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Project Management in International Arbitration

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"Economiser du temps et de l'argent" est une demande habituelle en arbitrage international. Cependant, il peut s'agir d'un objectif problématique puisqu'il ne prend pas toujours en compte certains aspects d'un arbitrage, en particulier son cycle de vie qui s'adapte et répond aux changements, ainsi que l'exigence d'un standard de qualité élevé. Cet article propose de se concentrer à la place sur la gestion de projet en arbitrage. Un arbitrage devrait être perçu comme un projet qui requiert une évaluation complète des objectifs des parties et d'autres parties prenantes, et une bonne gestion de projet pour atteindre ces objectifs. Les arbitres peuvent apprendre énormément des autres industries quant à la gestion de projet. Appliquer des compétences de gestion de projet à l'arbitrage comprend une planification appropriée, l'identification et la gestion de l'étendue du travail, l'implication des parties prenantes, l'organisation des problématiques et des preuves, et la conclusion adéquate de l'arbitrage.

"Saving time and costs" is a common demand in international arbitration. However, this can be a problematic goal to aspire to, as it can fail adequately to take into account all aspects of an arbitration, in particular the adaptive or change-driven lifecycle of the arbitration and the requirement for a high standard of quality. This paper proposes that the focus in international arbitration should instead be on project management. An arbitration should be viewed as a project that requires a full assessment of the objectives of the parties and other stakeholders, and proper project management in order to achieve those objectives. Arbitrators can draw on a considerable body of knowledge about project management from other industries. Applying project management skills to arbitration includes appropriate planning, identifying and managing work scope, engaging with stakeholders, organising issues and evidence, and closing the arbitration properly.

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I. INTRODUCTION

There are many qualities that define a good arbitrator. They must have sound judgment, good analytical capabilities, interpersonal skills, and a strong work ethic. Advanced project management skills are also increasingly required.

Project management is distinguished here from 'saving time and cost', a phrase which has become prevalent in international arbitration. It is a popular theme of many conferences and commentaries,[1] and frequently a measure by which institutions evaluate themselves in their publications.[2] It is also influencing the shape of new legislation. In India, for instance, the Arbitration and Conciliation Act, 1996 has recently been amended to restrict arbitration proceedings to a 12-month maximum. No one would deny that time and cost are important to arbitration stakeholders;[3] but as this article suggests saving time and saving cost can be problematic standards to aspire to. A more holistic understanding of arbitration is needed, as a project that requires a full assessment of the objectives of the parties and other stakeholders, and proper project management in order to achieve those objectives.

II. WHAT'S WRONG WITH SAVING TIME AND COST?

This section outlines five reasons why saving time and cost can be a problematic goal in international arbitration.

A. It undervalues other objectives

First, saving time and cost is not among the main objectives of arbitration, which differ from proceeding to proceeding. As discussed below, the principal end in all cases is to achieve a resolution of the parties' dispute. Time and cost savings are secondary objectives, or factors that provide parameters within which the principal objective of resolving the dispute is achieved. These secondary objectives must not divert attention from the main goal.

There are also other factors at play in an arbitral proceeding. Parties always want the opportunity to present their case. The UNCITRAL Model Law defined this as a "full" opportunity, although the 2010 UNCITRAL Rules changed this to a "reasonable" opportunity,[4] a shift that has

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1 See e.g. Jeorg Risse, "Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings" (2013) 29:3 Arbitration Intl 453; Philipp A Habegger, "Saving Time and Costs in Arbitration" in Manuel Arroyo, ed, *Arbitration in Switzerland: The Practitioner's Guide* (Alphen aan den Rijn: Kluwer Law International, 2013) 1393; Christopher Newmark, "Controlling Time and Costs in International Arbitration" in Lawrence W Newman & Richard D Hill, eds, *The Leading Arbitrators' Guide to International Arbitration* (Huntington: JurisNet, 2008) 81; David Brown, "What Steps Should Arbitrators Take to Limit the Cost of Arbitration?" (2014) 31:4 Intl Arbitration 499; David J A Cairns, "Oral Advocacy and Time Control in International Arbitration" in Albert Jan van den Berg, ed, *Arbitration Advocacy in Changing Times* (Alphen aan den Rijn: Kluwer Law International, 2011) at 181-201.

2 See e.g. ICC Commission Report, "Controlling Time and Costs in Arbitration" (2nd Edition, 2012). London Court of International Arbitration, News Release, "LCIA Releases Cost Duration Data" (3 November 2015), online: <www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx>.

3 This is consistently found in surveys of international arbitration users. See e.g. Paul Friedland & Loukas Mistelis, "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration" (2015) Queen Mary University of London & White and Case LLP at 7.

4 UNCITRAL, Model Law on International Commercial Arbitration, UN Doc A/40/17, 7 July 2006. Art 18; UNCITRAL, Sixth Committee, Arbitration Rules, UN Doc A/65/465, 2010. Art 17(1). See Sophie Nappert,

not been appreciated by many parties, who still expect the right to be heard in full.[5] There can be a tension between keeping time and cost down, and the desire of the parties to have their cases heard.

In other situations, parties may not place much emphasis on time and cost factors at all. They may, for instance, agree to suspend proceedings for a considerable period of time if the circumstances call for it, without being concerned that this means their arbitration is registered in the statistics as taking a relatively long time.[6] They may even be willing to incur relatively large expenditure in order to achieve the desired result. Time and money may be relatively unimportant when placed within the context of the broader transaction costs, to adapt a phrase used by Ronald Coase,[7] resulting from an unfavourable outcome. Such examples highlight the fact that saving time and cost may sometimes be more a concern to other stakeholders in an arbitration, such as institutions or governments, than of the parties to an arbitration.

There is a trend for those other stakeholders to impose time limits on arbitrations. However, an arbitrator and the parties to an arbitration are usually in the best position to weigh up the risks to time and cost schedules for an arbitration, bearing in mind the available resources, and to build in contingencies for these, rather than having fixed limits imposed from outside. At the 1976 Pound Conference, Professor Frank Sander of Harvard University observed that, with regard to small claims courts in the US:

> … the evidence now seems overwhelming that the Small Claims Court has failed its original purpose; that the individuals for whom it was designed have turned out to be its victims. Small wonder when one considers the lack of rational connection between amount in controversy and appropriate process. Quite obviously a small case may be complex, just as a large case may be simple.[8]

In a similar vein, parties to an arbitration are at risk of becoming victims of fixed time limits imposed by other stakeholders.[9]

B. It undervalues quality

Arbitration proceedings must adhere to high standards in order to ensure a certain degree of quality. Time and cost savings, however, can come at the detriment of this goal. Unlike time and cost, which are easily quantifiable, quality can be difficult to measure. As some writers on

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Commentary on UNCITRAL Arbitration Rules 2010: A Practitioner's Guide (Huntington: JurisNet, 2012) at 69.

