Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices

Irene Welser/Giovanni De Berti

I. Introduction

"Best practices" in arbitration are standards for conducting arbitral proceedings which arbitrators and counsel should apply to provide users of arbitration with the highest possible level of efficiency and fairness in the resolution of their business disputes. They lead to a harmonization and standardization of international commercial arbitration. Best practices also serve as a form of "checklist" for parties of what to expect from efficient proceedings and demystify the arbitration process. Best practices – if accepted by the arbitral community – therefore might increase the predictability of arbitration and thus also its acceptability for parties. While it might be argued that best practices render arbitral proceedings less flexible, the enumerated advantages (mainly the increased predictability and fairness of the proceedings) certainly outweigh this disadvantage.

This contribution serves two objectives: First, it shall present particular issues in arbitration where it may be said that best practices have already been established and further provide the reader with a description of some pros and cons of these established practices. As the list of best practices already established is so long that going into the details of each of them would go beyond the scope of this article, we will concentrate on selected best practices such as early organizational hearings, the production of documents as well as witness statements and witness examination. Second, our article will deal with best practices still to be established, such as the approach of arbitral tribunals in deciding on the law governing the merits of the procedure, or the arbitrator's role in bringing about a settlement. Again, these are only some examples among other important issues where arbitrators apply different practices in international arbitration. The purpose of this article also is to explore whether there is a need for establishing a best practice guideline and, in the affirmative, which topics such a guideline should cover.

II. Some Established Best Practices

A. Overview

Best practices in arbitration may cover a whole range of issues which typically arise in different stages of most arbitral proceedings, like the "state of the art" of commencing such proceedings, how to present evidence, how to prepare and conduct the oral hearing as well as post hearing activities. Regarding the following issues, it is, among the arbitral community, widely recognized that best practices exist:[1])

- Early organizational hearings, sometimes including an agreed time schedule;
- Document production;
- Written versus oral proceedings;
- Witness examination and written witness statements;
- The role of experts;
- Conflicts of interest.

Regarding several of these issues, the respective best practices can be found in publications of the International Bar Association. The "IBA Guidelines on *Conflicts of Interest* in International Arbitration"[2]) include standards regarding impartiality and independence of arbitrators as well as disclosure and offer guidance on the practical application of these standards. The "IBA" Rules on *Taking of Evidence* in International Arbitration",[3]) which deal with document production, witness statements, party-appointed and tribunal-appointed experts as well as with other main issues of evidentiary proceedings are often (in whole or in part) adopted in arbitral proceedings. Both publications were prepared by experts in international arbitration and are now recognized as best practice standards, in fact as *milestones* in their field by the arbitration community.

However, regarding some other "best practices", these usages are not (yet) published, but take place on the level of the practice of the arbitrators. We will describe in detail three important and recognized best practices. Insofar as these practices are not yet published, the following shall – for those who do not deal with arbitration procedures regularly – help to serve as an introduction to the practical handling of arbitration cases and thus demystify the arbitral procedure.

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[1]) Natalie Voser, *Harmonization by Promulgating Rules of Best International Practice in International Arbitration,* SchiedsVZ 113, 116 (2005).

[2]) *Available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited on 22 November 2009).

[3]) *Also available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (last visited on 22 November 2009).

B. Early Organizational Hearings/Agreed Time Schedule

1. Introductory Remarks

Early organizational hearings, also called pre-hearing conferences, case-management conferences or procedural conferences, are hearings held at an early stage of the proceedings in order to clarify procedural issues and to develop preliminary timelimits. While such hearings are now common in international commercial arbitrations,[4]) one may ask whether it is really necessary (from an efficiency perspective) and whether it makes sense to convene a separate hearing mainly dedicated to organizational matters. Can such a hearing really be considered as a "best practice already achieved"? When confronted with these questions, one is first inclined to say no. After all, time is a decisive factor in arbitral proceedings. Pursuant to Article 20 of the ICC Rules, "the Arbitral Tribunal shall proceed within as short a time as possible" and Article 24 sets a time limit of 6 months from the date of signing of the Terms of Reference to render the Arbitral award. In the light of these provisions, it might be argued that a first hearing which is mainly dedicated to procedural or organizational aspects would be a waste of time and that the arbitral tribunal should instead proceed to the merits of the case straight away.

A glance at the arbitration rules of various arbitral institutions seems to confirm this skeptical approach. Most of these arbitration rules do not even contain an obligation for the arbitrators to hold an oral hearing on the subject matter of the dispute at all, not to speak of provisions referring to first initial organizational hearings.

The ICC Rules of Arbitration follow this approach and do not provide for an early organizational hearing (nor for a compulsory oral hearing at all) but, as a general principle, leave it to a parties' request or the discretion of the Arbitral Tribunal to hear the parties in person. Article 18 ICC Rules determines that the Arbitral Tribunal – after having consulted with the parties – sets up a "provisional timetable" in order to determine a time line and the "provisional" course of the arbitral proceeding. Pursuant to Article 18 ICC Rules, the Arbitral Tribunal, shall draw up the Terms of Reference "on the basis of documents or in the presence of the parties". This provision does not explicitly provide for an early organizational hearing, but recognizes the possibility of such meetings. In legal writing on the ICC rules[5]) it has been stated that such meeting is usually "desirable", also because procedural details not included in the Terms of Reference might be raised and clarified, thus avoiding potential subsequent problems. The Report from the ICC Commission on Arbitration Controlling Times and Costs in Arbitration expressly states that a pre-hearing conference can play an important role in enabling the

[4]) *See, e.g.*, Albert Jan van den Berg, Organizing an International Arbitration: Practice Pointers, *in* The Leading Arbitrators' Guide to International Arbitration, 163, 170. (Lawrence W. Newman & Richard D. Hill eds., 2004).

