in deciding how to proceed, I have found it useful to envision where I would like to be once the closing submissions (written or oral, as the case may be) have been delivered by counsel. In an optimal situation, looking back at the completed procedural steps at that stage:

- the parties will have articulated early on the relief sought in a precise and comprehensive manner and responded to the relief sought by the other party;
- the respective positions as to relevant facts will have been clearly set out;
- the parties will have submitted apposite but not excessive evidence in support of their allegations;
- the legal aspects of the case will have been fully pleaded, and there is sufficient evidence on the record on the contents of the applicable substantive law or laws;
- time will not have been wasted on procedural battles of little additional value; and
- the parties' closing arguments provide the arbitral tribunal with a useful roadmap to the factual and legal exhibits on the record.

At times, real life turns out not to be in all respects optimal. When starting to deliberate, the arbitral tribunal may come to realize that the relief sought by a party,

8. *See*, *e.g.*, the IBA Guidelines on Party Representation in International Arbitration Art. 8(a) and (c) on the permitted ex parte communications with the prospective party-appointed arbitrator and the prospective presiding arbitrator.

despite having evolved several times in the course of the arbitration, is still in some regards unfit for determination. A surprisingly often arising issue is shortcomings in interest claims: the legal basis and the interest claim may be lacking altogether, and/or a party has not explained the legal basis for post-award interest where this is not evident under the applicable law.[9] The adverse party may have omitted to provide any response or comment on the interest claim. A party may have conducted the arbitration with a heavy emphasis on facts and evidence and omitted to furnish evidence on the contents of the applicable law, putting the arbitral tribunal in a rather delicate position in determining the contents of the applicable law to the extent required. The parties may prove to have very different expectations on the rules of the game or even the role of the arbitral tribunal, leading to time-consuming procedural battles and numerous procedural decisions. The early stages of the proceedings are an opportunity for the arbitral tribunal to reduce the possibility of unpleasant surprises by making sure that the parties understand the rules of the game in the same manner and commit to playing by them. The difficulty of this task may vary considerably, depending on the expectations of the parties based on their own legal cultures and the familiarity of counsel on both sides of international arbitration practises, as well as procedural strategies and tactics of the parties.

The first task of the arbitral tribunal after receipt of the case file is usually to organize the case management conference (CMC) for the purposes of determining the parameters of the procedure and the procedural timetable. Where expediency is primary, rather than basing the discussions on Procedural Order No. 1 (PO 1) templates from other cases, it may be more efficient to have a discussion with counsel on what features of the procedure are truly necessary and how each participant can best contribute to a swift process. This may require going a bit deeper into each of the typical topics on the CMC agenda. To give a concrete example, instead of just agreeing that written witness statements will be required for all fact witnesses, it may be useful to have a discussion on the drafting process and the contents of the witness statements. As regards document production, instead of just recording that the arbitral tribunal may use the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") as guidance when ruling on the requests, it could be useful to have a discussion on what in concrete terms is to be understood by "a narrow and specific requested category of documents" referred to in Article 3.3(a)(ii) of the IBA Rules and what is required for a party to show relevance and materiality of the requested documents.

One of the difficulties for the arbitral tribunal in the early phases is that the request for arbitration and the answer usually contain very little information on the matter at hand and only some key documents. An effective way for the parties to assist the arbitral tribunal and to make the early phase of the arbitration more efficient is to expand on the request for arbitration and the answer by including a more comprehensive account of the factual background, the key legal issues and evidence to be presented in support of the case. The more information the arbitral tribunal has early

9. For a comprehensive analysis of problems with interest claims, *see* Mika Savola, *Awarding Interest in International Arbitration*, Jubilee Publication for Professor Seppo Villa, Alma Talent Oy, 2021, pp. 493-515.

on in the case, the better the tribunal will be able to assist the parties in tailoring the proceedings to meet the needs of the case in question.

As to the CMC and the documentation resulting from it, i.e., usually the PO 1 setting forth the procedural parameters and the Procedural Timetable (PTT), much will depend on the parties and their counsel. Where the counsel know one another and their expectations on the procedure are similar, a lighter documentation may be sufficient. Where this is not the case, it may be prudent to opt for a rather detailed PO1 to minimize the possibility of disagreement on procedural issues later on.[10] However, since it would be an impossible exercise to anticipate in the documentation all issues that may arise, the parties' understanding of and commitment to the rules of the game may be more important than striving at an exhaustive PO 1.

