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**Documento de Trabajo**

**Serie Arbitraje Internacional  
y Resolución Alternativa de Controversias**  
Número 1 / 2007

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# Towards a new paradigm in international arbitration. The Town Elder model revisited

David W. Rivkin<sup>1</sup>

International arbitration today faces a growing list of challenges. Ironically, most of these challenges arise from the success of the process itself. Because international arbitration has proven to be an efficient and effective means to resolve international disputes, including the enforcement of awards, it has become standard to include arbitration clauses in any significant international transaction. In addition, the proliferation of bilateral investment treaties, the success of some investors in winning substantial claims under those treaties, and the changing economic environment worldwide have caused a boom in investment treaty arbitrations.

We are all familiar with the statistics showing such growth. Fifteen years ago, in 1992, the ICC had 337 new cases; in 2002, the ICC reached a high of 593 new cases. In the most recent statistics, for 2005, 521 new cases were filed, and a record total of 1,180 were ongoing at the year end. Other institutions have shown similar growth.

This growth is obviously a sign of the success of international arbitration, but it also raises new challenges. Parties come from a broader and more diverse array of countries, and they bring with them different expectations and different legal cultures. In 2005, the parties in the new ICC cases filed came from 117 different countries. Moreover, the cases are more complex. One-third of the newly filed ICC cases in 2005 involved more than two parties; 13% involved states or para-statal entities.

And finally, the amounts in dispute have grown significantly. In 1992, the ICC reported that 13% of their cases involved claims over \$10 million, and only 1% were over \$100 million. By 2005, nearly a quarter, or 23%, of the new ICC cases involved more than \$10 million, and 4% included claims over \$100 million. Even more strikingly, a recent survey by *The American Lawyer* found approximately 50 current contract and treaty arbitrations raising claims of at least \$1 billion.

These statistics and trends should make us all feel good about international arbitration and the system that so many of us have helped develop. However, each of these elements makes more difficult the parties' and arbitrators' task in conducting an efficient international arbitration.

There is no question that this growth has occurred because of the inherent advantages in the process seen by parties in international commerce. In a recent survey by PricewaterhouseCoopers and the School of

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International Arbitration at Queen Mary College, University of London, 73% of the respondents –in-house counsel at leading corporations around the world– preferred to use international arbitration, either alone or in conjunction with mediation. The study also found that 95% of corporations expected to continue using international arbitration. These respondents cited the advantages of international arbitration with which we are all familiar: the flexibility of procedure, the enforceability of the awards, the privacy that can be afforded to the process, and the ability of parties to select the arbitrators.

However, the survey also highlighted the dangers that are challenging the process. The respondents cited the expense and the length of time to resolve disputes as the two greatest disadvantages of international arbitration. It was quite striking that nearly two-thirds (65%) of the respondents believed international arbitration to be more expensive than trans-national litigation, and 23% more believed it to be as costly as trans-national litigation. Only 12% believed that international arbitration was less expensive. One-third of the respondents said that their corporation's most recent international arbitration case incurred costs greater than \$1 million, and indeed 12% incurred costs greater than \$5 million. Not surprisingly, the need for a mechanism to reduce arbitration costs was cited as one of the principal concerns of the corporations studied. Even the positive finding that 73% of PwC's respondents said that they preferred international arbitration had a danger sign: Less than half preferred international arbitration alone. The 73% figure was reached only when it included a preference to use international arbitration *along with* other alternative dispute resolution mechanisms in a multi-tiered process.

It is worth noting, perhaps, that in a 2003 study conducted by The American Arbitration Association, 58% of the corporate respondents said that arbitration decreased costs compared to litigation, and 67% said that arbitration decreased the time to decision compared to litigation. The differences between these figures may be due to the higher anticipated cost and length of American litigation compared to litigation in other parts of the world, since the PwC study had a broader geographical base of respondents.

In another survey, conducted by the accounting firm Grant Thornton, 80% of dispute resolution lawyers and 74% of the in-house lawyers said that they thought arbitration was expensive, and half of all participants thought that arbitration was slow.

We all know the causes of these concerns. The growth in caseloads has strained international arbitration institutions, parties, counsel, and the core of international arbitrators themselves. The complexity of cases today and the size of the claims have led to more extenuated proceedings, mountainous written submissions and longer hearings. Document discovery has become commonplace, even in Continental cases, and while the IBA Rules of Evidence have helped by providing standards to control the scope of discovery, other developments have caused new challenges. The growth in discovery of electronic documents is a test for all involved in arbitration (about which I will talk more later). The broad public policy issues raised in cases involving governments cause arbitrators to allow longer proceedings. Arbitrators who are too busy cannot schedule timely hearings and take a long time to draft the award. All of these factors today combine to create a crisis that we must find ways to resolve if international arbitration is going to continue to be the favored means of resolving international disputes.

