

**ACTIVATING ARBITRATION: FOUR DELOS PRINCIPLES TO
ACHIEVE FAIR AND EFFICIENT INTERNATIONAL ARBITRATION**

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Activating Arbitration: Four Delos Principles to Achieve Fair and Efficient International Arbitration

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By inserting a dispute resolution provision into their contract, parties recognise that it is neither possible nor necessary to anticipate every question, difficulty or cause of strife that might arise in the performance of their bargain, and that a means of addressing such matters is to provide, in final recourse, for a dispute resolution process. This reference in turn lends further support to the parties' commitment to perform their contractual obligations.

For cross-border business, international arbitration is the preferred method for resolving disputes.¹ Its benefits are well-rehearsed: avoiding specific legal systems and national courts, parties may select arbitrators to conduct a process that is typically flexible and private, and often confidential too, with a view to having their dispute determined through one or more globally enforceable awards.²

Until the 1950s, international commercial arbitration also boasted advantages in terms of time and cost.³ In spite of improvements and innovations in international arbitration, however, time and especially cost have become among the worst characteristics of this dispute resolution mechanism,⁴ to the

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¹ Queen Mary University of London and White & Case LLP, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (“**Queen Mary Survey 2015**”), p. 5.

² Queen Mary University of London and PricewaterhouseCoopers LLP, *International arbitration: Corporate attitudes and practices – 2006* (“**Queen Mary Survey 2006**”), p. 6 and Queen Mary Survey 2015, p. 6.

³ See, e.g., Florian Grisel, Emmanuel Jolivet, Eduardo Silva Romero, *Aux origines de l'arbitrage commercial contemporain : l'émergence de l'arbitrage CCI (1920-1958)*, (2016) 2 *Revue de l'arbitrage*, 403, paras. 15, 44-45.

⁴ Queen Mary Survey 2006, p. 7 and Queen Mary Survey 2015, p. 7. See also, e.g., Michael McIlwrath and Roland Schroeder, *The View from an International*

point of cancelling out – if not decisively outweighing – its benefits for smaller disputes.⁵ Lower value international trade is, in effect, priced out of recourse to international arbitration; and bereft of effective alternatives.

As a consequence, the relevant contracts often have little more teeth in case of dispute than the parties' appetite for preserving their relationship, the extra-contractual leverage that one party may have over the other and/or the parties' individual concern for their reputation on the market-place. Unless the parties can achieve a negotiated settlement of their differences, obligations will likely be unwound, rights swept aside and justice denied; where the rule of law is threadbare, transaction costs are higher to set off the risk of damage lying uncompensated.

This unfortunate state of affairs should be seen as an opportunity for the international arbitration community to make a powerful contribution to the global economy, by further reflecting upon and encouraging effective responses to this critical source of transactional risk. This is particularly true for SMEs and start-ups. It is submitted that such a solution would also help to alleviate the concerns around the legitimacy of investment arbitration creeping into the commercial sphere,⁶ by making the benefits of international arbitration more tangible to a far greater range of stakeholders.

The purpose of this article is to introduce and submit for critical review the efforts made by a circle of young international arbitration practitioners and

Arbitration Customer: In Dire Need of Early Resolution, (2008) 74:1 *Arbitration* 3, pp. 4-5: "There is no need to explain why businesses like speed, are impatient with delay, and abhor unnecessary cost. [...] realistically, it is difficult to comfortably predict an arbitration of any commercial complexity ending in fewer than two or three years. [...] In the business world, a time frame of two to three years is simply too long, particularly for a private process paid for by the parties, in which any right to appeal is largely given up."

⁵ See in this regard the provocative title of Mauro Rubino-Sammartano's article: *Is Arbitration to be Just a Luxury Clinic?*, (1990) 7:3 *Kluwer Law International* 25. Twenty years later, Peter Morton was raising the same issue in *Can a World Exist Where Expedited Arbitration Becomes the Default Procedure*, (2010) 26:1 *Arbitration International* 103. According to Queen Mary University of London and Pinsent Masons, *Pre-empting and Resolving Technology, Media and Telecoms Disputes, International Dispute Resolution Survey* (2016), the most significant factor for the survey respondents in deciding whether or not to initiate formal proceedings is the likely legal cost that will be incurred (Chart 19, p. 23).

⁶ See, e.g., Sophie Nappert, *Escaping from freedom? The dilemma of an improved ISDS mechanism*, EFILA Annual Lecture 2015, Section VI; Jacomijn van Haersolte-van Hof, *Challenges and Responsibilities of Arbitral Institutions*, para. 62 in Carlevaris et al. (eds.), *International Arbitration Under Review – Essays in Honour of John Beechey* (ICC, 2015); Gary Born, as reported by Jesse Kennedy in *The Threat of Winter Lingers Over Sydney Arbitration Week*, *CIArb Australia News*, December 2016, pp. 3-4.

their significantly more experienced mentors to initiate such a solution.⁷ Starting in early 2013, the first step involved consideration of how disputes were resolved in international arbitration, to what extent the theory and practice were consistent, and to what extent incentives were aligned. These discussions eventually crystallised into the rules of arbitration of a new arbitration centre that was established in early 2014 under the name of Delos Dispute Resolution (“**Delos**”).⁸

The Delos Rules of Arbitration (the “**Delos Rules**”) open at Article 1(2) with a restatement of the principal purpose of rules of arbitration, which are designed to support arbitration as a fair, just and effective binding dispute resolution mechanism:

2. The principal purpose of the Rules is to enable the Tribunal, the parties to the dispute and DELOS to deal with cases fairly, expeditiously and at proportionate cost. This includes:
 - a. ensuring that the parties’ due process rights are respected, including by giving each party a reasonable opportunity to put its case and deal with that of its opponent; and
 - b. dealing with the dispute efficiently and in a manner proportionate to:
 - (i) the value of the dispute; (ii) the complexity of the issues in dispute; and (iii) the importance of the dispute to any ongoing relationships between the parties.

In furtherance of this principal purpose, the Delos Rules provide the formal framework for giving effect to best practices, recent developments and accepted wisdom in international arbitration, which have been presented below as a set of four related principles (the “**Delos Principles**”) comprising (1) the active engagement of arbitral tribunals in the resolution of disputes, supported by (2) an *ex ante* focus on the choice of safe seats, (3) pragmatism in the formation of arbitral tribunals and (4) a heavy emphasis placed on early case preparation in order to achieve a more accessible and streamlined dispute resolution process that offers greater predictability.

⁷ The members of the Delos Founding Committee were Greg Falkof, Thomas Granier (after leaving his role as Counsel at the ICC), Dr Florian Grisel, Iain McKenny, Rachael O’Grady, Véronique Moutot and Hafez R Virjee. The first members of the Delos Board of Advisors are Professors Pierre Mayer and David D Caron.

⁸ www.delosdr.org.

Delos Principle 1: Active engagement of the arbitral tribunal

In the main, international arbitration is an adversarial system, largely driven by counsel. Operating within an increasingly standardised procedure,⁹ parties develop their case until the substantive hearing, at which time the arbitral tribunal will become more actively engaged in shaping the issues in dispute.¹⁰ This general leaning towards a staggered role for counsel and arbitral tribunals, further tilted by the latter's apprehensive concern for due process with an eye to the enforceability of awards, in turn allows arbitrators that are in demand to juggle larger caseloads which, by impacting their availability, reinforces the above-described features of the system.¹¹

While this model is intended to be conducive to assisting arbitral tribunals in making a fair and informed determination of the issues in dispute, it is frequently time-consuming and costly. It is time-consuming as the ultimate decision-maker tends not to take ownership of the substance of the case until a later stage of the proceeding; and for this reason it is costly as parties typically seek to present their case as comprehensively as possible and address the other side's position in the same level of detail, while they speculate over which arguments or evidence the arbitral tribunal might ultimately find persuasive or useful – in particular where counsel and relevant party representatives need to demonstrate internally and to other audiences that every effort was made to advance that party's position.¹² This situation is accentuated by the fact that party costs tend to be substantially recoverable by

⁹ See, e.g., Toby Landau, *The Day Before Tomorrow: Future Developments in International Arbitration*, 2009 Clayton Utz / University of Sidney International Arbitration Lecture; Michael E Schneider, Chapter 25: *The Uncertain Future of the Interactive Arbitrator: Proposals, Good Intentions and the Effect of Conflicting Views on the Role of the Arbitrator*, in Brekoulakis et al. (eds.), *The Evolution and Future of International Arbitration*, (Kluwer Law International, 2016), paras. 25.32-25.34.

¹⁰ See, e.g., Kap-You (Kevin) Kim, *The Gangnam Principles: A Blueprint for Efficiency in Arbitration*, in Carlevaris et al. (eds.), *International Arbitration Under Review – Essays in Honour of John Beechey* (ICC, 2015), p. 231.

¹¹ See, e.g., Sundaresh Menon, as reported by Kyriaki Karadelis in *Singapore hears pleas for procedural variety*, Global Arbitration Review (“GAR”), dated 3 December 2013.

¹² As described by Sundaresh Menon, “[f]or our clients, arbitration has become a one-strike proposition leading to escalation of costs”; see his keynote address “*International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*”, (2012) 17 ICCA Congress Series 6, para. 25. Two additional factors may contribute to increased time and cost being spent on developing a party's case: ethical duties of counsel to act as their client's zealous advocates, and any mismatch between the benefit to the party of ‘going the extra mile’ and the financial rewards that accrue from this additional work to that party's counsel; on this last point, see, e.g., the remarks by in-house counsel and arbitrators reported in *The dynamic of time and cost*, GAR dated 1 May 2009.

the winning party,¹³ and that such allocation is typically determined at the end of the proceedings. It is therefore unsurprising that, on average, over 80% of the costs incurred by parties in arbitration consist in legal fees and expenses.¹⁴

The above model of proceedings, which may be described as that of the ‘impartial referee’,¹⁵ has long been heavily criticised for the time and cost inefficiencies it induces. Writing more than thirty years ago, Judge Howard Holtzmann, who was then serving as one of the original members of the Iran-U.S. Claims Tribunal and as Vice-President of the International Council for Commercial Arbitration (ICCA), and who had previously contributed to the drafting of the 1976 UNCITRAL Arbitration Rules, explained that “*more arbitrators in complex international cases should recognize that they have a responsibility for the pace of the proceedings. In my view, adopting an activist attitude is the most important contribution an arbitrator can make toward overcoming delay.*”¹⁶

Ten years later at the 1994 Freshfields Arbitration Lecture, Judge Holtzmann noted the “*increasing recognition by the arbitration community – users, practitioners and arbitrators – that there is a pressing need to improve the efficiency of arbitral proceedings. In a group as resourceful as the arbitration community, attention to problems is likely to beget solutions*”.¹⁷ He proposed three techniques for arbitrators, drawn from his experience of the Iran-U.S. Claims Tribunal.¹⁸ Two of them are largely standard practice today: the use by arbitrators of schedules for party presentations at oral hearings and

¹³ See, e.g., ICC Commission Report, *Decisions on Costs in International Arbitration*, (2015) 2 ICC Dispute Resolution Bulletin, para. 13.

¹⁴ See, e.g., ICC Commission Report, *Decisions on Costs in International Arbitration*, (2015) 2 ICC Dispute Resolution Bulletin, para. 2.

¹⁵ See, e.g., Neil Kaplan, *Role of the Judge in Civil Litigation*, 2 Judges’ Forum Newsletter 6 (March 1994), as quoted in Howard M Holtzmann, Chapter 9: *Streamlining Arbitral Proceedings: Some Techniques of the Iran-United States Claims Tribunal*, in Lew, Mistelis (eds.), *Arbitration Insights* (Kluwer Law International, 2007), p. 156; Michael E Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* fn. 9, paras. 25.49-25.50.

¹⁶ Howard M Holtzmann, *What an Arbitrator Can Do to Overcome Delays in International Arbitration*, in *Justice for a Generation* (West Publishing Co., 1985), p. 336. See also, e.g., Pierre Karrer, *Arbitration Saves! Costs: Poker and Hide-and-Seek*, (1986) 3:1 *Journal of International Arbitration* 35, p. 36: “*By far the most important procedural factor influencing the financial outcome on the whole is the speed of the entire dispute resolution process. [...] Above all, how fast an arbitration will be concluded depends essentially on the chairman.*”

¹⁷ Howard M Holtzmann, *supra* fn. 15, p. 154.

¹⁸ *Id.* p. 155.

the use of checklists for pre-hearing management conferences,¹⁹ which is a positive sign of the change that can be effected.

More broadly, Judge Holtzmann's remarks underscore the widely held view that arbitrators are the keystone to greater efficiency in the conduct of arbitral proceedings.²⁰ Indeed, in a system valued for its flexibility,²¹ which places the final and binding resolution of disputes in the hands of third parties possessed with extensive procedural powers, their active engagement must be the primary consideration in the design of an efficient such system; and such is therefore the first Delos Principle.

This emphasis on proactive arbitrators reflects a strongly held preference within the international arbitration community,²² and continues to attract sustained efforts to increase its adoption in practice.²³ The discussion below of some of these efforts will clarify the understanding of the notion of 'arbitrator active engagement' (*a*) that informed the formulation of certain specific features of Delos arbitration (*b*) as well as the second and third Delos

¹⁹ The third technique he recommended (in fact the first, in terms of order in which he introduced them) was for arbitral tribunals, in appropriate cases, to indicate in advance the evidence they would require to establish *prima facie* proof of certain complex facts. *Id.* p. 155.

²⁰ See, e.g., Queen Mary University of London and White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* ("Queen Mary Survey 2012"), p. 13; L. Yves Fortier, *The Minimum Requirements of Due Process in Taking Measures Against Dilatory Tactics: Arbitral Discretion in International Commercial Arbitration – A Few Plain Rules and a Few Strong Instincts*, in A.J. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9 (The Hague: Kluwer Law International, 1999) 396; Michael McIlwrath *et al.*, *supra* fn. 4; remarks by Serge Lazareff reported in *The dynamic of time and cost*, GAR dated 1 May 2009.

²¹ Since the start of the Queen Mary Surveys ten years ago, flexibility has consistently been ranked as one of the most valuable characteristics of international arbitration; see in 2006, p. 6, and in 2015, p. 6.

²² See, e.g., ICC Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration* (2007) 18:1 ICC International Court of Arbitration Bulletin 23, paras. 15, 32-33; Queen Mary University of London and White & Case LLP, *2010 International Arbitration Survey: Choices in International Arbitration* ("Queen Mary Survey 2010"), p. 25; the College of Commercial Arbitrators (CCA), *Protocols for Expeditious, Cost-effective Commercial Arbitration: Key Action Steps for Business Users, Counsel, Arbitrators and Arbitration Provider Institutions* (Stipanowich *et al.* (eds.), 2010), pp. 69-70; ICC Commission Report, *Controlling Time and Costs in Arbitration* (2012), paras. 13 and 28.

²³ See, e.g., Lucy Reed, *More on Corporate Criticism of International Arbitration*, Kluwer Arbitration Blog, dated 16 July 2010; David W Rivkin, *A New Contract Between Arbitrators and Parties*, HKIAC Arbitration Week Keynote Address, 27 October 2015; Michael E Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* fn. 9.