§9.03 FEATURES OF A SWIFT PROCEDURE

In the following, I will discuss in more detail the procedural features that may be helpful in order to streamline and speed up the process and how these can be addressed in concrete terms in the CMC.

Reducing the number of submissions. The default position in most CMCs is to have two rounds of submissions. Unless the respondent presents a counterclaim, this is by no means indispensable. Having only one round of submissions requires a willingness by both parties to commit to a genuinely front-loaded procedure, in which the claimant submits a comprehensive statement of claim with all relevant facts, legal arguments and evidence, and the respondent submits a comprehensive statement of defense meeting the same requirements. When implemented in good faith by both parties, this will lead to significant savings of time. The agreed procedure should entail that further submissions will only be allowed at the request or permission of the arbitral tribunal on specific topics. To the extent that there may be a need to submit new claims, arguments or evidence after the first and only round of submissions, this would be possible on the agreed first cut-off date and, respectively, on the second cut-off date as a response to the submission of new claims, arguments or evidence on the first cut-off date.

Articulating with precision the requests for relief early on. The arbitral tribunal has preliminary information on the relief sought by the parties on the basis of the request for arbitration and the answer. When there is only one round of actual submissions, unclear or inapt requests for relief may prove problematic when the arbitral tribunal starts its deliberations. Different types of requests for declaratory relief that appear to have become more and more common in recent years may pose specific problems.[11] The arbitral tribunal is generally not in a position to reformulate the relief

10. *See* Mika Savola, *Procedural Order No. 1—Trends and Practices*, ASA Bulletin 4/2023 (December) pp. 783-804 https://doi.org/10.54648/asab2023055 making a compelling case in favour of a detailed PO 1 in cases where counsel come from different legal cultures.
11. Generally on non-monetary relief in international arbitration *see* Michael Schneider, *Non-monetary Relief in International Arbitration: Principles and Arbitration Practice*, ASA Performance as a Remedy, JurisNet, LLC 2011, available at www.lalive.law.

requested, at least not without soliciting the views of the parties. One way to anticipate this issue is to have an open discussion on it in the CMC and get commitment from the parties to give the matter special attention and to endeavor to formulate their requests for relief in such a way that they can be included directly in the dispositive section of the award.

Reducing the scope and extent of document production. It appears that the use of very extensive document production requests, still quite unusual in the early 2000s, is spreading to the Nordic Countries not only in arbitration but also in court proceedings. An extreme example is a recent Norwegian case where the order to produce documents issued by a Norwegian Court of Appeal would have led to the production of a data volume of 500 GB, some 2.5 million documents and requiring a workload of some 10 man years from the requested party.[12] While the order was ultimately annulled by the Supreme Court of Norway, the case may be seen as an indication of a radically more permissive approach to requests for document discovery in the Nordic Countries.[13]

In international arbitration, extensive and often excessive document requests have already, for some time, been a significant contributor to delay and costs and a standard topic of discussion in international arbitration seminars and conferences.

In the CMC, the arbitral tribunal has the possibility to encourage the parties to consider critically whether there is a need for a procedure for document discovery in the first place. It is not entirely uncommon that an extensive document production phase requiring several months to complete ends up bringing quite little added value to the proceedings compared to the time and costs needed. Where there is a need for document production, the arbitral tribunal may consider mechanisms to reduce its scope and extent. Such mechanisms may include, e.g., limiting the number of requests, ordering that the arbitral tribunal may only accept or deny a request (i.e., not "correct" it by accepting it partly in a redacted form) and ordering that as a rule, requests for documents on issues where the requested party bears the burden of proof are not permitted. Overly broad requests for documents can also be discouraged by imposing a requirement that the requesting party specify the factual allegations with regard to which the requested documents are suggested to have relevance as evidence.[14]

Efficient use of documentary evidence. Far too often, one as an arbitrator comes to realize that a considerable part of the documentary evidence submitted by the parties does not serve any purpose with regard to the central issues in dispute. It is understandable that counsel may wish to err on the side of caution when deciding whether or not to submit evidence so as not to find themselves barred from doing so