5 "Full opportunity" must also be understood in the context of the particular arbitration. A "full opportunity" in an emergency arbitration, for example, would look different from a "full opportunity" in a normal arbitration. But "full opportunity" is often understood by reference to the party's arguments, and not by reference to the constraints of the process.

6 For example, in two recent cases in which the author has sat as arbitrator, the parties have chosen to suspend the arbitration for over a year, for their own commercial reasons.

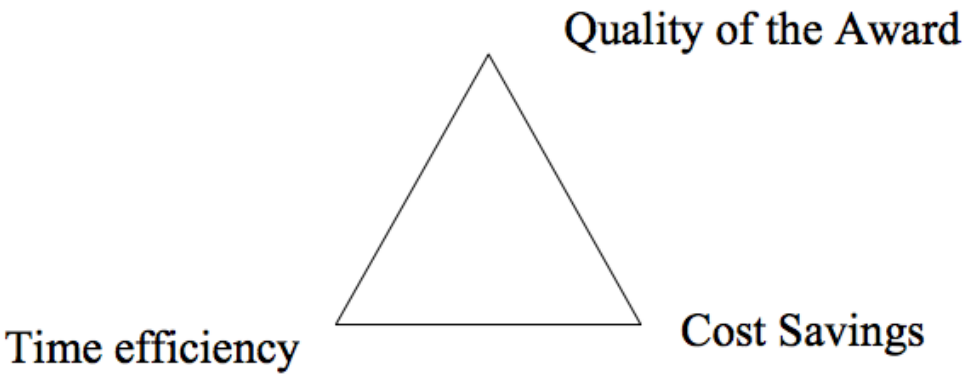
7 R H Coase, *The Firm, the Market, and the Law* (Chicago: University of Chicago Press, 1988) at ch 2.

8 Frank E A Sander "Varieties of Dispute Processing" in A. Leo Levin & Russel R. Wheeler, eds, *The Pound Conference: Perspectives on Justice in the Future* (Eagan: West Publishing, 1979) at 78.

9 See also Stephen Barker and Rob Cole, *Brilliant Project Management*, 3rd ed (Harlow: Pearson Education, 2012) at 23.

project management have put it, "[p]roject managers understandably respond to the pressure to deliver on time and somewhere close to budget. Quality can often end up as the poor relation to these two very obvious measures of success."[10]

Even if quality is accounted for, models of time and cost in international arbitration nevertheless appear ready to sacrifice it. A common trope in the analysis of time and cost in arbitration is the depiction of time, cost and quality as three corners of a triangle, as follows:[11]



The premise of such a depiction is that only some of these objectives can be achieved satisfactorily, with the others inevitably suffering proportionally. As Dr Joerg Risse observed:

> Parties to an international arbitration must choose now, by inserting a dot indicating their preferences, where their priorities lie: are they willing to maximize the quality of the award, regardless of time and costs? Then the dot will be close to the upper corner of the triangle. Or do they prefer to end their dispute quickly, even by a decision or mediocre quality? Do the parties prefer to save costs as to the arbitrators' fees and remuneration for outside counsel, trusting that the impact on the final award will be limited? Parties cannot evade an answer to these questions. If parties provide no answer, an automatism called 'international practice' will step in – and the result is the often criticized long and costly arbitral proceeding.[12]

This is not the only way to depict the relationship between time, cost and quality, however (the "triple constraints" of project management). In comparison, the Association for Project Management (APM), a leading project management organisation, based in the UK, suggests the following representation:[13]

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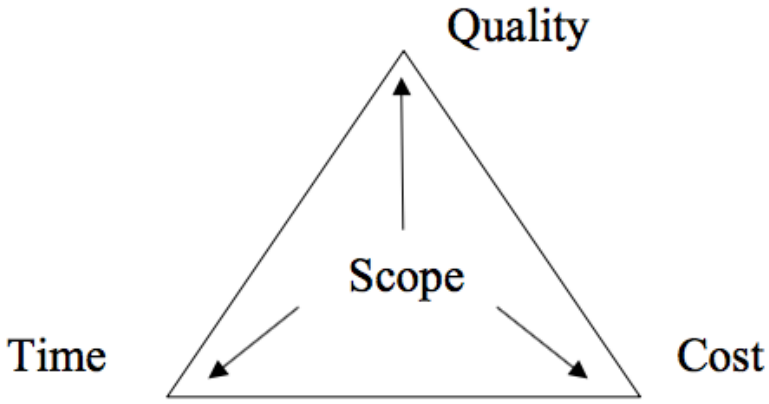
10 *Ibid* at 47.

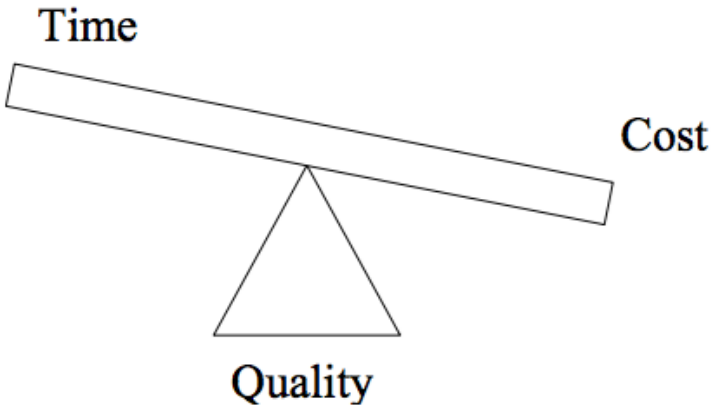
11 See Risse, *supra* note 1 at 455; Jennifer Kirby, "Efficiency in International Arbitration: Whose Duty is It?" (2015) 32:5 *J Intl Arbitration* 689 at 690. (Refers to this relationship as the Iron Triangle).