Principles regarding the choice of safe seats and pragmatism in the formation of arbitral tribunals.²⁴

(a) Profiling the proactive arbitrator

Over the years, much wisdom has been shared and many proposals have been made, challenged and implemented to improve arbitral tribunal efficiency in the sense of greater engagement by arbitrators in the process of resolving disputes.²⁵ In addition to savings in time and cost, such greater engagement is also likely to improve arbitrators' understanding of the dispute and knowledge of the case at the earlier stages of the proceeding, thus enhancing the overall quality of the arbitration.

Certain potential areas of improvement have attracted particular attention, and five of these are discussed below in order to profile the actively engaged arbitral tribunal through some of the techniques it might use in seeking to conduct efficient proceedings. Arranged according to the general course of proceedings, these techniques are: (i) undertaking early efforts in identifying the key issues in dispute and tailoring the procedure for their determination; (ii) disposing of issues early, where appropriate; (iii) reviewing the status of the proceeding between the first round of submissions and the substantive hearing; (iv) anticipating the post-hearing phase; and (v) allocating costs during the proceeding for greater efficiency.

²⁴ The developments that follow do not discuss the emergency arbitrator mechanism, as it provides interim rather than final relief.

²⁵ While an exhaustive survey of such proposals, discussions and arbitral institution initiatives is beyond the scope of this paper, some notable models proposed by well-known international arbitration practitioners include the following:

- Michael E Schneider's 'interactive arbitrator'. See, e.g., *Lean Arbitration: Cost Control and Efficiency Through Progressive Identification of Issues and Separate Pricing of Arbitration Services*, (1994) 10:2 *Arbitration International* 119; and *The Uncertain Future of the Interactive Arbitrator*, *supra* fn. 9;
- Christopher Newmark's 'proactive arbitrator'. See, e.g., Chapter 6: *Controlling Time and Costs in Arbitration*, in Newman, Hill (eds.), *The Leading Arbitrators' Guide to International Arbitration* (JurisNet, 2008, 2nd ed.);
- David W Rivkin's 'revisited Town Elder'. See, e.g., *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, (2008) 24:3 *Arbitration International* 375; with Samantha J Rowe, *The Role of the Tribunal in Controlling Arbitral Costs*, (2015) 81 *Arbitration* 116; *A New Contract*, *supra* fn. 23; and as reported by Kyriaki Karadelis in *Singapore hears pleas for procedural variety*, (2013) 9:1 *Global Arbitration Review*; and
- the Korean domestic arbitration approach described by Kap-You (Kevin) Kim as the 'Gangnam Principles'. See, e.g., Kap-You (Kevin), *supra* fn. 10, pp. 233-234.

i. *Early efforts at identifying the key issues in dispute and tailoring of procedure for their determination*

Upon receiving the case file following its constitution, an arbitral tribunal typically only has a summary view of the dispute, as introduced in the notice or request for arbitration and the likely response or answer thereto. By this stage, however, 2-4 months have probably elapsed already since the start of the proceeding and there is considerable pressure to get the case ‘on the road’. In these circumstances, tribunals – and the parties with them – frequently default to the standard ‘Procedural Order No. 1’, which establishes a standardised procedural scheme for the arbitration.

In the actively engaged arbitrator model, however, this initial stage of the proceeding would be taken as an opportunity to gain a better understanding of the case, identify the key issues in dispute on a preliminary basis, and seek to design a bespoke case procedure from the ground up. In doing so, the arbitrator would be in a position to address matters that counsel might otherwise avoid raising as not in their client’s interest, even if it would be in the interest of efficient proceedings, *e.g.* establishing uncontested issues. The result of this early interaction is that the ensuing submissions and taking of evidence are likely to be significantly more focused, which in turn saves time and cost.²⁶

Through their rules revisions, arbitral institutions have progressively sought to guide arbitral tribunals towards such proactivity, notably by encouraging²⁷ or making it a requirement²⁸ that arbitral tribunals convene a preliminary hearing

²⁶ See, *e.g.*, in addition to the references at fn. 25 above: Klaus Sachs, *Time and Money: Cost Control and Effective Case Management*, in Mistelis, Lew (eds.), *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006); remarks by Georgios Petrochilos as reported in *The dynamic of time and cost – the sequel*, GAR dated 15 July 2009; Toby Landau, *supra* fn. 9; Peter Ashford, *The IBA Rules on the Taking of Evidence in International Arbitration, A Guide* (Cambridge, 2013), Discussion of Article 2; Joerg Risse, *Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings*, (2013) 29:3 *Arbitration International* 453, Proposal 2; Yves Derains as reported in *The dynamic of time and cost*, GAR dated 1 May 2009 and in *Due process must trump efficiency, says Derains*, GAR dated 23 September 2014.

See also the IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 2; the College of Commercial Arbitrators (CCA), *supra* fn. 22, pp. 70-71; and ICC Commission on Arbitration, *Controlling Time and Costs in Arbitration* (2012), para. 28.

²⁷ See, *e.g.*, AAA Rules (2013): Art. R-21(a); ICDR Rules (2014): Art. 20.2; LCIA Rules (2014): Art. 14.1.

²⁸ See, *e.g.*, DIAC Rules (2007): Art. 22; ICC Rules (2012 / 2017): Art. 24; SIAC Rules (2013): Art. 16.3, now SIAC Rules (2016): Art. 19.3; SCC draft Rules (2017): Art. 28.1.

or case management conference, as “a tool designed to ensure a tailor-made procedure.”²⁹

The ICC further introduced in 1998 a requirement for arbitral tribunals, when drawing up their terms of reference pursuant to the ICC Rules, to include a list of the issues to be determined, unless they consider that such a list would be inappropriate.³⁰ According to the Secretariat’s Guide to ICC Arbitration, the list of issues is “primarily intended to identify questions of fact and law which, at the time of drafting the Terms of Reference, appear to be relevant to determining the parties’ claims. [...] [It] is not intended to limit the scope of the arbitration, as the relevant issues may well evolve as the case progresses.”³¹ Prior to the introduction of this device, there had been significant debate as to whether drawing up the list of issues should be a mandatory requirement for arbitral tribunals; it was decided against, notably because such a list may be premature in some cases or the source of new controversy.³² In practice, whether at the initiative of the arbitral tribunal or the parties, it is often the case that issues are simply described as those arising from the parties’ existing and future submissions.³³ While this approach provides a neat premise for applying the standard procedure, it defeats the main purpose of the list of issues. It is also contradictory with the expectations expressed in the Queen Mary Survey 2012, which found that the most highly rated method for expediting arbitral proceedings was considered to be the “identification by the tribunal of the issues to be determined as soon as possible after constitution.”³⁴

Finally, arbitral tribunals might also, in appropriate cases, make use of one of the techniques recommended by Judge Holtzmann in 1994, namely to indicate in advance the evidence they would require to establish *prima facie* proof of certain complex facts.³⁵

²⁹ Jason Fry, Simon Greenberg and Francesca Mazza, *The Secretariat’s Guide to ICC Arbitration* (ICC, 2012), para. 3-912.

³⁰ ICC Rules (1998): Art. 18(1)(d), now ICC Rules (2017): Art. 23(1)(d).

³¹ *The Secretariat’s Guide to ICC Arbitration*, *supra* fn. 29, para. 3-849.

³² See, e.g., Michael E. Schneider, *The Terms of Reference*, in *The New 1998 ICC Rules of Arbitration*, (1997) ICC Court Bulletin – Special Supplement 26, pp. 28-29.

³³ *Ibid.* This is known as the ‘Goldman formula’.

³⁴ Queen Mary Survey 2012, p. 13. In contrast, the question of the effectiveness of the parties submitting lists of issues early in the proceedings has attracted a more ambivalent response: see Queen Mary Survey 2015, p. 25.

³⁵ Howard M. Holtzmann, *supra* fn. 15, p. 155 *et seq.*

ii. *Early disposition of issues*

Either upon application by a party or through the early efforts described above, the proactive arbitral tribunal and/or the parties may identify issues suitable for early disposition.³⁶

In its Guidelines on Early Disposition of Issues in Arbitration, the International Institute for Conflict Prevention & Resolution (CPR) explains that “[t]he term “early” is intended to refer to a preliminary stage of the arbitration, before the parties proceed to a hearing of the entire dispute, before the taking of any evidence, or, where appropriate, after taking only limited evidence. The issues that may be dealt with through early disposition may be claims, counter-claims, defenses or factual or legal questions. Early disposition can have the effect of narrowing the issues in dispute in order to simplify and expedite the further hearing of the arbitration, or, where appropriate, disposing of the entire case.” In this manner, early disposition of issues can save time and costs; it may also provide the parties with sufficient certainty as to their likely exposure to allow them to settle the dispute.³⁷

The authority for arbitral tribunals to carve out issues for early determination is readily found under procedural laws and arbitral rules, both in the duty placed upon arbitral tribunals to conduct proceedings efficiently and in their power to issue one or more awards. Indeed, it is an illustration of the inherent flexibility of arbitration that the determination of issues may be phased, provided that, at each step, the parties are afforded a reasonable opportunity to be heard. In other words, the early determination of issues does not in and of itself raise due process concerns.³⁸

Separate considerations arise as to the availability and appropriateness of summary disposition of issues in international arbitration, *i.e.* the striking out of claims or defences that are manifestly without merit. As a leading international arbitration practitioner has pointed out, “it is uncontroversial to suggest that tribunals generally do not possess the powers of summary disposition conferred on national courts.”³⁹ Furthermore, such a procedure is

³⁶ See, *e.g.*, the IBA Rules on the Taking of Evidence in International Arbitration (2010), Art. 2.3; Michael McIlwrath *et al.*, *supra* fn. 4.

³⁷ See, *e.g.*, ICC, *Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration* (2014), p. 11; Michael McIlwrath *et al.*, *supra* fn. 4.

³⁸ See, *e.g.*, David W Rivkin, *The Town Elder Model Revisited*, *supra* fn. 25, pp. 380-381; Judith Gill, *Applications for the Early Disposition of Claims in Arbitration Proceedings*, (2009) 14 ICCA Congress Series 513, pp. 513-514 and 521-523; *Redfern and Hunter*, *supra* fn. 38, paras. 6.38-6.40.

³⁹ Judith Gill, *supra* fn. 38, p. 516; see also *Redfern and Hunter*, *supra* fn. 38, para. 6.38 fn. 35.

premised on abridged submissions and evidence, which arguably falls short of parties' right for a reasonable opportunity to be heard.⁴⁰ While certain arbitral institutions are answering the call for the provision of summary judgment procedures,⁴¹ other institutions, including the ICDR in its Rules and the ICC in its guidance notes, have maintained their established approach of expressly drawing the attention of arbitrators and parties to the tools already at their disposal.⁴²

Finally, the early consideration of certain issues does not entail that the resolution of the remainder of the dispute must be placed on hold until the arbitral tribunal has rendered its decision. The proceeding may be organised into parallel tracks to avoid any delay to the overall schedule of the proceedings.

iii. Reviewing the status of the proceeding between the first round of written submissions and the substantive hearing

In a standard procedure, the first round of submissions is often followed by a document production phase before the second round of submissions. A proactive approach would be to schedule an intermediary procedural hearing after the first round of submissions and before document disclosure, in order to ascertain which issues might require additional argument and which facts more evidence, and accordingly better focus the next stages of the proceeding.⁴³

In the variant of this hearing proposed by a leading international arbitration practitioner, Neil Kaplan, parties would make opening submissions and expert witnesses would present their evidence and explain the areas of difference with the other side (*viz.* the 'Kaplan Opening').⁴⁴

⁴⁰ Judith Gill, *supra* fn. 38, p. 516.

⁴¹ See, *e.g.*, SIAC Rules (2016): Art. 29; and SCC draft Rules (2017): Art. 39; see also Mark Friedman and Steven Michaels, *Is it summary judgment time?*, Global Arbitration Review dated 1 April 2006; Peter Rees as reported by Kyriaki Karadelis in *Striking out an unmeritorious case*, Global Arbitration Review dated 9 November 2012.

⁴² See, *e.g.*, ICDR Rules (2009): Art. 16.3, now ICDR Rules (2014): Art. 20.3; ICC, *Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration* (2014), Topic Sheet 4.

⁴³ See, *e.g.*, DIS Supplementary Rules for Expedited Proceedings (2008): Art. 5.3; Klaus Reichert as reported by Kyriaki Karadelis in *Smart-arbitrating*, GAR dated 27 October 2014; Doug Jones as reported by Kyriaki Karadelis in *Lessons on efficiency from Australia*, GAR dated 11 November 2014.

⁴⁴ Neil Kaplan, *If It Ain't Broke, Don't Change It*, (2014) 80:2 Arbitration 172, which introduced the 'Kaplan Opening (KO)'; see also the practice in Korean domestic arbitration described by Kap-You (Kevin), *supra* fn. 10, pp. 235-237. For a further

Following the second round of written submissions, attention turns to the preparation of the substantive hearing and arbitral tribunals generally convene a case management conference to address the logistics and schedule of the hearing. Whether at the time of this case management conference or separately, another leading international arbitration practitioner, Lucy Reed, has recommended that, in complex disputes, the arbitral tribunal hold a retreat to study and discuss the substance of the case (*viz.* the ‘Reed Retreat’), “*with the goal of arriving together at targeted directions to the parties for the hearing*”, including, potentially, to “*agree on questions to pose to counsel, and indicate what issues they would like to see further developed and which witnesses they would most like to hear. This must, of course, be without prejudice to the parties to present their cases as they see fit.*”⁴⁵

This latter point of arbitral tribunal directives to the parties on material issues for discussion at the hearing has been the subject of proposals inspired by the German traditional method for organising and deciding cases known as the “*Relationstechnik*”: the only evidence that should be discussed at the hearing is that relating to claims and defences that would stand if all of the relevant factual assertions made by the parties were assumed to be correct; all other claims and defences being consequently immaterial, arbitral tribunals should accordingly decline to hear evidence thereon.⁴⁶

Finally, the ‘Reed Retreat’ and similar proposals point to another important quality of proactive arbitrators, namely their ability to dedicate time as the case progresses to become intimately familiar with the case, on the basis that “*more time invested in preparation and deliberations improves speed in issuing awards and overall efficiency.*”⁴⁷ One way of securing this time is to schedule it expressly in the provisional timetable, such as for the ‘Reed Retreat’, which in turn raises the accountability bar towards the parties.

variant on this intermediary hearing, see Constantine Partasides and Scott Vesel, *A case review conference, or arbitration in two acts*, (2015) 81:2 *Arbitration* 167, pp. 167-168.

⁴⁵ Lucy Reed, *The HKIAC Kaplan Lecture 2013 – Arbitral Decision-making: Art, Science or Sport?*, (2013) *Journal of International Arbitration* 85, p. 96; see also: Neil Kaplan, *supra* fn. 44, proposing at p. 174 that the Reed Retreat could take place at the time of the Kaplan Opening; and David W Rivkin, *A New Contract*, *supra* fn. 23, p. 8, who also recommends that arbitrators schedule time from the start for pre-hearing deliberations.

