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Fragmentation and Judicialization of International Commercial Arbitration: Expedited Arbitration and the "Arbitral Trial"

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To Professor William F. Fox and Professor Thomas E. Carbonneau, with respect, admiration, and eternal friendship.

"It would seem that the tail of privatization has begun to wag the proverbial dog of adjudication."[1] – Professor Thomas E. Carbonneau

"No perfect procedure is likely to be discovered. For persons engaged in planning and drafting international commercial agreements, one thing is clear. To the extent that the parties do not choose a method of dispute resolution on their own, one will be imposed on them whenever a dispute arises under the contract."[2] – Professor William F. Fox

1. Introduction

International commercial arbitration ("ICA") is the preferred method of dispute resolution for commercial entities.[3] The main advantages are perceived to be enforceability, avoidance of specific legal systems and national courts, flexibility, and the ability of parties to select their arbitrators.[4] Notwithstanding these advantages, a twenty-first century ICA is tainted with a few shortcomings. The procedure is perceived to be too costly and lacking the expected speed.[5]

The two mentioned disadvantages have supposedly been a result of ICA becoming "judicialized" (or "Americanized"[6]). Some may even claim that ICA has become merely a "new litigation venue".[7] Put differently, the procedure has supposedly turned out to be much more

1 THOMAS E. CARBONNEAU, CARBONNEAU ON INTERNATIONAL ARBITRATION: COLLECTED ESSAYS 138 (Juris Net 2010).

2 WILLIAM F. FOX, INTERNATIONAL COMMERCIAL AGREEMENTS AND ELECTRONIC COMMERCE 88 (Wolters Kluwer, 6th ed. 2018).

3 White & Case and Queen Marry School of International Arbitration, *2018 International Arbitration Survey: the Evolution of International Arbitration* at 2, https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf.

4 *Id*. I would add here that its utility is also a manifestation of globalization and liberal capitalism. I usually refer to this development as a "post world-war II virtue." *See e.g.* CARBONNEAU, *supra* note 1, at 7-8. ("In its contemporary embodiment, ICA emerged soon after the Second World War—more than likely, as part of Western efforts to export the virtues of capitalism and to maintain the unity and develop the prosperity of the free world alliance.").

5 *Id*.

6 *See* CARBONNEAU, *supra* note 1, at 137 ("In their uniquely adaptive manner, the American common law and the American common law lawyer have adapted to the emergence of arbitration.").

7 *See e.g.*, Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 1 U. ILL. L. REV. 1, 4 (2010) and Irina Tymczyszyn, *Using Fast Track Arbitration for Resolving Commercial Dispute*, 6 CORP. AND COM. DISP. REV. 1, 25 (2018) ("International arbitration, which initially developed as an efficient and flexible form of dispute resolution, is no longer considered to be a faster and cheaper alternative to court proceedings. Paradoxically, according to a recent PWC survey, almost a quarter of their respondents (22 percent) across all industry sectors stated that arbitration was more costly than other methods of dispute resolution and almost a fifth of respondents (17 percent) found that the arbitration often took longer than the available alternatives."). *See also* Paulsson, *Fast-Track Arbitration in Europe (With Special Reference to the WIPO Expedited Arbitration Rules)*, 18 HASTINGS INT'L & COMP. L. REV. 713, 713 (1995) ("Arbitration, they say, has become too cumbersome, too expensive, and too legalistic-in sum, too contaminated by the habits of court litigation.").

"court-like" than what its users had expected. Thus, today, ICA stands in stark contrast to what the procedure looked like when it was initially developed in continental Europe in the early twentieth-century.[8] As a result, one can claim that ICA is "functioning in a manner untrue to its original character [and therefore] finds itself entrapped by the error of practices that it was meant to rectify."[9] For these reasons, in this paper I shall refer to the current ICA procedure as an "arbitral trial"; that is, an arbitral legal order that has shaken-off many of its old ideals and instead cloaked itself in many features and characteristics traditionally belonging exclusively to ordinary, adversarial, court litigation.

In this paper, I highlight three manifestations of judicialization *vis-á-vis* ICA; that is, (1) the "procedural judicialization"; (2) the "court judicialization"; and (3) the "institutional judicialization". In this light, I argue that there are both positive and negative aspects of such judicialization, seen in each of the three manifestations. Furthermore, I observe that international law has become fragmented, and therefore in need of specialized, tailor-made, procedural solutions.

First, procedural judicialization is not entirely a negative development, but rather a normal evolution of melding and harmonizing judicial cultures, as well as a result of fragmentation (e.g., the widened subject-matter arbitrability) and the increased high-stake and complex disputes adjudicated through arbitration. Moreover, procedural judicialization can improve the quality of the arbitral procedure (and therefore its legitimacy forms an empirical epistemic authority standpoint).[10] That said, the adoption of (American) trial techniques may not be vital and crucial for all types of disputes. Procedural judicialization comes at the expense of increased cost and lengthier procedures. The supposedly increased quality is not desirable at all times.

Second, the court's support or assistance in the arbitral procedure is necessary to some degree. The court has a vital and integral role to play at the front-end (when enforcing the arbitral agreement), while the arbitral procedure is on-going (e.g., appointing arbitrators, hearing witnesses under oath, rendering interim orders, etc.),[11] and at the back end (when recognizing, enforcing, setting-aside, or refusing to enforce the arbitral award). Courts have coercive powers and are therefore the institution that reassures the legitimacy and authority of the arbitral procedure. The main advantage of ICA—the enforceability of arbitral agreements and awards—is at the mercy of the national courts, who should exercise a pro-enforcement

8 *See e.g.*, Michael Mustill, *Comments on Fast-Track Arbitration*, 10 J. INT'L ARB. 121, 122 (1993) ("The procedure was, by definition, fast-track. That was why the parties chose it as their method of resolving disputes. What has changed in the last forty years is the creation of the new, slow-track arbitration which is the kind of arbitration which is the subject of almost everything written and spoken on the subject.") and Javier Tarjuelo, *Fast Track Procedures: A New Trend in Institutional Arbitration*, 11 PÉREZ-LLORCA L.J. 105, 105 (2017) ("The current sophistication and emergence of formalism in arbitration can sometimes significantly hamper arbitral proceedings. For this reason, the need for quick and effective awards may be taking modern arbitration back to its roots given that, historically, decisions on disputes between merchants would typically be rendered within a very short space of time.").

9 Carbonneau, *supra* note 1, at 127.

10 For a discussion on the difficulty between balancing speed, cost, and quality, *see e.g.* Jennifer Kirby, *Efficiency in International Arbitration: Whose Duty Is It?*, J. OF INT. ARB. 689 (2015).

11 Moreover, two negative aspects of ICA are perceived to be the "lack of effective sanctions during the arbitral process" and the "lack of power in relation to third parties." *See* White & Case and Queen Marry School of International Arbitration, *supra* note 2, at 2.

attitude; that is, an almost unconditional deference to the arbitral decision-making.[12] Thus, courts uphold the transnational arbitral legal order by not intervening unnecessarily in the procedure. Moreover, courts are tasked with protecting mandatory law by correcting wrongs through exercising final scrutiny. This function means that courts are the inevitable guardians of the arbitral order by sanctioning its legitimacy and authority. Put simply: for reasons deeply embedded in policy objectives and political concerns, courts in pro-arbitration jurisdictions rarely interfere with the arbitral order and generally exercise a pro-enforcement approach. Thus, court judicialization should be exercised very lightly, but it has a crucial function for protecting, preserving, and guarding the rule of law and the arbitral legal order. When a court instead intervenes unnecessarily in the arbitral procedure, the court judicialization can quickly turn adverse and do more harm than good.

Finally, arbitral institutions[13] have helped craft a decentralized arbitral legal order by generating workable templates based on best practices that furthers formality, i.e., a form of judicial norm.[14] Thus, a decentralized yet formalized arbitral legal order has been developed through arbitral institutions and other stakeholders to the transnational arbitral legal order.