12 Risse, *supra* note 1 at 455.

13 See Association for Project Management, "What is project management?" (n.d.) *Project Management*, online: <https://www.apm.org.uk/WhatIsPM>.



In this formulation, time, cost and quality are three boundary points marking out the scope of the project: the party is not required to choose between them. Other depictions of the relationship between these three elements include the following diagram:[14]



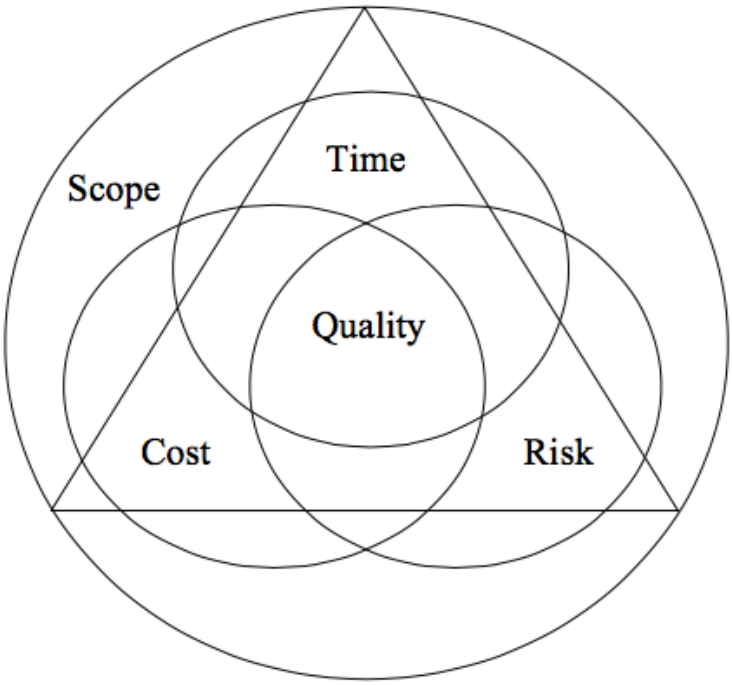
Here, quality is central to the outcome of the project, and time and cost are traded off against each other. Increased spending means the objectives are achieved in less time, and *vice versa.* [15]

Within the legal services industry, the following depiction has been used: [16]

14 Barker & Cole, *supra* note 9 at 75. This would particularly apply in a construction project, where increased spend typically means more people working on the project, and hence shorter time. It may not always apply in an arbitration, where increased spend may not necessarily result in shorter time.

15 Another formulation is W. Edwards Deming's view that when the focus is on quality, over time quality tends to increase and costs fall, because of the benefits of long-term relationships with a supplier committed to high quality standards. However, when the focus is on costs, over time costs tend to rise and quality declines: purchasing from the cheapest supplier usually results in additional costs, for example rework costs. He records one interviewee telling him: "We can not afford to purchase equipment and buildings at the lowest price. We have to be careful." See W. Edwards Deming, *Out of the Crisis* (Cambridge, Massachusetts: MIT Press, 2000) at 33.

16 The author is grateful to Rachael Moore of Ashurst LLP for this formulation. It draws on the work of Therese Linton of Sydney University.



Like the previous depiction, quality here is a non-negotiable item, while the scope is defined by time, risk and cost.[17]

C. It fails to identify the comparator

Thirdly, the goal of time and cost savings should require an objective standard by way of comparison, but this is usually not identified. Writing in 1989, Lord Mustill observed that:

> … it is to my mind undeniable that international commercial arbitration faces some serious problems. At least in its larger manifestations it can be too slow, too formalised and too expensive. It also lacks the procedural teeth which are the prime advantage of the courts. Nobody has yet discovered why the dinosaurs became extinct, but it is a reasonable surmise that their bulk was a significant factor. It would be a pity if arbitration went the same way. This is unlikely to happen, but it is at least worth asking whether a course of slimming might be in order.[18]

Writing in the 1980s, it is unlikely that Lord Mustill had the same absolute standard for time and cost in mind as current commentators. Inflation, at least, militates against this. If not by an absolute benchmark, then perhaps critics are thinking in relative terms. If so, it is never stated whether time and cost in that era's arbitrations are 10 per cent above the benchmark, or 50 per cent, or some other amount.

Alternatively, Lord Mustill's reference to "the courts" may be an indication that the

17 See generally Jim Hassett (for project management in the legal services industry), *Legal Project Management, Pricing, and Alternative Fee Arrangements* (Boston: LegalBizDev, 2013).
18 Michael Mustill, "Arbitration: History and Background" (1989) 6:2 *J Intl Arbitration* 43 at 56.

comparator is the time and cost of resolving a dispute through a state court system. However, time and cost vary considerably between court systems. The comparison is also tenuous since it might be said that users of arbitration pay a premium to avoid the possibility of appeal, the peculiarities of individual legal systems, and the centrally-mandated processes that one finds in state court.

No-one would disagree with Warren E. Burger when he said that: "Concepts of justice must have hands and feet … to carry out justice in every case in the shortest possible time and the lowest possible cost";[19] and the aphorisms of "justice delayed is justice denied" and "justice hurried is justice buried" are universally cited. But what is difficult is to identify what time and cost is "possible" in the circumstances and what yardstick is being used in the particular case, and to avoid the trap of thinking that if justice has a price, any price is too much. The challenge for international arbitration is to provide a process that is fit-for-purpose: involving neither under-delivery nor over-delivery, and meeting the realistic expectations of users.

D. It fails to take change into account

Many arbitration proceedings have an adaptive rather than a predictive lifecycle.[20] Rather than the scope being closely defined at the outset, an arbitration must facilitate change and have a high degree of stakeholder involvement. The parties to an arbitration proceeding may choose to alter the course of the arbitration halfway through, suspend it for commercial reasons; or settle their dispute entirely. Time and cost saving imperatives do not recognize this potentiality, which may render initial estimates redundant. Worse yet, it may set unrealistic expectations at the start of the arbitration by not incorporating contingencies for the changes that are likely to occur as the arbitration progresses.