⁴⁶ See, e.g., Joerg Risse, *supra* fn. 26, Proposal 6; but see Michael E Schneider, *The Uncertain Future of the Interactive Arbitrator*, *supra* fn. 9, paras. 25.22-25.23.

⁴⁷ Lucy Reed, *Arbitral Decision-making*, *supra* fn. 45, p. 95 (original emphasis). See also Karl-Heinz Böckstiegel’s technique of progressively elaborating a Tribunal Working Paper (TWP) over the course of the proceedings in order to support tribunal deliberations and the drafting of the award (Karl-Heinz Böckstiegel, *Party Autonomy and Case Management – Experiences and Suggestions of an Arbitrator*, 11 *Schieds* (2013, no. 1), p. 9).

iv. *Anticipating the post-hearing phase*

Substantive hearings are regularly followed by post-hearing briefs (and potentially replies to the same), which not infrequently revisit the entire case, before the arbitral tribunal determines the relevant issues in its award.

Substantial criticism has fastened both on whether post-hearing briefs – especially the ‘all-inclusive’ sort – are in fact useful and efficient in terms of time and cost, and on the often significant delays of arbitrators to issue their awards.

Five types of solutions have been formulated in seeking to improve the efficiency of the post-hearing phase, which are all concerned with more active engagement of arbitrators achieved by anticipating the award-drafting phase:

First, arbitral tribunals should only admit post-hearing briefs to the extent that they require the assistance of further briefing on specific questions in order to complete their deliberations, in which case clear instructions are required as to the questions to be addressed and, possibly too, the length of this further submission.⁴⁸

Second – and the most supported solution for improving time and cost efficiency in international arbitration according to the Queen Mary Survey 2015 – is the “*requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award.*”⁴⁹

Third, arbitral tribunals should consider enquiring with the parties in advance how detailed or short an award they wish to receive, including whether it should state reasons, as this will significantly impact the time and cost involved in preparing the award.⁵⁰

⁴⁸ See, e.g., by implication from the remarks of Emmanuel Gaillard as reported in *The dynamic of time and cost*, GAR dated 1 May 2009; remarks by Georgios Petrochilos as reported in *The dynamic of time and cost – the sequel*, GAR dated 15 July 2009; David W Rivkin, *A New Contract*, *supra* fn. 23, p. 4.

⁴⁹ Queen Mary Survey 2015, p. 25. See also Lucy Reed, *Achievable Reforms* (2013) 17 ICCA Congress Series 74-76, p. 75; David W Rivkin, *A New Contract*, *supra* fn. 23, pp. 5-6, 8-11; see further DIAC draft Rules (2016), Art. 35.4.

⁵⁰ See, e.g., Lucy Reed, *Achievable Reforms*, *supra* fn. 49, p. 75; David W Rivkin, *A New Contract*, *supra* fn. 23, p. 10; see also the practice in Korean domestic arbitration described by Kap-You (Kevin), *supra* fn. 10, p. 240; see further Joerg Risse, *supra* fn. 26, Proposal 8.

For examples of arbitral institution rules that provide that parties may dispense with reasons in their award: DIAC Rules (2007): Art. 37.5; DIS Rules (1998): Art. 34.3; HKIAC Rules (2013): Arts. 34.4 and 41.2(g); ICDR Rules (2014): Art. 30.1; LCIA Rules (2014): Art. 26.2; SCAI Rules (2012): Art. 32.3; SIAC Rules (2016): Arts. 5.2(e) and 32.4; UNCITRAL Rules (2010): Art. 34(3). The DIS Supplementary

Fourth, while arbitral institutions previously took account of arbitrators' efficiency in the conduct of proceedings, there is now more explicit emphasis on financial disincentives to delay in the rendering of the award,⁵¹ which in turn calls for greater anticipation by arbitrators of their work schedules.

Finally, institutional rules providing for smaller claim expedited procedures typically define a fixed time-limit for arbitral tribunals to submit their draft award to the institution. Where this time-limit is expressed by reference to the date on which the arbitral tribunals began work on the case rather than with respect to the date of closure of proceedings, it focuses the attention of the proactive arbitrator and the parties on drawing up from the start and abiding by a provisional timetable that can accommodate the requisite speed,⁵² thus reinforcing the time and cost efficiency of the proceeding.⁵³

v. *Interim decisions on the allocation of costs*

One of the final matters to be decided by arbitral tribunals in determining a dispute is whether and to what extent there should be any allocation of the costs incurred by the parties in connection with the proceeding.⁵⁴ In deciding this issue, arbitral tribunals may take account of the extent to which the parties' conduct in the proceeding has been expeditious and cost-effective, and indeed there appears to be a deep consensus that they should do so.⁵⁵

Rules for Expedited Proceedings (2008): Art. 7 provide that, for expedited arbitrations, "*the arbitral tribunal may abstain from stating the facts of the case in the arbitral award*", unless the parties agree otherwise.

⁵¹ See, e.g., the Arbitration Rules of the Russian Arbitration Association (2014): Art. 10.9; ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, dated 1 March 2017, Section VIII; see also Joerg Risse, *supra* fn. 26, Proposal 10 for financial incentivising by the parties of arbitral tribunals to rapidly deliver their awards.

⁵² For the purposes of increasing efficiency in arbitration proceedings more generally, Gabrielle Kaufmann-Kohler recommends that arbitrators "*set a realistic, non-extendable calendar for the entire arbitration at the outset.*" (*Beyond Gadgets – Substantive New Concepts to Improve Arbitral Efficiency*, *Journal of World Investment & Trade* 2004, pp. 69-72, at p. 69).

⁵³ See, e.g., DIS Supplementary Rules for Expedited Proceedings (2008): Arts. 1.2 and 5.1; HKIAC Rules (2013): Art. 41.2(f); ICC Rules (2017): Appendix VI Art. 4.1; SCAI Rules (2012): Art. 42.1(d); SCC Rules for Expedited Arbitrations (2010): Art. 36; SIAC Rules (2016): Art. 5.2(d); see also David W Rivkin, *A New Contract*, *supra* fn. 23, p. 11.

⁵⁴ Such costs may include the fees and expenses of the arbitrators, the administering cost of the arbitral institution, the parties' legal and expert fees and expenses and parties' internal management costs.

⁵⁵ Queen Mary Survey 2012, pp. 3 and 41.

Certain arbitral institutions thus expressly draw attention to this possibility in their rules as a signalling technique to both arbitrators and parties.⁵⁶

One commentator has gone further by proposing that parties expressly empower arbitral tribunals to allocate in their final decision a pre-set percentage of the total arbitration costs “*according to efficiency shown and adequacy of costs incurred*”, with reasons to be stated for this allocation.⁵⁷ Such a proposal, however, does not directly address what is felt by many to be the second worst characteristic of international arbitration, after its cost, namely the “*lack of effective [use of] sanctions during the arbitral process*”.⁵⁸ Here again, a solution lies with proactive arbitral tribunals who have the power to issue cost orders or awards as the case progresses, both to sanction wasteful behaviour and encourage future good conduct by the parties.⁵⁹

Further, by drawing the attention of the parties from the very start of proceedings to this power, and by indicating their willingness to make use of such a power, arbitral tribunals both incentivise parties towards efficient conduct and contribute towards the overall time and cost efficiency of the case.⁶⁰

Additionally, by rendering costs decisions (notably in phased proceedings) as the case progresses instead of reserving them for their final decision, arbitral tribunals can help reduce the risk of parties suffering from the sunk cost fallacy, namely the risk that the more time and unallocated cost parties have committed to the proceeding, the less inclined they are likely to be to settle the dispute, irrespective of how their chances of success might in fact have evolved during the proceeding.

Finally, arbitral tribunals may also consider at the start of the dispute, especially in smaller cases, agreeing with the parties on a budget for the proceedings, *i.e.* a maximum amount of party costs potentially recoverable, in

⁵⁶ See, *e.g.*, ICC Rules (2012): Art. 37.5, now ICC Rules (2017): Art. 38.5; LCIA Rules (2014): Art. 28.4; SCC draft Rules (2017): Art. 50(6); see also CIArb Cost-Controlled Arbitration Rules (2014), Art. 10(b).

⁵⁷ Joerg Risse, *supra* fn. 26, Proposal 9.

⁵⁸ Queen Mary Survey 2015, pp. 7 and 10.

⁵⁹ See, *e.g.*, Queen Mary Survey 2015, p. 25; ICC Commission on Arbitration, *Controlling Time and Costs in Arbitration* (2012), para. 82; ICC Commission Report, *Decisions on Costs in International Arbitration*, (2015) ICC Dispute Resolution Bulletin, issue 2, Section IV; CIArb International Arbitration Guideline, *Drafting Arbitral Awards Part III – Costs* (2016); Doug Jones, *Using Costs Orders to Control the Expense of International Commercial Arbitration*, 2016 Roebuck Lecture.

⁶⁰ *Ibid.*

an effort to keep such costs proportionate to the value of the dispute while ensuring a measure of equal footing of the parties.⁶¹

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The above discussion has underlined the significant potential for improving the efficiency of international arbitration in a manner that also enhances ‘quality’, by assisting arbitral tribunals with becoming better acquainted with the cases before them earlier on in the proceeding, thus bringing greater focus to the issues that require determination.

To sum up in the words of Neil Kaplan writing in 1994 in his judicial capacity about the transformation of the role of the trial judge in civil cases, “[w]hether it is called ‘case management’ or ‘judicial intervention’ really does not matter because what is involved is a more active approach on the part of the judge. He is no longer a mere referee allowing the parties to present their cases as they wish. Not only does he take a more active role in the trial itself but in more and more cases he is actively helping to get the case into a shape that will assist him in coming to an expeditious, economic and just solution.”⁶² With this in mind, we turn to the specific features of Delos arbitration that have been designed to promote the active engagement of arbitral tribunals.

(b) Delos Rules for proactive arbitrators

The active engagement of arbitral tribunals in the conduct of Delos arbitration is structured around four pillars: a statement of principle, informed by a statement of purpose, supported by a range of powers, and promoted through a scheme of incentives. In this manner, Delos arbitral tribunals know what to expect and what is expected of them by the parties and the arbitral institution.

The principle – namely Delos Principle 1 – is stated at Article 7.4 of the Delos Rules. It provides that “[t]he Tribunal shall take an active role in the resolution of legal and factual issues [...]”. This provision expressly rejects

⁶¹ See, e.g., ICC Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration (2003), Guideline No. 8; CIARB Cost-Controlled Arbitration Rules (2014), Art. 1(c), which aims to keep “the total cost of the arbitration, including the arbitrator’s fees and expenses, [at] no more than 20% of the amount in dispute”; CIARB International Arbitration Guideline, *Drafting Arbitral Awards Part III – Costs* (2016), pp. 4-5; see also the ICC Commission Report, *Decisions on Costs in International Arbitration*, (2015) ICC Dispute Resolution Bulletin, issue 2, Section IV; V.V. Veeder, Chapter 3: *The Role of Users*, in Mourre et al. (eds.), *Players Interaction in International Arbitration*, (2012) 9 Dossiers of the ICC Institute of World Business Law 35, pp. 38-39; Doug Jones, *supra* fn. 59, pp. 3-4.

⁶² Neil Kaplan, *Role of the Judge in Civil Litigation*, 2 Judges’ Forum Newsletter 6 (March 1994), as quoted in Howard M Holtzmann, *supra* fn. 15, p. 156.

the ‘impartial referee’ model as a default arbitral tribunal posture, in favour of the proactive arbitrator model.⁶³

Secondly, the principle of active engagement must be directed by a guiding purpose. As seen above, this principal purpose is set out at Article 1.2 of the Delos Rules as “*deal[ing] with cases fairly, expeditiously and at proportionate cost.*” Arbitral tribunals – as well as the parties and the arbitral institution – must therefore be attentive to the parties’ due process rights, and to the time and cost efficiency of the process.

With regard to due process, arbitral tribunals are reminded that they must ensure that the parties’ rights in this regard are respected (Article 1.2(a)) and that their decision be based on the parties’ submissions (Article 7.4).⁶⁴

As for efficiency, the notion is developed at Article 1.2(a)-(b) by reference to the parties’ “*reasonable*” right to be heard, in line with recognised standards,⁶⁵ and the requirement to deal with disputes “*efficiently and in a manner proportionate to: (i) the value of the dispute; (ii) the complexity of the issues in dispute; and (iii) the importance of the dispute to any ongoing relationships between the parties*”.

The above reference to the parties’ ongoing relationships is not found in any arbitration rules; yet it was the primary consideration of the ICC in its early promotion of arbitration as a dispute resolution mechanism.⁶⁶ Indeed, in a private dispute resolution process originating in the parties’ agreement, it seemed relevant to remind arbitral tribunals that the conduct of the proceeding may have implications beyond the dispute itself; in this sense, the proactivity of arbitrators (*e.g.* status calls convened by the arbitral tribunal president) may allow the parties to exercise self-restraint and maintain a level of procedural cooperation where the tone of exchanges might otherwise escalate to levels that could cause serious harm to the parties’ relationship. That having been

⁶³ It is apposite here to recall the words of John Uff, writing in 1993: “*the arbitrator has a “positive duty to direct the arbitration in the right course, without the comfort of being able simply to leave the parties to get on with the case”*”; see John Uff, *Cost-effective arbitration*, (1993) 59 *Arbitration* 31, p. 34.

⁶⁴ See in this regard, *e.g.*, Giuditta Cordero Moss, *Is The Arbitral Tribunal Bound By The Parties’ Factual And Legal Pleadings?*, (2006) 3 *Stockholm International Arbitration Review* 1-25; Report on Inherent and Implied Powers of Arbitral Tribunals by the Committee on International Commercial Arbitration submitted to and discussed at the 76th Conference of the International Law Association held in Washington D.C., United States of America, 7-12 April, 2014, adopted by the International Law Association in Resolution No. 4/2016, dated 11 August 2016.

⁶⁵ See, *e.g.*, HKIAC Rules (2013): Art. 13.1; LCIA Rules (2014): Art. 14.4(i); SCC Rules (2010): Art. 34; UNCITRAL Rules (2014): Art. 17.1; see also the English Arbitration Act 1996, s. 33.1(a).

⁶⁶ See, *e.g.*, Florian Grisel *et al.*, *supra* fn. 3, para. 14.

said, the Delos Rules are neutral at this stage as to whether and to what extent arbitrators should become directly involved in assisting parties with settling their dispute (e.g. by providing a preliminary assessment of the case), provided that the parties' due process rights are respected (Article 1.2(a)).

Thirdly, in support of their guiding purpose, arbitral tribunals may rely on the usual powers of being able to determine their own jurisdiction (Article 7.1) and to decide on all procedural and evidentiary matters (Article 7.2), including through the non-exhaustive list of typical powers set out at Article 7.4.⁶⁷ Article 7.2 further states that “[t]he parties are encouraged to agree on joint proposals on procedural and evidentiary matters for consideration by the Tribunal.”⁶⁸ The parties are thus encouraged to collaborate and reach agreement among themselves; and arbitral tribunals are thus encouraged to invite parties to engage in such collaboration, while remaining ultimately responsible for the conduct of the proceeding taking account of the parties' due process rights.⁶⁹

Finally, the placement of the principle of active engagement in introduction to the Article 7.4 list of powers is designed to draw the attention of Delos arbitrators to the broad case management and evidentiary powers available to them for the purposes of engaging actively with the dispute.