[5]) Derains & Schwartz, A Guide To The ICC Rules Of Arbitration 256 (2nd ed. 2005).

parties and the arbitral tribunal to discuss and agree on a procedure that is tailored to the specific case and enables the dispute to be resolved as quickly as possible.[6])

Just like the ICC Rules, also the arbitration rules of further various leading arbitral institutions do not provide explicitly for early organizational hearings.[7]) For example, according to the Vienna Rules, the conduct of arbitration proceedings is "at the absolute discretion of the arbitrator" (Article 20) and oral hearings shall take place at the request of one party, or if the Arbitral Tribunal considers them necessary. Again, a specific initial hearing is not even mentioned. Article 15 of the UNCITRAL Arbitration Rules also states that the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate. This lack of regulation on "early organizational hearings" in arbitral rules is in line with the general principle that the arbitrators have broad discretion on the conduct of the arbitral proceedings and thus is possibly not particularly surprising.

Still, as a working thesis, we would like to suggest that an early organizational hearing is, broadly speaking, common practice and may be considered to be "state of the art" and therefore one widely accepted "best practice" in international arbitration. What makes us so sure about this?

2. Aims and Purposes of an Early Organizational Hearing

In order to provide an answer, let us first look at the aims and purposes of such a hearing. These aims are diverse and include "soft" factors, like establishing a cooperative spirit among the disputing parties and the arbitrators as well as "hard" factors, like the establishment of the Terms of Reference and a procedural framework regulating the course of the further arbitral proceedings.

a) "Soft" Factors

First of all, it is a meeting: Of course, there is more to it than "getting to know each other"; nevertheless, the "getting to know" aspect is important. Arbitrators have sometimes not met before, especially if they come from different states, different legal backgrounds, cultures or profession. Thus, the organizational hearing, which is often referred to as "pre-hearing-conference" helps to create a first impression of the way the arbitral tribunal intends to handle the proceeding, the allocation of tasks and how the cooperation between the members of the arbitral tribunal will be organized in the future. Sometimes, it may also form the basis for a first outline of how the tribunal sees the case. If the arbitrators meet in person, or at least hold a telephone conference, this may facilitate to achieve common understanding over certain legal problems, enhance legal discussions or determine at the outset which legal issues require detailed elaboration – however, without the arbitrators being prejudiced in any way. The arbitrators will often not only reach a

[6]) ICC Publication 843, Controlling Times and Costs in Arbitration, mn 21, *available at* http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf (last visited on 10 September 2009).

[7]) Anke Meier, *Pre-Hearing Conference as a Means of Improving the Effectiveness of Arbitration,* SchiedsVZ 152, 153 (2009).

consensus regarding the course of proceedings and on the questions with respect to the taking of evidence, but also gain a first impression of the possible outcome of the arbitration – at least when legal and not factual questions are decisive.

Second, the early organizational hearing serves the important purpose of bringing the parties together, therefore avoiding different expectations. Bridging different cultures, as well as a possibly different legal approach should be one goal of any first hearing. Another important purpose is to form a common understanding of the proceedings, or even agree on a way how to proceed: How will the procedure be structured? What will be expected from the parties? Will discovery and inspection take place? How will the evidence-taking be structured? Will there be discovery and inspection or not? Will the parties have to prove the applicable law? In this context, it is important for the Arbitral Tribunal to offer its own views and guidelines, but at the same time also to consider the expectations and wishes of the parties.

Furthermore, a procedural hearing at an early stage of the proceedings ensures that the file will be well prepared by all participants and that a common understanding regarding the substantive issues may be reached.

To sum up, from our point of view, these "soft" factors already comprise advantages which outweigh the (minor) delay of the proceedings which might be caused by an early organizational hearing.

b) "Hard" Factors: Legal Relevance of Early Organizational Hearings

A first hearing does not only serve as a practical tool to create a "feel-good" factor, it is also of legal relevance that should not be underestimated:

aa) Identification of Jurisdictional Problems

First of all, jurisdictional objections, if any, may be discussed and – hopefully – settled. Unfortunately, it is often the case that the competence of the arbitral tribunal is disputed. This used to create serious problems under the "old" Austrian Arbitration regime[8]) because of possible prescription.[9]) A first oral hearing may serve as an important tool to evaluate this question and to find a solution acceptable for all parties involved. The arbitral tribunal or sole arbitrator may take the opportunity to use such a hearing to have the parties acknowledge its jurisdiction or even agree at this very late stage on the validity of a disputed arbitration clause.

bb) Agreement on Procedural Issues and on a Preliminary Timeframe

One of the main aims of early organizational hearings is to find agreement on details of the procedure. This often results in an order of the arbitral tribunal, the so-called Procedural Order No. 1, which contains regulations regarding im-

[8]) Valid until 2006.

[9]) Irene Welser, *Pitfalls of Competence, in* Austrian Arbitration Yearbook *2007, 3 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2007).*

portant procedural issues, like number and sequence of submissions, cut-off dates or the sequence of witnesses at the hearings.

The establishment of a procedural time-table is one of the explicit features set out in the ICC Rules (but also e.g. of the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce). As this time-table has to be established "after consultation with the parties", some form of exchange between arbitrators and parties must take place. A preliminary time-table can sometimes be established more easily at a personal meeting and thus take into consideration personal absences and holidays and generally set a time-schedule that the tribunal will be able to stick to. In this regard, it should be made clear by the tribunal whether or not it will later allow postponements or other deviations from the agreed time-schedule.

cc) Right to be Heard/to Duly Present the Case

If a hearing has taken place – even if it was only a "formal" one – parties will, from a practical perspective, have a rather weak argument that they have never had the possibility to fully present their case or that their right to be heard has been violated. This is important with respect to the possible risk of setting aside/challenge proceedings against an award or even in enforcement proceedings pursuant to the New York Convention.

dd) Conflict of Interest Issues

Even though, according to most procedural rules, conflict of interest issues must be raised at the very beginning of the proceedings, and – according to best practice rules – the arbitrator is also bound to disclose any possible conflict of interest as early as possible, a first hearing is still a fairly early point at which it can be ascertained whether or not a conflict of interest on the part of an arbitrator exists.