E. It fails to take into account project management

Finally, time and cost saving imperatives detract from one of the greatest advantages of international arbitration, in that they discount the possibility of using arbitration's inherent flexibility to formulate a process that suits the particular dispute. Some arbitrators may fall too readily into repeating 'standard' procedures (the "automatism called 'international practice'" which Risse referred to) that are not well suited to the parties and the issues before them.[21] This is a failing in their project management skills that should indeed be addressed, but not a reason to take all project management responsibilities away from arbitrators. Those responsibilities, and the types of project management that arbitrators may undertake, are considered in the rest of this article.

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19 Warren Burger, "The Judiciary" (1972) 38:24 *Vital Speeches of the Day* 740 at 743.

20 *A Guide to the Project Management Body of Knowledge*, 5th ed (Newtown Square: Project Management Institute, 2013) at ch 2.4 [PMBOK Guide]. "Project life cycles can range along a continuum from predictive or plan-driven approaches at one end to adaptive or change-driven approaches at the other. In a predictive life cycle, the product and deliverables are defined at the beginning of the project and any changes to scope are carefully managed. In an adaptive life cycle, the product is developed over multiple iterations and detailed scope is defined for each iteration only as the iteration begins."

21 Risse, *supra* note 1 at 455.

III. PROJECT MANAGEMENT DEFINITIONS

A. Arbitration as project

The Project Management Institute (PMI), a leading project management organisation based in the USA, defines a project for the purposes of project management as "a temporary endeavour undertaken to create a unique product, service or result."[22]

This definition serves us well here. Arbitration is a temporary endeavour, arising out of a specific contract, and is undertaken to create a unique result, namely the resolution of the particular dispute that is in front of the arbitrators. An individual arbitration does not exist to create law, or serve as a symbol of justice (except perhaps in the generic sense). It has no existence beyond the life of the case; it must be orientated towards results, with an emphasis on what needs to be delivered rather than on what needs to be done.

B. Arbitrator as project manager

A project, of course, also needs to be managed – it cannot manage itself. The PMI defines project management as "the application of knowledge, skills, tools and techniques to project activities to meet the project requirements."[23] It defines the project manager as "the person assigned by the performing organization to lead the team that is responsible for achieving the project objectives."[24]

When applying the project management paradigm to arbitration, it is the arbitrators who qualify as project managers. The parties have entrusted them with the dispute. The arbitral institutions[25] and arbitral laws[26] recognise that arbitrators bear the responsibility to adopt appropriate procedures.[27] It is important that arbitrators acknowledge this responsibility and embrace their role as project manager. As Rivkin and Rowe put it, “arbitrators who simply sit back and let the parties control the agenda are letting those same parties down".[28]

Of course, arguably the arbitrators cannot "lead" in the usual sense of the word, particularly if the team that is responsible for achieving the project objectives mainly comprises the parties and their lawyers. Arbitrators do not oversee the money spent by parties on their professional advisers, or the effort put in by counsel to prepare their client's case. But they can still lead

22 PMBOK Guide, *supra* note 20 at ch 1.2.
23 *Ibid* at ch 1.3.
24 *Ibid* at ch 1.7.
25 See e.g. *Singapore International Arbitration Center Rules 2013*, Rule 16.1. "The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final determination of the dispute".
26 See e.g. *Arbitration Act 1996* (UK), c 23, s 33(b). "The tribunal shall … adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined."
27 David W Rivkin & Samantha J Rowe, “The Role of the Tribunal in Controlling Arbitral Costs” (2015) 81:2 *Arbitration* 116; David W Rivkin, “Towards a New Paradigm in International Arbitration: The Town Elder Model Revised” (2008) 24:3 *Arbitration Intl* 375; See also Mitchell Marinello and Robert Matlin, "Muscular Arbitration and Arbitrators Self-Management Can Make Arbitration Faster and More Economical" (2012) 67:4 Dispute Resolution J 69.
28 Rivkin & Rowe, *supra* note 26 at 123.

indirectly.[29] Such leadership is manifested in:

> 1. setting the timetable which provides the framework for the parties and their counsel to operate in;
>
> 2. using costs awards, or the intimation of them, to mould parties' behaviour;[30]
>
> 3. leading by example, by being responsive to correspondence and thoroughly prepared at all relevant stages; [31]
>
> 4. remaining focussed on the objectives of the arbitration;
>
> 5. using all the tools and techniques available to them in order to keep the arbitration on course (as discussed below);
>
> 6. actively monitoring other stakeholders (in particular, the parties and their counsel) in order to confirm they will comply with the timetable;
>
> 7. keeping the timetable under review throughout the arbitration, to check that it remains achievable; and
>
> 8. for the presiding arbitrator of a three-person tribunal, communicating clearly and promptly with the other two arbitrators.

The project manager analogy is also useful because of the growing movement towards the professionalization of both roles. Project managers can train and earn qualifications via organisations such as the PMI and the APM, as can arbitrators through organisations such as the Chartered Institute of Arbitrators. In addition, it is recognised that project managers can bring their experience of other projects to bear, to ensure that best practices are adopted and past mistakes avoided; arbitrators also bring such experience to a case. Like project managers, arbitrators must constantly look to adapt and evolve, and learn from each arbitration they work on.

Thinking of an arbitrator as a project manager does not preclude assigning a similar role to counsel within his or her own team. The preparation and presentation of a party's case may be seen as its own project, occurring within the project of the arbitration as a whole. Budgets, in particular, which are outside the arbitrator's field of vision, fall squarely within the counsel's purview. The party's counsel (usually its external counsel, but sometimes its in-house counsel) should therefore also use the same tools and techniques as are described below.

C. The Arbitral institution as a project management office

The PMI also recognizes that multiple structures are involved in project management..

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29 Indirect leadership occurs in other project management situations. See PMBOK Guide, *supra* note 20 at ch 9.4.2. "Because project managers often have little or no direct authority over team members in a matrix environment, their ability to influence stakeholders on a timely basis is critical to project success."

30 ICC Commission on Arbitration and ADR, *Report on Techniques for Controlling Time and Costs in Arbitration*, 2nd ed, ICC, Doc 861-1 ENG (2015) 15, online: www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/.

31 Barker & Cole, *supra* note 9 at 162. "Brilliant project managers recognise the critical importance of preparation. This attitude extends into everything they do and say, whether it's having contingencies in place to deal with a serious project risk or circulating a well-constructed agenda in advance of a meeting."

