Rethinking Arbitration in the Contemporary Commercial Landscape – Enhancing Efficiency, Adaptability, and Results

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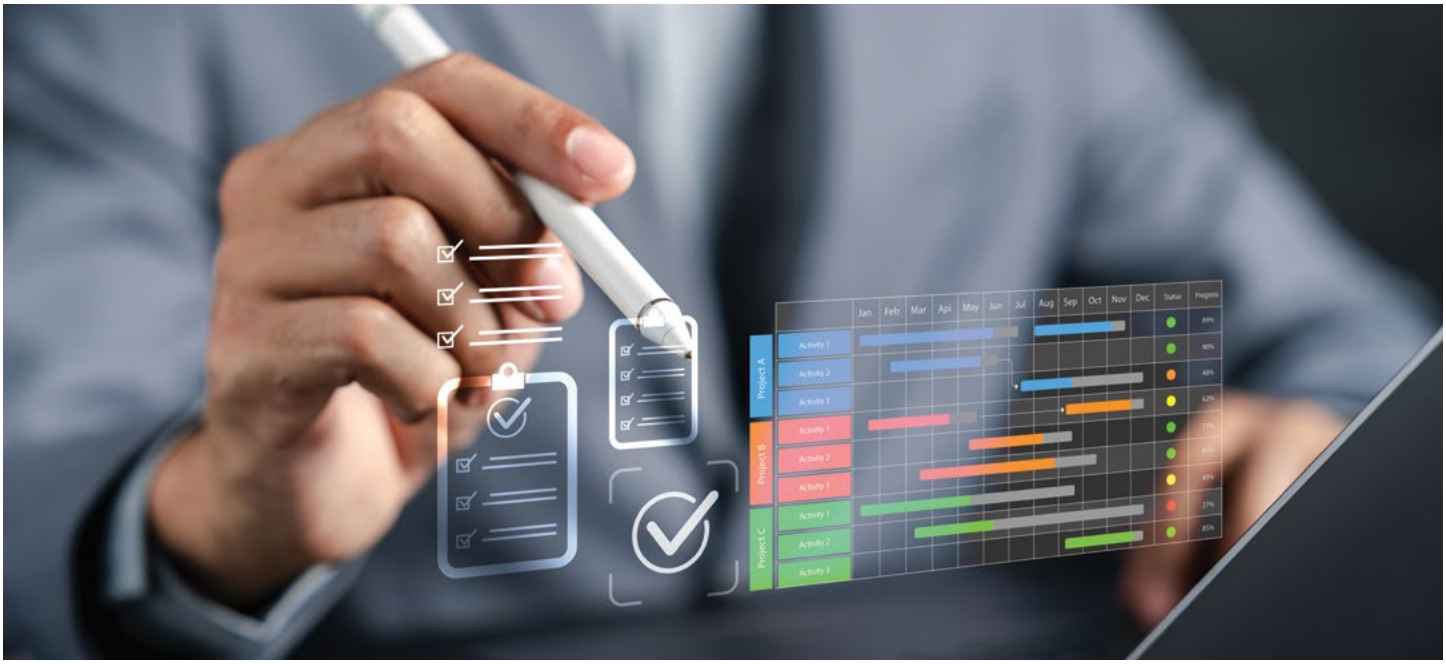

Transformational changes in the contemporary commercial landscape are prompting counsel, arbitrators, and administering institutions to rethink the arbitral process in an effort to better align it with evolving business objectives. While demands from arbitration users for more time and cost efficiencies are manifesting, external pressures toward the same goals arise from the proliferation of specialized courts that promise equivalent, if not more effective and efficient, dispute resolution tools.

Through that prism, and in line with the theme of New York Arbitration Week 2025, "Searching for the North Star," a program entitled "Rethinking Arbitration in the Contemporary Commercial Landscape – Enhancing Efficiency, Adaptability, and Results,"[1] focused on certain measures to strengthen arbitration's position as the preferred mechanism for the resolution of commercial disputes. As the following summary reports, the panelists suggested alternative, practice-oriented measures and highlighted considerations aimed at streamlining the arbitral procedure and increasing the quality of awards. These included: (I) Revisiting the advisability of *ex parte* discussions for chair selection; (II) Assessing the benefits of arbitrator complementary skills in the composition of the Tribunal; (III) Efficiency-focused case management tools; (IV) Processes to maximize the benefits of expert testimony and (V) The use of generative artificial intelligence.

I. *Ex Parte* Chair Selection Discussions

Pre-appointment interviews and communication between counsel and their party-appointed arbitrators during the chair selection process reflect common practice and comport with leading institutional rules. Appreciating the potentially negative impact of *ex parte* communications for procedural efficiency and legitimacy is, however, crucial. *Ex parte* communications during the chair selection process can unnecessarily stretch the timeline of the proceedings. In case the impartiality of the arbitrators is in doubt, related challenges during the constitution of the tribunal and at the enforcement stage may further delay the proceedings or the monetization of the award. Substantively, communicating *ex parte* during the chair selection process may shift tribunal dynamics and

undermine the trust that the parties have placed upon party-appointed arbitrators and ultimately the tribunal itself.

Chair selection processes that do not include *ex parte* discussions by either party can lead to a quicker constitution of the tribunal while, at the same time, upholding procedural integrity. Parties can retain their influence over chair selection by empowering both party-appointed arbitrators to lead the selection process jointly. For example, and consistent with the overarching core principle of party autonomy, the parties may jointly agree to forgo *ex parte* discussions and instead rely on a process whereby the party-appointed arbitrators jointly suggest one or more chair candidates to the parties, to which they can either both agree or reject. So long as doubts on impartiality are eliminated, party-appointed arbitrators may employ alternative, creative methods to select the chair, drawing upon the individual circumstances and party preferences to facilitate consensus.