3. How to Conduct a Pre-Hearing Conference

One of the first questions to decide when scheduling an early organizational hearing is whether to meet in person or to discuss issues on the telephone: "Real hearing" or "just" a conference call? What are the advantages and disadvantages? The authors favor a "real" hearing, with the arbitral tribunal and the parties' representatives coming together and sitting face-to-face. Not only is it more likely that different expectations and needs are actually uttered, but also the informal atmosphere before and after the meeting allows for talks between the arbitrators or even between parties' counsel that might lead to settlement discussions. Of course, disadvantages include higher costs due to additional travel expenses and possibly also a slight delay, as it is usually more difficult to find a suitable time slot for a personal meeting than for a conference call. The decision for or against a meeting in person also depends on the time frame for the arbitration procedure as a whole. If,

for example, the parties favour a quick decision or have agreed on a "fast track" procedure, a telephone conference is usually preferred. Such a conference call should then be extremely well-prepared and conducted on the basis of a detailed agenda in order to ensure that all issues are covered.

It goes without saying that the prior exchange of submissions is essential for the success of the pre-hearing-conference because of the complexity of some of the issues involved. Even though questions of organization will form an important part of the organizational hearing, legal questions may also be touched, especially if the parties are open for an amicable settlement of the dispute or an attempt to settle amicably is made by the tribunal. Before talking about the venue, questions of recording and taking of evidence, it is necessary for the Tribunal to know which witnesses of fact are expected – provided that they are known at this early stage – and whether there will be the need for the appointment of experts. Without prior exchange of written submissions from both parties, ideally including full argumentation from both sides, a first organizational hearing makes little or no sense.

A "Procedural Order No. 1" is generally no substitute for a first hearing. Nevertheless, the two of them are closely linked: Such procedural order is either issued in advance and amended during the first organizational hearing, or after discussion concerning its contents in the Pre-Hearing Conference. Often a Procedural Order No. 1 is the eventual outcome of the Pre Hearing Conference.

The duration of the first hearing – according to the experience of the authors – will normally not exceed two hours or half a day at the most, including the time spent on discussions regarding a possible settlement. If the first organizational hearing is held via telephone, it will usually be even shorter. Given the important advantages resulting out of such a meeting, it is definitely worth the time invested.

4. Possible Content of a Pre-Hearing Conference

First of all, as the name suggests, organizational questions will form an important part of the pre-hearing-conference. In this regard "organizational" also comprises issues regarding the conduct of the proceedings, the number and timing of additional written submissions – if any – and questions related to the presentation of evidence. As stated above, the result of these discussions will usually be reflected in a procedural order and a provisional timetable, issued by the arbitral tribunal.

The UNCITRAL Notes on Organizing Arbitral Proceedings ("Notes") provide for a useful checklist regarding matters to be considered when organizing arbitral proceedings.[10]) The checklist includes "simple" matters like the language of the proceedings or the use of electronic means for the submission of briefs and documentary evidence as well as more complex and difficult questions like the conduct of multi-party-arbitration, the determination of the relevant issues to be decided by the tribunal and the specification of the relief or remedy sought by the

[10]) *Available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf (last visted on 10 September 2009).

parties. The Notes may serve as a starting point or guideline for parties' counsel to deliberate, comment and finally agree upon the procedural conduct related to the particular case. If the parties fail to reach consensus upon certain matters listed therein, it is up to the tribunal to decide upon such open issues.

It may – at first glance – seem that purely organizational matters, such as the determination of the venue, room reservations, the exact dates when witness will be present etc. are of minor concern and should be left entirely to the discretion of the arbitral tribunal. This is, however, not the case. We have seen arbitration cases where the costs for hotel reservations – both for the hearing rooms, for separate breakout rooms for the parties and for hotel rooms or suites for overnight stay – were substantial or where it proved to be difficult to find a venue during a specific time period, so that the arbitrators' timetables had to follow hotel availability.

Further "formal" topics, such as costs, confidentiality, method of recording, the necessity or wish to have court reporters, will doubtlessly also be an issue and should be addressed in order to avoid possible surprises or false expectations.

If parties are considering applying a "fast track" procedure – a topic which is still one of the "hot" issues in international arbitration[11])– this and the details of such "fast track" procedure can be elaborated on in a first oral hearing.

Another important issue, which is still under debate, is whether the parties should have the possibility to hear a first rough legal outline from the arbitral tribunal at the first organizational hearing. This can, of course, enhance the possibility for a settlement between the parties. This particular topic will be dealt with under Section III, B of this article. But it might be said – from the perspective of the authors – that this is an issue where a "best practice" does not yet exist.

C. Document Production

1. The Best of Evidence

The production of documents is generally considered as the preferred and best evidence in international arbitration proceedings. Having the availability of documents agreed, exchanged or issued in non-suspicious times, i.e. during the course of the facts under consideration, is by all means the safest way to ascertain the existence and credibility of the facts themselves.

The IBA Rules, at Article 8, state that "the Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence".

This is perfect, but more easily said than done.

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[11]) Irene Welser & Christian Klausegger, *Fast Track Arbitration: Just Fast or something different?, in* Austrian Arbitration Yearbook *2008, 259 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2008).*

2. Admissibility, Relevance, Materiality, Weight

To begin with, the admissibility of documents usually does not create excessive problems for the arbitrators, unless there is evidence or appearance that their production is actually due to dilatory tactics. While arbitration rules and actual practice are generally in favour of an early and full production of all documents that are or may be relevant to the issues before the tribunal (see the LCIA[12]) and UNCITRAL Rules),[13]) later production of documents is not per se to be refused. Every document that can give a better or more complete view of the problem is actually welcome, and arbitrators should always take the utmost care to let all parties have a fair and balanced hearing, also as it relates to document production.

As to relevance, obviously different documents have different importance within the framework of a case, and there is an unquestionable tendency of the parties and their lawyers, if in doubt, to produce, rather than to withhold, any piece of evidence that later might prove even slightly useful. It is sometimes challenging to assess their relevance, namely at the early stages of the arbitration, when the arbitrators, and sometimes the parties themselves, do not yet have the full and complete grasp of the position.

Materiality and weight are, in an arbitration contest, fairly synonymous. Here an early evaluation is somewhat easier, since for instance documents created at the very time of the facts under consideration appear most reliable, while documents of the period when the dispute was brewing or in full development, risk being tainted with a self-serving bias.