A project management office (PMO) is "a management structure that standardizes the project-related governance processes and facilitates the sharing of resources, methodologies, tools, and techniques"[32]; and project-based organisations (PBOs) are ones that "conduct the majority of their work as projects".[33] Both definitions might apply to an arbitration institution, such as the ICC. Institutions maintain a portfolio of arbitration projects, and it is important to recognize the institutions' role in this respect. They support arbitrators conducting arbitrations under their rules; equally, they have a responsibility to monitor such arbitrators, which manifests itself in a further layer of indirect control. They audit the arbitration at its closing, including reviewing the award.[34] They may also reduce arbitrators' fees in consequence of arbitrator-caused delay,[35] and sanction arbitrators by removing them from their panel of arbitrators (if the institution maintains such a panel).[36]

D. Stakeholders in the project

Finally, project managers must acknowledge the various stakeholders in a project. The PMI defines these as:

> A stakeholder is an individual, group, or organization who may affect, be affected by, or perceive itself to be affected by a decision, activity or outcome of a project. Stakeholders may be actively involved in the project or have interests that may be positively or negatively affected by the performance or completion of the project. Different stakeholders may have competing expectations that might create conflicts within the project. Stakeholders may also exert influence over the project, its deliverables, and the project team in order to achieve a set of outcomes that satisfy business objectives or other needs.[37]

The parties are obviously stakeholders and have the most pressing interest in the proceedings. Other stakeholders include counsel and party-appointed experts who both derive fees from an arbitration hearing, and have a relationship with their clients to maintain. They have also invested reputational capital: wanting to serve their clients well and perform credibly in the eyes of the other participants. Arbitral institutions and the states of the seat of the arbitration are also stakeholders inasmuch as they have a "brand" to promote and protect. They desire to encourage others to nominate them in future arbitrations. The body of stakeholders can also conceivably extend to witnesses, who want to maintain their own reputation, as well as other

32 PMBOK Guide, *supra* note 20 at ch 1.4.4.
33 *Ibid* at ch 1.5.2.
34 The extent to which institutions review awards varies between institutions, of course, depending on their applicable rules and practices.
35 See the announcement by the ICC that it will reduce arbitrators' fees for unjustified delays in submitting awards, ICC, News Article, "ICC Court announces new policies to foster transparency and ensure greater efficiency" (6 January 2016), online: <http://www.iccwbo.org/News/Articles/2016/ ICC-Court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/>.
36 See Catherine A Rogers, "The Vocation of the International Arbitrator" (2005) 20:5 Am U Intl L Rev 957 ("The relative permanence and visibility of arbitral institutions, as compared to individual arbitrators, and their intimate knowledge of, and direct involvement in, arbitration practices and procedures gives them an unrivalled institutional competence to regulate arbitrators. Given their institutional competence, they are poised to become to international arbitrators what bar associations are to lawyers" at 1011).
37 PMBOK Guide, *supra* note 20 at ch 2.2.

service providers including transcribers and providers of hearing-rooms.[38]

The arbitrator as project manager must acknowledge these interests and communicate with such stakeholders as required throughout the project lifespan. Also, new stakeholders may be identified as the arbitration proceeds. For these purposes it is useful for an arbitrator to draw up a stakeholder register at an early stage of the case, identifying each stakeholder and its interests.[39] The stakeholder register can help with the identification of the scope of the project (as discussed below) and guide the arbitrator in the communication that is required as the arbitration proceeds.

IV. THE PROJECT MANAGEMENT LIFECYCLE

This section will illustrate arbitration as a project, approached from a project management perspective. Complex projects, such as major infrastructure works, justify detailed project management, with many layers and stages. A major arbitration may need such complexity too, but for this general overview the following four main stages of a project can be identified:[40]

A. Initiating

B. Planning

C. Delivering

D. Closing

These stages are considered in turn below.

A. Initiating

Any project must be started properly. A key document at the beginning of a project, in project management terms, is the project charter. This sets out the project and gives the project team the authority to proceed. In international arbitration, the Notice of Arbitration and Response might together comprise the project charter – they give authority for the appointment of the tribunal – but a better analogue is the Terms of Reference in ICC arbitration, which identifies the parties and the tribunal and summarizes the parties' positions.

i. The objectives of an arbitration

An important function of the project charter is to identify the project's objectives, and the parties' and other stakeholders' requirements for the arbitration. As indicated above, these may vary from arbitration to arbitration. An arbitrator might usefully discuss parties' objectives and requirements with them at an early stage of the arbitration, if the parties are willing to disclose these. Just as in mediation, it is helpful to establish at the outset what the common aims of the parties and other stakeholders are.[41] However, even if such a conversation is not feasible, an

38 This article mainly considers international commercial arbitration. In investment treaty arbitration, the body of stakeholders may be wider, to include all those affected by the decision (and it might be difficult for the arbitrator to identify these). Also, a number of these might not be included in the stakeholder register, because they fall outside the arbitration process, but nonetheless may have significant interests.

39 PMBOK Guide, *supra* note 20 at ch 13.1.3.1.

40 *Ibid* at ch 2.4.1.

41 *Ibid* at ch 3.3. "Involving the sponsors, customers, and other stakeholders during initiation creates a shared

arbitrator may consider what the parties' and other stakeholders' objectives and requirements might be.

Rule 37.2 of the Arbitration Rules of the Singapore International Arbitration Centre[42] states:

> In all matters not expressly provided for in these Rules, the President, the Court, the Registrar and the Tribunal shall act in the spirit of these Rules and shall **make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of the award**. (Emphasis added)

Similar wording is found in Resolution 40/72 of the General Assembly of the United Nations, adopted at the 112th plenary meeting on 11 December 1985, which is recorded at the beginning of the UNCITRAL Model Law on International Commercial Arbitration in the version published by UNCITRAL. This states (in part):

> Convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for **the fair and efficient settlement of disputes arising in international commercial relations**.[43] (emphasis added)

The English Arbitration Act 1996 states (at section 1):

> (a) the object of arbitration is to obtain **the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.**[44] (Emphasis added)

The principal objective indicated in these laws and rules is the conclusion of the arbitration or resolution of the dispute. Arbitration is typically resolved in one of two ways: through the parties coming to a negotiated settlement or through a final award. The former is not within the control of the arbitrator, but they can facilitate it through a process that brings the parties into contact and brings issues to the fore at an early stage. The latter is within the arbitrator's control, and must be borne in mind throughout, in particular from the early stages of the arbitration. It is also worth noting that these two objectives, from the point of view of the arbitrator, are also qualitatively different: one is process, the other is an outcome. Promoting the process is similar to the objective of a mediator; delivering an award involves being a decision-maker or judge.

