THE EFFICIENCY APEX: RETHINKING THE APPROACH TO PROCEDURE IN INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract

Despite decades of debate addressing efficiency of arbitral proceedings and continuous efforts at procedural innovation, time and costs continue to be a major concern of users of international arbitration. In this paper, the author explores what are the objectives of an arbitration, with a view to formulating a procedural threshold to achieve those objectives in the most efficient way (the "Efficiency Apex"). The paper finishes by proposing a synthesised framework for the implementation of the Efficiency Apex, with a focus on bespoke case management and a reversal of standard procedural presumptions at the outset of an arbitration.

I. Introduction

Efficiency is a long-standing topic of both interest and concern in international arbitration. For decades, the arbitral community has debated the consequences of the increasing time, costs, complexity of arbitration, and of possible solutions. In the context of these discussions, efforts have been made to address efficiency through a variety of ways, whether by the introduction of various procedural tools, the wide-spread adoption of expedited procedures, or the publication of guidelines on procedural efficiency. Some changes have been used to greater effect than others; yet none have provided a sufficiently comprehensive solution so as to satisfy ongoing efficiency concerns. Efficiency of the proceedings, in particular, the costs involved, remain a top concern for users of arbitration.[1]

As lawyers, it is embedded in our education and training that the proceedings should be as fulsome and thorough as possible – with each issue explored to its fullest extent, all avenues of argument presented and supported by any and all available factual and legal authorities. The default approach adopted at the outset of most arbitration proceedings is a standard procedural order accompanied by a comprehensive procedural timetable, providing the parties with free range for several rounds of submissions, a discovery process, witness statements, expert reports (where relevant), and a full evidentiary hearing. While there may be some variations as between matters of different sizes and

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[1] *See* White & Case and Queen Mary University of London, *2018 International Arbitration Survey: The Evolution of International Arbitration*, at 8, chart 4, *available at* https://arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF. The cost of arbitration was listed as the "worst" characteristic of international arbitration, with 67% of respondents listing cost as one of their "three worst characteristics of international arbitration." *See also*, the discussion of the recent demand for efficiency in arbitration in Loukas Mistelis, *Efficiency. What Else? Efficiency as the emerging defining value of international: Between Systems Theories and Party Autonomy*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 349-376 (Thomas Schultz and Ortino Federico eds., 2020).

complexities, invariably, the vast majority of arbitrations adopt what has become a relatively standard set of procedures.

The aim of this article is to propose that, if true and meaningful progress is to be achieved with regard to efficiency, we need to fundamentally change our default approach to adopting standard procedures at the outset of the arbitration. The focus should be to adopt a procedure which includes only those steps that are necessary to achieve the objectives of the arbitration proceedings. Anything beyond that is, arguably, unnecessary and contributes to the inefficiency of the proceedings. The primary motivator underlying commercial arbitration is, after all, to pursue commercial interests and, while other interests may be at play, money is the ultimate motivating factor. Arbitration proceedings which expend time and costs beyond what is necessary to achieve the objectives of the arbitration are therefore, to a certain extent, undermining the very purpose of the arbitration.

Unnecessary procedural elements – any elements for which the work undertaken is unnecessary to achieve the objectives of the arbitration – operate to siphon money from the parties and shift it to others involved in the dispute resolution process, including counsel, arbitrators, and experts. While it is clear that such costs cannot be avoided completely, as they are a necessary part of the procedure, it is often the case that the costs incurred go well beyond what is necessary.

In the 2021 Queen Mary – White & Case International Arbitration Survey, respondents were asked (from the position of party or counsel) which procedural steps they would be willing to do without, if it would make an arbitration faster or cheaper.[2] A majority of respondents were willing to place limits on the length of submissions, and large numbers were willing to forgo oral hearings, document production or having more than one round of submissions, amongst other procedural elements they were willing to sacrifice. This provides evidence of both an interest and willingness, on the part of counsel and parties, to place limits on the proceedings in the name of achieving greater efficiency.

Further, excessive information may instead be of detriment to a tribunal, leading to information overload and burial of the information most relevant to the issues necessary to determine the dispute. Unnecessary procedural elements also operate to delay the resolution of the dispute, which can have negative effects, as arbitrators' memory and understanding of important aspects of the matter fade with time.[3] Delays and increased costs undermine the legitimacy of the arbitral process, decreasing parties' willingness to use it as a means of resolving disputes, and decreasing the pool of parties financially willing or able to pursue their claims.

It may be argued that costs orders and the awarding of interests are tools built into arbitral procedures, which are structured to address scenarios where parties fail to act efficiently, whether by filing unnecessary claims/defences, pursuing unmeritorious applications, or otherwise causing delay. However, while costs orders can provide a remedy to punish the offending party, the damage to the proceedings would have been done. The fees incurred unnecessarily would have to be diverted from the parties to the pockets of the various players in the dispute resolution process.

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2 *See, supra* note 1, at 13, chart 9.

3 Leah Elizabeth Thomas, *Consequences of undue delay in passing arbitral awards and imposition of timelines as a solution*, 6(2) NLIU L. REV. 220, 224 (2021).