Fourthly, the Delos Rules provide a scheme of incentives to promote active engagement. These incentives are four-fold and relate to safe seats (discussed below under Delos Principle 2), a pragmatic approach to the constitution of arbitral tribunals (discussed below under Delos Principle 3), the fees of the arbitral tribunal and procedure.

⁶⁷ These additional powers include at Art. 7.4(b) the power to render an award with or without holding an oral hearing. Such a power is less exceptional than may appear, being both routinely found in expedited arbitration rules (see e.g., CIArb Cost-Controlled Arbitration Rules (2014): Art. 7(a); ICC Rules (2017): Appendix VI Art. 3.5; SIAC Rules (2016): Art. 5.2(c); SCC draft Rules for Expedited Arbitrations (2017): Art. 33(1)) and being subject to the arbitral tribunal's duties to conduct proceedings fairly and make every effort to ensure that their awards are enforceable (Arts. 1.2 and 1.3). See also the SCAI Rules (2012): Art. 15.2, which, irrespective of whether or not proceedings are expedited, allows arbitral tribunals, “[a]fter consulting with the parties, [...] [to] decide to conduct the proceedings on the basis of documents and other materials”.

⁶⁸ See, similarly, LCIA Rules (2014): Art. 14.2: “parties may agree on joint proposals for the conduct of their arbitration for consideration by the Arbitral Tribunal. They are encouraged to do so in consultation with the Arbitral Tribunal and consistent with the Arbitral Tribunal's general duties under the Arbitration Agreement.”

⁶⁹ See Maxi Scherer, Lisa Richman, Remy Gerbay, *Arbitrating under the 2014 LCIA Rules – A User's Guide* (Kluwer Law International, 2015), pp. 205-207; and Peter Ashford, *supra* fn. 26, para. 2-2, commenting on the similar balance struck under the IBA Rules on the Taking of Evidence (2010).

On fees, Delos has retained the discretion found at arbitral institutions generally to set their amount, taking into account the diligence and efficiency of the arbitrator and the volume of work he or she has performed. Given this discretion and the procedural incentive described below, Delos considered that it was not necessary also to include express language in its Rules setting out fee premiums or penalties for the timing of submission by the arbitral tribunal of its draft award.

On procedure, Delos has built on the successful experimentation conducted by leading arbitral institutions in their smaller claim expedited procedures to define a time-limit from the start of the case by which arbitral tribunals are required to communicate their draft award to the arbitral institution.⁷⁰ Such a mechanism increases predictability for parties as to the time required for the resolution of their dispute, and incentivises arbitrators and parties to tailor the procedure to the needs of the case, given that the procedural timetable must be defined working backwards. In doing so, due consideration will need to be given to the time required for tribunal deliberation and drafting the award, and therefore to the sort of award that is required, as discussed above.

Delos has adapted this mechanism of a time-limit for the submission of draft awards in three important respects:

One, instead of differentiating between an expedited procedure with fixed time-limits for small claims (as defined) and a default procedure with no fixed time-limits (or the indicated time-limits are known to be extended on a near-automatic basis) to apply otherwise, Delos has chosen to provide a single procedure. The indicated time-limit must therefore vary according to the value of the dispute (*i.e.* the sum of the value of all claims), which has been arranged into tiers in the time and cost schedules found at Appendix 4 to the Delos Rules.

For Tier 1 disputes with a value of up to EUR 200,000, the indicative time is 60 days from the start of the case following the constitution of the arbitral tribunal (and, more specifically, from the Delos Time Notice discussed below) until the delivery of the draft award to Delos; for Tier 2 disputes with a value of EUR 200,000 up to EUR 5 million, Delos provides an indicative time of 120 days; and for Tier 3 disputes with a value greater than EUR 5 million, the indicative time is 180 days.⁷¹

⁷⁰ See fn. 53, above.

⁷¹ By way of comparison, the expedited procedures of the HKIAC Rules (2013), the ICC Rules (2017), the SCAI Rules (2012) and the SIAC Rules (2016) provide for the resolution within six months of disputes with a value of up to, respectively: HKD 25 million (Art. 41), *i.e.* close to EUR 3 million; USD 2 million (Appendix VI Art. 1.2); S\$ 6 million (Art. 5), *i.e.* close to EUR 4 million; and CHF 1 million (Art. 42), *i.e.*

Two, the above stated times are presented in the Delos Rules as being indicative, in order to avoid straitjacketing arbitral tribunals and Delos into having to meet a pre-set time-limit in the Rules that may exceptionally not be adapted to the dispute at hand. The objective is to ensure as far as possible that, once a time limit has been set by Delos, it will be respected by the arbitral tribunal and the parties. This is one of the reasons why, under Article 7.3 of the Delos Rules, the procedure and provisional timetable for the proceeding are to be defined only once the relevant time limit has been notified by Delos.

Three, as explained at Article 9.5 of the Delos Rules, the time-limit given to arbitral tribunals is for the submission of their draft award, which may be interim, partial or final according to Article 8.1. This approach is designed (i) to provide arbitral tribunals with a further incentive to consider the suitability of phasing the resolution of the dispute from the start, which in turn requires them to become familiar with the case from the start, and (ii) to maintain flexibility and quality, notably as it allows arbitral tribunals and parties to reassess the suitability of the procedure and provisional timetable as the case unfolds and keep under review whether (a different) phasing may be appropriate.

While as a result of this approach parties do not have as much certainty that their dispute will be finally resolved within the indicative time-limit as compared with fixed time-limits in expedited procedures, the above approach provides parties with the predictability of a decision within the indicative time and, in the case of a phased proceeding, the possibility of recovering their costs at the end of each phase as well as a milestone at which to (re)consider a settlement to their dispute without having incurred the cost of litigating the case in full.

Delos has implemented its award time-limit mechanism through the concept of the ‘Delos Time Notice’ (Article 9.5), namely the notification by Delos to the arbitral tribunal and the parties of the time granted by Delos to the arbitral tribunal for submitting its draft award. The date on which this notice is given is referred to as the ‘Time Notification Date’. A Delos Time Notice will only be issued once (an instalment on) the arbitration costs have been paid by the parties (Articles 9.5-9.6).

close to EUR 1 million. Neither the DIS Supplementary Rules for Expedited Proceedings (2008) nor the SCC Rules for Expedited Arbitrations (2010) (including the 2017 draft) specify a dispute value threshold for their application. The DIS provides for a time period of six months (Art. 1.2), the SCC, of three months (Art. 36; and see Art. 44 in the 2017 draft).

Finally, following receipt of the Delos Time Notice, “*the Tribunal shall conduct a case management meeting to consult the parties on the procedure and provisional timetable for the arbitration. During or as soon as practicable following such meeting, the Tribunal shall establish the procedure and provisional timetable for the arbitration and inform the parties and DELOS of the same.*” (Article 7.3). In order to maximise the time available under the Delos Time Notice, arbitral tribunals are encouraged to schedule the case management meeting ahead of receiving the Delos Time Notice, in coordination with the parties and Delos.

In his much discussed *Ten Drastic Proposals for Saving Time and Cost in Arbitral Proceedings*, Joerg Risse argued that the question of efficiency in international arbitration was ultimately one of party priorities within a triangle that had quality, time and cost as its three corners.⁷² He therefore concluded that “*there exist[ed] a diminishing marginal utility between the time and costs invested in the arbitration and the quality of the final award.*”⁷³ Parties could either “*maximise the quality of the award*” through the standard procedure, described as “*full-fledged arbitration*”, or “*accept certain limitations in order to ensure a swift and inexpensive dispute resolution process*”.⁷⁴

As shown above, however, standard procedure arbitration and the variety of its alternatives are not mutually exclusive on the quality scale. For the same aspirations in terms of quality, parties have at their disposal a spectrum of choices, which range from extensive party procedural autonomy before an arbitral tribunal acting as an impartial referee, together with the time and cost issues they presently bemoan, to more limited procedural autonomy in a proceeding conducted by a proactive arbitral tribunal seeking to achieve efficiency with fairness. This is not to say that ‘quality’ cannot be made into a variable as well, but it is to say that the widely recognised proactive arbitrator model establishes that this need not be so.

In sum, time and cost issues are not a fatality in international arbitration, and efficiency can be enhanced without compromising on quality. The keystone to this equation is arbitrator proactivity, notably for lower value disputes, hence its identification as the first Delos Principle.

⁷² Joerg Risse, *supra* fn. 26, pp. 454-455. See also Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?*, (2015) 32 *Journal of International Arbitration* 6.

⁷³ Joerg Risse, *supra* fn. 26, p. 465.

⁷⁴ *Id.* pp. 454-455.

The discussion so far has focused on two adjudicator models: the proactive arbitrator *vs.* the impartial referee. It does not follow in practice, however, that less engaged arbitrator conduct would necessarily evidence a leaning towards the impartial referee model over the actively engaged alternative. Indeed, the proper characterisation of arbitral tribunal conduct must take account of the constraints induced by the law of the seat. The less arbitration-friendly the legal place of arbitration, the more due process conservatism and inefficient adjustments are likely to be required of an arbitral tribunal seeking to ensure as far as possible that its award would be upheld by the courts of the seat. Hence Delos Principle 2, which emphasises the use of safe seats in support of the active engagement of arbitral tribunals.

Delos Principle 2: Safe seats, rather than any seat

While the past thirty years have seen growing concern over the increasing prevalence of the impartial referee model, there has also been growing disquiet about what has come to be described as arbitrator ‘due process paranoia’.⁷⁵ This poses a different challenge to the active engagement of arbitral tribunals: while the preceding discussion on adjudicator models explored the potential for efficiency and its apparent tension with quality, the due process concern raises the question of how to pursue efficiency without compromising the validity of any award.

As will be seen, excessive concern over due process is a familiar issue that has attracted familiar answers; while these answers do not differentiate between places of arbitration, they can be significantly strengthened through an *ex ante* focus on ‘safe’ seats, which Delos has defined as its second Principle in order further to support the active engagement of arbitral tribunals (a). The notion of a Delos safe seat can be defined by reference to six principles and would benefit international arbitration beyond considerations of efficiency (b). Finally, the Delos focus on safe seats has informed the formulation of certain specific features of Delos arbitration (c).

(a) ‘Due process paranoia’ and the gap in its traditional cures

In a survey completed in 2010, the Corporate Counsel International Arbitration Group (“CCIAG”) studied the factors thought to contribute to the rising inefficiency of international arbitration. Among these, 90% of the survey respondents “*identified excessive concern for due process over efficiency, leading to a free-for-all on timing*”.⁷⁶

Five years later, one of the key findings of the Queen Mary Survey 2015 was the near-unanimous concern over the issue of ‘due process paranoia’,⁷⁷ defined as follows:

“Due process paranoia” describes a reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully. Many interviewees described situations where deadlines were repeatedly extended, fresh evidence was admitted late in the process, or other disruptive behaviour by counsel was

⁷⁵ Queen Mary Survey 2015, pp. 2 and 10.

⁷⁶ See Lucy Reed, *Corporate Criticism*, *supra* fn. 23.

⁷⁷ Queen Mary Survey 2015, pp. 2 and 10.

*condoned due to what was perceived to be a concern by the tribunal that the award would otherwise be vulnerable to challenge.*⁷⁸

The above findings echo the concerns voiced by leading members of the international arbitration community, who have referred to arbitrators being “*afraid*” of taking a “*robust attitude*” on case management out of “*fear*” of having their awards challenged;⁷⁹ according to a leading international arbitration practitioner, this fear is “[*o*]ne of the plagues of arbitration”.⁸⁰

Two related answers have typically been given in response to this issue, which focus on the excessiveness of the concern for due process: (i) that no judge would overturn an award on the sole basis that it was rendered in a proceeding conducted firmly by the arbitral tribunal;⁸¹ and (ii) that arbitrators must have ‘courage’, on the basis that there is no inherent incompatibility between active case management and a healthy concern for due process.⁸²

Both views find significant support in the accumulated experience reflected in the arbitration rules and guidelines reviewed above, which promote the active engagement of arbitral tribunals, and in the numerous proposals discussed above to achieve greater efficiency in international arbitration.⁸³

While both of these responses are helpful, they consider the issue as it arises once an arbitration is underway. As a result, they make no differentiation among arbitration seats and so obscure the importance of ‘safe seats’ (defined below) both to minimise the odds of the first answer and to support the active engagement required by the second answer.

⁷⁸ Queen Mary Survey 2015, p. 10; see also p. 2. This issue is exacerbated by the increasing use of due process as a ‘sword’: see Lucy Reed, 2016 Freshfields Arbitration Lecture, as reported by Alison Ross in *Reed condemns Trump approach to due process*, GAR dated 1 November 2016; Bernardo Cremades, *The use and abuse of “due process” in international arbitration*, CI Arb 2016 Alexander Lecture.

⁷⁹ See, e.g., remarks by Wolfgang Peter as reported in *The dynamic of time and cost*, GAR dated 1 May 2009.

⁸⁰ See, e.g., remarks by Yves Derains as quoted in *Due process must trump efficiency, says Derains*, GAR dated 23 September 2014.

⁸¹ See, e.g., L. Yves Fortier, *supra* fn. 20, section IV; remarks by Yves Derains as quoted in *Due process must trump efficiency, says Derains*, GAR dated 23 September 2014; remarks by Philippe Pinsolle, referring to a study he prepared for the ICCA 2016 Congress in Mauritius, as reported in *Defending investment arbitration “a lost battle”*, says Pinsolle, GAR dated 11 October 2016.

⁸² See, e.g., L. Yves Fortier, *supra* fn. 20; remarks by Emmanuel Gaillard and Serge Lazareff as reported in *The dynamic of time and cost*, GAR dated 1 May 2009; Ali Khan, “*Pussyfooting around*” or “*cutting to the chase*” – are tribunals playing it too safe?, GAR dated 23 June 2016.

⁸³ See also, e.g., James Allsop, *The Authority of the Arbitrator*, 2013 Clayton Utz / University of Sidney International Arbitration Lecture.

For a focus on ‘safe seats’ to be meaningful, however, this must be addressed *ex ante*, *i.e.* before proceedings have been commenced at the time when the parties are concluding their arbitration agreement. It is in this sense that Delos has defined a focus on ‘safe seats’ as its second Principle.

(b) ‘Safe seats’: a Delos perspective

A safe place of arbitration is one where the legal framework and practice of the courts support recourse to arbitration as a fair, just and cost-effective binding dispute resolution mechanism. Conversely, a place of arbitration that does not qualify as a ‘safe seat’ by Delos standards is one that materially increases the cost of arbitrating disputes in that place, whether such cost is borne by the parties directly (*e.g.* jurisdictions that require awards to be signed at the place of arbitration and/or deposited with competent authorities) or indirectly by requiring arbitrators, who might otherwise have been inclined towards greater engagement, to temper their efficiency inclination with more or less significant measures of due process conservatism (*e.g.* jurisdictions where the practice of interventionist courts undermines the finality of awards) and inefficient adjustments (*e.g.* not being able to award the immediate payment of an interim cost order⁸⁴).