Four requirements that set boundaries around the arbitration are then identified: the objectives must be achieved in a fair, expeditious and economical manner, and the award must be enforceable. The first three terms can all bear a subjective meaning and can be interpreted differently

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understanding of success criteria, reduces the overhead of involvement, and generally improves deliverable acceptance, customer satisfaction, and other stakeholder satisfaction."

42 *Supra* note 24 at 37.2.

43 UNCITRAL, *supra* note 4 at *vii*.

44 *Supra* note 25 at s 1.

by parties depending on their background, national culture and individual circumstances. Also, the relationship between these requirements must be interrogated, in order to establish whether there are any inconsistencies, and, if so, how these are to be resolved.[45]

The fourth requirement, relating to the enforceability of the award, also depends on the particular circumstances, although some general points may be made. For an award to be enforceable, the provisions of the relevant law at the place of enforcement (which the arbitrator may reasonably assume will be based on the New York Convention) must be complied with. This will encompass ensuring due process, and avoiding unethical behaviour; moreover, as Lord Neuberger observed at the Centenary Conference of the Chartered Institute of Arbitrators, an arbitrator must uphold the rule of law.[46]

Other requirements may be imposed by particular stakeholders, as identified in the stakeholder register. For example, the relevant arbitral institution may specify a particular process, such as the Terms of Reference procedure specified by the ICC.

ii. The scope of an arbitration

From an assessment of the objectives and requirements, along with an acknowledgement of the available resources, comes an appreciation of the scope of the arbitration. As one project management textbook puts it: "All projects need a sound statement of scope. This describes the boundary to be drawn around what the project will and will not deliver."[47]

The PMI defines a project scope statement as:

> … the description of the project scope, major deliverables, assumptions, and constraints. The project scope statement documents the entire scope, including project and product scope. It describes, in detail, the project's deliverables and the work required to create those deliverables. It also provides a common understanding of the project scope among project stakeholders.[48]

A project scope statement is needed at the start of arbitration so that any requests for changes at later stages can be properly assessed (as discussed below). It can also help the arbitrator identify when the scope is being exceeded, in the absence of a specific request – hence avoiding "scope creep".[49]

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45 For example, the Singapore High Court in *AQZ v ARA* [2015] SGHC 49 had to consider whether the parties' choice of the SIAC Rules, with its expedited procedure involving one arbitrator, could be reconciled with the express statement in the arbitration agreement that the parties wanted there to be three arbitrators.

46 Lord Neuberger, "Arbitration and the Rule of Law", Speech at the Chartered Institute of Arbitrators Centenary Celebration, Hong Kong, 20 March 2015, online: <www.supremecourt.uk/docs/speech-150320.pdf>.

47 Barker & Cole, *supra* note 9 at 19. See also PMBOK Guide, *supra* note 20 at ch 5.3. "The preparation of a detailed project scope statement is critical to project success and builds upon the major deliverables, assumptions, and constraints that are documented during project initiation. During project planning, the project scope is defined and described with greater specificity as more information about the project is known. Existing risks, assumptions, and constraints are analysed for completeness and added or updated as necessary."

48 PMBOK Guide, *supra* note 20 at ch 5.3.3.

49 Barker & Cole, *supra* note 9 at 19. "On any project there is a risk of 'scope creep' – the gradual process of the work expanding without the implications being managed effectively." See also PMBOK Guide, supra note 20 at ch 5.6. "The uncontrolled expansion to product or project scope without adjustments to time, cost, and resources is

B. Planning

Once the arbitration is underway, two further documents must be developed: a project management plan and a project schedule. The PMI observes that a project management plan "defines how the project is executed, monitored and controlled, and closed".[50] It will include:

> 1. the objectives of the arbitration, its scope and the deliverables (in particular, the arbitration award);
>
> 2. the resources available in the arbitration, and a general allocation of responsibilities; and
>
> 3. an implementation strategy, including an identification of possible risks, and the assumptions underlying the planning.

A project management plan will then influence the budgets for the arbitration prepared by the parties and their counsel, based on the objectives, scope and schedule.

A project schedule will include:

> 1. an achievable timetable for the arbitration, taking into account the objectives, deliverables, resources and any external factors;
>
> 2. a specific allocation of responsibilities; and
>
> 3. an identification of the dependencies in the schedule, so that a critical path can be developed which shows the longest route to the completion of the arbitration (determining the duration of the arbitration) and the achievement of the objectives.[51]

The project plan and project schedule will be prepared through communication with the various stakeholders, most obviously with the parties to the arbitration at a procedural hearing, but also with other stakeholders such as the arbitral institution. The plan and the schedule will only be workable if there is buy-in from all stakeholders.

Individual stages of the arbitration, such as disclosure of documents, might be broken down into subordinate phases with specific plans and schedules. For the arbitrator, the process for drafting the award might be mapped out, in particular identifying the allocation of responsibilities between arbitrators when there is a three-person tribunal, and the timing for the drafting of each section of the award. Further, the counsel on each side can prepare their own plans and schedules for work done within the relevant counsel team, such as drafting of pleadings.

The project plan and the project schedule are tools to be used during the arbitration: they must make the objectives of the arbitration visible, and make it easy for stakeholders to track the arbitration's progress. As a result, the plan and the schedule must be prepared logically and presented in a user-friendly format. For example, in addition to being set out in writing in a procedural order, the arbitration schedule might be presented in a graphical format such as a Gantt

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referred to as scope creep."

50 PMBOK Guide, *supra* note 20 at ch 4.2.

51 *Ibid* at ch 6.6.2. "The critical path is the sequence of activities that represents the longest path through a project, which determines the shortest possible project duration."

chart or a flow diagram, or by using a Kanban board.