Even for the winning party, the delay in obtaining remedies, uncertainty arising from the dispute, and wasted time, are all additional consequences that are not necessarily remedied by an award of costs and interest. Further, the very fact that the issues of efficiency, time, and costs continue to arise are evidence that the spectre of adverse costs and interest are insufficient as a deterrent.

The objective of this discussion is to encourage tribunals and parties to engage more deeply at the outset of the proceedings, in order to select a procedure that eliminates unnecessary procedural elements and focuses the parties on what is necessary to achieve the objectives of the arbitration. The objectives of an arbitration, as explored below, are to render an enforceable and correct award, as efficiently as possible. To achieve this, it is proposed that the procedural presumption at the outset of the proceedings be reversed – instead of starting from the assumption that the resolution of the dispute will require a full set of standard procedures, the starting point should instead be to evaluate the originating documents of the arbitration and determine what beyond those is necessary for the tribunal to resolve the disputes before it. The goal is to reach, but not exceed, the point where a tribunal has received sufficient information to resolve the parties' dispute, which the author refers to as the '*Efficiency Apex*.' It is also suggested that at this point, the parties' due process rights would also have been satisfied, subject to certain other protections discussed below in Part II.

To achieve this, the tribunal and parties should focus, from the outset of the arbitration, on adopting a more restrictive or limited procedure. Where parties are aware of the procedures and framework for the arbitration from the beginning of the arbitration, including appropriate limitations, they have the opportunity to adjust their submissions and evidence accordingly so that their case is fully presented. Where there are concerns about such limitations, the parties have protections built into the process. Further, in the event that a party is legitimately concerned about the procedure adopted, such concerns are to be raised at the appropriate time when such limitations become clear and should be appropriately reasoned. It will generally not be acceptable to complain, at the enforcement stage, that they were denied due process for reasons they were aware of during the arbitration.

The author is neither oblivious to the realities of international arbitration practice and the potentially conflicting motivations of those involved in the process, nor of the belief that these proposals will provide a panacea to all efficiency issues. However, given the pervasiveness of concerns relating to efficiency and the effects that it has on the legitimacy of an arbitration, there is an obligation to make a concerted effort to change our approach to arbitral procedure. Arbitrations are not judicial proceedings, the latter of which are subject to public scrutiny and multiple levels of review and appeal, and which may act as precedents for future cases. Arbitration is a process by which the parties carry out contractual obligations to resolve disputes privately. Enforceability, correctness, and efficiency are the prevailing objectives of arbitration. The more we focus on those objectives, the greater the chances are of achieving the benefits which attracted users to arbitration in the first place. The objectives are discussed below in detail in Part II, and a synthesised framework for their application is proposed in Part III.

II. The objectives of an arbitration

As a starting point, it is necessary to discuss the objectives of an arbitration. Like any dispute resolution process, the ultimate goal is for the parties to find a resolution to their dispute. In the case of arbitration, if this resolution does not occur by settlement between the parties, it will occur by way of one or more awards.

The rendering of an award – in and of itself – is not a sufficient objective however, and the method in which the award is rendered must, therefore, be considered. The prevailing party in the arbitration will want a method of recourse for the relief granted in the award, and so it follows as such that the award should be enforceable. This generally encapsulates, at a minimum, the protections provided in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"],[4] which will be addressed in greater detail later in this part.

As discussed above, since it is primarily commercial interests which are at stake, any funds which are expended unnecessarily operate to shift money away from the parties and, therefore, undermine, at least to some extent, the objectives which the parties are trying to achieve. The author, therefore, proposes that another objective of the arbitration is to render the award as efficiently as possible. Efficiency obligations can be found enshrined in many of the rules of leading arbitral institutions, ranging from an obligation on the tribunal to adopt suitable procedures to avoid '*unnecessary delay and expense*,' to obligations on both the tribunal and the parties to '*make every effort to conduct the proceedings in an expeditious and cost-effective manner*.'[5]

There are concerns, however, that efficiency may come at a cost to the quality of the proceedings. Fabricio Fortese and Lotta Hemmi frame the issue in the following manner:

> *"Efficiency is often assimilated with only cost and time efficiency, but the other side of the same coin is to gain the efficient proceedings without risking either the correct outcome or the due process."*[6]

The above passage suggests that two competing interests are efficiency on one side (of both time and costs), and the quality of the proceedings on the other (being the correct outcome and due process). A decrease in the time and money that is expended on the dispute should correlate with a *reduction* in the procedure, whether by reducing the length of the submissions, reducing or eliminating document exchange, limitations on hearings, or other choices implemented in the name of efficiency. Logically, these limitations may have an impact on the parties' ability to present their case, which may prevent sufficient information being relayed to the tribunal in order for it to reach the correct conclusion. Jennifer Kirby has described these competing interests in the following terms:

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4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(d), June 10, 1958, 330 U.N.T.S 38 [*hereinafter* "New York Convention"].