3. Production and Disclosure

Without examining in detail the different features of document production under common law and civil law proceedings, let us say that, in a nutshell, in the former the parties are supposed to produce all relevant documents, be they favourable or unfavourable to their respective position: hence the rules on and practice of requesting extensive and often onerous discoveries of documents from the other party. In the latter, the parties are expected to produce only the documents in support of their claims or defenses, and requests of discovery can only be aimed at specific – usually "common" – documents which are stated to be in favour of the requesting party and in possession of the requested one.

Pausing here for a moment, it has been noted that in civil matters the two great legal systems appear to reverse the general philosophy they follow in criminal matters: the common law system becomes inquisitorial (the parties must tell

[12]) Article 15 (6) LCIA Arbitration Rules: *"All statements referred to this Article shall be accompanied by copies (or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where appropriate) by any relevant samples and exhibits."*

[13]) Article 18 (2) UNCITRAL Arbitration Rules: *"The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit."*

the whole truth, whatever the effects), the civil law one becomes accusatorial (no party can be forced to accuse itself).

In international arbitration, the more diffused – and better – "best practice" is in favour of a mixture of the two systems, with a significant predominance of the civil law one. Article 15 (6) LCIA Arbitration Rules states: *"All statements referred to in this Article shall be accompanied by copies (or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies and which have not previously been submitted by any party, and (where appropriate) by any relevant samples and exhibits."*[14]) Each party would therefore produce the documents on which it relies. Requests for discovery are allowed only if limited to specific documents, or classes of documents, which are sufficiently identified, are shown to be relevant and material to the case and likely to be in the possession of the other party. The IBA Rules consolidated this practice ten years ago in Article 3.

Even applying these rules and practices, the production of documents may somehow get out of hand. It is a repeated experience for an arbitral tribunal to be swamped by masses of documents produced (let alone discovered) by the parties, namely in construction disputes. Various systems have been devised that try to reduce such masses to manageable proportions, such as management meetings with the parties and detailed and careful classification of documents (in chronological order, by issues, by subject matters, by colour codes or in form of a "common bundle"), and even using an expert to try and organize the documents. Satisfactory results can be obtained by helping, inducing or requesting (by moral suasion) the parties to jointly identify, select and concentrate the most important documents in very little (possibly a single) number of folders.[15])

4. Electronic Disclosure

A special problem has emerged with reference to the disclosure of electronically stored documents, as their retrieval, storage and accession may involve considerable costs. Best practices in this respect appear to have been incorporated at present in the Protocol for E-Disclosure in Arbitration published in October 2008 by the Chartered Institute of Arbitrators. Besides confirming for e-disclosure the same principles applicable generally to disclosure of documents in arbitration (requests of discovery are allowed only if limited to specific documents, or classes of documents sufficiently identified, shown to be relevant and material to the case and likely to be in the possession of the other party), the Protocol indicates the need for the tribunal to provide for an early evaluation and regulation of the problems that might be caused by a request of discovery of electronic documents, an appropriate allocation of costs, the establishment of a clear and efficient proce-

[14]) Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration, 300 (Sweet & Maxwell eds., 2004).

[15]) *Id.* at 303.

dure of discovery, recurring – if needed – to technical guidance on e-disclosure issues.[16])

5. Third Party Disclosure

Disclosure may involve an application to the tribunal to request third parties to produce documents relevant to the issues before the arbitrators. Upon such request, the tribunal may order the production of documents, but certainly it has no (enforceable) power to compel the parties to do so. In rare cases, some jurisdictions allow arbitrators to obtain an order from the civil courts to make a witness appear before the tribunal (e.g. the English Arbitration Act 1996, Sect. 43, the Italian Code of Civil Procedure, Article 816-ter) and in this case ask the witness to produce the document. The witness, however, while answering questions on the document, may still refuse to exhibit it. If the document requested appears to the tribunal relevant and material, it is certainly good practice to try and secure it even in this case, or to draw inferences from the refusal to produce, as the case may be.

6. Translations

Finally, documents could be in a language different from that of the arbitration proceedings, and unknown to the tribunal, or to some of its members. If both parties understand the language, the best practice would be to ask for an agreed translation. Failing this, the second best practice appears to be a translation effected by an official translator chosen by the tribunal but paid by the party who intends to produce the document.

D. Written Witness Statements and Witness Examination

In international arbitration, witness evidence can be considered as the second best evidence compared to document production.

The general "best practice" principle is that the agreement of the parties, if any, or failing this, the discretion of the arbitrators may structure the taking of witness evidence, both written and oral.

1. The Fewer the Better

In this respect, international tribunals generally aim at limiting the oral part of the witness evidence as much as practicable.[17]) If document production is relevant, material, and indeed sufficient, let alone overblown, oral testimony should not be considered essential, nor indeed taken.

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[16]) CIArb Protocol for E-Disclosure in Arbitration, Sections from 10 to 13, *available at* http://www.ciarb.org/information-and-resources/E-Discolusure%20in%20Arbitration.pdf.

[17]) Alan Redfern & Martin Hunter, *supra* note 10, at 304.

Arbitration, namely international arbitration, must be time- and cost-effective. Having witnesses appear in person and be examined by the tribunal directly will always involve time and costs. This may be unnecessary, and should be avoided, in particular if the procedure is structured according to the common law system, with examination in chief, cross-examination and re-examination. Therefore, oral depositions by witnesses have become somewhat unusual in international arbitration. Indeed it has been noted that oral evidence is slowly being transformed to a more or less written form of evidence.[18])

Namely, a practice has evolved that no witness will be allowed to testify unless he has submitted a written witness statement.[19]) Accordingly, in a procedural order (possibly after a procedural pre-hearing conference) the tribunal will usually dispose that each party shall submit written witness statements, subject to verification at the oral hearing only if the other party, or the tribunal, so requests. In this way, the arbitrators can save time and the parties can save costs. In certain cases, such as essentially documentary arbitrations or issues mainly of a legal nature, arbitral tribunals should be more and more inclined to avoid oral testimony completely, or to limit it to very specific issues.