As stated above, there are many positive aspects of judicialization, but there are a few negative ones too. Primarily, the negative aspects have to do with the judicialization having turned the arbitral procedure to become lengthy and costly. Thus, a serious gap has been identified between commercial entities' expectations, on the one hand, and experiences, on the other.[15] These users are now demanding a cost and speed efficient solution to the perceived and hard-felt issues.[16] In this paper I argue that expedited arbitration meets that demand.[17] With the increased use of expedited arbitration, the negative aspects of the judicialization trend seems to be redressed, while we still preserve the added benefits of the positive aspects of judicialization

12 *See e.g.* José María Alonso, *The Globalization of International Arbitration* in THE BAKER MCKENZIE INTERNATIONAL ARBITRATION YEARBOOK 11, 18-19 (2017) (explaining that transnational principle in the public procedural order created by the arbitral legal order include impartiality, the right to be heard, and equality). *See* Carbonneau, *supra* note 1, at 3.

13 See e.g., AAA-ICDR, SCC, ICC, IBA, UNCITRAL, etc.

14 The "formalization" has also been a source of critique. *See e.g.*, Leon Trakman & Hugh Montgomery, *The Judicialization of International Commercial Arbitration: Pitfall or Virtue*, 30 LJIL 405, 405 (2017) ("Recently, within international commercial arbitration (ICA) circles, a growing concern has emerged amongst critics, arbitrators, and commentators alike about the formalization and 'judicialization' of international arbitration. Critics have suggested that ICA laws and procedures increasingly replicate national judicial procedures, national laws, and their legal intricacies.").

15 Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the 'New Litigation'*, 7 DEPAUL BUS. & COM. L. J. 400 (2009). *See also* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution*, 1 J. EMPIRICAL LEGAL STUD. 843, 895 (2004) and Stipanowich, *supra* note 7, at 4 and Peter Morton, *Can a World Exist Where Expedited Arbitration Becomes the Default Pocedure?*, 26:1 ARB. INT'L., 104 (2010) ("One questions how long this apparent mis-match between the needs and expectations of the business community and the product that is being delivered by the arbitration community can continue.").

16 *See e.g.,* Morton, *supra* note 15, at 104 ("THERE IS a growing chorus of discontent from the 'consumers' of the arbitration process (the business community) about the increased time and costs of arbitration.").

17 *See e.g.*, Michael Mcllwrath and Roland Schroeder, *The View from an International Arbitration Customer: in Dire Need of Early Resolution*, 74 ARB. 3 (2008).

(mainly the increased procedural quality and necessary supervision of complex and high-stake disputes).[18]

On this note, it is my opinion that treating expedited arbitration as the default mechanism for certain low-value and less complex disputes would further entrench the currency and standing ICA, in particular for small and medium enterprises ("SME"). In a word, expedited arbitration offers a compelling alternative to the arbitral trial.[19] Furthermore, given the lessons learned during COVID-19, I would go one step further and propose that we start considering a world where *digital* (i.e., remote) expedited arbitration becomes the default mechanism for certain low-value and less complex disputes. The approval of digital expedited arbitration as the default mechanism would help to further meet the demands of cost-reduction and increased speed, i.e., the negative effects of judicialization.[20]

However, one should not forget that, ultimately, what kind of arbitral procedure that is suitable for a particular dispute at any given time will depend on the actual need for "litigation-like" futures when the party is presenting his or her case. Wearing my academic and practical hat simultaneously, I am constantly engaging in the almost impossible task of balancing between cost, speed, and quality (known as the "iron triangle") from a theoretical as well as practical level.[21] This is a daunting and cumbersome task. Whether to proceed with expedited arbitration or the arbitral trial is one such area of dispute resolution that underscores and illustrates the dilemma of how much quality one would (or should, or even could be due to mandatory laws of due process) sacrifice for the advantages of speed and cost reduction. When should a client be instructed to proceed with expedited arbitration and when is the arbitral trial more suitable? There is no easy answer to the difficult question posed.

Notwithstanding this, by understanding fragmentation of international arbitration and the positive and negative aspects of judicialization, we can start crafting default and subsequently case-specific solutions that meets the demand for a cost and speed efficient procedure for certain (not all) disputes and for certain (not all) parties.

Conclusively, in this paper I argue that expedited arbitration enters the transnational scene as an exceptional development in the world of transnational dispute resolution.[22]

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18 This is not to be confused with "fast-track arbitration," which is merely an accelerated form of arbitration with tighter scheduling and perhaps less maneuvering when it comes to requests for extension. *See e.g. See generally* Mustill, *supra* note 8.

19 *See e.g.*, Haflidi Kristjan Larusson, *Expedited Arbitration – Meeting the Needs of SMEs*, 63 SCANDINAVIAN STUD. 169, 176 (2017) (expedited arbitration"has grown over the last few years, as it brings arbitration closer to its historical roots of timely, cost-effective and commercially orientated dispute resolution. As complex, lengthy and costly litigation and arbitration have become the norm, it is time to try and strike a new balance in this context and where international arbitration serves the needs of the whole of the international business community. A number of arbitral institutions have now separate rules governing expedited arbitration.16 This is a direct response to the increased demand for such alternative, faster and less-costly arbitration in the international business community and serves the needs of SMEs in particular.").

20 This is a suggestion *de lege ferenda* and limited to the expedited arbitral procedure. I have elsewhere argued that there do exist a right to a physical arbitration hearing, even though I acknowledge that digital hearings are fully functional, and I have also had both good and bad experiences with such procedures. In fact, I am working on a paper where I explain why arbitrators may have had the powers during the pandemic to decide to conduct a digital hearing at the protest of one party in expedited arbitrations. → source for this statement

21 *See* Kirby, *supra* note 10.

22 To some degree it can actually be said to be new wine in old bottles. But whether it is a novel development or a revisiting of ICA's gravamen is too important to touch upon in brief and merits a discussion in its own. The

Additionally, it will assist international lawyers with dispute system design ("DSD"). I am not, however, arguing that expedited arbitration is suitable to complex and high-stake disputes. The arbitral trial has also been a pragmatic and inevitable development. I argue that the arbitral trial is the best dispute resolution venue for redress of high-value and complex commercial disputes with a transborder component to it.

2. Fragmentation of International Arbitration

International law and procedures demand increased specialization and expertise. As arbitration has grown in taste for various kinds of disputes, arbitration has been customized with the specific subject-matter in mind and has therefore grown into something that it was not traditionally. Fragmentation in international arbitration is seen in—or rather appears as a result of—*inter alia* widened subject-matter arbitrability,[23] various kinds of arbitrations having developed to facilitate growing complexity,[24] and law firms focusing on arbitration in an increasingly niche manner.

Over time, arbitration as a dispute resolution venue was asked to handle not only commercial disputes between commercial parties, but also financial services disputes, labor disputes, consumer disputes, investment disputes, intellectual property disputes, antitrust disputes, disputes implicating fraud and corruption claims, etc.[25] To meet these demands at the highest level, institutional rules had to be formed with the subject-matter complexity in mind. The default procedure had to be formed as an arbitral trial with all the necessary litigation tools available and set-up for an adversarial procedure to meet this new reality of arbitrating complex and high-stake matters.

Within arbitration then, the widened subject-matter arbitrability has pushed the procedure to embrace litigation features not necessary for all commercial matters but needed for more complex and high-value disputes. Moreover, the increased demand (primarily as a call from academicians) for fairness and justice lead to the need for regulating the arbitral procedure as well as tightening the back-end court scrutiny of arbitral awards. Moreover, it has also invited

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author will likely prepare an empirical, historical, and comparative research paper on this theme in the years to come. *See e.g.*, Mustill, *supra* note 8, at 122 ("The procedure was, by definition, fast-track. That was why the parties chose it as their method of resolving disputes. What has changed in the last forty years is the creation of the new, slow-track arbitration which is the kind of arbitration which is the subject of almost everything written and spoken on the subject.")