5 *See,* London Court of International Arbitration (LCIA) Arbitration Rules 2020, art. 14.1(ii); International Chambers of Commerce (ICC) Arbitration Rules 2021, art. 22(1); Stockholm Chamber of Commerce (SCC) Arbitration Rules 2023, art. 2(1); Hong Kong Internatonal Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 13.5; International Centre for Dispute Resolution (ICDR) Arbitration Rules 2017, art. 22(2); ICDR Arbitration Rules 2017, art. 22(8); Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, art. 19.1.

6 Fabricio Fortese and Lotta Hemmi, *Procedural Fairness and Efficiency in International Arbitration*, 3(1) GRONINGEN J. INT'L L. 110, 116 (2015).

> *"To the extent people spend time and money on things that don't go towards producing awards that are correct and enforceable, many parties would probably agree that such time and expenses could be saved without reducing quality."*[7]

The objective proposed by this passage appears to be the prevention of the wastage of time and money, without reducing the '*quality*' of the proceedings; the latter which would appear to encompass both the due process rights of the parties as well as the correctness of the result. While due process concerns find protection in the enforceability objective discussed above, the correctness of the result does not have similar safeguards. As arbitral awards are, generally, not subject to appeal on the grounds that they are incorrect, it should be the aim of any tribunal to render decisions that are correct on the case before them. The integrity of the institution of arbitration as a whole would suffer if it were the prevailing view that tribunals do not aim to render correct decisions. As such, the author proposes that rendering an award that is correct, to the greatest extent possible, is an integral objective of an arbitration.

In light of the foregoing, the author proposes that the objectives of an arbitration are three-fold: (i) to produce an enforceable award; (ii) to produce a correct award; and (iii) to produce the award as efficiently as possible. Each of these objectives will be addressed in turn below.

A. Enforceability Objective

When discussing the objectives of an award, one inevitably gravitates towards enforcement, and the elements set out in Article V of the New York Convention. At the outset, it should be noted that the grounds for annulment or refusal of enforcement operate as a minimum standard for an award to achieve, and should not necessary (on their own) be relied upon as an aspirational objective at the outset of an arbitration. Further, the protections afforded by the New York Convention generally come into play following the conclusion of an arbitration, while this discussion is concerned with the determination of the procedure at the outset of the dispute.

Nonetheless, there are three important requirements to be gleaned from the New York Convention that can be used as guiding principles when determining the procedure to be adopted in an arbitration: (i) the tribunal shall not exceed the authority granted to it; (ii) the parties shall be treated with equality; and (iii) the parties shall have a full opportunity to present their case.

i. The Tribunal shall not exceed the authority granted to it

This requirement finds its source in Article V(1)(d) of the New York Convention, which provides, *inter alia*, that recognition or enforcement may be refused where the "*arbitral procedure was not in accordance with the agreement of the parties*."[8] One of the cornerstones of arbitration is that it is a consensual process based upon the agreement of the parties to resolve their disputes privately, and it should not be controversial that the parties' agreement as to the procedure should be complied with. As such, when the tribunal is determining the procedure for the arbitration, party agreement takes precedence.

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7 Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is it?,* 32(6) J. INT. ARB. 689, 691 (2015) [*hereinafter* "Kirby"].

8 New York Convention, art. V(1)(d).

Where this requirement becomes most interesting for the purposes of this discussion is where the parties do not agree on particular aspects of the procedure. In cases of such disagreements, which are common, prior agreements of the parties as to procedure will govern, the principle source of which will be the arbitration agreement which specifies the applicable rules for the arbitration. The rules of most, if not all, leading arbitral institutions grant significant authority to the tribunal to determine the specific procedures to be adopted. The 2021 ICC Rules of Arbitration ["**ICC Rules**"] provide the following at Article 22 with regard to the conduct of the proceedings:

> *"In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."*[9]

This provision confirms the primacy of the parties' agreement on procedure, failing which, the tribunal is granted broad discretion to "*adopt such procedural measures as it considers appropriate*,"[10] following consultation with the parties. As such, by virtue of agreeing to the application of the ICC Rules, the parties come to the agreement that the tribunal shall have broad discretion with regard to the determination of procedure on which the parties fail to reach agreement. Similarly, broad discretion can be found in the rules of other arbitral institutions.[11] The United Nations Commission on International Trade Law Model Law on International Commercial Arbitration ["**Model Law**"] also expressly states that where the parties fail to agree on the procedure to be followed, the tribunal shall conduct the arbitration in such manner as it considers appropriate.[12]

As such, so long as the tribunal respects the procedural agreements reached by the parties, it would satisfy this element of enforceability. This includes not only the arbitral procedure agreed to by the parties after the dispute has arisen, but also the procedure agreed to by the parties in their arbitration agreement, including any institutional rules incorporated therein. Those institutional rules generally, in turn, include a delegation of authority to the tribunal over procedural matters, who has discretion to adopt the procedures that it determines are best suited for the arbitration, which is most often subject to requirements of efficiency. This latter agreement – to be bound by the tribunal's discretion – should be no less binding than other contractual obligations of the parties *vis-á-vis* the arbitral process. Indeed, the tribunal's discretion to determine the arbitral procedure, in the absence of parties' agreement on such matters, is considered a foundation of the international arbitral process.[13]

ii. The parties shall be treated with equality

The requirement that the parties be treated with equality, while not explicitly set out in Article V of the New York Convention, is nonetheless a universally accepted principle in international arbitration. In many legal systems, the treatment of equality as between the parties is considered to be a principle of fundamental justice, a breach of which would be considered as grounds for