12. Presentation of Fredrik Lilleaas Ellingsen at the Norwegian Arbitration Day on Feb. 8, 2024 in Oslo.
13. Supreme Court order 27 May 2019, HR-2019-997-A (case no. 18-186326SIV-HRET). The trend towards more extensive obligation to produce documents is reflected also in a recent decision by the Finnish Supreme Court KKO 2019:7, in which the required evidentiary value of the requested documents was set at a rather low level.
14. In court proceedings in Finland and Sweden, the parties are required to specify an evidentiary topic (in Swedish *bevistema*, "theme of evidence") for each piece of documentary evidence. The requirement of such topic could be a useful tool in international arbitration proceedings as well.

after the cut-off dates. However, when expediency of the proceedings is important and the parties are willing to commit to a swift and front-loaded process, this may also be helpful for the purposes of focusing on the essential and practicing restraint when it comes to the temptation to submit large numbers of documents just in case. In the CMC, the arbitral tribunal may encourage the parties to specify for each piece of documentary evidence the factual allegations that they relate to and to identify clearly the specific parts invoked in support of the allegations in the documents. New kinds of documentary evidence, such as printouts from WhatsApp or chat log exchanges, may require special attention to ensure user-friendliness and verifiability.

Guidance on the contents of witness statements. Virtually all international arbitrations use witness statements, and they may be indispensable for the expediency and efficiency of the proceedings, especially in cases with many witnesses of fact. In any large and complex case, it is hardly conceivable to address witness testimony only orally in the same way as in court proceedings in some jurisdictions.[15] Being informed early on of the contents of the fact witnesses' testimony invoked by the adverse party also reduces the possibility of surprises or "trial by ambush" that may lead to procedural complications or due process concerns. The requirement that written witness statements be submitted for all witnesses is therefore an important feature of a swift process.

In practise, there is quite a lot of variation in the preparation and contents of witness statements. For the witness evidence to serve the efficiency of the proceedings as much as possible, it may be useful to take the issue up for discussion. In a recent publication, it was suggested that the following principles should guide the preparation of witness statements:[16]

(i) subject to providing background context, the witness statement must only contain matters relevant to the issues in dispute of which the witness has personal knowledge;
(ii) the witness statement must not contain any supposition, speculation, conjecture, or commentary on another person's knowledge;
(iii) the witness statement must not contain any argument;
(iv) there should not be any recitation of the documentary record or quotations from contemporaneous documents;
(v) witnesses should only refer to documents which they had received or were aware of before the dispute arose, and only if it is necessary to refer to the document; and
(vi) the witness should identify where documents have been used to refresh the witness's memory (whether or not those documents have been referred to or not in the witness statement).

15. E.g., in Finland and Sweden witness statements are as a general rule not allowed for fact witnesses and the hearing takes place orally also for direct testimony.
16. Doug Jones and Robert Turnbull, *Witness statements and memorials, Reforms to serve parties, arbitrators and arbitrations*, ICC Publication Rethinking the Paradigms of International Arbitration, International Chamber of Commerce 2023, p. 136.

The parties' commitment to observe guidance along the principles outlined above could significantly improve the quality of the witness statements, assist in focusing on the case of each party at an early stage and be conducive to a swift and efficient process.

Submitting appropriate evidence on the contents of the applicable law. Counsel whose practise focuses on proceedings in State courts may not always pay sufficient attention to the need to submit evidence on the contents of the applicable substantive law in international arbitration proceedings. As opposed to state courts in civil jurisdictions that have the power to apply the law ex officio by the application of the *jura novit curia* principle, arbitral tribunals need to be cautious in developing legal arguments not invoked by the parties so as not to risk validity and enforceability of the award because of violation of the right to be heard.[17] It may also be risky for the Arbitral Tribunal to base its decision on a legal source, not on the record, if such a legal source comes as a surprise to the parties.[18] To avoid any surprises in this regard, the issue may benefit from discussion at the CMC, getting commitment from the parties to submit evidence on the contents of the applicable substantive law in a front-loaded manner comprehensively early on as legal exhibits, with translations into the language of the arbitration to the extent needed.