II. Expertise-Based Composition of the Tribunal

Ideally, the chair's unique strengths will complement those of the party-appointed arbitrators according to the case characteristics. More generally, beyond legal expertise, Tribunals with diverse experience and backgrounds are likely to enhance the quality of the results and procedural economy. Industry and country knowledge, for instance, or language skills might be some of the factors to take into consideration. Equally, lived in-house and commercial experience can enhance decision-making and aid the arbitral process.

Business and transactional fluency can allow for a more nuanced, in-depth understanding of financial data and commercial structures. Financial literacy and meaningful related experience can help a tribunal ask experts targeted questions and advance damages assessments and valuation analysis. Tribunal members with commercial experience can inform the decision-making process with real corporate practice, in the same way as an arbitrator with industry expertise can familiarize the tribunal about specific industry practices.

More concretely, firsthand experience in negotiations and drafting of contracts may allow for a more ready understanding and evaluation of the underlying facts and transactional idiosyncrasies. A nuanced view can also contribute to streamlining document discovery. It can expose privilege considerations, especially as they relate to in-house communications that are often complex. Lastly, understanding the underlying economics of disputes and impact on other company activities, including deal-making and the availability of financing options, can be helpful in better assessing arbitration budgets and tighter timelines.

III. Isolating Core Issues Through Effective Case Management

There is a growing need for arbitrators to consider procedural measures that, if permitted, can lead to cost and time efficiencies throughout the arbitration lifecycle. Discovery requests and legal arguments often go beyond the core issues of the dispute and what truly is necessary for its resolution. The tribunal will contemplate means to limit the scope of submissions and discovery to what is necessary for the parties to focus on the key matters that impact the dispute and decision-making. Notably, when the outcome of the case hinges upon one or two issues, shifting the focus accordingly can significantly speed up the proceedings.

One effective procedural tool enshrined in several leading institutional rules, specifically in larger disputes that will generally take longer to resolve, is the disposition of certain issues in advance of the hearing on the merits. In certain circumstances, a Tribunal may also consider the bifurcation of proceedings for a more efficient process or at the request of the parties offer an early assessment on some key issues. An early assessment by the tribunal may not only allow the parties to focus on core issues, but also potentially help them independently reach a settlement.

IV. Maximizing Quantum-Related Expert Input

The calculation of damages and, more generally, valuation-related disputes can often be complex and typically require significant input from multiple experts. Beyond different understandings of the facts, assumptions, and methodologies, a significant source of additional time and cost in the presentation of quantum evidence can be a failure of quantum experts to directly engage with or respond to opposing positions.

The tribunal has several options for structuring a more efficient quantum determination and avoiding "ships passing in the night." Instructing experts to identify the disputed and undisputed issues in a joint statement before the submission of their reports can lead to more targeted reports that better serve the arbitrators. Parallel examination of the experts together in front of the Tribunal offers an opportunity to ask questions concurrently, clarifying differences and minimizing the potential that the differences in methodology will remain unexplained.

V. Harnessing the Capabilities of Generative AI

Use of advanced AI in legal practice has become ubiquitous. It corresponds with an increasing demand of clients to harness the AI efficiencies to reduce costs. For the same reason, arbitral institutions are embracing AI deployment in case management and, with a limited scope, in decision-making,

as is the case in document-only construction disputes under the AAA rules. AI is already embedded in the workflows of counsel: it can assist expertise-based selection of arbitrators by sifting through vast profile databases and can be tasked with legal research and analysis, drafting, (live) translation, summarization, and review of documents. Specific tools allow counsel to train their cross-examination skills on the case at hand.

Despite its transformative nature, concerns relating to the use of AI in arbitral decision-making, and inherent factors, such as the potential of "hallucinations," evidence manipulation, lack of transparency in "reasoning" and data protection, remain. Skepticism regarding its deployment in arbitration also arises from limited regulation and related case law, as well as potential regulatory inconsistencies across jurisdictions that may affect the enforceability of awards. More innovative and reliable uses of AI in arbitration are underway, with targeted attempts by law firms, universities, companies, and institutions to explore new uses to foster greater efficiency as the technology matures and the regulatory landscape takes shape.

VI. Conclusion

The arbitral process is tailored to achieve effective and precise adjudication of the dispute at hand. It is this core tenet that bars generalized measures and universal solutions. Addressing procedural inefficiencies and fathoming new ways to optimize procedure and results is essential to keep arbitration in pace with developments in the contemporary commercial landscape.

Enhancing the chair selection process, prioritizing a practical and commercially focused approach in selecting arbitrators, leveraging tailored case management tools to isolate core issues and maximize the value added by quantum experts, and leveraging the expansive capabilities of generative AI carefully have the potential to make a real impact on the efficiency of the arbitral process and quality of its outcome. Arbitrators, counsel, and administering institutions will continue to refine best practices in an effort to enhance efficiency while retaining or improving the quality of the result and thus maximizing the key advantages of arbitration as the dispute resolution mechanism of choice for commercial disputes.

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Endnote

1. The program panelists were Myrna Barakat Friedman, Michael Glackin, Annie Lesperance, Chris Polson and Javier Rubinstein. During the program, the panelists engaged with representatives from the leading administering institutions: Gwenllian Kern-Allely (ICC), Melissa Leiland (JAMS), Abbey Pellino Hawthorne (ICC), Yanett Quiroz Valdovinos (ICDR) and Jeff Zaino (AAA).