9 ICC Rules of Arbitration 2021, art. 22(2) [*hereinafter*, "ICC Rules"].
10 ICC Rules art. 22(2).
11 *See*, LCIA Arbitration Rules 2020, art. 14.5; SCC Arbitration Rules 2023, art. 23(1); HKIAC Administered Arbitration Rules 2018, art. 13.1; ICDR Arbitration Rules 2017, art. 22(1); SIAC Arbitration Rules 2016, art. 19.1.
12 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006) [*hereinafter*, [Model Law], art. 19.
13 GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 182 (3d ed. 2022).

refusal under Article V(2)(b) of the New York Convention (i.e., on the grounds that it is contrary to public policy). Some jurisdictions, such as Singapore, have expressly incorporated a breach of natural justice as a ground for refusing enforcement of an award.[14] The principle of equality of treatment is also found in Article 18 of the Model Law. Likewise, leading commentaries confirm that this is a fundamental requirement for the tribunal in exercising its discretion over the conduct of the proceedings.[15] This requirement should not, therefore, be a contentious one.

A distinction should be drawn, however, between equality of treatment between the parties and affording the parties' procedural demands equal weight. Not all procedural demands or proposals made by the parties are created equal. The tribunal's decisions on procedure should not automatically default to a middle ground between the positions of the parties, as one side's proposals may be clearly more appropriate for the efficient and effective conduct of the proceedings. Agreeing with one party more than the other on procedural matters is, therefore, not a matter of equality; it is the application of those procedural determinations where the requirement of equality comes into play.

In the context of fixing procedural directions at the outset of an arbitration, the principle of equality is a relatively simple concept and should generally encompass equal application of the procedural decisions (e.g., equal opportunities for submissions). While there may be the rare case where one party requires additional procedural concessions, this objective should be relatively easy to comply with when fixing procedural directions at the outset of the arbitration.

iii. The parties shall have a full opportunity to present their case

The third requirement for enforcement, that the parties shall have a full opportunity to present their case, is the most complex in practice. There is a tendency for tribunals, at the outset of the arbitration, to impose minimal restrictions on the parties' procedural proposals, whether out of deference to parties due to an alleged lack of details known about the dispute at that time, or arising from the ever pervasive '*due process paranoia*.'

However, it is widely accepted that the right to '*full opportunity'* does not constitute a *carte blanche* for a party to demand and receive any and all procedural accommodations it seeks, and nor should it be considered to be such. As discussed above, the objective of an arbitration is to render an enforceable award, that is correct, as efficiently as possible. Procedural elements which either do not contribute to these objectives, or which exceed these objectives, operate to undermine the overarching commercial rationale for the dispute.

The right to present one's case is stated more generally in Article V(1)(b) of the New York Convention, where it provides the grounds for refusal of enforcement where a party was "*otherwise unable to present his case.*"[16] In Article 18 of the Model Law, the right is framed as requiring that "*each*

[14] See Singapore International Arbitration Act, Section 24(b).

[15] *Supra* note 13, at 20-22; REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 6.10-6.12 (Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides eds., 2009).

[16] New York Convention, art. V(1)(b).

party shall be given a full opportunity of presenting his case,"[17] while in England & Wales, a non-Model Law country, it is framed as a "*reasonable opportunity*."[18]

Further still, the right to be heard is considered to be a fundamental principle of natural justice, and finds further protection in the *public policy* provision in Article V(2)(b) of the New York Convention, and in some national arbitration legislation.[19]

At their core, these provisions are all concerned with the due process rights of the parties, and many authors and courts have downplayed or dismissed any practical differences between them. What appears to be universally accepted is that parties' procedural rights are impliedly limited by considerations of fairness, and a *full* opportunity is not an open-ended one.[20]

Indeed, it has been observed that the drafters of Article 18 of the Model Law were primarily concerned with placing *limits* on the right to be heard so as to prevent its abuse by unscrupulous parties seeking to delay the proceedings. The Singapore Court of Appeal in *China Machine New Energy Corporation* v. *Jaguar Energy Guatemala LLC & AEI Guatemala Jaguar Ltd.*, referred to the *travaux préparatoires* of the Model Law and went on to conclude that "*the parties' right to be heard is impliedly limited by considerations of reasonableness and fairness*."[21]

The challenge for a tribunal, when determining the procedure to be adopted at the outset of the arbitration is, therefore, to evaluate the parties' respective proposals and determine the optimal procedure, which will not unduly restrict the parties' ability to present their case, while endeavoring to avoid unnecessary time and costs. It is here that tribunals often err on the side of caution, whether out of fear or prudence, which is summarised in the following passage:

> *"The arbitral tribunal may thus reason that avoiding the risk that the award be set aside or refused enforcement on the basis that a party's requests were rejected outweighs the disadvantages of indulging excessive procedural requests by one party. The consequence of this calculation is that a dissatisfaction may grow among the users of arbitration, who witness that insufficiently assertive case management by the arbitral tribunal renders the proceedings inefficient and unnecessarily expensive. In extreme cases, hypertrophic proceedings may affect the efficiency to an extent that due process is violated.*"[22]

This passage highlights the consequences of tribunals taking an unnecessarily expansive approach to procedure, which leads to wasted time and costs, and a resulting dissatisfaction amongst users. The key for tribunals is to focus on the objectives of an arbitration – a correct and enforceable award rendered as efficiently as possible – to take appropriate and reasonable steps from an early stage of the arbitration.