Efficient use of oral hearing. Even in the rare case that no cross-examination will be needed for any of the facts or expert witnesses, an oral hearing serves an important function for the arbitral tribunal to communicate directly with counsel and clarify any unclear issues. This is all the more the case in proceedings with only one round of submissions. A bare minimum oral hearing may consist of brief opening arguments by the parties and questions by the arbitral tribunal, followed by oral closing submissions, which was the case in a recent Expedited Arbitration under the FAI Expedited Arbitration Rules in which I served as the sole arbitrator. However, in the more usual scenario, time will need to be allotted to fact or expert witness testimony. Opting for a fully digital hearing may be the speedy and cost-efficient choice in certain cases.[19] In cases where an in-person hearing is the better option, for the purposes of avoiding delays in the event of surprises, it is prudent to agree on the possibility to allow for the possibility of hearing witnesses remotely or even organize the hearing entirely or partially as a remote hearing, if a compelling need arises.

Opting for oral closing submissions instead of post-hearing briefs. Oral closing submissions are very efficient from the arbitrator's perspective in that they are delivered at the end of the oral hearing when the whole hearing is in the arbitrator's

17. For an excellent overview of the topic, *see* Affef Ben Mansour, et al., *Does Jura Novit Curia Apply in Arbitration? ICC Bulletin* 2023 issue 3, pp. 53-61.
18. In ICC Court scrutiny, an often recurring comment to the arbitral tribunal relates to legal sources referred to in the draft arbitral award with regard to which it is unclear whether they are on the record, *see Ten Tips on How to Make an Arbitration Award Work: Lessons from the ICC Scrutiny Process*, ICC Dispute Resolution Bulletin 2022, Issue 2, p. 59.
19. For useful tips in this regard, *see*, *e.g.*, Niels Schiersing & Tim Robbins, *Digital Hearings, the Arbitrator's Perspective* and Johan Sidklev, *Best practices in conducting a digital arbitral proceeding, in Digital Hearings*. Civil Procedure and Arbitration, ed. Mika Savola, Ylli Dautaj, Bruno Gustafsson & Rolf Åbjörnsson, Norsteds Juridik 2022.

fresh memory, and the arbitral tribunal may start its deliberations right away using the closing submissions as useful guidance. Post-hearing briefs will always cause some delay because of the time needed for their preparation and the arbitral tribunals' review of their contents. Post-hearing briefs may also entail a bigger temptation for the party to come up with new allegations, arguments or evidence that may lead to procedural disputes and further delay. Post-hearing briefs may be necessary from the parties' perspective and valuable also from the arbitral tribunals' perspective in many large and complex cases. Where expediency is key, the parties and counsel should seriously consider opting for oral closing arguments.

§9.04 DRAFTING PROCESS OF THE FINAL AWARD

Once the closing arguments have been delivered and proceedings have been declared as closed, the duration of the arbitration up until the issuance of the final award is in the hands of the arbitral tribunal. The key to a speedy last part of the arbitration is front-loaded work and preparation by the arbitral tribunal. When acting as the sole arbitrator, I have found it useful to start early on preparing a document that will serve as an outline for the final award with all necessary information on the procedure, the relief requested and sometimes also summaries of the parties' positions. In a similar manner, preparing concise summaries of the parties' submissions at the receipt of each submission has been helpful both for the purposes of staying on top of things and preparing for the oral hearing.

The most critical and time-consuming part of the work of an arbitral tribunal is the actual decision-making and drafting of the reasoning explaining why the case has been decided in the manner that it was. The parties to an arbitration may sometimes take the view that in order to have the decision available as quickly as possible after the hearing, the final award should be rendered without reason. Whether the arbitral tribunal can, at the request of the parties, do so or not depends on the applicable arbitration law. Nowadays, under most arbitration laws and rules, the parties may validly agree that the arbitral tribunal shall decide the matter without giving reasons upon which the award is based (§9.04[A]). However, the parties should carefully consider whether sacrificing the reasons of the award for increased expediency is genuinely in their best interest (§9.04[B]).

[A] Most Arbitration Laws Permit Agreeing on the Award Being Issued Without Reasons

Article 31(2) of the UNCITRAL Model Law provides as follows:

> The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

In the drafting process of the 1985 UNCITRAL Model Law, the reasons for and against requiring awards to state the reasons upon which they are based were

considered. In favor of the requirement, it was noted that many national laws required reasons, and this was thought to improve the quality of the award. Against the requirement it was suggested that awards that did not state reasons could be issued more speedily and were less subject to challenge and that issuing awards without reasons was usual in certain kinds of arbitration.[20] The end result was a provision requiring reasons but permitting the parties to agree that no reasons are to be given.