The most commonly applied rules in international arbitration have either confirmed or accepted this tendency. Article 8, subparagraph 1, of the IBA Rules tersely states that "the Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing", and that it may "limit or exclude any … appearance of a witness … if it considers such … appearance to be irrelevant, immaterial, burdensome, duplicative": a wide enough standard to use when the tribunal comes to the conclusion that the documentary evidence is sufficient to reach a decision.

The tendency to try and exclude oral testimony from the start is somewhat reinforced by the provisions of the following subparagraphs of the same Article 8, whereby, once the witness testimony has been admitted, the procedure to be followed is akin to the common law one, with examination in chief, cross-examination and re-examination, plus direct examination from the tribunal: with obvious expenditure of substantial time.

When the parties submit written statements, the accepted practice is actually fairly liberal. As to form, no special requirements are usually imposed, and while some written statements are submitted in the form of affidavits under oath, they are often simply dated and signed by the witness. The IBA Rules, in Article 4.5 (c), merely request "an affirmation of the truth of the statement".

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[18]) Julian D. M. Lew et al, *Comparative International Commercial Arbitration,* 565 (Kluwer Law International eds., 2003).

[19]) Laurent Lévy & Lucy Reed, *Managing Fact Evidence in International Arbitration, in* International Council for Commercial Arbitration, *International Arbitration 2006: Back to Basics?,* 636 (Kluwer Law International eds., 2007).

2. Witness Interview

Contrary to the clear legal provisions of certain jurisdictions, in international arbitration, a party or its legal representative may give evidence as witness, and witnesses or potential witnesses may be interviewed by or on behalf of a party. This is a compromise between the rules that in certain jurisdictions forbid a party or a lawyer even to contact a witness before examination, and other jurisdictions where failure to prepare the witness for the examination may constitute professional malpractice.

Interviewing the witness before the hearing, indeed before indicating the person as a witness, is indeed important in international arbitration. The general civil law rule not to contact the potential witness beforehand may have the result that the witness turns out to be substantially unaware of the facts on which he should give testimony. While this is bad enough in domestic proceedings, it would amount to an unacceptable waste of time, money and energy to have a witness crossing the world merely to declare his ignorance of the facts of the case.

However, parties and their lawyers coming from different legal systems may find themselves under difficulties as to how to behave with regard to the treatment of witnesses. Therefore it is advisable for the tribunal to spell out clearly, at the beginning of the arbitration, the kind of contacts and interviews that a party may have with a witness. Obviously, having witnesses submitting written statements requires some form of prior interview[20]).

3. Witness Examination

In the same spirit, the tribunal should clarify how the witnesses will be examined at the oral hearings, unless the applicable rules contain specific indications on this point. This will avoid inconvenience and likely loss of time at the hearing, and on the contrary allow the hearing to be as fruitful as possible. In this respect the practices vary, usually in accordance with the personality and background of the arbitrator or arbitrators: some will follow a common law approach, and leave the parties, or rather their lawyers, conduct the interrogations; others will maintain direct control of the questioning, at most allowing the parties only to propose the questions to the tribunal, who will then put them to the witness; and variations between these two extremes. One of the delicate aspects is to adapt the common law practice of cross-examination vis-à-vis civil law lawyers, and indeed arbitrators: one possible compromise should be to set strict time limits for the cross-examination, so that it would concentrate on important issues. The important thing is to clearly establish basic rules in advance, namely by an initial procedural order.

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[20]) Michael Molitoris & Amelie Abt, *Oral Hearings and the Taking of Evidence in International Arbitration, in* Austrian Arbitration Yearbook 2009, 190 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2009).

The same applies to the sequence of examination and the separation of witnesses, i.e. whether each witness should testify in the presence of other witnesses or not. Here again the practice varies and often has to be adapted to the specific circumstances of the case. It may prove useful to have one witness assist at the examination of another witness, if their respective depositions need to be confronted. On the other hand, a witness may be influenced by the testimony, or even by the sole presence of the another witness in the hearing room. The tribunal should evaluate these aspects and give clear indications beforehand, also establishing the order in which witnesses will be heard, so that a schedule of appearance may be fixed, again with savings of time and costs. This obviously should be done in cooperation between the parties and the tribunal, the latter having as always the final say regarding the management of the proceedings.

As seen above, international arbitration practice is rather liberal in admitting testimony given in ways and by persons that may not be allowed in certain jurisdictions. This does not mean that an international tribunal would value all witness deposition at the same level. Written testimony may be preferred for sake of expediency, but would remain less convincing than direct examination. Depositions by the party itself or by its representatives or officers would be admissible as testimony – contrary to the rules applicable in certain jurisdictions – but they will not be given the same weight and relevance as depositions by truly independent witnesses.

III. Possible Future Best Practices

Despite the increased harmonization and standardization by way of best practices, there are still areas of arbitral proceedings where big differences prevail. Several of these differences can be attributed to the clash of cultures in arbitration, i.e. the differences between the ways practitioners from a civil law or a common law background proceed with regard to certain arbitral issues.

The question now arises whether also regarding these areas a harmonization of the arbitral process is required. The following issues are among those where the necessity and feasibility of the introduction of best practices are frequently discussed, notably also at the Vienna Arbitration Days 2009 Conference:

- Early evaluation and the role of the arbitrator in bringing about a settlement;
- Interim and final rulings on costs;
- The identification of the governing law;
- Evidentiary privileges;
- Third party participation;
- Set-off defence.

Former contributions to the Austrian Arbitration Yearbook have already described several of these issues, e.g. by giving an overview of civil and common law doctrines regarding costs[21]) or of set-off in international commercial arbitra-

[21]) Jenny W.T. Power & Christian W. Konrad, *Costs in International Arbitration – A*

tion.[22]) For this contribution we have selected two important issues, applicable law and the role of the arbitrator in bringing about a settlement and will explore whether best practices in these areas are needed and what they could be like.

A. Governing Law

The identification of the substantive law applicable to the dispute does not always constitute a problem in arbitration proceedings.