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17 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006) [*hereinafter*, [Model Law], art. 18.

18 The Arbitration Act 1996, c. 23, § 33 (Eng.).

19 *See e.g.*, the Singapore International Arbitration Act, § 24(b) (1994).

20 *Supra* note 13, at 2175; JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 751 (2012).

21 China Machine New Energy Corporation v. Jaguar Energy Guatemala LLC & AEI Guatemala Jaguar Ltd, [2020] SGCA 12, ¶ 97.

22 Giuditta Cordero-Moss*, The Alleged Failure of Arbitration to Address Due Process Concerns: Is Arbitration under Attack?, in* STOCKHOLM ARBITRATION YEARBOOK 2021 259 (Axel Calissendorff and Patrik Schöldström eds., 2021).

To this end, it is helpful to discuss the actual practical effects of early-stage procedural management by the tribunal: what are the consequences of a tribunal restricting procedural rights where one party has sought more expansive procedures? How and when does this result in a potential violation of a right to due process? In this light, the submissions of counsel necessary to plead their client's case can be compared to a gaseous substance, and the procedures adopted to a container in which the gas is contained. The greater the size of the container, the more the gas will expand to fit its contents; however, the amount of gas remains the same. Similarly, the more expansive a procedure adopted, the more likely that counsel are to expand their submissions to take advantage of the space permitted. It is not necessarily the quantity of submissions and evidence which are *required* to plead the case that expand, but it is merely the counsel taking advantage of the additional leeway granted to expand their submissions in potentially unnecessary ways.

The key to efficiency is finding the smallest size of the container in which the gas is able to fit – in terms of arbitration, this means finding the most efficient set of procedures which permit a counsel to plead their client's case. Once those parameters are set at the outset of an arbitration, the counsel would be able to adapt and plan appropriately, to ensure that their client's case is adequately presented to the tribunal within the set procedures.

It should also be noted that in cases where a party seeks to resist enforcement of an award on the basis of a violation of its due process rights, that party will have to demonstrate that it was the procedural directions that were the cause of its inability to fully present its case, which should have been known by the party at the time it was pleading its case. A recent decision from the Singapore International Commercial Court, in assessing a claim for a breach of natural justice, highlighted this factor by stating "*the tribunal's decisions can only by assessed by reference to what was known to the tribunal at the time, and it follows that the alleged breach of natural justice must have been brought to the attention of the tribunal at the material time*."[23] (emphasis added)

Given that procedural directions are issued at the outset of a dispute, it would be challenging for a party to legitimately raise such concerns after the dispute has been terminated. This is since the parties were aware of the procedure and were provided the opportunity to present their case in accordance with such procedure. If a party was truly aggrieved or prejudiced by the procedures adopted, such concerns should have been properly raised at the relevant time of the proceedings and addressed then.

In consideration of the foregoing, the following principles can be drawn from the requirement that parties be given a *full opportunity* to present their case: (i) the right is impliedly limited by considerations of reasonableness and fairness; (ii) the procedure adopted should aim to accommodate what is necessary for the parties to plead their case, and not to exceed this; and (iii) any concerns that the procedure adopted is insufficient for a party to plead its case should be raised and addressed at the relevant time.

23 GPE and Gaja v. Twaris Consultancy and SEPC, [2021] SGHC(I) 17, ¶ 104.

In summary, the enforceability objective will be satisfied when the foregoing three elements have been met: (i) the tribunal has not exceeded the agreement of the parties; (ii) the parties have been treated with equality; and (iii) the parties have had the opportunity to present their case.

B. Correctness objective

An objective which is notably missing from the requirements of the New York Convention, Model Law and other relevant sources is that an arbitral award, and the decisions rendered therein, should be "correct." This omission appears to be by design to avoid inconsistent and unwanted interference by national courts in arbitral awards, and to ensure the (relative) finality of awards.

However, this is not to say that correctness should not also be an objective of arbitral awards. Despite being excluded from the elements set out in the New York Convention, it should be the goal of any tribunal to aim to render a decision that is as *correct* as possible. Indeed, aside from partisan desires, it should be the objective goal of parties to arbitration that decisions in awards that are rendered be correct, to the extent that they can be described as such. Despite the scope for differences in interpretation and discretion, there are inevitably decisions which are objectively correct, those which are incorrect, and others that fall far more closely to one end of that spectrum than the other. Further, the integrity of the arbitral process depends on a level of trust and belief in the system that tribunals shall endeavour, and overwhelming succeed, to render decisions which are correct on the basis of the case before them.