23 *See e.g.* Ylli Dautaj, *The Act is not the entire story: How to make sense of the U.S. Arbitration Act, KLUWER ARB. BLOG (April. 4, 2018). http://arbitrationblog.kluwerarbitration.com/2018/04/04/act-not-entire-story-make-sense-u-s-arbitration-act/.*

24 *See e.g.* Meng Chen, *Emerging Internal Control in Institutional Arbitration*, 18 CARDOZO J. CONFLICT RESOL. 295, 305 (2017) ("Contrary to uniform trends in arbitration rules, these arbitration institutions follow disparate paths on establishing arbitration rules governing specific subject matters. All arbitration institutions located in Europe choose to rely on arbitration rules and mediation rules to provide effective service, while the AAA from the United States takes another path. The AAA enacted more than sixty arbitration rules, codes, and protocols to govern very specific subject matters, including but not limited to consumer disputes, labor disputes, security disputes, construction disputes, internet disputes, electronic transaction disputes, ethical issues, real estate disputes, insurance disputes, and class arbitration issues. These regulations significantly enrich AAA's services in dispute resolution.").

25 For a discussion on "specialization" in ICA, *see* Trakman & Montgomery, *supra* note 14, at 428-29.

scholars and policymakers from not purely commercial fields to "think" about (or rather level an attack on) arbitration.

I propose that international arbitration is indeed tailored to the subject-matter and complexity in mind, while always preserving the fundamental elements of the procedure. ICA should be divided in two broader categories: (1) the Arbitral Trial, and (2) the Expedited Arbitration. Within these broader categories, sub-categories can develop to meet the specialization. I agree with Trakman and Montgomery in that:

> [T]he value of ICA ought to transcend a single and determinative pathway, such as streamlined, quick, and timely awards, or even the converse of exhaustive case analyses, voluminous written proceedings, and meticulously reasoned awards. The nature of arbitration should, rather, be contextually determined, taking account of the dispute, jurisdiction, applicable law, and reasonable expectations of the parties. In this way "best international practice" can provide a more *situational* way of looking at ICA, rather than trying to promote the "one-size-fits-all" model of the 'ideal' arbitration often promoted in the narrative of "judicialization."[26]

Finally, I should add that there are both positive and negative aspects of "fragmentation". I do not criticize the arbitral trial, nor the utilization of American advocacy through common law trial techniques. Quite the opposite is true. Such usage has proven instrumental to an advocate's success in international arbitration. However, I do offer an account for how expedited arbitration can help remedy some of the negative aspects of fragmentation and judicialization.

3. Three Manifestations of Judicialization

Judicialization is the process by which a non-judicial alternative dispute resolution mechanism (e.g., negotiation, mediation, and arbitration) comes to be dominated by quasi-judicial (i.e., legalistic) rules and procedures.[27]

In the early 1900's, ICA was used primarily by commercial parties from France, Germany, and Switzerland, but not often so by English or US parties.[28] Even as late as post world-war II, arbitration in the United States existed in primarily two forms; that is, as a procedure for small monetary value disputes and for labor disputes.[29] United States was not—back then—concerned with ICA nor with investment treaty arbitration (ITA).

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26 *Id*., at 406.

27 C. Neal Tate, *Why the Expansion of Judicial Power?*, THE GLOBAL EXPANSION OF JUDICIAL POWER 27, 28 (C. NEAL TATE & TORBJÖRN VALLINDER (eds.), THE GLOBAL EXPANSION OF JUDICIAL POWER 28 (1995).

28 Eric Bergsten, *Americanization of International Arbitration*, 18 PACE INT'L L. REV. 289, 292 (2006).

29 *Id*. at 290 (2006).

Times have changed and ICA is nowadays widely used by US commercial entities and has undergone a radical change as a result.[30] More than that, following the US involvement, ICA has allegedly become "judicialized" or "Americanized."[31] Eric Bergsten rightly noted that:

> American lawyers participating in international commercial arbitration brought and used American litigation skills. The Americans utilized a more aggressive form of advocacy than the continental Europeans were used to in international commercial arbitration. The European arbitrators tended to be the "Grand Old Men" of the European legal community. While this is a broad generalization, it is accurate. The American attorneys tended to be fact-oriented while European attorneys tended to be law-oriented and wanted to hear more about the appropriate legal theories relevant to the dispute.[32]

The European (or "Civilian") model of arbitration was based on the active role of the arbitrator in constituting the record and in applying the law.[33] The common law model, on the other hand, is adversarial. Thus, the "battle" between adjudicatory methodologies had to answer questions such as: "What fact-finding techniques should apply? Who bears responsibility for and has the final authority in fact-finding? How much discovery should take place? What probative value should be given to variegated factual elements?"[34] Carbonneau described the Anglo-American influence, and the common law-civil law divide as follows:

> The influence of the Anglo-American legal profession extended to the structure of arbitral proceedings, which began to mirror the basic characteristics of a

30 The push for ICA was initiated in the 1960s and 1970s by the American Arbitration Association (AAA) and the adoption of commercial arbitration rules. *See* Supplementary Procedures for International Commercial Arbitration of the American Arbitration Association (AAA) (February 1, 1986). The percentage of cases solved through federal civil cases decreased between 1962 and 2002. *See* Stipanowich, *supra* note 7, at 4.

31 *See* Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69 (2003) (in this article, Professor Alford presents several American influences, including but not limited to the influence of Anglo-American law firms, the style of advocacy, discovery, choice of law, language, and venue); Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19(2) OHIO ST. J. ON DISP. RESOL. 35, 35 (2003); Steven Seidenberg, *International Arbitration Loses Its Grip: Are U.S. Lawyers to Blame?*, 96 A.B.A. J. 50 (2010). For a brief explanation of what "Americanization" is, *see e.g.* George M. von Mehrem & Alana C. Jochum, *Is International Arbitration Becoming Too American?*, 2 GLOBAL BUS. L. REV. 47, 49 (2011) ("What, then, is 'Americanization'? I see it as the role played by American (or, more accurately, Anglo-American) procedural tools in international arbitration—and the style used by advocates in those proceedings.").

32 Bergsten, *supra* note 28, at 294. *See also* Helmer, *supra* note 31, at 36 ("The result of judicialization in arbitration is 'formalism, judicial style, and diminished flexibility,' and eventually, transformation of arbitration into 'offshore-U.S.-style-litigation.'."); Mehrem & Jochum, *supra* note 31, at 47 ("American lawyers naturally brought with them a desire to use American trial procedures. They wanted to use cross-examination to confront adverse witnesses. They also wanted document production to develop evidence to support their case. American clients and arbitrators were of the same mind. After all, from the perspective of those accustomed to American litigation, document production and cross-examination were critical procedural tools.").

33 CARBONNEAU, *supra* note 1, at 153.

34 *Id*. at 166.

> United States common law trial. In effect, the coexistence of two influential centers of legal doctrine on arbitration instituted a struggle between the European civil law and the Anglo-American common law for dominance in the conduct of arbitral proceedings. This tension continues to be present in contemporary arbitral practice.[35]

This "judicialization" or "Americanization", then, seeks the surrendering of certain key features of arbitration—such as cost-reduction and speedy outcomes—in favor of increased predictability, reliability, and equity.[36] The American participation can be said to have moved the traditional continental European informality and simplicity of arbitral proceedings to a more formal litigation-kind venue "that includes expert opinions and witnesses, cross-examination, extensive discovery, lengthy interrogatories and depositions, and all of the other ingredients of the American-style adversarial trial."[37] Put differently, the influence of the common law trial techniques allegedly improves the quality of the ICA procedure, but at the expense of costs and speed. The question is now whether such trade-off is always meritorious.

I wish to highlight two sides of the "judicialization" story, namely, that there are both positive and negative aspects of such development. The often-one-sided narrative of describing "judicialization" as inherently negative undercuts the broadening potential of ICA to "not only be quick, cheap, and efficient, but also internationally accessible, carefully reasoned, respected, and supported by all the parties involved."[38]

My task here is limited to offer an account for how expedited arbitration can help remedy some of the negative aspects of judicialization, while not trying, or even intending, to argue against the positive aspects of what I call the arbitral trial in this paper.

a. The Arbitral Procedure

Much of the criticism of judicialization in ICA "stems from standard arbitration procedures [having] taken on the trappings of litigation"; that is, US-style litigation and with it "extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost."[39] Within high contentious advocacy I would say that the two most prevalent features would be American style of document submission and examination of witnesses and expert witnesses.[40]

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35 *Id*. at 13.