1. A Law unto itself

To start with, in most cases the dispute relates to a typically international commercial contract, and this kind of contract tends to be a law unto itself. Almost everything has been expressly provided for in detail, and the task of the arbitration tribunal is to deal with matters of fact. The applicable law is referred to, if ever, in a cursory way, by mentioning the choice of law clause contained in the contract.[23])

However, the absence of such clause is more frequent than one would expect. This may be due to the fact that the parties normally dealt with domestic contracts, which obviously do not need a choice of law clause. Not being accustomed to insert this clause, the parties did not feel the need when entering into an international transaction.

In other cases perhaps the point was raised, typically each party objected to the law of the other party being the governing one, and the matter was quickly brushed under the table as practically not important (in the absence of lawyers, one may hope). Parties entering lucrative contracts tend to disregard the possibility of ending up in court or arbitration. Sometimes they would even think that opting for arbitration should – by itself – solve this problem, which, by the way, may not prove so wrong after all.

Even in this case, more often than not the tribunal may not need to search outside the text of the contract in order to adjudicate on the dispute, the contractual rules, as applied to the ascertained facts, being amply sufficient.

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comparative overview of Civil and Common Law Doctrines, in Austrian Arbitration Yearbook 2008, 401 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2008); Jenny W.T. Power & Christian W. Konrad, *Costs in International Arbitration – A comparative overview of Civil and Common Law Doctrines, in* Austrian Arbitration Yearbook 2007, 261 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2007).

[22]) Christian Koller, *Contemplations on Set-off and Counterclaim in International Commercial Arbitration, in* Austrian Arbitration Yearbook 2008, 59 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2008).

[23]) Alan Redfern & Martin Hunter, *supra* note 10, at 76.

2. A Difficult Issue

However, it could happen that the issue of which legal provisions are to be applied may become suddenly important, as well as a disputed one.

In such case, the process of identifying the applicable law can be complex, and an interim award may become necessary or highly advisable, if the tribunal is not able to obtain the consent of the parties on which legal provisions to choose.

The two traditional ways of ascertaining the applicable law are that of the civil law tradition, whereby it is the judge (or arbitrator) who has to declare the law, in application of the "iura novit curia" principle; and the common law tradition, which puts the burden of proving the law on the parties, indeed as they would have to prove a fact.

In international arbitration, both methods may create difficulties, either for the tribunal or for the parties, given the likelihood that either or both are not familiar with the law eventually found to be applicable.

In either case, the research of the applicable law may turn out to be lengthy and expensive. If it is the tribunal's task, it will in all likelihood appoint a legal expert witness: unless it has among its members a jurist conversant with such law, and indeed it would be advisable that the chairman (or the sole arbitrator) had such expertise. If the burden of proof is on the parties, they would submit documents and legal expert witness reports, and the tribunal will then decide, taking into account said submissions.

Some assistance could come from the indications given to the arbitrators by internationally applied rules on the choice of law. In turn, they can be divided into two main categories. The UNCITRAL provisions, both the Rules[24]) and the Model Law,[25]) state that "the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable". This was the rule applied by the ICC until 1997, and necessarily results in the identification of a national law, with accompanying difficulties, first in proving it, and then in applying it to a situation that was not originally considered with reference to a domestic environment.

3. The Modern Approach

Nowadays the ICC[26]) and other arbitral institutions[27]) provide that the arbitral tribunal shall apply the rules that it determines to be "appropriate". Other institutions refer to the rules with which the subject matter of the dispute has the

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[24]) UNCITRAL Arbitration Rules, Article 33 (1).

[25]) UNCITRAL Model Law on International Commercial Arbitration, Article 28 (2).

[26]) Article 17 (1) ICC Rules of Arbitration: "*The party shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.*"

[27]) *E.g.*, Article 24 (2) VIAC Rules of Arbitration: "*Failing any designation by the parties, the sole arbitrator (arbitral tribunal) shall apply the rules of law considered by him (it) as appropriate.*"

"closest connection",[28]) definitions that may lead to results indeed not dissimilar from each other.[29])

The Rules of UNCITRAL, of the ICC and practically all other arbitration institutions also provide that the tribunal shall take into account the relevant trade usages.

These rules give the arbitrators substantial autonomy in identifying the provisions to be applied in resolving the dispute, which may not necessarily be those of a national legal system.

Actually successive awards, today more extensively published and hence available than previously, have created a sort of "case law" on identifying the applicable rules of law. According to such case law, the tribunal may take into account the existence of model contracts in certain industries, international conventions such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), trade standards as the INCOTERMS, general principles of law, trade usages and the rules of the lex mercatoria.

General principles recognized as applying to international transactions are those of good faith, respect of the agreements (pacta sunt servanda), subject always to that other fundamental principle of rebus sic stantibus, liability for damages due to breach of contract, duty of mitigation etc. These principles are at the heart of all contractual relationships, namely in international transactions, and have been confirmed by international trade usages and by transnational law.

The notion of trade usages is contained in Art. 9 (2) of the CISG: "The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

The most important development in transnational trade law is represented by the lex mercatoria ("Law Merchant"), the rules and practices recognized over the centuries by the international business community, today also codified by the UNIDROIT Principles on International Commercial Contracts.

Arbitral tribunals have increasingly been applying the rules of the lex mercatoria[30]) and this trend is to be encouraged and increased to attain a true internalisation of commercial arbitration.

In truth, by referring their possible conflicts to an international private system of dispute resolution, the parties apparently wanted to avoid, first of all, the submission of their disputes to their respective jurisdictional systems but to select

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[28]) *E.g.*, Article 3 (3) Arbitration Rules of Chamber of National and International Arbitration in Milan: *"In the absence of an agreement pursuant to paragraph 2, the Arbitral Tribunal shall choose the rules with which the subject matter of the dispute has its closest connection."*

[29]) Lawrence W. Newman & Richard D. Hill, *The Leading Arbitrators' Guide to International Arbitration,* 194, (Huntington Juris eds., 2008).