It will be apparent from the above that the Delos understanding of what constitutes a ‘safe seat’ serves a different and complementary purpose to the aspirational meaning given to the expression under the 2015 ‘Centenary Principles’ of the Chartered Institute of Arbitrators (“**CIArb**”). The former focuses on the immediate needs of users and practitioners of international commercial arbitration, while the latter is a policy statement to support ‘countries, arbitral institutions, professional bodies and legal sectors’ in “*respond[ing] to the challenge of providing effective and safe arbitration facilities for the 21st century and beyond.*”⁸⁵

The areas of convergence and divergence between the two approaches, and thus a more specific definition of the Delos notion of ‘safe seat’, may readily be charted with reference to the Centenary Principles copied below (strikethrough indicates deleted text, underlining indicates added text and italics indicates text that has been moved; headings were underlined in the original text and have not been modified):

⁸⁴ See the example given by Doug Jones, *supra* fn. 59, pp. 9-10.

⁸⁵ CIArb London Centenary Principles 2015: Introduction.

1. Law

A clear effective, modern International Arbitration law which shall recognise and respect the parties' choice of arbitration as the method for settlement of their disputes ~~by~~:

- (a) by providing the necessary framework for facilitating fair and just resolution of disputes through the arbitration process, notably the ready recognition and enforcement of orders and awards made at the Seat, including where proceedings are conducted outside of the Seat;
- (b) through adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements;
- (c) by limiting court intervention in disputes that parties have agreed to resolve by arbitration; and
~~striking an appropriate balance between confidentiality and appropriate transparency, including the growing practice of greater transparency in investor state arbitration;~~
- (d) by providing a ~~A~~ clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.

2. Judiciary

An independent Judiciary, competent, efficient, with expertise in International Commercial Arbitration and respectful of the parties' choice of arbitration as their method for settlement of their disputes.

3. Legal Expertise

An independent competent legal profession with expertise in International Arbitration and International Dispute Resolution providing significant choice for parties who seek representation in the Courts of the Seat ~~or in the International Arbitration proceedings conducted at the Seat.~~

4. Education

~~An implemented commitment to the education of counsel, arbitrators, the judiciary, experts, users and students of the character and autonomy of International Arbitration and to the further development of learning in the field of arbitration.~~

54. Right of Representation

A clear right for parties to be represented at arbitration by party representatives (including but not limited to legal counsel) of their choice whether from inside or outside the Seat.

65. Accessibility and Safety

Easy accessibility to the Seat, free from unreasonable constraints on entry, work and exit for parties, witnesses, ~~and~~ counsel and arbitrators in International Arbitration, ~~and~~ adequate safety and protection of the participants, their documentation and information.

7. Facilities

~~Functional facilities for the provision of services to International Arbitration proceedings including transcription services, hearing rooms, document handling and management services, and translation services.~~

8. Ethics

Professional and other norms which embrace a diversity of legal and cultural traditions, and the developing norms of international ethical principles governing the behaviour of arbitrators and counsel.

9. Enforceability

~~Adherence to international treaties and agreements governing and impacting the ready recognition and enforcement of foreign arbitration agreements, orders and awards made at the Seat in other countries.~~

10. Immunity

~~A clear right to arbitrator immunity from civil liability for anything done or omitted to be done by the arbitrator in good faith in his or her capacity as an arbitrator.~~

As the above makes clear – and unsurprisingly – there are large areas of agreement between the Delos approach to the notion of a ‘safe seat’ and the CI Arb Centenary Principles. Where they diverge is in the recognition given to the increasingly globalised and technological environment in which international arbitration takes place, captured in the distinction between the legal place of arbitration and the physical or virtual place from where arbitrations may be conducted. This decoupling has three significant implications:

First, a seat may be ‘Delos safe’ in spite of the fact that it does not possess all of the hallmarks of today’s all-round world-class most popular arbitration seats. It is necessary and sufficient for a seat to be ‘Delos safe’ that it meet the standards of the six revised CI Arb principles above, which may be summarised as a pro-arbitration legal framework, practised with relevant expertise by an independent and competent judiciary and legal profession, in a manner that embraces the pluralistic nature of international arbitration.⁸⁶

When these characteristics are found together, parties, arbitral tribunals and arbitral institutions can take comfort that their arbitrations will be seated in a modern, stable, predictable and supportive legal place where, notably, the threshold for annulment of awards will be high and the risk of court intervention low.

⁸⁶ The deletion of the reference to confidentiality in Centenary Principle no. 1 is discussed under Delos Principle 4, below.

That parties increasingly recognise the importance of these criteria in their choice of seat is confirmed by comparing the Queen Mary Surveys for 2006 and 2015: ten years ago, the choice of seat was as much a matter of legal considerations as of convenience;⁸⁷ nowadays, the three most important reasons in the choice of a seat are, first, the neutrality and impartiality of the local legal system, followed by national arbitration law and finally the jurisdiction's track record for enforcing agreements to arbitrate and arbitral awards.⁸⁸

Secondly, a given place of arbitration may be competitive in the international arbitration market in spite of the fact that it does not meet the criteria for being 'safe'. For example, in a jurisdiction that does not meet the standards of Centenary Principles nos. 1 (law), 2 (judiciary) and 9 (enforceability), a commercial hub may nonetheless develop into a thriving hearing centre for international arbitration by focusing on Centenary Principles nos. 5 (right of representation), 6 (accessibility and safety) and 7 (facilities); similarly for a metropolis in this jurisdiction, which may emphasise Centenary Principles nos. 3 (legal expertise), 4 (education) and 8 (ethics) in order to achieve thought leadership and become a global provider of international arbitration services, especially where the hourly rates of locally-based arbitration lawyers are cheaper than in other markets.⁸⁹

These examples point to the variety of objectives (*e.g.* economic, legal influence, soft power) that places of arbitration might pursue in seeking to leverage their comparative advantages in the international arbitration market, without the need to meet the standards of all ten Centenary Principles. Put differently, the competition between places of arbitration over which one gets chosen as the seat in arbitration agreements should become increasingly misguided to the extent that it is premised on the view that the economic value of arbitration proceedings accrues in the main to the legal seat of arbitration. To the contrary, the above examples highlight how the distinction between safe legal places of arbitration and places of arbitration attractive in other respects may lead to a greater geographic spread of economic benefits

⁸⁷ Queen Mary Survey 2006, p. 14.

⁸⁸ Queen Mary Survey 2015, p. 14.

⁸⁹ In a discussion on counsel fee arrangements, Christopher Newmark thus observes that in "*a market for legal services that is truly international, where clients can choose which city they will go to for their arbitration counsel, it is surprising that the fee rates which arbitration lawyers charge for their services remain very much based on local market forces. As a general rule, arbitration lawyers in Paris and Geneva are cheaper by the hour than arbitration lawyers in London and New York. And yet, many of those lawyers do the same type of work (and even work in the same large international law firms).*" (see *supra* fn. 25, pp. 93-94).

from international arbitration, as well as more diverse and sophisticated offerings and practices.

The above view is consistent with arbitration rules⁹⁰ and guidelines⁹¹ that promote the use of cost-effective locations for holding meetings and hearings.

Thirdly, by stripping down the notion of a ‘safe seat’ to its core, legal function divorced from economic considerations, and by using the related objective criteria to openly identify those seats that may be deemed safe, the international arbitration community would be greatly facilitating: (i) user negotiations over the seat of arbitration, by focusing discussions on a choice among recognised safe seats; therefore (ii) the active engagement of arbitral tribunals, and therefore efficiency; and (iii) an evolution towards greater safety in those jurisdictions wishing specifically to be considered as safe for the seating of arbitrations.

To contribute to this effort, Delos has drawn up an initial list of safe places of arbitration, set out at Schedule 1 to its Model Clauses, which can support the cost-effective and rapid arbitration proceedings users expect. At present, it consists of the following seventeen seats, with more likely to be added in the future once a systematic study has been completed: Amsterdam (The Netherlands), Auckland (New Zealand), Frankfurt (Germany), Geneva (Switzerland), Hong Kong (PRC), Lisbon (Portugal), London (UK), Miami (USA), New York (USA), Paris (France), Seoul (South Korea), Singapore (Singapore), Stockholm (Sweden), Sydney (Australia), Toronto (Canada) and Vienna (Austria).

(c) Features of Delos arbitration that promote the use of safe seats

In support of the efficiency of Delos arbitration, Delos has provided model arbitration clauses that provide for the designation of a seat of arbitration, in the same manner as do other arbitral institutions.

Given the Delos emphasis on safe seats, however, in particular for smaller value disputes, the Delos model arbitration clauses invite parties to choose

⁹⁰ See, e.g., DIS Rules (1998): Art. 21.2; ICC Rules (2017): Art. 18(2)-(3); HKIAC Rules (2013): Art. 14(2); LCIA Rules (2014): Art. 16(3); SCAI Rules (2012): Art. 16(2)-(4); SCC Rules (2010): Art. 20(2)-(3); SIAC Rules (2016): Art. 21.2.

⁹¹ See, e.g., ICC Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration (2003), Guideline No. 11; ICC Commission on Arbitration, *Techniques for Controlling Time and Costs in Arbitration* (ICC Publication 843, August 2007), para. 73; ICC Commission on Arbitration, *Controlling Time and Costs in Arbitration* (2012), para. 70; ICC, *Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration* (2014), p. 53.

one seat from among the seventeen recommended safe seats listed in Schedule 1 to the Delos Model Clauses.

Should the parties nonetheless prefer to opt for another seat, Delos draws their attention to the fact that Delos may exercise its discretion to apply any time and costs scale to the parties' dispute and/or to vary the dispute timetable, as necessary. This notice in the Model Clauses is premised on Article 9.3 of the Delos Rules, which provides that "*DELOS will exercise its discretion, as informed by the principal purpose of the Rules, in fixing the arbitration costs where: [...] the parties have agreed to arbitration under the Rules but have used a different arbitration clause from the DELOS model clause or have modified the same.*"

Finally, Article 5 of the Delos Rules provides for Paris as the default place of arbitration in the absence of any agreement by the parties or determination by the arbitral tribunal.⁹²

To conclude, while due process paranoia is inimical to efficiency, a healthy, non-excessive, concern for due process is not only compatible with efficiency but also complementary.

Furthermore, where parties have located their arbitration in a safe seat, it can reasonably be assumed that a firm arbitrator hand will not endanger the validity of any award, and that 'courage' is no more than a dramatic encouragement for 'active engagement'.

Finally, it was noted in discussing the first Delos Principle that the Delos Rules provide a four-fold scheme of incentives to promote the active engagement of arbitral tribunals. These incentives relate to arbitrators' fees, arbitral procedure, safe seats and, as the third Delos Principle, pragmatism in the constitution of arbitral tribunals.

⁹² Paris is also the default seat of arbitrations conducted under the auspices of the Jerusalem Arbitration Centre (JAC), per JAC Rules (2013): Art. 15.1(ii).

Delos Principle 3: Pragmatism in the formation of arbitral tribunals

In the timeline of a typical arbitration, several weeks and more often months are devoted at the start of the case to constituting the arbitral tribunal. While this is a known cause of delay in arbitration proceedings,⁹³ its potential for greater efficiency appears to have attracted little attention so far, other than through smaller claim expedited procedures and the existence otherwise of institutional rules that provide for the expedited formation of arbitral tribunals in cases of exceptional urgency.⁹⁴ Instead, efforts have been directed at making available emergency arbitrator procedures to provide parties with an avenue for emergency arbitral interim relief, pending the constitution of the arbitral tribunal.⁹⁵

Leaving aside for present purposes the stopgap mechanism of the emergency arbitrator, even as regards larger claims that do not require an arbitral tribunal to be constituted with exceptional urgency leading international arbitration practitioners have recognised the possibility of forming arbitral tribunals in shorter periods of time, if necessary through greater reliance by the parties on arbitral institutions.⁹⁶

This is true for the formation of three-member arbitral tribunals as well as for the appointment of sole arbitrators, which has been rated as the most effective method of expediting arbitral proceedings, second only to the “*identification by the tribunal of the issues to be determined as soon as possible after*

⁹³ See, e.g., Queen Mary Survey 2010, p. 32; David W Rivkin, *The Town Elder Model Revisited*, *supra* fn. 25, p. 379; remarks by Peter Rees as reported in “*This parrot is not dead*”, GAR dated 8 November 2012.

⁹⁴ See, e.g., DIAC Rules (2007): Art. 12; LCIA Rules (2014): Art. 9A. This criterion of ‘exceptional urgency’ has been “*interpreted and applied strictly*”, with the result that there have been but few examples of the use of this feature; see *Redfern and Hunter*, *supra* fn. 38, para. 6.31. See also the remarks by Jacomijn van Haersolte-van Hof reported by Kyriaki Karadelis in *Smart-arbitrating*, GAR dated 27 October 2014, regarding the LCIA having “*re-packaged some existing, underused measures*”, including the one on expedited formation of arbitral tribunals, “*to bring them into the limelight*”. This provision, previously found at LCIA Rules (1998): Art. 9, is now at LCIA Rules (2014): Art. 9A and followed by Art. 9B on emergency arbitrators and Art. 9C on the expedited appointment of replacement arbitrators.

⁹⁵ See, e.g., AAA Rules (2013): Art. R-38; ICC Rules (2012 / 2017): Art. 29; ICDR Rules (2014): Art. 6; LCIA Rules (2014): Art. 9B; SCAI Rules (2012): Art. 43; SCC Rules (2010): Art. 32.4 and App. II; SIAC Rules (2010): Art. 26.2 and Sch. 1 now SIAC Rules (2016): Art. 30.2 and Sch. 1. While the availability of the emergency arbitrator mechanism has become widespread, many still appear to be doubtful about its effectiveness; see Queen Mary Survey 2015, pp. 25 and 27-28.

⁹⁶ See, e.g., David W Rivkin, *The Town Elder Model Revisited*, *supra* fn. 25, p. 379; remarks by Peter Rees as reported in “*This parrot is not dead*”, GAR dated 8 November 2012; Douglas Thomson, *Not sick but curable*, GAR dated 6 March 2015.

constitution”⁹⁷ (as discussed above). Indeed, as compared with three-member arbitral tribunals, sole arbitrators have the benefit of speed and economy,⁹⁸ notably for smaller disputes; and there is arguably little difference between sole arbitrators and three-member arbitral tribunals in terms of “*the quality of the arbitral process or the award.*”⁹⁹

Reflecting the above within the framework of a single set of arbitration rules, Delos took a pragmatic approach to the formation of arbitral tribunals with a view to enhancing the overall efficiency of the proceeding: the Rules are heavily slanted towards the expedited appointment of sole arbitrators (a), while allowing for the cooperative possibility of three-member arbitral tribunals (b).

(a) Expedited appointment of sole arbitrators

The first opportunity for an arbitral institution to influence the number of arbitrators that might ultimately be called upon to determine a dispute is in the model clauses it makes available to its users. The model Delos arbitration clause thus states in relevant part that “[t]he arbitration tribunal shall consist of a sole arbitrator appointed in accordance with the DELOS Rules of Arbitration.”