As is seen in practice, however, the concept of *correctness* is not always a clear cut case, particularly where elements of interpretation, the assessment of evidence, and the exercise of discretion are involved. This is exacerbated by the more limited knowledge available to tribunals (and to parties) at the outset of the proceedings.

The focus for the correctness objective must necessarily rely on the information provided to the tribunal – which provides the tribunal with the ability to reach the correct conclusion (whether they actually do so or not). When a tribunal has no knowledge of an arbitration, they have no chance of reaching the correct conclusion. As the tribunal receives more information on the dispute, its chances of reaching the correct conclusion increase exponentially. To this end, the author suggests that the objective of achieving *correctness* is fulfilled where the tribunal has received sufficient information to determine the issues before it.

However, at a certain point, further increases in the knowledge provided to the tribunal decrease in value, until it reaches a point where additional information is no longer necessary or beneficial to the tribunal. This fits the analogy of where the container is larger than is necessary to contain the gas: the same amount of gas could be contained in a smaller container, and the excess space of the container is unnecessary and inefficient. In arbitration terms, the objective should be to provide the tribunal with sufficient information to determine the dispute before it, with the least amount of time and money expended (i.e., as efficiently as possible).

The author proposes that at this stage – where the tribunal has been provided with the information necessary to decide the issues before it – the parties' due process rights have been satisfied. Additional submissions, evidence, and procedural steps beyond this are unnecessary to achieve the '*correctness*' objective, and, therefore, can be eliminated without affecting the parties' substantive

rights with regard to the decisions of the tribunal. It is difficult to argue that a party's right to plead its case has been prejudiced by limiting or eliminating superfluous submissions or procedural steps that had no effect on the outcome of the arbitration.

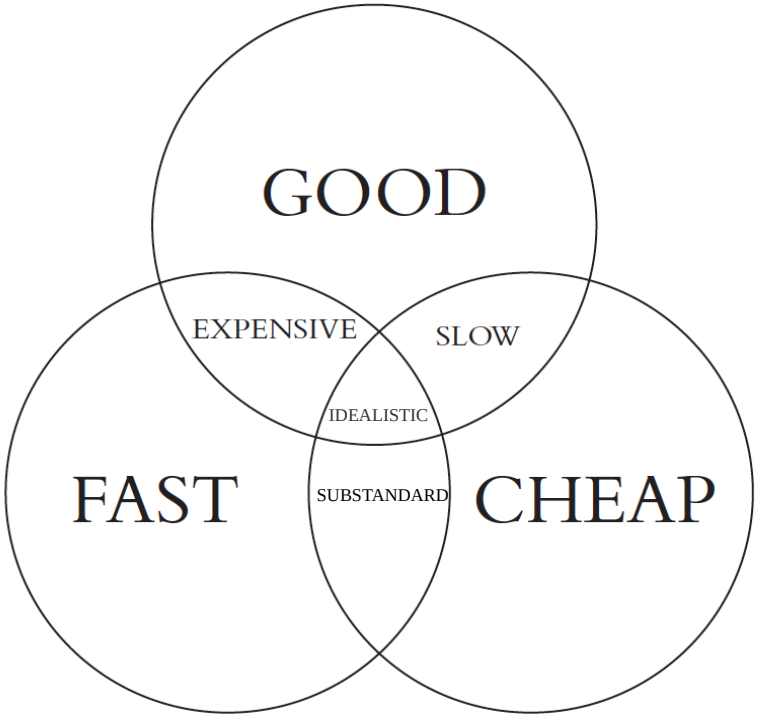
C. Efficiency Objective

How does one then determine the point at which the two above objectives are achieved? The goal is to adopt as efficient a procedure as is required to satisfy the objectives of enforcement (the parties have a full opportunity to present their case) and correctness (the tribunal has received sufficient information to reach the correct conclusions). While there is no exact science as to how a tribunal achieves this, the more restrictive the procedure adopted at the outset of an arbitration, the more likely counsel are to refine their cases and focus on the essential and most relevant aspects of their case.