C. Delivering

The delivery phase can be broken down into four main project management work streams for an arbitrator, namely: organising the issues and evidence; engaging with stakeholders; managing the scope and schedule; and drafting the award.

i. Organising the issues and evidence

Organising the issues and the evidence presented by the parties is an essential part of an arbitrator's role.[52] This process of collating and organising requires close analysis of the dispute by the arbitrator and only by such an organization can the arbitrator produce an award that is not simply a reproduction of a party's submissions (and a reproduction of submissions is no award at all). Actively engaging with this organising task becomes all the more important in cases where there is a large amount of evidence, or else important points may be lost. Nor can arbitrators simply rely on the parties' counsel to do this job for them: while counsel may provide useful support for the arbitrators (for example, by providing an index of documents), the responsibility remains that of the arbitrators and cannot be delegated.[53]

Various powers, tools and techniques are available to the arbitrator to assist with this. At the outset, the arbitrator may identify and list the key issues. This list then becomes the foundation stone for a number of other lists, including:

1. a list of key events and dates;
2. a list of documentary evidence; and
3. a list of people involved – not only the people involved in the dispute, but also witnesses and other stakeholders;

Each list may be cross-referenced against the list of issues. In this way an "issue map" can be developed, through the multiple connections – perhaps most usefully presented in a pictorial form similar to that of a "mind map".[54]

As such an issue map takes shape, it can guide the arbitrator as to the form of the arbitration as the schedule proceeds. For example, an issue might suggest the bifurcation of the proceedings, if relevant the appointment of an expert to assist the tribunal, or a particular arrangement of the presentation of witness evidence in a manner that suits the nature of the evidence and the issues

52 Michael E Schneider, "Lean Arbitration: Cost Control and Efficiency through Progressive Identification of Issues and Separate Pricing of Arbitration Services" (1994) 10:2 Arb Intl 119.

53 In a judicial context, see the comments of Judge Richard Posner criticizing the delegation of opinion-writing to law clerks: "The judge-editor also may not realize that the process of writing, which means searching for words, for sentences, in which to express meaning, is a process of discovery rather than just of expressing preformed ideas; that it reveals analytical gaps; that it gives rise to new ideas; and that fluency in writing comes largely from – writing." Richard Posner, Reflections on Judging (Cambridge, MA: Harvard University Press, 2013) at 240.

54 See generally Tony Buzan, *The Ultimate Book of Mind Maps* (Thorsons, 2012). See also Iain Sheridan, "Qualitative Analytical Models for Arbitration" (2016) 33:2 J Intl Arb 171. The author presents three analytical models that may contribute to improving the processes and outcomes of international arbitration, including mind maps.

involved, such as witness conferencing.

ii. Engaging with stakeholders

The second work stream involves engaging with stakeholders during the arbitration. Key to this is building effective relationships,[55] so that stakeholders' needs are met, and stakeholders' inputs are appropriately made. Relationships depend on the individuals concerned, so the arbitrator's style may need to be adapted to suit the circumstances; but some general observations may be made.

First, the stakeholder register (as discussed above) will help the arbitrator identify each stakeholder's interests, and guide the arbitrator in the engagement. For example, Professor Julian Lew has lamented that sometimes the interests of parties' counsel may be an obstacle to an arbitration:

> Lawyers have increasingly seen arbitration as another playing field in which to exercise litigation skills, rather than as a forum for dispute settlement. They view the objectives as 'beating' the other party rather than determining the meaning of the agreement out of which the dispute has arisen and the rights and obligations of the parties. The attempts by lawyers from one jurisdiction to impose their own procedural system on the tribunal and the other party in the name of 'fairness' can undermine the international arbitral process. Tactical issues, such as challenges to arbitrators, raising jurisdictional issues, demands for additional time, lengthy hearings, additional submissions, excessive witnesses and challenges to the procedural directions of arbitrators, have all contributed to make arbitration more contentious. All that matters is for the client to win! As a result of these factors, the original twin merits of arbitration, i.e. speed and inexpense, are no longer really true.[56]

Recognition of such an attitude may help the arbitrator in understanding communications from certain counsel and guide behaviour to a productive end.

On the other hand, the inattention of parties and their counsel may equally create obstacles, including poorly presented submissions or badly organised evidence. For example, in the Hong Kong High Court case of *Tang Chung Wah and another v. Jonathan Russell Leong and others*, the judge complained that the trial bundle, which filled 22 files, was excessive in bulk and:

> Had the parties taken care to include only those documents which were strictly essential to resolve their disputes or which could reasonably be expected would be referred to in the course of the trial, I would have thought the trial bundles could have been shrunk to no more than 3 to 4 lever arch files in total.[57]

The arbitrator must strive to ensure that parties and their counsel remain productively

55 Barker & Cole, *supra* note 9 at 84. "A large part of the role involves building effective working relationships with a whole range of people – and sometimes in challenging circumstances. A mantra for us is: project managers manage people not activities."
56 Julian Lew, "Achieving the Potential of Effective Arbitration" (1999) 65:4 Arb 283.
57 *Tang Chung Wah and another v. Jonathan Russell Leong and others,* [2016] HCA 1691/2011 at para 189.

engaged throughout the arbitration.[58]

Of course, there is also the risk that arbitrators themselves may lose focus, particularly party-appointed arbitrators on three-member tribunals who may not have a central role throughout the arbitration. It is part of the responsibilities of the presiding arbitrator to ensure that all arbitrators are fully engaged and contributing. Regular communication between the arbitrators is important here. It has been rightly recognised that it is important for arbitrators to take advantage of opportunities directly after a hearing to converse about the award, while the evidence is fresh in one's mind (the so-called "Reed Retreat"[59]). Equally, discussions between the arbitrators might take place at earlier stages of the arbitration, such as when pleadings are filed.

Engagement with stakeholders includes ensuring that communications are effective. In particular, email communication ought to be clear and responsive; and hearings and meetings must be managed appropriately. This includes:

1. preparing a suitable agenda in advance;

2. setting a time-period for the hearing or meeting that accommodates the agenda;

3. managing the hearing or meeting to ensure that the agenda is completed within the time available (with appropriate allocation of time to each item);

4. following up with a suitable record of what was discussed or decided;

5. adopting communication techniques that are appropriate for the content of the meeting/hearing, such as facilitation techniques during discussion of the project schedule;

6. ensuring that relevant stakeholders attend each meeting/hearing, for example parties' commercial representatives or in-house counsel at the procedural hearing;

7. using telephone and video conferencing where appropriate, to cut down on costs;

8. using in-person meetings where appropriate, recognising that body language is an important element of communication and cannot be replicated remotely;[60] and

9. employing active listening techniques, to ensure comprehension of the points that are made, and to demonstrate this to the speaker (whether counsel or witness), thereby encouraging them to be succinct.

iii. Managing the scope and schedule

58 For a discussion of the need for in-house counsel to be fully engaged, see Ugo Draetta, "The Role of In-house Counsel in International Arbitration" (2009) 75:4 Arb 470.