36 Helmer, *supra* note 31, at 36.

37 CARBONNEAU, *supra* note 1, at 137.

38 Trakman & Montgomery, *supra* note 14, at 407.

39 Stipanowich, *supra* note 15, at 384. On the continental reception of discovery, see Helmer, *supra* note 31, at 50 ("When it comes to the Continent, 'the word "discovery" rank[s] second only to "punitive damages" in terms of its capacity to strike terror into the civil law hearts,' as noticed by a couple of insightful practitioners. Continental lawyers are accustomed to a different kind of 'discovery' (or rather 'disclosure'): lawyers for each side produce all relevant documents to support their claim or defense, and the judge (or an arbitrator) may question witnesses, appoint experts, and, in a number of countries, also order a party to produce relevant evidence.").

40 *See e.g.*, Irene Welser & Christian Klausegger, *Fast Track Arbitration: Just Fast or Something Different* in AUSTRIAN YEARBOOK ON INT'L ARB. 259, 260 (2009) ("Nowadays, parties tend to submit extensive files and voluminous attachments to the arbitrators far in excess of the amount of material they would produce in state court.

It is true that the American litigation style and techniques have pushed ICA in a certain "more American" path. However, this may be a natural outcome of US participation. It would be strange if the opposite was true, i.e., that the continental way of doing arbitration, which in turn mimics more the continental civil law tradition, would have remained the dominant influence on ICA as it was prior to the US participation.[41] Moreover, it is also true that not all aspects of US litigation have grown into integral parts of ICA, e.g. interrogatories and depositions are rarely used.[42] In an interesting manner, Eric Bergsten explained the American entrance to ICA through an analogy with immigration, he wrote that:

> The international commercial arbitration experience during the last fifty years is analogous to the experience of immigration into a country. Immigrants must adjust to their new country, but the country will also change to accommodate them. This is what happened to international commercial arbitration when the Americans arrived, and things have been evolving ever since.[43]

Furthermore, I believe that much of the reasons behind procedural judicialization of ICA has been a result of the widening in subject-matter arbitrability.[44] It is inevitably the case that in order to "grapple more effectively with a range of business disputes, including many large, complex cases, arbitration procedures" became longer and more detailed.[45] Put simply, adversarial lawyers had to utilize trial techniques to get ahead and ultimately to win. Fact-finding through discovery, advocacy through cross-examination, and extensive hearings to present one's case with full due process are important features of litigation and should be maintained for certain high-stake ICA matters.

I shall also add that the "Common Law-Civil Law Divide" is exaggerated.[46] From a comparative law perspective, I would say that it has been advantageous to adapt US litigation advocacy. The utility of American trial techniques is here to stay, but an alternative to the arbitral trial should be provided for.

Because arbitrators, unlike state judges, have a reputation to lose, and because compensation schemes for arbitrators tend to foster a more thorough approach, arbitral tribunals are nowadays often expected to review lengthy submissions and countless binders of attachments, despite the fact that, in most circumstances, the case could have been presented in a shorter and more precise manner without sacrificing quality.").

41 *See e.g.*, Mehrem & Jochum, *supra* note 31, at 55 ("We cannot expect American parties—advised by American lawyers—to agree to participate in a process that is bereft of all American procedural mechanisms.").

42 *See id*. at 54.

43 Bergsten, *supra* note 28, at 301.

44 *See* Dautaj, *supra* note 23.

45 Stipanowich, *supra* note 7, at 11.

46 *See e.g.* Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in International Arbitration*, 18 ARB. INT'L 59 (2002); *but see (or contra)* CARBONNEAU, *supra* note 2, at 153 ("Old debates about common law and civil law concepts of procedure have been revitalized.").

Another fact that pushed "judicialization" in ICA is that the number of US businesses participating in ICA increased, and so did the participation and involvement by US law firms.[47] This is the essence of a market-economic development.[48] Elena Helmer eloquently wrote that:

> The author believes that American influence on international arbitration is significant but falls short of Americanization. Rather, the current trends and developments in international commercial arbitration demonstrate an ongoing process of harmonization in many areas of international arbitration. This includes national arbitration laws, rules of major arbitration institutions, and arbitration practices, as demonstrated by the United Nations Commission on International Trade Law (UNCITRAL) and International Bar Association (lBA) documents as well as procedures adopted by international arbitral tribunals.[49]

Finally, it should be mentioned that the critique of ICA in terms of becoming "judicialized" or "Americanized" has not been a critique of the procedure lacking quality, but rather one on increased cost and lack of efficiency.[50] Thus, not all aspects of the "judicialization" are inherently negative. That said, reforms to accommodate the legitimate expectations *vis-á-vis* streamlining the arbitral procedures has been presented with the intent of the expedited arbitration regime.

b. National Courts

National courts can assist, support, or interfere with the arbitral procedure at the front-end, i.e., where one of the parties, for example, seek to attack the validity of the arbitration agreement or challenge the arbitrability, while the other seek to compel arbitration. National courts can also support or unnecessarily interfere with the arbitral procedure at the back end, i.e. when the award is challenged or the enforcement is refused. The arbitral legal order has partly been de-judicialized, or "a-nationalized" (depending on how one looks at it[51]), by having elaborated uniform and harmonized arbitration laws and multilateral enforcement treaties that makes foreign arbitral awards final, binding, and directly enforceable, subject to a few (mostly

47 Alford, *supra* note 31, at 80 ("Just as the United States has been and will be the dominant force in economic globalization, our law firms will be the dominant force in international arbitration.").

48 *See id*. ("Just as the United States has been and will be the dominant force in economic globalization, our law firms will be the dominant force in international arbitration.").

49 Helmer, *supra* note 31, at 37-38.

50 For a good discussion of efficiency in document production, with an emphasis on the burden of proof rather than discovery, *see* Yves Derains, *Towards Greater Efficiency in Document Production before Arbitral Tribunals—A Continental Viewpoint*, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, ¶ 11 (Spec. Supplement 2006).

51 The formalization of ICA by putting it in a regime of its own could be a manifestation of judicialization, while also be considered a de-judicialized aspects of the procedure since it removes court interference, i.e. what I present to be the second manifestation of judicialization.

procedural) limitations.[52] Moreover, national courts' submission through deference to the enforceability of the arbitral agreement and the arbitral decision-making has been almost constant in pro-arbitration jurisdictions and remains instrumental for the institution of ICA.[53] Thus, court judicialization through interference, as opposed to assistance and support, in the arbitral legal order should be exercised with a great measure of caution.

I, furthermore, argue that a great part of the reason for the judicialization of ICA in terms of back-end scrutiny (e.g. the "second-look doctrine") has been a result of the widening in subject-matter arbitrability.[54] Moreover, one must recognize the fact that the quality check by national courts (albeit limited) reassures the legitimacy and authority of the arbitral legal order—i.e. some judicialization is inevitable and necessary.[55] I do not take a strong position, yet, on whether a completely detached and autonomous arbitral order with respect to the back-end would be a good or bad development.[56]

c. Arbitral Institutions and IBA

Arbitration has matured to have its own institutional personality and status; rules on arbitral procedure have an established content and arbitral institutions provide the necessary

52 *See e.g.* UNCITRAL* Model Law on International Commercial Arbitration, Conn. Gen. Stat. § 50a-100 (LexisNexis, Lexis Advance through P.A. 21-6); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 84 Stat. 692, 330 UNTS 3, 21 U.S.T. 2517 ("New York Convention"); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes ("ICSID")) 575 UNTS 159; Alonso, *supra* note 12, at 12 (explaining that the UNCITRAL Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) have primarily contributed to the expansion and generalization of arbitration) and CARBONNEAU, *supra* note 2, at 10 ("[d]uring the 1990s, there was an eruption of UNCITRAL-inspired arbitration laws throughout the globe").

53 *See* CARBONNEAU, *supra* note 1, at 53 ("Under contemporary rule-making in the area, two interrelated principles provide a type of solution: (1) highly limited judicial supervision of awards; and (2) giving absolute sovereign effect to arbitrator rulings. The two rules constitute two sides of one coin: judicial deference to and the hegemony of the arbitration process.").