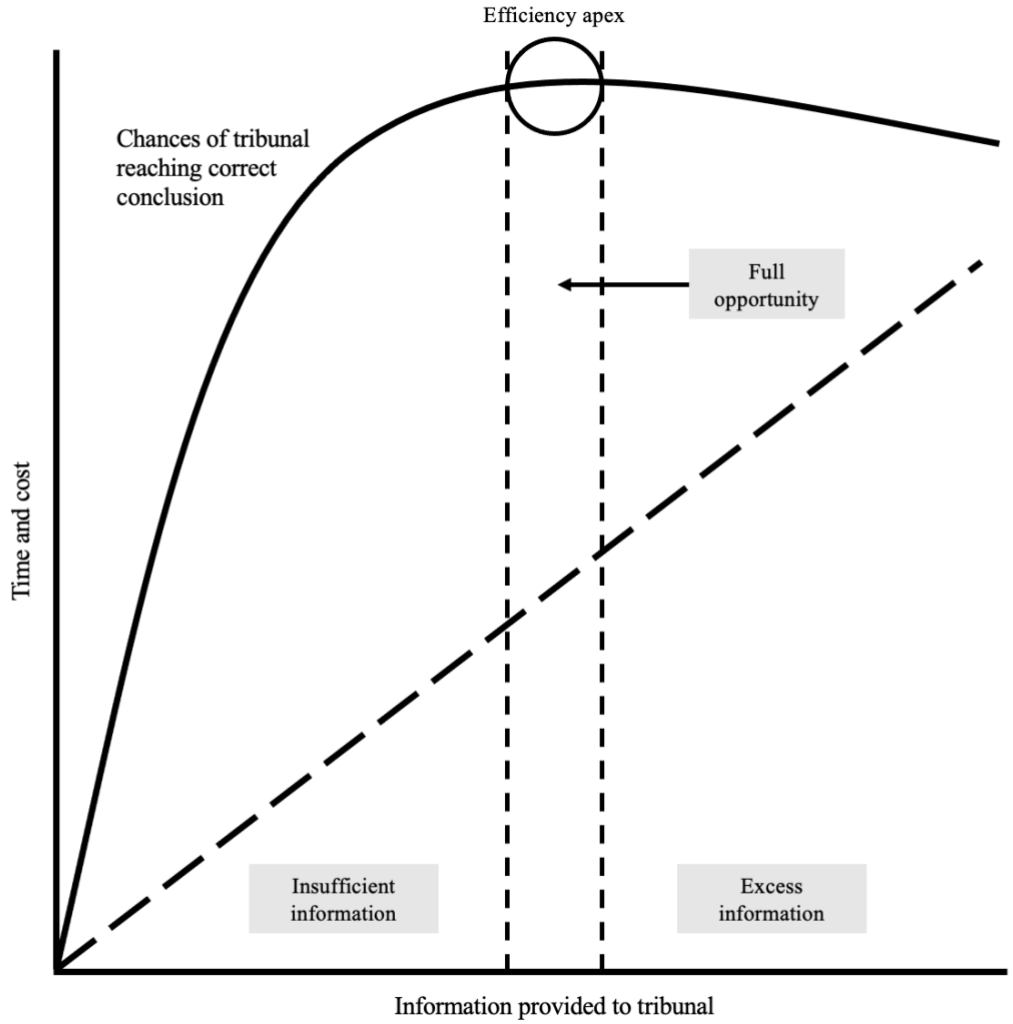
The traditional instinct has been to err on the side of caution and adopt a standard set of procedures for the arbitration, with little consideration of what aspects of the procedure could be limited or removed without affecting the integrity of the results. Such caution leads to a situation in which it is too late to make choices that would lead to greater efficiency – on the realisation that they are unnecessarily lengthy, the length of submissions cannot be limited after they have been filed, nor can the document production exercise be done away with after it is realised that little to no material or relevant documents came to light through the process. The time and money spent on those aspects cannot be unspent after the fact. It is, therefore, incumbent on the tribunal and the parties to make concerted efforts at the outset of the arbitration to select the most efficient means of conducting the arbitration.

Some authors have referred to the '*Iron Triangle*' while discussing efficiency in arbitration. The Iron Triangle proposes the following – (i) you cannot have a good arbitration that is both fast and cheap; (ii) a fast arbitration that is good will be expensive; and (iii) a cheap arbitration that is good will be slow. The theory is that the pursuit of one of those three goals (good, fast and cheap), inevitably requires the sacrifice of another of those goals. It has been visually represented in the following way:[24]

[24] See Kirby, *supra* note 7. The language in the diagram has been altered slightly from the original, but the meaning is substantially similar.



However, the underlying assumption of this theory is that the quality of the proceedings (the *good* objective) increases in tandem with the more time and money that is expended in the arbitration. As has been explored by the author in the preceding sections, this is not necessarily the case: a *good* arbitration is one which results in an enforceable and correct award. Once these objectives have been met, more time and more money do not increase the objective quality of the arbitration. Instead, a 'good' arbitration is one which results in an enforceable and correct award with the least time and money expended. In this regard, the ultimate goal is not to achieve an arbitration that is simply faster or cheaper, it is trying to adopt a procedure which will involve the least time and costs which is necessary to resolve that particular dispute, resulting in an enforceable and correct award. The author refers to this point at which optimal efficiency has been reached as the '*Efficiency Apex*,' as demonstrated in the following chart:



The left (y) axis indicates the increase in time and costs, while the bottom (x) axis represents information provided to the tribunal (by way of submissions, evidence or otherwise). For simplicity, these two factors increase steadily in tandem (i.e., more information to the tribunal requires more time and costs spent).

The curved line represents the chances of the tribunal reaching the correct conclusion. The chances of this occurring begin at zero when no information has been provided to the tribunal and increase exponentially before levelling out at the dotted line, which represents the point when the tribunal has received sufficient information to render its decisions on the issues before it. It is where the proceedings reach the point where the tribunal has sufficient information that the *Efficiency Apex* is reached. The goal should, therefore, be to adopt a procedure which aims for the Efficiency Apex Zone, where the tribunal has received sufficient, but not excessive, information. As suggested earlier, this will also be the point at which the parties will have had a full opportunity to present their case, because, any additional information would not improve the tribunal's chances of deciding the issues before it in any different manner.