National laws still differ on the requirement of reasons. One example of a law that sets a mandatory requirement of reasons is the Belgian Law on Arbitration of 2013, set out in Book VI of the Belgian Judicial Code (the "BJC"). Article 1713 § 4 of the BJC provides that the award shall state the reasons upon which it is based.[21] Pursuant to Article 1717 § 3 a) iv) of the BJC, absence of reasons constitutes a cause for setting aside an arbitral award. The Belgian legislator of the 2013 reform decided to deviate on this point from the UNCITRAL Model Law, considering that Belgian public policy requires that all judgments and awards be reasoned because of the jurisdictional nature of arbitration.[22]

It should nevertheless be noted that under Belgian law, the requirement for reasons is a formal one. It is satisfied as soon as the arbitrators have stated the reasons for their decision and responded to the means and pleas developed by the parties. The court seized with setting aside of the arbitral award may neither control the application of the law by the arbitral tribunal nor examine the opportunity or appropriateness of the decision of the arbitral tribunal[23] nor is a contradiction in the reasons a cause for annulment of an arbitral award under Belgian law.[24] The requirement to provide reasons has not been considered part of the international public policy in Belgium either, and consequently, absence of reasons should not constitute grounds for refusing recognition and enforcement of a foreign arbitral award in Belgium.[25]

The Netherlands Arbitration Act of 2015 similarly requires awards to be reasoned—save for arbitrations pertaining to the quality or condition of goods—but allows the parties to agree in writing that no reasons shall be given once the arbitration is pending.[26] Examples of provisions in national arbitration laws that are in substance similar to the UNCITRAL Model Law are, for instance, Article 52(4) of the 1996 English Arbitration Act[27] and Article 189(2) of the 1987 Swiss Private International Law Act.[28]

20. Holzmann H.M., Neuhaus J.E., *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer 1989, pp. 837-838.
21. "*La sentence arbitrale est motivée.*"
22. Niuscha Bassiri & Maarten Draye (eds.), *Arbitration in Belgium. A Practitioner's Guide*, Wolters Kluwer 2016, p. 473.
23. *Ibid*.
24. *Ibid*., p. 474.
25. *Ibid*., p. 523.
26. Albert Marsman, *International Arbitration in the Netherlands: With a Commentary on the NAI and PCA Arbitration Rules*, Wolters Kluwer 2021 at 14-050.
27. England, like many other common law countries, has a long tradition of unreasoned awards. The practise started to change with the passing of the 1979 English Arbitration Act and was completed in the 1996 English Arbitration Act. For more information on the historical background, *see* Noam Zamir and Neil Kaplan, *To reason or not to reason: arbitral awards—the conflict between conciseness and the duty to provide reasons under national laws and international rules,* Arbitration International, 2024, XX, pp. 2-4.

As to the Nordic countries, Norway and Denmark, as UNCITRAL Model Law countries, have adopted the solution set forth in the Model Law.[29] Conversely, the Finnish and Swedish Arbitration Acts do not contain specific provisions on reasons. The reasoning of the Finnish and the Swedish legislators is similar to the points made against the requirement of reasons in the drafting process of the UNCITRAL Model Law referred to above. As to Finnish *travaux préparatoires*, the rationale for not including such provision in the 1992 Arbitration Act was not to encourage post-arbitration disputes on the adequacy of reasons in the award.[30] As to Swedish law, according to the *travaux préparatoires*, the rationale for not requiring reasons is, on the one hand, cost-efficiency and, on the other hand, keeping down the number of challenges to the arbitral tribunal's reasons. However, even without an explicit requirement for reasons, it is hardly conceivable that an arbitral award would be rendered in Finland or Sweden without reasons unless the parties have explicitly agreed so. Both the SCC Arbitration Rules and the FAI Arbitration Rules contain an explicit requirement that the award be reasoned, and proper reasoning is, without any doubt, the expectation of the parties in ad hoc arbitration in Finland and Sweden as well.[31]

Parties may agree that the award is rendered without reasons by agreeing on arbitration under certain rules on expedited arbitration. As to the Nordic countries, the SCC Expedited Arbitration Rules permit the award to be rendered without reasons unless a party requests a reasoned award no later than at the closing statement. Under Article 41.1 of the Finland Arbitration Institute (FAI) Rules for Expedited Arbitration, rendering the award without reasons is the default position unless a party has requested reasons to be given:

> An award shall be made in writing. It shall not contain reasons, unless a party has requested a reasoned award within the time limit set by the sole arbitrator.