The notes to this model clause nonetheless clarify the possibility for the parties to agree instead on a three-member arbitral tribunal and draw their attention to the costs implications of such a choice.¹⁰⁰

Parties might also not have decided on the number of arbitrators in their arbitration agreement or left the matter open; if so, the Delos Rules provide

⁹⁷ Queen Mary Survey 2012, p. 13.

⁹⁸ See, e.g., *Redfern and Hunter, supra* fn. 38, para. 4.25; ICC Guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration (2003), Guideline No. 5.

⁹⁹ Jennifer Kirby, *With Arbitrators, Less Can be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated*, (2009) 26:3 *Journal of International Arbitration* 337, p. 337; see also, e.g., Jan Paulsson, *The Idea of Arbitration* (OUP, 2013), p. 164.

¹⁰⁰ Pursuant to Appendix 4 of the Delos Rules, the arbitration costs may be increased by up to double in case of a three-member arbitral tribunal – without impact, however, on the indicative time, as discussed below.

Should parties have opted for a three-member arbitral tribunal, Delos will invite them as appropriate to consider agreeing instead on referring the dispute to a sole arbitrator. Certain arbitral institutions expressly draw parties’ attention to this consultative practice for smaller value claims in their rules; see, e.g., HKIAC Rules (2013): Art. 41.2(b); SCAI Rules (2012): Art. 42.2(c). The ICC has gone further by expressly allowing in its expedited procedure for the appointment of a sole arbitrator “*notwithstanding any contrary provision of the arbitration agreement*”; see ICC Rules (2017): Appendix VI Art. 2.1.

that the arbitral tribunal shall be composed of a sole arbitrator (Article 6.4). This is the position taken in many leading arbitration rules,¹⁰¹ which also allow the arbitral institution a discretion to appoint instead a three-member arbitral tribunal if such would be appropriate in the circumstances.¹⁰² Some arbitral institutions have omitted this discretion from their smaller claim expedited rules¹⁰³ and, similarly, the Delos Rules do not allow Delos such a spontaneous discretion.

Nonetheless, as made explicit in the Delos Rules, a party may, in the absence of any contrary agreement, request Delos to constitute a three-member arbitral tribunal, which Delos will consider in light of the principal purpose of the Rules (Article 6.4(b)). This flexibility, which gives effect to users' preference for three-member arbitral tribunals,¹⁰⁴ is tempered by: (i) a *de minimis* financial condition, namely at present amounts in dispute that are greater than EUR 5 million, as discussed below; and (ii) that any such request be submitted no later than three days following the due date for the respondent's Notice of Defence (and Counterclaim),¹⁰⁵ in order to minimise the time of uncertainty regarding the size of the arbitral tribunal.

Once the number of members of the arbitral tribunal has been established, the next step is their nomination. The Delos Rules provide that the parties may jointly nominate the sole arbitrator, provided that they do so "*no later than (i) three days following the due date for Respondent's Notice of Defence or, if applicable, (ii) seven days following the DELOS decision*" as to whether the arbitral tribunal will be composed of one or three members (Article 6.5). While the three-day time period may at first sight appear to be extremely short, it allows in fact for a reasonable amount of time from the start of the proceedings (*i.e.* at least ten days) for the parties to ascertain whether there is even a possibility that an agreement on a joint nomination could be reached. In the negative, it is in the interest of efficiency that this time-period be as

¹⁰¹ See, *e.g.*, AAA Rules (2013): Art. R-16; DIAC Rules (2007): Art. 8.2; ICC Rules (2012 / 2017): Art. 12.2; ICDR Rules (2014): Art. 11; LCIA Rules (2014): Art. 5.8; SCAI Rules (2012): Art. 6.2; SIAC Rules (2016): Arts. 5.2(b) and 9.1.

¹⁰² *Ibid.*

¹⁰³ See, *e.g.*, HKIAC Rules (2013): Art. 41.2(a); SCAI Rules (2012): Art. 42(b); SCC Rules for Expedited Arbitrations (2010): Art. 12; SCC draft Rules for Expedited Arbitrations (2017): Art. 17.

¹⁰⁴ See, *e.g.*, Queen Mary Survey 2010, p. 25.

¹⁰⁵ While Claimant may submit a Notice of Response to Counterclaim in answer to a Notice of Defence and Counterclaim (Art. 4.3 of the Delos Rules), it has been considered that this further submission would not have any material impact on the parties' ability to determine whether the dispute warrants the constitution of a three-member arbitral tribunal and, therefore, that it should not delay the constitution of the arbitral tribunal (whether composed of one or three members).

short as possible. In the affirmative, the limited time available is designed to focus the parties' attention on the constitution of the arbitral tribunal from the very start of the proceeding, bearing in mind both that they would already be familiar with their respective claims if they engaged in the recommended pre-arbitration negotiations (as discussed below in relation to Delos Principle 4) and that they may jointly request an extension of time pursuant to Article 2.3 of the Delos Rules.

Assuming that the parties jointly nominate a sole arbitrator, said nominee has five days under the Delos Rules to deliver signed statements of independence and impartiality and of availability (Article 6.5); if he or she fails to do so in a timely manner, the Rules provide for nomination by Delos (Article 6.6). This short time-limit is designed to ensure both that parties verify beforehand that their selected arbitrator is not conflicted and is available to handle their dispute actively, and to confirm post-nomination the reactivity of the arbitrator.

The final step in the constitution of the arbitral tribunal is the seven-day time-limit for parties to consider the statements of independence and impartiality and of availability of the nominated arbitrator and potentially raise any challenge (Articles 6.5 and 6.3).¹⁰⁶

All in all, the constitution of a Delos sole arbitrator tribunal in the ordinary course of events may be completed within two weeks from the due date for the Notice of Defence, which is extremely efficient.

In practice, such efficiency is likely to result less from the exercise of party autonomy than from the proactivity of the arbitral institution: party agreement on the joint nomination of a sole arbitrator tends to be difficult, and thus of limited occurrence;¹⁰⁷ as a result, Delos will likely be selecting most of the sole arbitrators appointed under its Rules, which appears to be users' preferred solution in the absence of party agreement on a joint nomination (as compared, for instance, with parties choosing from an exclusive list of arbitrators).¹⁰⁸ The central role of Delos in the selection of sole arbitrators calls for three observations:

¹⁰⁶ The seven-day time-period allows parties to raise any areas of concern with the prospective arbitrator(s) prior to having to submit a formal challenge; this process typically allows potential issues to be clarified in a consensual manner.

¹⁰⁷ See, e.g., the ICC Dispute Resolution Statistics for 2012, 2013, 2014 and 2015, which show that in 2012 the ICC selected 82.8% of the sole arbitrators appointed under its rules; this figure was 78.3% in 2013, 70.9% in 2014 and 75.7% in 2015.

¹⁰⁸ Queen Mary Survey 2012, p. 6.

First, in order to be in a position to fulfil its role effectively in selecting sole arbitrators, Delos needs to be able to anticipate user needs and to have access to a strong network of potential arbitrators. As regards anticipating needs, Delos has implemented a system for users to register their contracts with Delos following their signature, by simply e-mailing a copy thereof to Delos (as further discussed below in relation to Delos Principle 4). Delos also requests parties in their Notice of Arbitration and Notice of Defence to indicate any proposals they may have regarding the profile and qualifications of the sole arbitrator,¹⁰⁹ in line with established – although apparently not widespread – practice.¹¹⁰ As regards developing a network of potential Delos arbitrators (rather than an exclusive list¹¹¹), this is a work in progress which will notably involve building relationships with under-40 arbitration groups globally, in due course.

Indeed, and *secondly*, Delos’s concern for smaller claims will require the selection of younger arbitrators, thereby likely expanding the pool of international arbitration practitioners with experience in serving as arbitrators, which in turn benefits the international arbitration community as a whole. While arbitrator fees for smaller disputes are necessarily limited to keep the arbitration costs proportionate to the amounts in dispute, there is not an arbitration practitioner in the younger age range who would not be excited, dedicated and energetic about serving as an arbitrator regardless of compensation, to paraphrase a leading international arbitration practitioner.¹¹² With the continued growth of the arbitration market, there are, furthermore, an increasing number of such younger practitioners potentially available to serve as arbitrators.

Finally, for arbitrators wishing to secure repeat appointments by Delos as sole arbitrators, they have by that very fact a further incentive to engage actively in the resolution of Delos arbitrations in line with the first Delos Principle, and more broadly to deal with their cases in accordance with the principal purpose of the Delos Rules.

¹⁰⁹ See Appendices 1 and 2 to the Delos Rules.

¹¹⁰ See, e.g., DIAC Rules (2007): Arts. 4.1(f) and 5.1(e); ICC Rules (2012 / 2017): Arts. 4.3(g) and 5.1(e); LCIA Rules (2014): Arts. 1.1(iv) and 2.1(iv).

¹¹¹ Regarding the pitfalls of an exclusive list of arbitrators, see, e.g., the remarks of Alexis Mourre as reported by Alison Ross in *London: Party-appointed arbitrators – love them or loathe them?*, (2011) 6:1 GAR dated 19 January 2011; Charles N Brower and Charles B Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, (2013) 29:1 Arbitration International 7.

¹¹² See remarks by Jennifer Kirby, *The dynamic of time and cost – the sequel*, GAR dated 15 July 2009.

(b) The cooperative possibility of three-member arbitral tribunals

While as seen above the design of Delos arbitration has been heavily slanted towards the appointment of sole arbitrators, the Rules allow for the appointment of three-member arbitral tribunals in two situations: if the parties have so agreed, whether in their arbitration agreement or subsequently (Article 6.4(a)); or, in the absence of any agreement by the parties as to the number of arbitrators, as a matter of discretion by Delos upon a party's reasoned request submitted no later than three days from the due date for the Notice of Defence, provided that the value of the dispute falls within Tier 3 of the cost schedules at Appendix 4 to the Delos Rules (Article 6.4(b)).¹¹³

Tier 3 is presently defined as all disputes with a value greater than EUR 5 million (Appendix 4). The definition of this threshold was largely informed by reference to the practice of the ICC Court in deciding upon the size of arbitral tribunals in the absence of agreement by the parties: as of 2011, such practice pointed to reliance on sole arbitrators for disputes with a value below USD 5 million.¹¹⁴

The choice made in the Rules to condition the availability of three-member arbitral tribunals to the value of the dispute carries with it two important consequences.

First, the Tier categorisation under the Delos Rules is determinative of the indicative time that will guide Delos in setting the Time Notice for the submission by the arbitral tribunal of its draft award. For Tier 3 disputes, the indicative time is presently 180 days, which applies to sole arbitrators and three-member arbitral tribunals alike. Indeed, the Time Notice is premised on

¹¹³ In catering for the possibility of three-member arbitral tribunals, it seemed preferable not to emulate the LCIA model of an arbitral institution nominating the full panel unless the parties have expressly stipulated that there are to be unilateral appointments (see LCIA Rules (2014): Arts. 5.7 and 7.1; see also Jan Paulsson, *e.g. Must We Live with Unilaterals?*, (2013) 1:1 ABA Section of International Law 5), notably in light of the choice made to present the reference to sole arbitrators as the default position in the model Delos arbitration clauses (therefore, unlike the model LCIA arbitration clause, the model Delos arbitration clauses do not alert parties to the possibility of providing for party nomination of arbitrators).

¹¹⁴ *The Secretariat's Guide to ICC Arbitration*, *supra* fn. 29, para. 3-440; compare with the earlier practice of the ICC Court as discussed by Yves Derains and Eric Schwartz in *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2nd ed., 2005), p. 148.

For other factors taken into account in setting this threshold, see, *e.g.*, V.V. Veeder, *supra* fn. 61, who noted at 38 that in London in the early 2000s, City law firms tended to advise clients not to pursue a claim by means of international arbitration under the aegis of the ICC or LCIA Rules if the amount in dispute was lower than a figure in the range of USD 3-5 million. More recently, Matthew Gearing put the threshold at USD 10 million, as reported by Kyriaki Karadelis in *Singapore hears pleas for procedural variety*, (2013) 9:1 Global Arbitration Review.

the value and complexity of the dispute and its importance to any ongoing relationship between the parties through the principal purpose of the Rules (Article 1.2(b)), *i.e.* the focus is on the parties' dispute and need for resolution rather than on the adjudicator.¹¹⁵ This inevitably raises the question of arbitrator availability, not least in light of the added pressure of coordinating three busy schedules.

Hence, *secondly*, for disputes involving significant amounts, the Delos *ad valorem* fee schedule allows for appropriate compensation of well-established arbitrators, which achieves a financial balance between arbitrators' commitment to greater availability and the parties' need for a rapid resolution of their dispute.¹¹⁶

Once it has been ascertained that a three-member arbitral tribunal is to be appointed, the Rules seek to promote early cooperation between the parties and the efficient formation of the arbitral tribunal by building on users' and arbitration practitioners' definite preference for parties being able to nominate their co-arbitrators.¹¹⁷

More specifically, the claimant and respondent have the same time-limit for nominating their co-arbitrators, namely three days from the due date for the Notice of Defence if they had previously agreed on forming a three-member arbitral tribunal whether in their arbitration agreement or subsequently, and seven days otherwise from the Delos decision as to the size of the arbitral tribunal (Article 6.5). If either party fails to make its nomination within the prescribed time-limit, the nomination of the entire arbitral tribunal will be

¹¹⁵ This view may be related to statements by well-known in-house counsel that "*there is no denying the gap that exists today between the time generally taken in arbitration to reach decisions and the needs and objectives of businesses to assess exposure quickly and resolve disputes expeditiously*"; see Michael McIlwrath *et al.*, *supra* fn. 4, p. 3.

¹¹⁶ As noted above, the remuneration of Delos arbitrators takes account at the discretion of Delos of arbitrators' diligence and efficiency and the volume of work performed. This is intended to help address the issue of co-arbitrators 'free riding' on the presiding arbitrator's work, raised for example by Jennifer Kirby, *supra* fn. 99, p. 352.

¹¹⁷ See, *e.g.*, Queen Mary Survey 2012, p. 5, in which a significant majority of respondents indicated their preference for party-nomination of the co-arbitrators; see also, *e.g.*, Jennifer Kirby, *supra* fn. 99, referring at 353 to parties being "*viscerally attached to having "their" co-arbitrator*"; Alexis Mourre, *Are unilateral appointments defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, Kluwer arbitration blog, dated 5 October 2010; Charles N Brower *et al.*, *supra* fn. 111. See further Florian Grisel *et al.*, *supra* fn. 3, para. 42.

handled by Delos (Article 6.6), which is a novel solution to the formation of three-member arbitral tribunals.¹¹⁸

In the first scenario of the parties having opted for a three-member arbitral tribunal in their arbitration agreement, the time-limit allows the claimant to review the respondent's Notice of Defence prior to making its nomination. Such nomination, however, might as a result not be made until the last minute, which raises the risk of the respondent not being able to make a timely nomination, as its choice of a co-arbitrator typically takes into account the claimant's choice. The most effective safeguard of both parties' exercise of their autonomy in the selection of the arbitral tribunal is therefore for the claimant to have previously been made aware of the respondent's objections to the claims, thus allowing the claimant to proceed with its nomination earlier, for example in the Notice of Arbitration.¹¹⁹ This in turn has implications for the manner in which the parties conduct any pre-arbitration negotiations, as discussed below in relation to Delos Principle 4.