III. Applying the Objectives in Practice

How then do we apply these principles in practice? There is of course no single course of action which can be uniformly applied to all matters, as each matter will vary in the challenges the parties face in preparing and presenting their cases, and the nature of the disputes to be resolved. However, if there is one overriding concept that is to be applied in all matters — it is the increased engagement at initial states of the proceedings, on the part of the tribunal as well as the parties. Simply because determining the most efficient procedure at the outset of the proceedings is a challenging exercise, does not mean that we should capitulate and adopt the standard full set of procedural steps with minimal limitations by default.

To achieve this in practice, the author proposes that upon receiving the file, the tribunal should prepare a Preliminary Procedural Assessment ["**PPA**"]. The PPA would consist of a bespoke list of relevant procedural questions to be addressed to the parties, which the tribunal will have prepared based on its review of the case materials. Depending on the case, the PPA may include the following:

(a) **Early determination/preliminary assessment**: Whether there are any issues which are appropriate for early determination, or whether a preliminary assessment of the issues may be worthwhile;

(b) **Early-stage applications**: Whether the parties intend to file any -early-stage applications, such as for interim relief, security for costs, or challenges to jurisdiction;

(c) **Bifurcation**: Whether bifurcation of the proceedings may be appropriate for issues of jurisdiction, merits or quantum;

(d) **Submissions**: The style of submissions (memorial/pleading) any limits on the submissions – whether on the number of rounds or pages – and the minimum length of time required for preparation;

(e) **Document production**: The minimum time between steps required in document production, or whether the parties would be willing to forgo or limit document production;

(f) **Witnesses**: Whether the parties agree that statements of fact and documentary evidence are to form part of the parties' submissions, and limit witness statements to areas of disagreement;

(g) **Hearing**: Whether the parties may be willing to have the matter heard on the documents only, and whether the parties would be willing to hold evidentiary hearings by virtual means; and

(h) **Experts**: Whether any expert evidence is necessary, and whether the parties would be open to having joint expert reports or tribunal appointed expert(s).

The parties would be invited to complete the PPA and submit it to the tribunal, without the same being communicated to the other side. The questions in the PPA are not mandatory, as parties may not be in a position to have informed responses to all queries. It is also appreciated that parties may not want to '*show their hand*' on certain matters at an early stage, although the parties would be

encouraged to be as open as possible, as strategy for pure gamesmanship purposes is discouraged and may result in adverse costs consequences.

Upon receiving the completed PPAs, the tribunal would then prepare proposed procedural directions, whether in the form of procedural order no. 1, a procedural timetable or otherwise. The tribunal would do so on the basis of the responses provided by the parties, as well as upon its review of the case materials. Where there are areas of agreement in the PPAs, the tribunal would adopt such agreement, and in areas of disagreement, the tribunal would be required to make an informed decision.

The draft procedural directions would then be circulated to the parties, along with copies of the PPAs for the parties' information. The parties should be given an opportunity to review and to agree on the draft, whether as proposed by the tribunal or amended by party agreement. Any areas of disagreement would be resolved at a case management conference. Parties may object to any of the proposed procedure, but such objections must be reasoned. In the absence of a reasonable basis for such objections, the tribunal should aim to adopt the more '*efficient*' procedure.

In certain cases, the tribunal may agree with the parties that there is insufficient information at an early stage to impose limitations, forgo certain procedural steps, or otherwise find ways to make the proceedings more efficient. In such cases, it may be appropriate to issue partial directions and revisit the remaining procedure at a later stage.

The rationale for the tribunal to be the one to prepare such directions is that efficiency may be required to be a tribunal-driven initiative. Parties may be reticent to agree to any limitations at early stages of the proceedings out of caution or uncertainty, so as not to prejudice their rights at a later stage. Respondent parties may also feel that they have had inadequate time to prepare and do not yet have access to sufficient information in order to provide informed responses and agree to any limitations. However, as has been touched on throughout this discussion, tribunals should feel confident to place reasonable restrictions on the procedures adopted, given their wide discretion on matters of procedure in the absence of party agreement, as well as in light of their obligations to conduct the proceedings efficiently. Likewise, counsel should be well-equipped to adapt their submissions and case strategy to fit such procedures, and to raise appropriate and reasoned objections when such procedures may be limiting their due process rights.

The touchstone throughout this process should be the objectives of an arbitration as discussed above: to render an award that is enforceable and correct, as efficiently as possible. As suggested in the preceding sections, the parties' due process rights relating to their right to present their case may be considered to be satisfied where the tribunal has been provided with the information necessary to decide the issues before it, at which point the *correctness* objective is also met. Unless appropriate efforts are made at the outset of the arbitration to tailor the procedure to be as efficient as possible, it will be too late to do so at a later stage of the proceedings. If the arbitration community is serious about trying to address concerns relating to the time and costs of arbitration, then we need to be serious about changing the way that we approach procedure. We cannot simply continue to conduct arbitrations with the same approach, and expect different results. One might say that it would be the definition of insanity.