54 *See* Dautaj, *supra* note 23. *See also* Tibor Várady et al, INTERNATIONAL COMMERCIAL ARBITRATION – A TRANSNATIONAL PERSPECTIVE 65-66 (AMERICAN CASEBOOK SERIES, 7th ed. 2018) ("As, however, arbitration became the dominant method of settlement of international trade disputes, the spectrum of cases submitted to arbitration became much more broad. It now includes most difficult and complicated cases as well; it includes acrimonious confrontations, and disputes about huge sums of money. The newly emerging environment prompted some transformation. Informality has ceded ground to regulation, spontaneity has found a rival in conceptualization. Informality is still on the banner of arbitration, it is still one of its actual comparative advantages, but proportions have shifted.").

55 *See e.g.* MICHAEL W. REISMAN, SYSTEM OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION BREAKDOWN AND REPAIR 127-28, 140 (Duke University Press 1992); CARBONNEAU, *supra* note 2, at 4-5 ("ICA needed the approbation of states to benefit from municipal court's status of legitimacy and their authority in order to function effectively as a transborder system."); *cf* CARBONNEAU, *supra* note 1, at 85 ("Because arbitral tribunals have become a substitute vehicle for law, the critics argue that courts must preserve some basic role and guarantee that the tribunals follow ritualistic patterns and are guided by agreed-upon legal rules.").

56 *See e.g.*, JEAN-FRANCOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 120-34 (Sweet & Maxwell 2007).

infrastructure for the proceedings.[57] Arbitral institutions supplement the vacuum of controls on ICA and improves the regime's legitimacy, authority reliability, and effectiveness.[58] Moving ICA to a decentralized transnational legal order through institutional service providers is a welcomed development. However, such development inevitably demands legalistic rules and procedures.

Both institutional rules and the soft laws developed by, for example, the International Bar Association (IBA) establishes formal arbitral authority. These rules are agreed upon and therefore also an expression of party autonomy. As was rightly observed by Cheng:

> Except for judicial review, arbitration institutions also play important roles in controlling international arbitration process. Arbitration rules and regulations established by numerous arbitration institutions take on major responsibility to regulate arbitration process in the modern age. Because arbitration institutions are at the leading positions that can make sensitive and timely responses to their clients' needs and have sophisticated legislative experience, institutional arbitration rules and regulations are tailored as practice-oriented and have effective enforcement. In addition, arbitration institutions can interpret and execute their own arbitration rules in a more consistent and certain manner. Furthermore, defects discovered in arbitration rules are easier and faster to get revised or repaired in practice.[59]

I perceive much of the institutional arbitration development to be a positive manifestation of judicialization. It is a form of harmonization of the arbitral legal order, which has been accomplished *inter alia* through arbitral institutional rules, UNCITRAL arbitration rules, the IBA rules (e.g., on evidence and ethics).[60]

Notwithstanding this, arbitral institutions, too, have realized that the development may have gone too far and therefore sought alternative procedures for achieving a speedy and cost-effective procedure. Arbitral institutions must ask themselves what more they can do "to bring to the attention of counsel and the parties the possibilities of adopting an expedited process."[61] The introduction of expedited arbitration is a step in the right direction. Making expedited arbitration the default procedure for low-value and less complex matters is another step in the right direction. Chen observed that:

> Generally, arbitration institutions do have different emphases in revising their arbitration rules, but the major direction of their revisions is streamlining arbitration proceedings by granting arbitral tribunals more discretionary power and providing faster and simpler procedural options. Maybe it is still too early to contend that similar revisions in institutional arbitration rules evidence that

57 *See* CARBONNEAU, *supra* note 1, at 71.

58 *See* Chen, *supra* note 24, at 310.

59 *Id*. at 308.

60 *See e.g.*, Helmer, *supra* note 31, at 55-63.

61 Morton, *supra* note 15, at 111.

> international arbitration culture or standard norms have been formed. At least, it is clear that, institutional arbitration rules all over the world comply more and more with a uniform trend by taking similar revisionary paths.[62]

Finally, I believe that the US influence in ICA is also a result of American expertise in leading through institutional soft powers. It has rightly been noted that the US "influence has been ameliorated by countervailing forces, producing efforts at harmonization such as the IBA Rules on the Taking of Evidence in International Commercial Arbitration."[63]

4. Expedited Arbitration

Arbitration is the overwhelmingly preferred international commercial dispute settlement regime. Thus, this paper actually engages in a discussion and analysis on the perfection of a dispute resolution system that works—and the proof is in the pudding.[64]

Expedited arbitration is a way in which to offer a variant of arbitration that brings the regime back to its roots and ones more elevates the currency of speed and cost efficiency, while simultaneously understanding the need of the heightened standing of additional procedural "quality" in some complex and high-stake cases. Put simply, expedited arbitration constitutes an important tool to counter the negative effect of judicialization—i.e., to save ICA from becoming as costly and lengthy as litigation while not undercutting the option of pursuing the arbitral trial.[65]

Thus, expedited arbitration is an alternative approach to both litigation and to the arbitral trial. It is "designed for parties who consider time to be of the essence, and who are willing to accept the marginal reduction in legal security for greater speed and lower costs."[66] One can say that expedited arbitration aligns ICA with the values that long guided the procedure in continental Europe, instead of being "placed at the mercy of vicissitudes of adversarial advocacy."[67]

In 2010, Peter Morton asked whether a "world can exist where expedited arbitration becomes the default procedure"?[68] This question was asked at the backdrop of the

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62 Chen, *supra* note 24, at 305. She also concluded that "Empirical research on data collected from eight world-leading arbitration institutions indicates that: first, these arbitration institutions are constantly revising and enriching their arbitration rules to improve dispute resolution services; second, institutional arbitration rules are revised to a more uniform way at the worldwide level; third, arbitration institutions take different paths in establishing arbitration rules and regulations for specific subject matters." *Id.* at. 309.

63 Stipanowich, *supra* note 7, at 23.

64 White & Case and Queen Marry School of International Arbitration, *supra* note 3, at 2; *see also* Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 THE AM. J. OF COMP. L., 233, 255 (2006) ("As the globalization of national economies continues, more par ties will turn to private rather than public means of resolving transnational disputes.").

65 *See e.g,.* Giacomo Marchisio, *Recent Solutions to Old Problems, A Look at the Expedited Procedure under the Revised ICC rules of Arbitration*, ICC DISPUTE RESOLUTION BULLETIN, 76, 80 (2017).

66 Paulsson, *supra* note 7, at 715.

67 CARBONNEAU, *supra* note 1, at 146.

68 Morton, *supra* note 15.

dissatisfaction with the evolution of ICA turning into a judicialized dispute resolution venue. As of today, expedited arbitration has become the default procedure at certain arbitral institutions. For example, the International Chamber of Commerce ("ICC") automatically directs certain arbitration matters into the expedited route, i.e., per default.[69]

Thus, "[p]lanners and drafters of commercial dispute resolution agreements must move beyond a monolithic conception of arbitration and consider process options in light of contextual needs and goals."[70] This trend towards revisiting the fundamental elements of ICA started in the twenty-first century whereby leading US arbitral institutions created templates for expedited or streamlined arbitration.[71]

a. What is Expedited Arbitration?

Expedited arbitration is a procedure that holds the traditional advantages of arbitration, i.e., the procedure is (a) flexible; (b) confidential; and (c) final, binding, and directly enforceable.[72] In addition, the procedure is, as it once was, (d) quick, and (e) cost-effective. These last two element came as a response to the criticism of international arbitration having become costly, lengthy, and complex.[73]

Thus, the underlying intention behind expedited arbitration is to pre-define a cost- and speed effective procedure that is proportional to the value or complexity of the dispute.[74] In a word: expedited arbitration is an attempt to redress the judicialization of ICA by offering a cost- and speed efficient venue for redress of commercial grievances with reasonable due process. Mostly, this venue is offered for small value claims and for small and medium enterprises.

b. When is Expedited Arbitration Practical and When is it Not?