In the second scenario of the parties agreeing to a three-member arbitral tribunal subsequently to their arbitration agreement and no later than three days following the due date for the Notice of Defence (Article 6.4(a)), it is here again in both parties' interest to communicate early about the size of the arbitral tribunal, lest they find themselves also having to nominate their co-arbitrators (or seeking to agree upon the joint nomination of a sole arbitrator) within the same time-limit (Article 6.5).

Finally, in the scenario of a decision by Delos to constitute a three-member arbitral tribunal, the parties must react rapidly in nominating their co-arbitrators following receipt of the decision, especially if respondent is to nominate after claimant. This requires a degree of anticipation and cooperation between the parties to ensure that both sides are able to nominate a co-arbitrator, which in turn contributes to a helpful dynamic for the active conduct of the arbitration by the arbitral tribunal.

¹¹⁸ It may be said that Delos addresses to the extent of this default position the 'moral hazard' raised by Jan Paulsson in regard of the formation of three-member arbitral tribunals through party-nomination of two unilaterals; see Jan Paulsson, *Moral Hazard in International Dispute Resolution*, (2010) 25:2 ICSID Review 339. This is especially true in the case of a non-participating respondent in proceedings initiated on the basis of an arbitration agreement calling for the constitution of a three-member arbitral tribunal: in such circumstances, the claimant would, in effect, be deprived of the possibility of naming a co-arbitrator, contrary to the position found in the rules of leading arbitral institutions.

¹¹⁹ The model Notice of Arbitration at Appendix 1 of the Rules thus requests the claimant to indicate the details of its nominated co-arbitrator and, otherwise, the claimant's proposals regarding the profile and/or qualifications of the member(s) of the Arbitral Tribunal. The model Notice of Defence at Appendix 2 sets out the same requests for the respondent.

In sum, the Delos Rules recognise the sole arbitrator as the default adjudicator of smaller claims, which may only be displaced by agreement of the parties. While additional flexibility has been provided for the constitution of three-member arbitral tribunals in Tier 3 disputes, this flexibility is contingent on party proactivity.

More generally, the Delos Rules emphasise anticipation and cooperation by the parties in the exercise of their autonomy in nominating the members of their arbitral tribunal. This has the twin benefits of ensuring efficiency in the formation of the arbitral tribunal and setting the tone for further efficiency in the proceedings to follow.

In practice, it may be anticipated that the dynamics of party nomination of sole arbitrators will largely result in Delos nominating most of the sole arbitrators appointed under its Rules. This role of the arbitral institution in turn creates an incentive for arbitrators seeking repeat appointments to engage actively in the resolution of Delos arbitrations in accordance with the first Delos Principle, which adds to the financial, procedural and seat-related incentives discussed above.

Finally, while the first three Delos Principles have focused on the contributions that arbitrators and arbitral institutions may make to enhance the efficiency of international arbitration without compromising on fairness or quality, the fourth Delos Principle addresses the role of parties and their counsel in this regard, which may be captured in the well-known mantra ‘preparation, preparation, preparation’.

Delos Principle 4: ‘Preparation, preparation, preparation’

To the question of ‘whose arbitration is it anyway – the parties’ or the arbitration tribunal’s?’, there is usually only one answer: it is the parties’ dispute.¹²⁰ It should therefore come as no surprise that the Queen Mary Survey 2010 found that “*parties contribute most to the length of proceedings*”,¹²¹ *i.e.* the very time and cost of which they disapprove.

By way of explanation for this apparent paradox, respondents to the survey considered that the factors which contributed most to the length of the proceedings were within the parties’ control, but that arbitral tribunals were best placed to render proceedings more efficient (followed by arbitral institutions and, lastly, the parties themselves).¹²² Hence user dissatisfaction and the first three Delos Principles.

An alternative explanation formulated by a senior in-house counsel at a 2009 GAR roundtable on time and cost in international arbitration, and echoed by a leading arbitrator, is “*the perceived lack of alignment between the parties, their outside counsel, the arbitrators and the arbitration institutions*”.¹²³ Both illustrated this statement by reference to the commonly found time-based fee structure of law firms and the suggestion that “*it may not always be in their clients’ best interest to go that extra mile*”;¹²⁴ equally, as observed by another leading arbitration practitioner participating in the roundtable, “*“truth” is expensive [...] Parties may have to take a view at some point on what priority they place on getting to the absolute truth*”.¹²⁵

¹²⁰ See, *e.g.*, V.V. Veeder, *supra* fn. 61, p. 35; for another perspective, see, *e.g.*, V.V. Veeder, Chapter 15: *Whose arbitration is it anyway—the parties’ or the arbitration tribunal’s?: an interesting question?*, in Newman, Hill (eds.), *The Leading Arbitrators’ Guide to International Arbitration* (JurisNet, 2008, 2nd ed.).

¹²¹ Queen Mary Survey 2010, p. 32.

¹²² *Ibid.*; see also Karl Hennessee, Chapter 4: *In-House Counsel: Why they should be more Involved in the Arbitral Process*, Mourre *et al.* (eds.), *Players Interaction in International Arbitration*, (2012) 9 Dossiers of the ICC Institute of World Business Law 42, p. 44.

¹²³ See the remarks by Andrew Clarke, echoed by Wolfgang Peter, both as reported in *The dynamic of time and cost*, GAR dated 1 May 2009.

¹²⁴ *Ibid.*

¹²⁵ See the remarks by David Brynmor Thomas, as reported in *The dynamic of time and cost*, GAR dated 1 May 2009.

Another illustration of interest-based analysis may be found in the debate over party-nominated arbitrators or unilaterals – see, *e.g.*, Jan Paulsson, *supra* fn. 118; Albert Jan van den Berg, *Dissenting Opinion by Party-Appointed Arbitrators in Investment Arbitration*, in Arsanjani *et al.* (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2011), p. 834; Alexis Mourre, *supra* fn. 117; Charles N Brower *et al.*, *supra* fn. 111.

To the extent that such party-counsel misalignments may be the result of a knowledge gap between the two, the ICC has developed a useful *Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration*, which was published in 2014. Law firms have also sought to address user concerns through public commitments towards their clients as to how they might strive to control time and costs in arbitration, such as the 2010 ‘Debevoise Protocol’.¹²⁶

Yet the persistent dismay over time and costs¹²⁷ notwithstanding such initiatives may require another perspective on the issue raised above of a potential misalignment of interests – one that considers the varied interests of the participants in the dispute resolution process, the existing incentives and disincentives, and whether the whole is coherent; and one that calls for a response that considers orienting conduct as a complement to initiatives designed to inform and guide such conduct.

Examples of such an interest-based perspective are the four-fold incentive scheme designed by Delos for the active engagement of arbitrators, the Delos identification of safe seats, which links ‘safety’ with the time and cost schedules in order to help address due process paranoia, reduce the risk for parties of additional controversy and promote more diverse and sophisticated offerings and practices for the ultimate benefit of users, and the procedure under the Delos Rules for the formation of arbitral tribunals, which encourages anticipation and cooperation between the parties in order to exercise their autonomy to select themselves the members of the arbitral tribunal.

This last example, which focuses on one specific stage of arbitral proceedings, points to the broader contribution parties and their counsel may make to greater efficiency in the conduct of arbitrations, in particular through a keen emphasis on anticipating and tackling issues early, *i.e.* preparation. The developments that follow consider the specific features of the Delos Rules that incentivise parties and counsel towards greater preparation both prior to the start of formal proceedings (*a*) and once an arbitration has begun (*b*).

(a) ‘A stitch in time saves nine’, or how to achieve greater efficiency in arbitration through advance preparation

The earliest stage at which disputes may be anticipated is when parties enter into a relationship (*i*). Once a dispute has arisen, further incentives may be

¹²⁶ *Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration* (2010); see also *Arbitration 2.0: A Manifesto for Efficiency in International Dispute Resolution*, by Perkins Coie (2014).

¹²⁷ See, *e.g.*, Queen Mary Survey 2015, p. 7.

deployed to help parties either settle the dispute or otherwise prepare to engage efficiently in an arbitration (ii).

i. Anticipating dispute-related issues at the contract formation stage

As is known, a well-conceived and drafted contract materially reduces the risk of disputes. Clear language and definition of each side's obligations combined with clear provisions on how the parties may exit their relationship are the first answers in terms of dispute prevention. While a detailed discussion of contracting is beyond the scope of this paper, four points may usefully be addressed here:

First, it is standard practice for arbitral institutions to make available a model arbitration clause. Such clauses typically provide for a broad mandatory reference to arbitration together with a designation of any administering institution and/or its rules, the language of the arbitration, the place of arbitration and the size of the arbitral tribunal, thus significantly reducing the risk of peripheral disputes grafting on to the main conflict. Delos provides a model arbitration clause, which differs from standard model clauses by being prescriptive about the place of arbitration (Delos Principle 2) and the size of the arbitral tribunal (Delos Principle 3).¹²⁸

In addition, some institutions have also suggested stepped, escalation or multi-tiered dispute resolution clauses, which promote pre-arbitration mechanisms for resolving disputes, including negotiation and mediation.¹²⁹ Delos recommends a pre-arbitration negotiation period, as discussed below.

Secondly, it is advisable for parties to agree on the governing law for their contract. Some institutions, including Delos, provide template language¹³⁰ while others simply draw the parties' attention to this question.¹³¹

¹²⁸ Delos also makes a recommendation as to the language of the arbitration, namely English and French at present, based on the languages for which it is best equipped today to administer arbitrations; further languages will be added in due course.

¹²⁹ See, e.g., the AAA (2013) and ICDR (2014) mediation clauses and the ICC mediation (2014) and dispute board (2004) model clauses.

¹³⁰ See, e.g., the DIS (1998), LCIA (2014), SCC (2010) and SIAC (2016) model arbitration clauses.

¹³¹ See, e.g., the ICC model arbitration clause (2012). The HKIAC's model arbitration clause (2013) suggests language for the law applicable to the arbitration agreement (but not for the governing law of the contract). While this provides greater clarity, it also reduces the flexibility for an arbitral tribunal or a court at the seat of arbitration to decide in favour of a law that could uphold the reference to arbitration (comp. with the approach taken under the Swiss Federal Statute of Private International Law, section 178(2)).

Thirdly, it is also advisable for parties to consider in their contract whether to provide for the confidentiality of any future dispute, given the varying positions on this question found in arbitration laws, including those of the Delos safe seats.¹³² Certain institutions have addressed this uncertainty by providing for the confidentiality of arbitrations conducted under their rules.¹³³ To the extent that the confidentiality of any arbitration (and the confidentiality of their work and relationship more broadly) is important to users, it is something that they should be anticipating at the time of entering into their arbitration agreement rather than taking a chance on the *lex arbitri* or the designated institutional arbitration rules. Delos has accordingly made available the following model clause for parties who wish to keep their arbitration and its outcome confidential:

The parties agree to keep confidential the existence and contents of the arbitration and the written and oral pleadings and all documents produced for or arising from the arbitration, save as may be required by legal duty or to protect or pursue a legal right.

Fourthly, Delos has set up a contract-registration system.¹³⁴ Delos strongly recommends that its users register their contracts with Delos following their signature, by simply e-mailing a copy thereof to Delos.¹³⁵ Certain companies now routinely copy Delos when communicating the signed copy of their contract to their counterparties; Delos responds shortly after by communicating a ‘Contract Registration Number’ (CRN).¹³⁶ In addition to helping Delos anticipate arbitrator needs, as seen above, and the positive network effect generated by registration, parties derive four more specific benefits from this process: (i) it has helped certain smaller companies achieve a level of discipline in finalising their contracts and thus reduced their legal risks, where they might otherwise conduct relationships on an uncertain premise; (ii) for certain smaller companies (including start-ups), this added layer of formalism to their contracting processes has reinforced their credibility towards their counterparties; (iii) contract registration has also addressed an organisational and legal security challenge faced by many

¹³² *E.g.*, contrary to the general confidentiality obligations found under English, Hong Kong, New Zealand, Portuguese and Singaporean law, the default position under Australian, French, Korean and Swedish law is the absence of confidentiality of international arbitrations seated in those jurisdictions; see Global Arbitration Review, *Commercial Arbitration 2016*.

¹³³ See, *e.g.*, DIAC Rules (2007): Art. 41; DIS Rules (1998): Art. 43; LCIA Rules (2014): Art. 30; HKIAC Rules (2013): Art. 42; SCAI Rules (2012): Art. 44; SIAC Rules (2016): Art. 39.

¹³⁴ This registration system is referenced at para. 5 of Appendix 4 of the Delos Rules.

¹³⁵ The e-mail address presently used for this purpose is info@delosdr.org.

¹³⁶ See Art. 5 of Appendix 4 to the Delos Rules.

companies, which not infrequently misplace important documents, including contracts; and (iv) in case of dispute, parties benefit from a lower cost schedule, as set out at Appendix 4 of the Delos Rules.

ii. *The Delos pre-arbitration negotiation period*

Once a dispute has arisen, parties will usually first seek to resolve it among themselves, as this is the most time- and cost-efficient outcome and helps to preserve the relationship. In this respect, an arbitral institution that recommends a pre-arbitration negotiation period and provides suggested contractual language to this effect does no more than to formalise good business practice.

Delos has put a time and cost price to this cooling-off phase in consideration of its importance to the efficient resolution of the parties' dispute. Indeed, as indicated in the notes to the suggested contractual language, this time is precious for parties to assess their positions carefully as it may assist them with settling their dispute and, once proceedings have begun, with engaging in an efficient proceeding (and therefore save time and cost later on).¹³⁷ The Delos Rules accordingly provide for a five-part scheme of incentives, as follows:¹³⁸

First, there is a financial incentive. Anticipating the preparation of an arbitration can be costly in terms of management time, for example to conduct fact-finding with the key people involved in the dispute and to retrieve relevant documents,¹³⁹ and costly as a result of instructing counsel early. These costs, which benefit both the pre-arbitration negotiations and, in the absence of a settlement, the likely ensuing arbitration, are recoverable in a Delos arbitration through the express power given to arbitral tribunals to allocate the costs incurred by the parties "*in connection*" with the arbitration (Article 7.4(c)); arbitral tribunals may thus allocate parties' internal and legal costs of pre-arbitration negotiations.¹⁴⁰ Parties should accordingly invest in

¹³⁷ See, e.g., the remarks by Andrew Clarke, Anne-Véronique Schlaepfer and Laurent Gouiffès as reported in *The dynamic of time and cost – the sequel*, GAR dated 15 July 2009; Jean-Claude Najjar, *How to Mitigate Legal and Arbitration Costs: Considerations by a User*, (2013) 17 ICCA Congress Series 305-320; remarks by Isabelle Hautot as reported by Kyriaki Karadelis in *Singapore hears pleas for procedural variety*, GAR dated 3 December 2013: "*preparation at the outset is the most important tactic for controlling the proceedings*".

¹³⁸ These developments do not address the situation where it would not be advisable for a party to wait for the expiry of the negotiation phase to commence proceedings, e.g., if the claims are about to become time-barred.

