

NOTE

Time and Costs: Issues and Initiatives from an Arbitrator's Perspective

Albert Jan van den Berg¹

Arbitration practitioners and clients frequently raise concerns about the time it takes to carry out arbitration proceedings and the costs incurred in the process. This note addresses two issues in the 'time and costs' conundrum and suggests some practical answers to address them from an arbitrator's perspective. In particular, this note addresses: (i) agreements on timing between counsel to parties and (ii) the justification of the time spent by arbitrators on a case.

The first issue arises because of the excessive time that certain arbitral procedures can take. This excess is sometimes due to arbitrators, but in most cases it is due to the parties. Barring exceptional circumstances, there is no justification for an agreement by counsel allowing, for example, that a Statement of Claim be filed in six months and the Statement of Defense six months later. And what should one think about an agreement made in November 2012 for a hearing in December 2016? While such scheduling agreements may be due to the heavy workload of counsel, they could also stem from the desire to increase billable hours. There may be various reasons why the parties' actions can protract the proceedings, but agreements reached by the parties—and more precisely, their counsel—on the conduct of the arbitration are an increasingly frequent cause of delay.

This timing issue is a platform for the first initiative: for arbitrators to be less *laissez-faire* with respect to the scheduling of the procedure by the parties' counsel. Party autonomy is a good thing, but it may well have reached its limits. Arbitrators should rather actively inquire with counsel why such extraordinary periods of time are necessary. An effective measure—which the author applies in practice more and more—is to require the presence of senior management or senior in-house counsel at the first procedural meeting. Magic occurs when the Presiding Arbitrator inquires with counsel why he or she needs six months to prepare the Statement of Claim.

The second issue concerns the justification by the arbitrator of his or her time spent. It is a fact that nowadays virtually all institutions remunerate arbitrators on the basis of the number of hours that they serve. The American Arbitration

¹ Partner, Hanotiau & van den Berg, Email: ajvandenberghvdb.com. This note is an adapted version of a presentation made at the AAA/ICDR/ICC/ICSID colloquium held in Washington, DC, on 18 November 2011.

Association and International Centre for Dispute Resolution (ICDR) have clear rules on hourly remuneration. The International Centre for Settlement of Investment Disputes (ICSID) has a day fee, but in the author's experience, ICSID actually pays its arbitrators by the hour as well. As for the International Chamber of Commerce (ICC), it states officially that it remunerates its arbitrators on an *ad valorem* basis (ie as a percentage of the amount claimed), but in practice the ICC always asks for the number of hours an arbitrator has spent, such that certain patterns of hourly remuneration can also be seen at the ICC.

Issues concerning the amount of time spent by arbitrators arise out of certain practices that are seldom discussed publicly because they are considered too sensitive or are simply not known.

Three examples from recent cases may illustrate the issue of time spent by an arbitrator. Why is it that co-arbitrator A has drafted 80 per cent of the 300-page award and the chair the remaining 20 per cent, yet co-arbitrator B has spent the same number of hours as co-arbitrator A? Why is it that co-arbitrator X charges three times more hours than colleague Y? Why is it that, active in several cases at the same arbitral institution, arbitrator Z submits time charges which, added together, show that he worked more than 24 hours per day during a certain period?

The issue of arbitrator time is also raised in the context of parties asking why they have to advance such high amounts for the fees and costs of the tribunal. Parties have the legitimate question: 'What are they doing for my money?'

An initiative to address this concern is the arbitrators' budget. Below is an example of a budget that was used in a complex case where the claim amount was over 1 billion Euros. The budget is contained in the Appendix [Table A1](#), which includes a detailed estimate for the number of hours each arbitrator anticipates spending during each step of the proceedings, such as for the review of the parties' written pleadings, review of and ruling on production of document requests, preparation for the hearing, conduct of the hearing, deliberations and drafting the award.

The budget should be prepared by the tribunal at the outset of the case and submitted to the parties for comment. Experience shows that parties do comment on the budget by stating, for example, that the time for review of the written pleadings can be estimated less because those pleadings will be short and there will be few witnesses and no expert reports. The draft budget can be adjusted accordingly.

Importantly, the budget gives parties a detailed view about what to expect with respect to how much time—and therefore how much of the parties' money—will be spent by the arbitrators. The budget can also be adjusted upward or downward as the case progresses. In the author's experience, parties greatly appreciate this type of information, which makes international arbitration more transparent. It also makes arbitrators more accountable, in part by requiring them to justify major departures from the budget. In addition, the budget increases the parties' readiness to pay advances.