According to information received from the FAI, there have been only a handful of cases in recent years where the award has been given without reasons.[32] The situation is very similar in arbitrations conducted under the SCC Expedited Arbitration Rules in recent years.[33]

The validity of an agreement under Finnish law to the effect that the arbitral award shall not contain reasons was recently tested in the District Court of Helsinki. In the matter in question, the parties to the arbitration had, in the course of the arbitration, agreed to apply the FAI Rules for Expedited Arbitration. At the first Case

28. Daniel Gisrberger and Nathalie Voser, *International Arbitration, Comparative and Swiss Perspectives*, Fourth Extended Edition 7/1520 and 1507.
29. Article 31(2) of the Danish Arbitration Act of 2005 is identical to the corresponding provision in the UNCITRAL Model Law. As to the Norwegian Arbitration Act of 2004, Art. 36(2) sets a requirement that the award be reasoned, but Art. 36(6) provides that the parties may contract out of such requirement.
30. Government Bill HE 202/1991 vp., p. 8.
31. For Swedish law, *see International Arbitration in Sweden, A Practitioner's Guide*, second edition, eds. Annette Magnusson, Jakob Ragnwald and Martin Wallin, Wolters Kluwer 2021, p. 311 #358. For Finnish law, *see* Mika Hemmo, *Välimiesmenettely*, Alma Talent 2022, p. 944.
32. Telephone conversation with Sanna Kaistinen, General Secretary of the FAI on Mar. 7, 2024.
33. Information received from Evelina T. Wahlström, Head of Quality at the SCC on Mar. 8, 2024.

Management Conference, the parties had specifically agreed that there is no need to give reasons in the arbitral award. After the sole arbitrator had found for the claimant, the respondent initiated setting aside proceedings claiming, *inter alia*, that the arbitral award violated the public policy of Finland and the European Convention of Human Rights because no reasons for the award had been provided. In its judgment rendered on January 5, 2024,[34] the District Court of Helsinki correctly held that neither Finnish public policy nor the European Convention of Human Rights prevents a party from waiving its right to a reasoned award, rejecting the action for setting aside.

To conclude, there appears to be a wide consensus in national laws and rules that the parties can validly agree on an award without reasons. However, a totally different question is whether agreeing so is in the parties' best interest.

[B] Agreeing on an Award Without Reasons Is Rarely in the Interest of the Parties

An award without reasons may be in the interest of the parties in case they are in agreement that there is only a need for a swift resolution of the dispute and that reasons for the decision will not serve any purpose. This could be the situation in relatively straightforward matters, e.g., where the dispute turns on a single issue of fact, such as the quality or condition of commodities delivered.

However, in more complex cases, the situation is quite different. As in the Finnish court case referred to above, the losing party may come to regret its decision to agree that the award shall be given without reasons. Without reasons, the losing party may only make assumptions as to why the case has been decided as it was. It may nevertheless also be important for the winning party for future purposes to understand why some arguments or evidence have not convinced the arbitral tribunal. All this benefit for present and future purposes is lost with an award without reasons.

Also, from the arbitrator's perspective, agreeing to render the award without reasons is far from optimal. As an arbitrator, one has a strong desire to explain the findings and decisions and demonstrate that the evidence presented in the matter has been given appropriate consideration and the legal arguments have been adequately assessed. Writing is an important part of making sure that the logic of the decision holds water and that all relevant aspects have been taken into consideration. In the words of an eminent practitioner:

> We all know what the reasons for providing reasons for arbitral awards are. Probably the most important one is to oblige the arbitrators to think carefully of every aspect of the dispute and to allow them to come to a decision that is fully thought through and respectful of the rules by which they have to abide in

34. L 706/2023/344, decision number 1014 6972. The respondent appealed the decision to the Court of Appeal of Helsinki, which rejected the appeal by its decision rendered on May 8, 2024 (decision number 705, matter number S 24/203) and upheld the decision of the District Court of Helsinki.