[30]) Irene Welser & Christian Klausegger, *supra* note 11 at 264.

one with an international flair. In addition, by not choosing any specific legal system for the merits of these disputes, in all likelihood they wanted these to be adjudicated with due respect of general legal principles, but even more with due respect of business sense.

They should get what they bargained for.

B. Early Evaluation and the Role of the Arbitrator in Bringing about a Settlement

1. Introductory Remarks

One of the most disputed questions in international arbitration is whether the arbitral tribunal is, at a fairly early stage, allowed – or even obliged – to give its first legal evaluation of the case, or even make a settlement proposal.[31]) Whether or not such an approach is expected or even desired is highly dependent on the cultural and legal background of the parties.

The role of an arbitrator in the settlement process may be manifold: He may simply explore whether the parties have themselves thought about a settlement without giving any hint of how he personally sees the case. He may invite the parties to think positively about a settlement, taking into account the costs and duration of the proceedings. As this approach is often exercised by state judges who are keen to avoid work and seek to get rid of case files quickly, it is certainly not the best way to persuade parties in arbitration and should remain only a side argument, even though we have seen substantial ad-hoc-arbitration cases in which the fees that the arbitrators proposed – namely their hourly-rates – were so high that both parties decided to settle the case amicably without the help of the arbitrators straight away.

But the arbitrator may go further: Sometimes, it is sufficient if he evaluates the pros and the cons for each side with the parties and outlines the mutual procedural and legal risks. In other cases, it will be helpful if he does actually provide the parties with an early legal evaluation of the case. As to factual assumptions, great care has to be taken that he does not anticipate a later evaluation of evidence. In most cases, at such early stages, no evidence has been taken and it would be fatal to create the impression that the outcome of the evidentiary proceedings is irrelevant. This method of early evaluation is even recognized as an ADR technique as such; why not use it as part of arbitration proceedings?

Thus, the means an arbitrator or an arbitral tribunal may use to let the parties reach a settlement can be very different and should, in any case, be appropriate for the legal and cultural background of the specific parties: In some jurisdictions, parties expect the arbitrator to play an active role by trying to achieve a settlement,

[31]) *See* Alexander Petsche & Martin Platte, *The Arbitrator as Dispute Settlement Facilitator?, in* Austrian Arbitration Yearbook 2007, 87 (Klausegger, Klein, Kremslehner, Petsche, Pitkowitz, Power, Welser & Zeiler eds., 2007).

that he promotes a possible amicable solution, often by letting the parties know his preliminary legal opinion or a possible outcome of the case. In other cultures, this approach is considered as shocking or unlawful, because they see the arbitrator's obligation as being limited to solving legal questions, applying the law and deciding a case, but not settling it. Therefore, until a "best practice" is established that the arbitrator should positively be a dispute facilitator, the background of the parties and their mutual understanding of the role and position of the arbitrator highly influences this issue: There seems to be a clash of cultures and – as a working hypothesis – the authors would like to promote the idea that yes, this clash of cultures should be bridged or overcome by establishing a best practice in international arbitration that the tribunal, before entering into evidence taking procedures, should try to reach a settlement between the parties.

This for the following reasons: First, statistics prove that the vast majority of parties enter into arbitration proceedings with the hope or the wish to reach an amicable settlement. Thus, facilitating a consensual resolution of the dispute is definitely regarded as one of the main functions of arbitration proceedings. Second, most international arbitration cases not only have a commercial background, but often the disputes arise out of a business relationship that is still ongoing. Thus, reaching an amicable settlement with the support of the arbitral tribunal is often more favorable for both parties than ending the proceedings by award, where one party wins and the other loses. Third, a settlement agreement can, with the help of the arbitrator, often be reached at a fairly early stage when the costs of the proceedings have not yet reached astronomical heights. Fourth, an early legal evaluation by the Arbitral Tribunal may in fact substitute some forms of Alternative Dispute Resolution like Mini-Trials, Early Neutral Evaluation or Expert Determination and Conciliation or even Procedural Risk Analysis with the positive side-effect that it is all done within and not outside of the arbitration proceedings and thus carries no risk of prescription.

2. Legal Framework

Of course, to apply a possible "best practice" of early legal evaluation and settlement proposal by the arbitrator, the legal background of the specific proceedings needs to be taken into account: Is the Arbitrator entitled or obliged to facilitate a settlement?

a) Lex Arbitri

Even though there seems to be a general consensus that an international arbitrator should encourage the voluntary settlement of the case between the parties, the various Civil Procedure Acts usually do not contain any provision that specifically applies to arbitration and promotes early settlement. Therefore, it may be asked whether, according to the applicable lex arbitri, regulations concerning state judges should be applied by analogy?

In Austria, according to Section 258 CCP, in court hearings the first oral

hearing serves inter alia the purpose to evaluate and discuss the factual and legal allegations of the parties, and the initiative of the judge to reach a settlement between the parties. With respect to arbitration, Section 605 CCP, the arbitrators have no duty to mediate between the parties, it is up to the parties to decide whether they conclude a settlement agreement during the arbitral proceedings, which may then – upon the request of the parties – be issued in the form of an arbitral award. Although the regulations on Austrian court proceedings are generally not to be applied to arbitrations with their seat in Austria, it is, for Austrian practitioners, clearly evident that an arbitrator is – at least – *allowed* to explore the possibility of an amicable settlement by the parties.

The legal situation in Germany is essentially the same. In Italy, the law was the same until recently, and the attempt at settlement by the judge had become in almost all cases a perfunctory step with no real significance. Nowadays the law requests the judge to help the parties to reach a settlement only on a joint request by all of them. In France, the law explicitly states that the legal duty of a judge to try to reach a settlement also applies in arbitration, but in some commentaries, a clearer distinction between the decision-making and settlement function is postulated.

In the Anglo-Saxon tradition, the settlement topic is more or less conferred on the parties: They – and not the judges or arbitrators – are required to explore alternatives to litigation, and they are encouraged to settle their disputes at an early stage. In the USA, regarding federal district courts, mediation techniques have been promoted recently, however, such promotion of settlement does not extend to arbitration.