Expedited arbitration is practical when the clients' goals and priorities are met by a less judicial procedure for dispute resolution. If costs and time can be reduced, while the conflict management aspect can be facilitated efficiently, the expeditious format is apt for the task at

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69 The ICC makes expedited arbitration applicable by default to a dispute that does not exceed USD 2 Million. The parties can of course "opt-out". *See* Int'l Chamber of Commerce, *Expedited Procedure Provisions*, ICCWBO.ORG, https://iccwbo.org/dispute-resolution-services/arbitration/expedited-procedure-provisions/ (last visited 18 September 2021).

70 *Id*. at 57.

71 Stipanowich, *supra* note 15, at 391.

72 See e.g., https://sccinstitute.com/our-services/expedited-arbitration/.

73 *See* Piotr Wójtowicz and Franco Gevaerd, *How Uncitral's Working Group II on Arbitration Is Analyzing the Field to Help Expedited Processes*, 37(6) INTERNATIONAL ADR 90 (2019). For a good discussion on the "judicialization" of arbitration (in the negative and positive, respectively), *see* Stipanowich, *supra* note 8 and ALEC STONE SWEET AND FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY (2017).

74 Marchisio, *supra* note 65, at 77 ("These reforms were inspired by the so-called principle of proportionality, according to which the procedural means invested in a dispute should be proportional to the value of the dispute itself.").

hand. The court-like due process is not the name of the game, even though some due process represent a mandatory rule that cannot be infringed—even as an expression of party autonomy.

Expedited arbitration is not suitable for complex matters or mattes with a high value in dispute.[75] Moreover, expedited arbitration is likely not suitable for multi-party disputes.[76] There can often be a tension between time and economy, on one hand, and other goals, on the other.[77] The rules of expedited arbitration "were intended to satisfy the demand for a simplified and more cost-effective means of arbitration in cases of less complexity and monetary value."[78]

Some guidance for when expedited arbitration rules are not practical can be found in the recent UNCITRAL Working Group II's "Draft provision 3" on "Non-application of the Expedited Arbitration Provisions".[79] Such a solution can be crafted by counsel in arbitration clauses, too, for example as follows:

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75 It is important to point out here that value is not the single decider of complexity. Complex cases can have a low value, or no determined value (e.g. when a claim for specific performance of declaratory statement has been put forth). *See e.g.*, Tymczyszyn, *supra* note 7, at 27 ("Further, the value of the claim often may not reflect the complexity of the issues in dispute.").

76 *Id.* at 27 ("[g]enerally, fast track arbitration will not be suitable for complex disputes or multi-party proceedings").

77 Stipanowich, *supra* note 15, at 406 ("Accommodating these competing expectations ion discrete cases is perhaps the greatest challenge for drafters of arbitration and dispute resolution provisions, since the balance will be struck differently depending on the circumstances."); *see also* Ylli Dautaj and Per Magnusson, *An SCC Perspective: What Happens When the Expedited Arbitration Provisions no Longer Remain Practical?*, 3 JURIDISK TIDSKRIFT (2021) and Tymczyszyn, *supra* note 7, at 27 ("Expedited procedures would best suit those cases where the need to resolve disputes quickly outweighs the parties' need to present their case in scrupulous detail, and there are no major factual disagreements. If determination of the factual issues requires an expert's involvement or detailed witness statements, then fast track is best avoided.").

78 ROBIN OLDENSTAM, KRISTOFFER LÖF, ALEXANDER FOERSTER ET AL, MANNHEIMER SWARTLING'S CONCISE GUIDE TO ARBITRATION IN SWEDEN 66-67 (2019).

79 UNITED NATIONS GEN. COMMISSION ON INT'L TRADE LAW (2020), https://undocs.org/en/A/CN.9/WG.II/WP.214. *See* Draft Provision 3: Draft provision 3 (Non-application of the Expedited Arbitration Provisions)
Agreement of the parties on non-application
1. At any time during the proceedings, the parties may agree that the Expedited Arbitration Provisions shall no longer apply to the arbitration.
Request by a party for non-application
2. At the request of a party, the arbitral tribunal may, in exceptional circumstances, determine that the Expedited Arbitration Provisions shall no longer apply to the arbitration.
Elements to be taken into account when making the determination
3. In making the determination pursuant to paragraph 2, the arbitral tribunal shall invite the parties to express their views and take into account, among others, the following:
(a) The urgency and time-sensitivity of resolving the dispute;
(b) At which stage of the proceedings the request is made;
(c) The legal and factual complexity of the dispute, for example, the anticipated volume of documentary evidence and the number of witnesses;
(d) The anticipated amount in dispute (the sum of claims made in the notice of arbitration, any counterclaim made in the response thereto as well as any amendment or supplement) and its proportionality to the expected cost of arbitration;
(e) The terms of the parties' agreement referring their dispute to arbitration under the Expedited Arbitration Provisions and whether the exceptional circumstance could have been foreseeable at the time of agreement; and
(f) The consequences of the determination on the proceedings, including on the procedural fairness.
Consequences of the non-application

> The Rules for Expedited Arbitration shall apply to any dispute, controversy, or claim arising out of or in connection with this agreement, or the breach termination or invalidity hereof, unless the ICC or the Sole Arbitrator in its discretion determines, taking into account the complexity of the case, the amount in dispute, and other such circumstances, that the ordinary Arbitration Rules shall apply. If so, the ICC shall also decide whether the Tribunal shall be composed of a Sole Arbitrator or three Arbitrators. The seat of arbitration shall be Paris, France. The language shall be English.

Moreover, arbitration institutions can—and do—take this into account. For example, the ICC holds that the court can determine "that it is inappropriate in the circumstances to apply the expedited procedure provisions."[80]

Put in a word: in some cases, witnesses must be heard and cross-examined, discovery may be crucial, and depositions really important. In these cases, especially given the width of subject-matter arbitrability, the dispute is simply too complex for a sole arbitrator to hear within a limited timeframe. If a matter is not practical for expedited arbitration, the institution or sole arbitrator should decide to apply the ordinary rules instead.[81]

c. Why to Draft Expedited Arbitration Clauses?

The judicialized ICA came to present serious obstacles for many years to come. By illustration, in 2004, a corporate general counsel explained that "arbitration is as expensive [as litigation] […] less predictable, and not appealable. Arbitration is often unsatisfactory because litigators […] run it exactly like a piece of litigation."[82] Here it should be remembered that arbitration is the parties' procedure and that they—together with in-house counsel—should not allow litigators to completely dictate the format, content, and scope of the arbitral procedure.[83] To some extent, litigation lawyers have already turned arbitration into an arbitral trial, but the expedited arbitration procedure presents a response to such development and offers a compelling alternative that is cost and speed efficient.

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4. When the Expedited Arbitration Provisions no longer apply to the arbitration pursuant to paragraph 1 or 2, the arbitral tribunal shall remain in place to the extent possible and conduct the arbitration in accordance with the UNCITRAL Arbitration Rules

80 Article 30(3)(c), 2017 ICC Rules.

81 *See* Dautaj and Magnusson, *supra* note 77.

82 *See* Stipanowich, *supra* note 15, at 895; Stipanowich, *supra* note 8, at 9.

83 *See e.g.*, Larusson, *supra* note 19, at 176 ("This means that when advising SMEs, counsel should usually advise against the use of traditional, full-scale, institutional arbitration. They know that their client will most likely not be able to initiate such arbitral proceedings against the other party and if the other party sues the SME in such arbitration, the costs of defending the rights of the SME will be disproportionate, possibly beyond the SME's financial means and could even lead to the SME's collapse. […] For fast-moving SMEs with limited financial flexibility, being embroiled in lengthy and costly arbitration proceedings may cause a material set-back in the SME's overall operations. This is especially true if the SME is still a "one-product" company with one core asset (such as a single software solution), which may be the subject-matter of the dispute.").