59 Lucy Reed, "Arbitral Decision-Making: Art, Science or Sport?" (Kaplan Lecture 2012 delivered at the Hong Kong International Arbitration Centre, 2 December 2012), online: www.arbitration-icca.org/media/4/42869508553463/media113581569903770reed_tribunal_decision-making.pdf.

60 See e.g. James Borg, *Body Language*, 3rd ed (Pearson: 2013).

The third work stream involves managing the scope and schedule of the arbitration. It is important to recognize that planning is not confined to the early stages of arbitration. As the PMI has observed, "Due to the potential for change, the development of the project management plan is an iterative activity and is progressively elaborated throughout the project's life cycle. Progressive elaboration involves continuously improving and detailing a plan as more detailed and specific information and more accurate estimates become available."[61]

The plan and schedule must not be set out in an initial procedural order and then treated as if set in stone. An arbitrator must return to that procedural order again and again throughout the arbitration, to check whether the arbitration remains on track, and to work out what additional details might be needed and what improvements might be made.[62]

An important part of this is managing change in the arbitration. Change might be unexpected and outside anyone's control, such as illness during a hearing. It may also be at the request of a party, either to change the schedule of the arbitration to ensure that the scope is achieved, or to change the scope of the arbitration with consequent change to the schedule. The arbitrator must ensure on the one hand that such change does not derail the arbitration, but on the other hand that appropriate change is allowed in order to achieve the arbitration's objectives. A suitable statement of the scope and schedule at the beginning of proceedings (as dicussed above) will help the arbitrator to accommodate change effectively. Change may require amendments to the project management plan, the scope statement, and the schedule. [63]

Change control as the arbitration proceeds is facilitated by the on-going preparation of a change register, recording all changes and change requests (even if rejected), and is moderated by the award of any costs that are consequent upon such changes. Related to this, it is important to anticipate the risks and consequent changes that might impact the arbitration: in particular, the risk that the scope of the arbitration might expand, for example as a result of a party's case not being set out in full at the beginning of the arbitration, meaning that the scope of the arbitration cannot properly be captured at the outset.[64]

Various powers, tools and techniques are available to the arbitrator to manage the scope and the schedule. For instance, the arbitrator may use cost awards to sanction misbehaviour, restrict the parties' written submissions by imposing a page-limit, employ a checklist of things to be done, or use technology such as shared online workspaces, ftp sites and electronic submissions.

iv. Drafting the award

The fourth work stream is the drafting of the award itself. The award is the product of all

61 PMBOK Guide, *supra* note 20 at ch 1.3.
62 See also the observation above that many arbitrations have an adaptive rather than a predictive lifestyle: see Section II (D) and footnote 21.
63 PMBOK Guide, *supra* note 20 at ch 4.5. "The project management plan, the project scope statement, and other deliverables are maintained by carefully and continuously managing changes, either by rejecting changes or by approving changes, thereby assuring that only approved changes are incorporated into a revised baseline."
64 The suggestion of a "Kaplan Opening", requiring the parties to make a short presentation at the beginning of an arbitration in order to set out their respective cases, is intended to mitigate this risk: Neil Kaplan, "If It Ain't Broke, Don't Change It" (2014) 80:2 Arb 172, online: <www.arbitration-icca.org/media/4/44493740788727/media314050030194870kaplan_if_it_aint_broke_dont_change_it.pdf>.

that has gone before, but may in large part be advanced concurrently with the other work streams. In particular, the sections of the award describing the arbitration itself can be drafted as the arbitration proceeds; and the structure of the award can be developed as the issues are identified and organised. The proper weighing of the evidence and determination of the issues of course cannot be concluded until all evidence and submissions have been filed, but the ultimate drafting task can be made considerably easier by the preceding efforts, as well as by the time spent on organising and analysing the issues and the evidence.

Drafting the award in the final stage of the arbitration should be properly scheduled, and, if there is a three-person tribunal, responsibilities must be properly allocated. The tribunal must also communicate with relevant stakeholders – the parties and the arbitral institution, in particular – as to progress in the drafting, so that their expectations are managed and they have the opportunity to comment on the timing.

D. Closing

Like all projects, an arbitration must be properly closed. Closing comes when the objectives of the arbitration have been achieved and the scope has been fulfilled:[65] hence it is important to state these at the outset and record any changes to them during the course of the arbitration. Formalities must also be complied with, to authorize closing: either the award must be issued, or the tribunal must confirm that the arbitration has been brought to an end following a settlement.[66]

It is important at closing for those involved to review what has been done. If an arbitral institution is involved, it may conduct an assurance review of the award before the award is issued. The institution may also review the arbitrator's performance in order to inform decisions about appointing the arbitrator again in the future. The parties should themselves provide feedback to the institution, to contribute to this assessment.

Finally, arbitrators must analyse what they have done and what they have delivered, in order to learn lessons from the arbitration and, if any mistakes have been made, to avoid these in future. In each case, a written record should be made in order to preserve the lessons. This record might be begun early in the arbitration, as such lessons arise, and reviewed and concluded at the end of the case.

V. CONCLUSION

The purpose of this paper has been to demonstrate that the "fair and efficient settlement of disputes" by arbitration, as envisaged by UNCITRAL, does not simply equate to saving time and costs. What is needed instead is project management that is appropriate to the dispute, with a view to achieving the objectives of the particular arbitration within the requirements set by the parties and other stakeholders, and avoiding under-delivery or over-delivery of services.

Time may be saved and costs may be reduced, but this must be against a realistic standard that relates to the dispute. Moreover, arbitrators should not be assessed by how many savings

65 This includes the parties agreeing that the scope has been fulfilled earlier than anticipated, via a settlement.
66 By way of termination order, for instance. See e.g. UNCITRAL, Model Law on International Commercial Arbitration, *supra* note 4 at Art 17.

they make, but by the strength of their project management skills and their efforts to ensure that the arbitration is brought to a conclusion with speed and costs that are reasonable in the context of the dispute.