If, however, parties from a "settlement adverse" cultural background are surprised or even shocked when an arbitrator tries to explore settlement possibilities, this is due to their fear that, by giving his early evaluation of the case, he has adopted a certain legal point of view before the evidence-taking procedure has begun. In a nutshell, it is more the fear that the arbitrator is no longer neutral, or that he may express signs of bias, if he actively promotes a settlement than a general mistrust in amicable settlement.

b) Institutional Rules and Codes of Ethics

While some of the most important institutional rules are silent on the issue of the arbitrator, others allow or even encourage the arbitrator to assist the parties in reaching an amicable settlement. The first groups of rules which do not contain provisions on the arbitrator's role in amicable settlements include the ICC Rules and the Vienna Rules. On the other hand, the Arbitration Rules of the German Institution of Arbitration expressly authorize the arbitrator to encourage voluntary settlement. Section 32 DIS provides that "at every stage of the proceedings, the arbitral tribunal should seek to encourage an amicable settlement of the dispute or of individual issues in dispute". Art. 25 (1) of the Arbitration Rules of the Chamber of National and International Arbitration of Milan and the Rules of Procedure

of the Arbitration Court of the Slovak Chamber of Commerce and Industry contain a similar regulation.

As regards Codes of Ethics, there is a striking difference between the IBA Guidelines on Conflicts of Interest in International Arbitration and the American Arbitration Association Guide for Commercial Arbitrators. This difference might be due to the addressees of the Guidelines. The AAA Guide forthrightly states that arbitrators should "not participate in settlement discussions", albeit also allowing an arbitrator to also act as mediator or conciliator when requested by the parties or by the applicable regulations. Pursuant to the IBA Guidelines (general standard 4d), arbitrators are allowed to participate in settlement discussions. However, they recommend that the arbitrators receive "express agreement" by the parties that acting in such a manner shall not disqualify an arbitrator from continuing to serve as an arbitrator.

c) Interim Result

As a result, it may be summarized that it is basically – according to a broad international understanding – not forbidden for an arbitral tribunal to explore whether the parties are willing to start settlement talks. Neither is it forbidden to share the tribunal's primary legal assessment of the case with the parties. To make it a "best practice", however, certain basic rules have to be met. Furthermore, there are some techniques that should rather be avoided. On the one hand, an arbitrator should clearly respect the frontiers of arbitration as such – for instance, in comparison to mediation or other ADR techniques. On the other hand, he must avoid any impression that might entail partiality or prejudice.

3. How to Proceed? Four Basic Rules

If we concede that it is worthwhile thinking about an early evaluation and an eventual settlement proposal by the Arbitral Tribunal as a "best practice", some basic rules need to be followed. The authors have decided to formulate four basic rules.

a) Rule No. 1

As a first rule, it is clearly necessary to see the limits of arbitration: By no means is the arbitrator a mediator; by no means is he a conciliator, nor is he the appropriate person to evaluate the economic risks of the parties.

Rule No. 1 for a best practice would therefore be: *Respect the limits of arbitration.*

b) Rule No. 2

Secondly, the arbitrator as settlement facilitator and the parties who start settlement discussions should bear in mind that it is not possible to "brain-wash" the arbitrator and/or the other party. We have often seen suggestions for settlement talks such as, "The parties should form a common consent that neither party

is allowed to use arguments or documents that have been made available during the settlement procedure" or even that the Arbitral Tribunal is not allowed to use such information in the case that a settlement cannot be eventually reached.

Especially when talking about the information that the arbitrator receives, for as long as we remain human beings (which hopefully will be for a long time), it is impossible to totally ignore such information. Even if the arbitrator does not mention such information in his award, this information will still be in his mind, and he will – whether intentionally or not – somehow be influenced by it.

If parties therefore wish to start settlement talks using information that they do not think fit for "official" use in arbitration proceedings, they are better advised to do this in the course of a separate mediation or other ADR procedure – and should definitely not share this information with the arbitrator.

Therefore, Rule No. 2 would be: *Don't burden the arbitrator with information or evidence you don't want to formally introduce in the proceedings.*

c) Rule No. 3

If an arbitrator does not want to lose his reputation, he should never put pressure on the parties or – by means of pure persuasion – push them into a settlement they do not want. This will not only ruin his future chances of appointment, but may also risk a challenge of the arbitrator due to alleged partiality or the setting aside of the arbitral award.

Thus, here is Rule No. 3, addressed to the arbitrator: *Don't put pressure on the parties, but seek their consent and respect the limits they set.*

d) Rule No. 4

The IBA Rules of Ethics for International Arbitration provide that it is undesirable for any arbitrator to discuss settlement terms with one party in the absence of the other party, even if the other party has given its consent. The reason for such recommendation is that he may, in the course of such separate sessions – widely known as "caucus sessions" – lose his impartiality and therefore become disqualified from continuing in his position. This is true even if such separate sessions take place with both parties and would, therefore, not automatically violate the principle of equal treatment.

Another aspect of impartiality is avoiding the impression that the arbitrator knows the outcome of the case before evidence has actually been taken. We all know that early legal evaluation can be extremely helpful in reaching an amicable settlement, but it should not create the impression that the case has been decided before it has actually started. Thus, good timing for early evaluation is just as crucial as making clear that such evaluation is preliminary, and may of course be subject to review during the course of the proceedings.

As a consequence, we would formulate Rule No. 4, again for the arbitrator: *Don't endanger your impartiality by settlement talks or early evaluation, and namely: Don't hold separate talks with either party.*

C. Closing Remarks

Both procedural issues examined, the role of the arbitrator in achieving a settlement as well as the status of the governing law, are candidates for further standardization because of the prevailing differences in how arbitrators approach these issues and because of the importance of these issues for parties. In the current situation, the different practices – especially between common law and civil law countries – often lead to the parties' expectations regarding these issues being disappointed.[32])

While thus the need for best practices is arguably established, it remains difficult to determine best practices which are generally acceptable. In this contribution we developed some possible solutions. However, regarding these issues, all has not been said and it will undoubtedly take more time until best practices in these areas are achieved.

[32]) *See* Natalie Voser, *supra* note 1 at 264.