The time to return to the fundamental elements of ICA has come, at least for many commercial disputes. Commercial parties that appreciate the currency of speed and cost efficiency demand a procedure that is more apt to their actual needs. In this light, both counsel and service providers (arbitral institutions) are waking-up to their task. Stipanowich wrote that:

> Clients and counsel tend to have neither the time nor the expertise to craft their own process templates, and usually need straightforward, dependable guidance from those that develop and administer the procedures upon which they rely. Provider institutions are awakening to the need to promote real choices in arbitration, but much remains to be done.[84]

Stipanowich then listed six reasons why business expectations do not resonate well with the actual experience of arbitration; that is, (1) failure to plan with specific business goals in mind; (2) difficulty of designing an appropriate system prospectively, before disputes arise; (3) inexperience of transaction counsel when negotiating and crafting contracts with dispute resolution clauses; (4) realities of the negotiating process with parties' different goals and priorities; (5) limited guidance; and (6) .[85] This is exactly why counsel should become aware of expedited arbitration when drafting dispute resolution clauses and why arbitral institutions nowadays offers this procedure and some even treats it as the default procedure. Moreover, courts should not too easily set-aside or refuse enforcement of expedited awards in order to reinforce its authority and legitimacy.

The truth is this: without an alternative to the time-consuming and costly arbitration trial that is nowadays the norm, the procedure will slowly diminish into the hands of other alternative dispute settlement regimes—e.g., mediation, fact-finding, "rent-a-judge", etc.[86] Such systems are not as effective and will therefore not be as effective as ICA in facilitating commerce, trade, and investments in the same manner as ICA. The reason for civil bench trials and civil jury trials reducing was–according to Trial Lawyers–due to formality, on the one hand, and expense and delay, on the other.[87] The same evolution is now appearing as true for ICA because it has to a great extent mimicked and become a "new litigation." Notwithstanding this, arbitration still holds the fundamental element of flexibility and party autonomy which makes it possible to amend the procedure to reflect the needs of the business community, without undercutting reasonable due process.

d. SMEs: The Engine of Economic Prosperity and Their Adjudicatory Needs

84 Stipanowich, *supra* note 15, at 386.

85 *Id*. at 388.

86 *See* CARBONNEAU, *supra* note 1, at 15 ("Tinkering with the tried and true, a workable and working process, is a hazardous undertaking.").

87 *See* Stipanowich, *supra* note 15, at 387. Institution for the Advancement of the American Legal System, *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System* at 3 (2009).

It has been said that the "corporate retreat from litigation was fueled by concerns about cost."[88] Traditional, full-scale arbitration (i.e., the arbitral trial) is in some cases "simply too expensive to pass the optimal cost-benefit test, in particular for small and medium-sized enterprises" (SMEs).[89] For SMEs, such a full-scale procedure decreases liquidity and deflects focus from growth initiatives. Notwithstanding this, costs are relative and, in some cases, justified.

Elaborating a sensible dispute resolution venue for SMEs is not a minor issue. This is a task to take very seriously. SMEs contribute to the economic output in both US and EU of around 50 % and enter cross-border contracts daily.[90] The world is a globalized place and not only multinational enterprises enter into commercial agreements across borders and not all commercial transactions are valued in the millions or billions. "Therefore, it is of particular importance that SMEs can have access to timely and cost-effective arbitration options in the context of their cross-border contracts."[91]

In Stipanowhich list of reasons why business expectations do not resonate with experience (*see* above), he lists *inter alia* difficulties of designing an appropriate system prospectively, inexperience of transactional counsel, and limited guidance.[92] As he further rightly noted, "[u]nless a client is entering into a significant commercial relationship or preparing a contract template that will be used multiple times, it is unrealistic to expect counsel to spend considerable time planning and drafting arbitration agreements."[93] Thus, it is important that expedited arbitration rules are increasingly being treated as the default rules. Such default procedure will be particularly beneficial for SMEs.

5. Covid-19 and the Lessons Learnt: New Wine in Old Bottles

Some 10 years has passed since Peter Morton asked whether a "world can exist where expedited arbitration becomes the default procedure"?[94] When Morton asked this question, ICA had since some time back become costly, time-consuming, and too formal—an antithesis to its fundamental elements of flexibility, expeditiousness, and cost-efficiency. As a result, commercial parties instead started embarking on other types of alternative dispute resolution

88 Stipanowich, *supra* note 7, at 24.

89 Larusson, *supra* note 19, at 170 -72 ("Although no companies wish to be embroiled in lengthy and costly disputes, SMEs are particularly sensitive to contentious matters, as they are usually faced with the double Achilles' heel of limited resources and a limited scope for acceptable delays in the development of their technology and business. This means that SMEs' competitive advantage can be materially hampered if they get caught in costly dispute resolution and, in some instances, this can prove fatal to their operations.").

90 *Id*. at 171 (referring to Edinburgh Group, *Growing the global economy through SMEs*, Issue 7 and Small Business and Entrepreneurship Council, "www.sbecouncil.org").

91 *Id*.

92 Stipanowich, *supra* note 15, at 388-90.

93 *Id*. at 390.

94 Morton, *supra* note 15.

(ADR).[95] This negative development was redressed by the invent of expedited arbitration. The idea of expedited arbitration was so well received that it started finding its place as the default arbitral procedure (*see* more below).

Moreover, considering the lessons learned while arbitrating during the covid-19 landscape, I know ask: Can a world exist where *digital* expedited arbitration becomes the default procedure? The answer should equally be "yes it can", and perhaps even that "it should." The framework for arbitration "should be tailored to reflect the very different realities of different transactional settings."[96] It is suggested that "as the process grows and develops, its gravamen should be revisited."[97] Digital expedited arbitration could effectively meet the demands and expectations for commercial parties adjudicating low-value and less complex disputes.

a. The Default Expedited Procedure

ICA in its current form has rightly been criticized for sometimes being too costly, lengthy, and complex.[98] The truth of the matter is that the arbitral trial may simply be inefficient for certain disputes and for certain parties. These parties are now demanding a viable alternative, but meanwhile one that preserves the fundamental elements of ICA. The good news is that the international arbitration community has been observant and already implemented countermeasures, including the drafting of expedited arbitration rules.[99] Thanks to specialization and judicialization of ICA, the procedure is now seriously opening up its doors for offering a compelling alternative to the arbitral trial, i.e., the expedited arbitration route. Expedited arbitration has been—and must continue to be—welcomed as something that increases the versatility of institutional arbitration.[100]

Expedited arbitration has grown tremendously in popularity and has even become the default procedure at certain arbitral institutions for "low value" and less complex disputes.

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95 Stipanowich, *supra* note 7, at 7.

96 *Id.* at 57.

97 CARBONNEAU, *supra* note 1, at 43.

98 Wójtowicz and Gevaerd, *supra* note 73, at 90 (pt. 1).

99 Id.; Morton, *supra* note 15, at 104 ("The reputation of arbitration as the quick and informal alternative to court proceedings is, for many, now consigned to history. Complaints are rife of the increased 'judicialisation' of arbitration, whereby counsel and arbitrators (who may be former judges) are all too ready to import the court procedures which they know and love into the arbitration process, with little more than a moment's thought as to whether there may be a quicker and cheaper means of concluding that particular dispute. Practitioners and institutions are, quite rightly, looking to tackle the problem head on."). In this light, I also want to address the difference between an arbitration specialist (e.g., a practicing academic) and a pure practitioner. The latter may be less receptive to assume guilt of the arbitral procedure for not meeting traditionally perceived expectations of ICA. The practitioners' task and mission are to win. *See e.g.,* Paulsson, *supra* note 7, at 713 ("Put on the defensive and consumed by guilt, arbitration specialists have quickly addressed such charges and have devised solutions to the alleged problems. The arbitration practitioners, however, have typically ignored the suggested solutions."). The arbitration specialists have responded to the guilt by presenting expedited arbitration rules, which will help build an adjudicatory civilization through ICA. *See e.g.,* Thomas E. Carbonneau, *Building the Civilization of Arbitration – Introduction*, 113(4) PENN ST. L. R. 983 (2009).

100 Tarjuelo, *supra* note 8, at 116.

Thus, expedited arbitration can nowadays be found either as an (1) automatic offering (i.e., the default procedure), or as an (2) elective choice (i.e. in an arbitration clause or in a submissions clause).[101]

Because parties generally tend to be less agreeable in limiting the arbitral width when negotiating and even less agreeable when the dispute has ensued, there is a need for tackling this problem through institutions adopting special rules for expedited procedures, on the one hand, and even go as far as to make the rules applicable per default under certain circumstances. ICC is one of the leading institutions that have made expedited arbitration the default procedure for certain type of disputes.