¹³⁹ See, e.g., Jean-Claude Najjar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, (2009) 25:4 *Arbitration International* 515, p. 518.

¹⁴⁰ The arbitration rules of leading arbitral institutions appear to allow the recovery only of the costs incurred for the proceeding itself (including preparation of the request for

preparing their cases at the latest upon issuing/receiving a notice of dispute, and keep a clear record of the costs incurred as a result.¹⁴¹

Secondly, there is a practical incentive for respondents: Article 4.1 of the Delos Rules provides that, “[f]rom the date of (deemed) receipt by Respondent of the Notice of Arbitration and of the Filing Fee payment receipt, whichever is latest, Respondent will have seven days to submit a “Notice of Defence” or a “Notice of Defence and Counterclaim””. In order for respondents to be in a position to comply with this time-limit and not delay the proceedings from the very start, it is necessary that they and their counsel have a good understanding of their position ahead of time. In practice, defending counsel is not infrequently selected and instructed until after the start of proceedings, and therefore starts learning and assessing the case as it prepares the response to the notice of arbitration.

It follows from the above that it is in the interest of claimants seeking an efficient resolution of their dispute to ensure that, prior to the start of proceedings, they have given the opposing side adequate notice and time to develop their position on the dispute. In this respect, the language proposed by Delos for a pre-arbitration negotiation period provides both disputing sides with certainty as to when the ‘preparation clock’ starts at the latest, while allowing any future claimant a legitimate expectation that the future respondent has had a contractually agreed reasonable amount of time to prepare for any efficient proceeding. This time-period should accordingly be defined carefully by both sides at the time of concluding their contract.

Thirdly, where at least one party begins an arbitration unprepared, all of the parties take the risk discussed above in relation to Delos Principle 3 that they will not be able to nominate the members of the arbitral tribunal.

Fourthly, while the premise of the Delos cost schedules found at Appendix 4 to the Rules is to provide parties with a measure of predictability, Article 9.7 states that, “[a]t any stage prior to the delivery of the final Award, DELOS may adjust the arbitration costs to take into account (a) any significant change in the claims of the parties, the complexity of the dispute, the

arbitration); see, e.g., in addition to the language of these arbitration rules: *The Secretariat’s Guide to ICC Arbitration*, supra fn. 29, para. 3-1492; CI Arb International Arbitration Guideline, *Drafting Arbitral Awards Part III – Costs* (2016), p. 13. Nonetheless, there have been instances where arbitral tribunals have allowed the recovery of pre-arbitration negotiation costs: see, e.g., ICC Commission Report, *Decisions on Costs in International Arbitration*, (2015) 2 ICC Dispute Resolution Bulletin, para. 99.

¹⁴¹ The following provides a helpful checklist for anticipating the start of formal proceedings: Michael McIlwrath, *Anti-Arbitration: 10 Things To Do Before The Arbitration Gets Underway*, Kluwer Arbitration Blog, dated 12 November 2011.

anticipated time and expenses incurred by the Tribunal and/or the conduct of the arbitration, and/or (b) the termination of the arbitration, including by processing reimbursements to the parties in proportion of their respective payments.”

In other words, parties who come to arbitration unprepared to an extent that materially undermines the efficiency of the proceeding should be ready to bear the cost of such inefficiency (and the same applies where such inefficiency results from strategic choices made by the parties). Conversely, parties who handle the arbitration as one route to resolving their dispute may reduce the arbitration costs by obtaining a partial refund thereof in case of settlement prior to the rendering of a final award. This ‘price’ factor is partly reflected in the arbitration rules of leading arbitral institutions, which typically take into account a change in the amount and/or complexity of the claims, and/or the work performed by the arbitral tribunal.¹⁴²

Finally, while the Delos schedules found at Appendix 4 of the Rules are also intended to provide parties with a measure of time predictability, Article 8.3 states that the Delos Time Notice may be modified notably “*by agreement of the parties*”. Exceptional circumstances aside, this option lays ultimate responsibility with the parties for the overall efficiency they expect of their arbitration: in an environment that requires proactivity by the arbitrators, extensions of the Delos Time Notice without negative impact on the arbitrators’ fees reflects the inability of parties to participate in efficient proceedings, or their positive choice for less efficient proceedings.

The preceding developments on the Delos pre-arbitration negotiation period call for three concluding observations: (i) parties who are looking for the efficient resolution of their disputes need to be prepared from the outset for such a process; (ii) such preparation in turn is of assistance to parties to settle their dispute without the need for arbitration; and (iii) the expectation of a time- and cost-efficient dispute resolution process adds leverage for the party seeking to engage in meaningful discussions, as dilatory negotiation tactics may be called as a bluff by initiating proceedings, with the possibility of a first decision within 2.5-6.5 months.

(b) The case against prolixity, or how to enhance efficiency during arbitration proceedings

If arbitration proceedings become necessary, the claimant will initiate proceedings by filing a Notice of Arbitration, prepared in accordance with the

¹⁴² See, e.g., Klaus Sachs, *supra* fn. 26, paras. 5-7 to 5-17. While the various fee schedules referenced in the article have since been updated, the principles have remained the same for present purposes.

model set out at Appendix 1 of the Delos Rules (see Article 3.2(a)); and the respondent will respond through a Notice of Defence (and Counterclaim), prepared in accordance with the model set out at Appendix 2 of the Delos Rules (see Article 4.1). While such models are in one sense no more than an alternative presentation of the numbered lists found in the rules of leading arbitral institutions, they differ in two specific respects:

First, for users and counsel unaccustomed to international arbitration, such templates help to make the process more accessible. At the same time, the use of templates makes it easier for Delos to process new cases rapidly, notably for the purposes of forming the arbitral tribunal and setting the arbitration costs.

Secondly, these templates are prescriptive in terms of how parties are to present their positions and supporting evidence. The claimant is thus required to provide:

a statement of up to a maximum of ten pages, setting out the background and nature of the dispute, and the issues in dispute. As part of this statement, please indicate whether, and for which issues and to what extent, you expect to require witness and/or expert evidence. In addition to the contract(s) to be provided under section 4 below, you may enclose with your Notice of Arbitration up to ten documents to support your claim(s).

Similarly, the respondent is required to provide:

a statement of up to a maximum of ten pages, setting out your position on the dispute and the claims [...]. If you have any comments on section 4 of the Notice of Arbitration [regarding the arbitration agreement], please provide these in a further statement of up to a maximum of ten pages. As part of the above, please indicate whether, and for which issues and to what extent, you expect to require witness and/or expert evidence. You may enclose with your Notice of Defence up to ten documents to support each of the two statements above. For the avoidance of doubt, where a document has already been provided by Claimant, it is not necessary to provide it again. [...] If you have a counterclaim, please set it out in a statement of up to a maximum of ten pages. You may enclose with your Notice of Defence and Counterclaim up to ten documents to support your counterclaim.

For counsel that is not entirely familiar with their client's case, these page and exhibit limits allow them to comply with the filing requirements without exposing their party unduly. For counsel who are well prepared, however, such limits are an opportunity for effective advocacy by allowing them to emphasise concisely¹⁴³ the key points¹⁴⁴ of their client's case.¹⁴⁵

¹⁴³ See, e.g., Constantine Partasides, *A Few Words on Prolixity in International Arbitration*, in Carlevaris *et al.* (eds.), *International Arbitration Under Review – Essays in Honour of John Beechey* (ICC, 2015), pp. 301-305.

In addition, the requirement not typically found in arbitration rules for the parties to indicate any anticipated witness and/or expert evidence provides all participants with further insight into each party's level of preparedness and the potential complexity of the case.

This information, combined with an effective presentation of the parties' positions and the possibility of anticipating the likely range of the Time Notice to be issued by Delos,¹⁴⁶ lays a solid foundation for all to prepare for the case management meeting (Article 7.3) by considering, for the arbitral tribunal, the sort of procedure required to resolve the dispute efficiently and, for the parties, the sort of procedure required to be able to make their case and test the other side's case efficiently,¹⁴⁷ bearing in mind their duty "to act in good faith and assist the Tribunal to further the principal purpose of the [Delos] Rules" (Article 1.4).¹⁴⁸

¹⁴⁴ See, e.g., Eric Robine, *What Companies Expect of International Commercial Arbitration*, (1992) 9:2 *Journal of International Arbitration* 31, at 1.2(a): "[...] avoid introducing questions contrived to meet the needs of the case. [...] Not only is such a strategy illusory, since the arbitrators are unlikely to be taken in, but it is also dangerous [and inefficient]"; Michael E Schneider, *Lean Arbitration*, *supra* fn. 25, p. 127.

¹⁴⁵ As pointed out by Lucy Reed, brevity is not a substitute for quality and, paraphrasing her lecture, a focused introduction in this initial round of submissions does not preclude the later submission of detailed pleadings with extensive support, once the appropriate procedure and timetable has been discussed with and confirmed by the arbitral tribunal. See Lucy Reed, *Arbitral Decision-making*, *supra* fn. 45, pp. 97-98.

¹⁴⁶ Following the due date for receipt of the Notice of Defence (and Counterclaim), Delos assesses the value of the dispute and fixes the arbitration costs (Art. 9.2). Once these have been paid, Delos issues the Time Notice, which takes into account the value of the dispute by reference to the time and cost schedules at Appendix 4.

¹⁴⁷ In seeking to achieve the same purpose, certain leading arbitral institutions provide the possibility for parties to submit from the start full statements of claim and of defence (see, e.g., DIAC Rules (2007): Arts. 4.2 and 5.2; DIS Rules (1998): Arts. 6.1 and 9; HKIAC Rules (2013): Arts. 4.6 and 5.3; SCAI Rules (2012): Arts. 3.4(a) and 3.8(b); SIAC Rules (2016): Arts. 3.2 and 4.2). In line with the approach taken in other leading arbitration rules (see, e.g., LCIA Rules (2014): Arts 1.1(iii) and 2.1(iii); UNCITRAL Rules (2013): Arts. 3.3(d)-(e) and 4.2(e); SCC Rules (2010): Arts. 2(ii) and 5.1(iii)), it seemed preferable in the interest of starting proceedings rapidly (both pre- and post-filing of the Notice of Arbitration), that arbitral tribunals receive a limited amount of information that may not all be focused rather than a significant volume of potentially loosely organised submissions and supporting documents of varying levels of immediate relevance.

¹⁴⁸ With reference to the duty to act in good faith, see, similarly, LCIA Rules (2014): Art. 14.5 and 32.2; SCAI Rules (2012): Art. 15.7. See also the IBA Guidelines on Party Representation in International Arbitration (2013) and ICC, *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*, dated 1 March 2017, para. 32.

At this critical juncture, users concerned about time and cost should participate actively with their counsel in shaping the process¹⁴⁹ and, indeed, it is considered better practice for clients to attend the case management meeting;¹⁵⁰ such active user participation is furthermore beneficial throughout the proceeding, including to assist counsel in gaining access to key documents and people in support of the client’s position.¹⁵¹

Finally, through such active participation, users avoid any risk of procedural or calendar misalignment with their external counsel and achieve a greater sense of ownership of the dispute resolution process, as reflected by their input as to their preferred form of award¹⁵² and the possibility under the Delos Rules for the parties jointly to request the arbitral tribunal to provide them with “*a non-binding indication of its likely decision on all or part of the issues in dispute*”, at any time prior to the arbitral tribunal delivering its draft award to Delos (Article 8.7).

In sum, while arbitrators and arbitral institutions inevitably have their share of responsibility in achieving greater efficiency in international arbitration, users and their counsel have an important part to play as well through anticipating risks at every stage and working closely together both prior to and during arbitration proceedings. Not only can the time and cost invested in early preparation assist with settlement discussions and otherwise save time during the proceeding, that cost is also recoverable under the Delos Rules. Conversely, where parties are not sufficiently prepared prior to the start of an arbitration, such may result in compounding time and cost inefficiencies once proceedings have begun.

¹⁴⁹ See, e.g., ICC, *Guide for In-House Counsel and Other Party Representatives on Effective Management of Arbitration* (2014), p. 5; see also Jean-Claude Najjar, *supra* fn. 139, p. 525; Karl Hennessee, *supra* fn. 122, p. 44.

¹⁵⁰ See, e.g., AAA Rules (2013): Art. R-21(a); ICC Rules (2012 / 2017): Art. 24.4; ICC Commission Report, *Controlling Time and Costs in Arbitration* (2012), para. 30; see also Klaus Sachs, *supra* fn. 26, para. 5-38.

¹⁵¹ See, e.g., in addition to the references at fn. 149 above: Douglas Thomson, “*A Tale of Two Clients*” – *how parties can best assist their case*, GAR dated 26 February 2016, notably the remarks of Peter Wolrich.

¹⁵² See the discussion above under Delos Principle 1—section (a)(iv). Art. 8.2 of the Delos Rules allows parties to agree to vary the requirement for arbitral tribunals to provide reasons for their award, the default position being that arbitral tribunals must provide reasons for their decisions, albeit in a manner proportionate *inter alia* to the value and complexity of the dispute, the importance of given issues to the parties and the parties’ need for a roadmap for the future of their relationship and/or the future use of similar contracts.

Conclusion

In the early days of international commercial arbitration, the ICC considered arbitration as an effective means of dispute prevention.¹⁵³ It is unclear that arbitration as it is generally practised today is still able to fulfil such an original promise, save perhaps through the time and cost disincentive to arbitrate, especially for smaller disputes. It is further unclear that arbitration today provides users with sufficient time and cost predictability to allow for adequate risk mitigation and business planning.

While various user voices have accordingly suggested enhancing speed at the cost of other considerations,¹⁵⁴ many in the international arbitration community have expressed the hope and proposed solutions to enhance efficiency without compromising on fairness or the quality of the decision-making process.

To the founders of Delos, it appeared that there was a certain systematic combination of incentives and innovations, known or new, that could make a positive contribution to the fair and efficient resolution of disputes through arbitration. Such a combination, presented in this paper by reference to four principles, could not be implemented within the framework of existing structures and thus led to the creation of a new arbitral institution.

Looking ahead, there are many possibilities for the development of this institution, including consideration of joinder and consolidation issues, emergency arbitration, cross-claims among claimants or respondents, the role of arbitrators in settling disputes, the cost allocation implications of unsuccessful settlement negotiations, arbitrator and expert track record transparency and the availability of additional safe seats.

For now, however, it is enough to note that a number of (smaller) companies have inserted Delos arbitration clauses into their contracts and become ambassadors of an approach to arbitration that leverages its efficiency as an incentive to settle disputes rapidly.

¹⁵³ Florian Grisel *et al.*, *supra* fn. 3, para. 14.

¹⁵⁴ See, *e.g.*, remarks by Lara Levitan as reported in *Alternatives to the High Cost of Litigation*, (2006) 24:11 CPR International Institute for Conflict Prevention & Resolution 182, pp. 182-183; remarks by Alberto Ravell as reported by Kyriaki Karadelis in *Smart-arbitrating*, GAR dated 27 October 2014; remarks by Tim Williams as reported by Lacey Young in *Corporate counsel swap views in London*, GAR dated 1 June 2016.