Another initiative is time recording by arbitrators. Arbitrators should be required to submit a detailed specification of their time spent to the arbitral institution on a monthly or quarterly basis, with a copy to their fellow arbitrators. The advantage of this approach is that arbitrators will be remunerated for the

actual time spent and not for phantom hours. Another advantage is that the institution can keep track of the costs and can exercise control over arbitrators who record time excessively, inaccurately, or not at all.

The latter category is also worrisome. A number of arbitrators do not have—and some do not want to have—time recording software and simply guess the number of hours spent. It happens, not infrequently, that the guesses bear only limited resemblance to the hours actually spent. The problem is, in fact, not only an inflated number of hours, but also, conversely, time lost due to a lack of timely accounting.

Arbitral institutions could develop time recording software or an ‘App’ for their arbitrators and give it to them for free at the time of their appointment. It could be simple software, off the shelf, and adapted to the profession of being an arbitrator. The software could be adapted to the particular needs of the arbitral institution in question (eg ‘ICDR Module’). A further step the arbitral institutions could take would be to make it a condition for appointment that the arbitrator agrees to submit time sheets regularly to the arbitral institution.

In conclusion, arbitrators could take three initiatives to combat increasing time and costs in international arbitration. They should: (i) limit their *laissez faire* approach with respect to agreements on scheduling by counsel to parties; (ii) provide parties with a budget that estimates the hours they will spend on a case; and (iii) be required to submit time sheets to arbitral institutions on a regular basis. Some arbitrators may object to these suggestions under the belief that budgeting and time recording are *infra dignitatem* for those serving as international arbitrators. Yet, we have to realize that the *nobile officium* is no longer an excuse for a lack of accountability. Being an arbitrator means being part of a service industry. One of the basic rules of that industry is that if one is remunerated for a service, one has to account for it.

Table A1. A]B/Draft/Rev05/[date]

Case No. _____

Claimant v. Respondent

Budget Estimate (Non-Binding)

Item No.	Description	Arb A Hours	Arb B Hours	Chair Hours	Secretary	Total
(a)	Arb A: To be invoiced thru [date of budget]	8.5				
(b)	Arb B: To be invoiced thru [date of budget]		11.5			
(c)	Chair: To be invoiced thru [date of budget]			18.5		
(d)	Review Memorial	16.0	16.0	16.0		
(e)	Review Counter-Memorial	16.0	16.0	16.0		
(f)	Review and Ruling on Prod of Doc'ts Requests	4.0	4.0	8.0		
(g)	Preliminary Views Hearing (under advisement)					
(h)	Review Reply	12.0	12.0	12.0		
(i)	Review Rejoinder	12.0	12.0	12.0		
(j)	Pre-Hearing Conference, including preparation	10.0	10.0	14.0		
(k)	Preparation for Hearing	24.0	24.0	30.0		
(l)	Travel to and from [city X] re Hearing	20.0	20.0	10.0		
(m)	Hearing: 5 days	40.0	40.0	40.0		
(n)	Review and deliberations during Hearing	20.0	20.0	20.0		
(o)	Review Post-Hearing Briefs	12.0	12.0	12.0		
(p)	Deliberations	24.0	24.0	24.0		
(q)	Travel to and from [city Y] re deliberations	0.0	0.0	24.0		
(r)	Drafting of Award	24.0	24.0	60.0		
(s)	Review of correspondence during arbitration	12.0	12.0	30.0		
(t)	Procedural and administrative matters, including review of correspondence and applications as well as drafting of Procedural Orders	8.0	8.0	22.0		
(u)	Total hours of arbitrators [(a) thru (t)]	262.5	265.5	368.5		896.5

(continued)

Table A1. Continued

		Amount	Amount	Amount	Amount	Amount
(v)	Amount: 1 hour @ US\$ 375 * (u)	98,437.50	99,562.50	138,187.50		336,187.50
(x)	Travel expenses (Prep Conf, Hearing, Deliberations)	6,400.00	6,400.00	6,400.00		
(y)	Hotels and meals (Prep Conf, Hearing, Deliberations)	3,000.00	3,000.00	4,500.00		
(z)	Other expenses			2,500.00		
(aa)	Total expenses of arbitrators [(x)+(y)+(z)]	9,400.00	9,400.00	13,400.00		32,200.00
(bb)	Total per arbitrator [(v)+(aa)]	107,837.50	108,962.50	151,587.50		
(cc)	Assistant Secretary: 120 hours @ US\$ 0.00				0.00	
(dd)	Expenses (travel, hotels, meals, etc.)				4,500.00	
(ee)	Total Administrative Secretary [(cc)+(dd)]				4,500.00	4,500.00
(ff)	Subtotal [(v)+(aa)+(ee)]					372,887.50
(gg)	Contingency: 5% [(over ff)]					18,644.38
(hh)	Grand Total [(ff)+(gg)]					391,531.88