The ICC rules from 2017 were, among other things, aimed at enhancing the time and cost efficiency of the arbitral procedure. The ICC made the rules for expedited arbitration the default ones for disputes of amounts less than USD 2 million.[102] Thus, unless the parties expressly opt-out from the expedited rules, any request for arbitration based on an arbitration clause that refers to ICC arbitration and that was signed post March 2017 is to be arbitrated as an expedited arbitration provided it meets the amount threshold. Furthermore, the expedited rules provide for a six-month timeframe for rendering the award following the date of the case management conference, with a possible extension at the discretion of the court.[103] On 1 January 2021 the ICC updated its rules again, introducing significant developments (*see* one such development below).

b. A Default Digital Expedited Procedure?

Whether arbitrators have the discretion to proceed with a digital hearing despite the protest of one or both parties have been vividly discussed recently.[104] My position is that arbitrators do not have such discretion, but I unfortunately seem to hold a minority view. However, I am of the opinion that arbitrators have such discretion in expedited arbitration (as opposed to "ordinary" arbitration) if the procedure can otherwise be delayed by preparing for a physical hearing. I am also of the firmly entrenched view that when one deals with expedited arbitration, one has specifically bargained for expeditiousness at the expense of some qualitative features.

Regardless of that discretionary debate, though, arbitral institutions are increasingly incorporating rules that specifically empowers arbitrators to decide whether to conduct the

101 *Id*. at 108.

102 Parties are free to agree to the use of expedited arbitration also for disputes above the threshold amount. I, however, would carefully consider such suggestion since the ICC may at its own discretion determine that the procedure is not suitable for expedited arbitration, and moreover that the complexity of the case can give rise to a challenge on the lack of due process.

103 Int'l Chamber of Com. Arbitration Rules, Art. 31(1), app. VI, Art. 1(4) (2021).

104 Ylli Dautaj and Per Magnusson, *Does a Right to a Physical Hearing Exist in Arbitration? Sweden* in DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION? (James Hosking, Yasmine Lahlou, and Giacomo Rojas Elgueta eds., forthcoming in 2021). *Cf* James Hosking, Yasmine Lahlou, and Marcel Engholm Cardoso, *Does a Right to a Physical Hearing Exist in Arbitration? USA* in DOES A RIGHT TO A PHYSICAL HEARING EXIST IN INTERNATIONAL ARBITRATION? (James Hosking, Yasmine Lahlou, and Giacomo Rojas Elgueta eds., forthcoming in 2021).

hearing digitally. For example, on 1 January 2021, the ICC introduced new procedures by updating key provisions in its arbitration rules. The new Article 26 reads as follows:

> A hearing shall be held if any of the parties so requests or, failing such a request, if the arbitral tribunal on its own motion decides to hear the parties. When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it. The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication.[105]

The 2017 ICC rules had not expressly accounted for the option to pursue remote/digital arbitration hearings. This latest addition in 2021 has been a natural development of the experiences gathered during the covid-19 arbitral landscape. Whether the discretion is given *ipso facto* or following successfully consulting with the parties is more cumbersome to discern. In the expedited arbitration context, I would argue that the matter is pretty clear – the sole arbitrator can decide to conduct the hearing by written exchanges (if due process allows), let alone via a digital/remote hearing (if due process allows). I would even take it one step further and argue that digital expedited arbitration should be the new default procedure for low-value, less complex disputes at the ICC. More arbitral institutions may follow-suit and we may soon live in a world where digital expedited arbitration is the default procedure.

6. Concluding Remarks

ICA's initial success as an informal, speedy, and cost-efficient transborder dispute resolution mechanism is undeniable. However, today, the procedure has largely become judicialized, and therefore ill-liked by many and applauded by others. Both sides have merit in their claim to authority. I believe that the evolution towards an arbitral trial was inevitable as courts were asked to approve the procedure by sanctioning the outcome of arbitral decision-making and with it "private justice". Thus, as domestic courts were asked to shake-off its traditional hostility towards ICA, the procedure had to meet litigators and judges half-way by amending the procedure. Put simply, there were concessions on both sides and with approval came conditions of "judicial maturity".

In the early 90's, Professor Carbonneau was a forefront figure in this debate. Already then, he had cautioned against judicialization and any such reform that does not align with the fundamental elements of ICA. Following ICA's widespread usage, Carbonneau expressed his reduced mission as follows:

> My ask is no longer to arrest a locomotive proceeding down the tracks at full throttle. I can only try to convince the engineer to slow the train to a pace at which an accounting of its direction can take place. As reduced as my mission has become, it still smacks of the impossible. My legs can hardly propel me to the speed demanded by the chase. My cries are barely audible in the rush of air

105 Article 26, 2021 ICC Rules.

> that follows in the train's passage. My signals of caution are confused with errant sparks and extinguished as quickly.[106]

Carbonneau was ahead of his time in spotting an adverse trend, which he articulated so eloquently in several papers and book contributions.[107] Meanwhile, law firms and service providers were occupied with capitalizing on fueling the dispute resolution demand with costly litigation features, but yet with high quality legal services. The users wanted to win and wanted aggressively skillful lawyers on their side. Eventually, the scope of the arbitral competence was inevitable too and the subject-matter inarbitrability doctrine became less and less prevalent. Arbitrators were considered competent to handle statutory claims and other complex matters traditionally falling outside the realm of ICA. Thus, ICA had "passed from the state of nature to life in a civilized society, and in the process ha[d] acquired many of the trappings of the dysfunctional judicial trial—an omen perhaps of its ultimate fate."[108] Meanwhile, the increased quality of the ICA procedure was, too, undeniable, making it harder (if not impossible) to downplay its righteous entrance for complex and high-stake ICA disputes. All in all, there can be no denial of the fact that the American trial techniques widened the lawyers' toolkit in this now highly contentious and adversarial setting. American law firms were highly sought after to win in arbitration, at any price. More than that, there can be no denial of the fact that it has partly been for the better, yet not exclusively so.

Thus, even if the arbitral trial is considered to be "better" than expedited arbitration from a quality standpoint, it may still be unproportionally so for certain types of disputes and for certain types of commercial parties. As eloquently explained by one author: "expedited arbitration may be the only commercially realistic arbitration option for SMEs in many instances and despite its limits, it is certainly better to have access to imperfect justice than to no justice at all."[109]

The architects of building an adjudicatory civilization through ICA (e.g., the ICC) understood this when partaking in elaborating the institution of transborder arbitration. The same visionaries are now increasingly working to re-meet the calls for a "de-judicialized" arbitral alternative. In responding to the customers' demands and expectations, ICC and other arbitral service providers have turned expedited arbitration into the default procedure and the UNCITRAL has set-up an entire working group dedicated to elaborating on expedited arbitration rules.

With that said, no one perfect dispute resolution venue will be discovered. Not a single dispute resolution regime will be able to meet all demands and expectations. This is even more so in the transnational context. Professor Carbonneau once wrote that the "work of intermediating between different concepts of the trial and justice and tailoring remedies to human needs remains unfinished."[110] In the experience of human-life, I am afraid to say that the work of adjudicatory perfection will remain an ongoing and unfinished project forever. Time and context turn demand into a pendulum that swings with the winds of contemporary

106 CARBONNEAU, *supra* note 1, at 125.

107 *See e.g.*, chapters in *id*. → what pages?

108 *Id*. at 127.

109 Larusson, *supra* note 19, at 179.

110 CARBONNEAU, *supra* note 1, at 141; FOX, *supra* note 2, at 88.

wants and needs. However, for the winds of today, (digital) expedited arbitration will provide for an effective recourse to redress many commercial grievances, in particular for SMEs in low-value and less complex disputes. All in all, (digital) expedited arbitration helps respond to the perceived shortcomings of the arbitral trial by offering a procedurally compelling, yet cost- and speed efficient, alternative to it.