> reaching their decision, and that has the cogency, intellectual rigour and persuasiveness that only writing can provide.[35]

To conclude, agreeing that the award shall be rendered without reasons is rarely in the interest of the parties or the arbitral tribunal. Such option may be appropriate for very straightforward disputes such as quality arbitrations. For disputes of any degree of factual, technical or legal complexity—and it is submitted that this applies to most international arbitrations—it is hard to see how the gain in time could outweigh the downside of the parties not being provided with an explanation as to why the case has been decided as it has.

A middle ground between fully reasoned awards and awards without reasons is provided, e.g., in Article 42(2)(f) of the Swiss Rules of International Arbitration. Under the said provision, where the Expedited Provisions apply, the arbitral tribunal may state the reasons for the award in a summary form. Summary reasons are certainly better than no reasons at all. However, explaining in a summary manner may not be a satisfactory solution in that summary reasons may fall short of convincing the reader. Stating the reasons in a summary form may be a workable solution in straightforward disputes or, e.g., in decisions on disclosure of documents rendered in a Redfern-schedule format. To the extent it is possible to dispense the arbitral tribunal with giving reasons for its final award, the same applies *a fortiori* to procedural decisions.

§9.05 APPLICATION IN PRACTISE OF A THREE-MONTH TIMELINE

Below, I have set out as a listing the timeline applied in the three-month arbitration referred to in the introduction as a list of the essential procedural steps from the nomination of me as the sole arbitrator on day 1 until the rendering of the Final Award on day 85:

Day 1 Appointment of the Sole Arbitrator (SA)
Day 1 SA's proposal of times for the CMC and for the agenda
Day 3 CMC (Teams)
Day 3 SA provides draft minutes of the CMC and the PTT to the Parties
Day 7 Parties' comments to draft CMC minutes and the PTT
Day 8 SA provides signed CMC minutes and the PTT to the Parties
Day 23 Statement of Claim, Documentary Evidence and Witness Statements
Day 42 Statement of Defense, Documentary Evidence and Witness Statements
Day 49 First Cut-off date submissions
Day 56 Second Cut-off date submissions
Day 56 Claimant's request to submit additional evidence
Day 57 Respondent's response and request to submit additional evidence
Day 57 SA's decision on additional evidence

35. Luca G. Radicati di Brozolo, *Reasons in International Commercial and Investment Arbitration Awards—How Much and How?* in Explaining Why You Lost—Reasoning in Arbitration—Institute Dossier XVIII—2020, published by the International Chamber of Commerce (ICC).

Day 67 Oral Hearing
Day 71 Cost Submissions
Day 73 Reply Cost Submissions
Day 73 Closing of the Proceedings with regard to the matters to be decided in the Final Award
Day 85 Final Award

Put briefly, the factors and features of the procedure that made the exceptionally compact procedure possible can be summarized as follows:

(i) The professional and constructive attitude of counsel on both sides.
(ii) Quick kick-off of the proceedings after receipt of the case file, CMC on day 3 and putting together the minutes (replacing the usual PO 1) and the PTT without delay thereafter.
(iii) Agreeing on only one round of submissions.
(iv) The parties agreeing on and committing to a genuinely front-loaded procedure in which the Statement of Claim and the Statement of Defense provided a comprehensive account of the facts and legal argumentation of the respective party, accompanied with all documentary evidence, all witness statements, expert evidence and legal exhibits of that party.
(v) Concise Oral Closing Arguments that provided me with a useful roadmap to the evidence and legal argumentation of each party and permitted immediate start of decision-making after the closing of the oral hearing.
(vi) Arbitrator availability throughout the procedure and in particular at critical points.

It is unlikely that we would have agreed on such a speedy process without the necessity to do so because of the fixed three-month time limit in the arbitration clause. I would nevertheless strongly advise against agreeing to the arbitration clause on a time limit without the possibility of extending the time limit. It is very risky and may, in the worst case, lead to the arbitration clause being in practise inoperative. A better option would be to refer to expedited clauses providing for a possibility to transfer to a full-fledged process if the situation so requires, empowering the arbitral tribunal or the arbitration institute to grant extensions if there is a compelling need.