The goals of international arbitration have not changed. In short, they can be neatly summarized as (1) a fair and neutral process, (2) conducted by intelligent and experienced arbitrators, (3) resulting in a timely and well-reasoned decision, and (4) benefiting from an effective enforcement mechanism.

The question that I wish to discuss in this speech is how we continue to achieve these goals in light of the challenges I have described. If we continue as is, the system may eventually collapse under its own weight.

We know that in today's world, the pace of change has accelerated. Modern business makes decisions, introduces new products, and buys and sells companies at a rapid pace. Performance statistics are reviewed daily, and quarterly results are intently scrutinized. While we all used to be content with reading a newspaper each morning, now we visit news websites several times a day, and news organizations feel that they must provide a steady stream of new news throughout the day.

In light of these developments, we cannot be content with taking two years to resolve a dispute. By then, the parties involved have long since moved past the business concerned with the dispute. Moreover, in many circumstances, the parties have had to break apart and follow new strategies, while if the dispute had been resolved more quickly perhaps those parties could have found a new way to work together. In the end, our arbitration decisions may properly allocate loss and gain between the two parties, but they do not contribute to the advancement of either side's broader interests or their ability to improve their own businesses.

In recent years, there have been some promising innovations that have, I believe, begun to ameliorate the length and cost of international arbitration proceedings – or at least have slowed their growth. The IBA Rules of Evidence have reduced the scope of document discovery and have made resolving discovery disputes easier by providing a commonly understood set of standards. Witness conferencing is used more often to focus expert testimony. More and more arbitrations are conducted using time limits, or chess clocks, to limit the amount of time each party has to present its case. In every case in which I have been involved where a chess clock is used, the time limit has forced the parties to present only material and relevant evidence, and it has avoided cumulative and unnecessary testimony. Never have I felt that important evidence was not able to be presented to the arbitral tribunal period. In my view, however, these reforms are insufficient.

Therefore, I propose a more radical solution. A return to basics Economists use an effective tool known as zero-based budgeting. In that process, one does not start with the prior year's budget and simply make revisions to that budget. Instead, one builds from scratch to identify only what expenses are necessary for the coming year. The arbitration community should adopt the same approach to international arbitration procedure. We can and should all build on experience from procedures developed in prior cases. However, we should not fall into the routine, as we too frequently do, of simply using the same procedures from case to case. At the beginning of each new case, parties and arbitrators should focus exactly on what is necessary -and only what is necessary- for that specific case. Is discovery necessary at all? How about witness statements? Memorials? Oral testimony?

Of course, I understand that there is a balance between efficiency and reaching the correct decision. Arbitration would be much cheaper and quicker if the arbitrators decided their cases by a coin flip or, as was done in ancient China, an archery contest. But we can still come to good decisions without as much process as we now have.

The original conception of arbitration was of two business people taking their dispute to a wise business person in whom they both trusted, describing their respective claims, and then asking the arbitrator to provide them with the best solution to their dispute. I will call that the Town Elder model. Modern disputes have grown too complex, of course, for that model in its purest form to have any current usefulness. However, my thesis is that in each case we should start with the Town Elder model and build into it only the additional

procedure that is necessary for that particular dispute. As I mentioned before: building from the ground up, rather than using a pre-conceived notion of how the case should proceed.

These needs were set out well in the General Principles or Preamble to the new Spanish Arbitration Act. The *Exposición de Motivos* recognizes that “arbitration, especially international commercial arbitration, is an institution that must evolve at the same pace as other legal institutions, or risks becoming outdated.” The *Exposición* goes on to describe the “need for the swiftness typical of arbitration to be adapted to practical demands.” (EM pp.337, 348).

Let us look for a moment at each stage of the case and think about a different paradigm for proceeding in each.

One of the biggest causes of delay is simply in getting the case started. It takes on average about four months to constitute the arbitral tribunal. Why is that necessary? To be sure, selecting the right arbitrators is the key to having an effective and efficient arbitration, so the significance of this stage should not be short-changed. Nevertheless, the pool of experienced arbitrators is generally well known; it is growing; and there is now a vast amount of information available about prospective arbitrators. Parties should not blindly agree in their arbitration clause to allow each side as long as twenty or thirty days to name an arbitrator, when it can likely be done in a shorter period of time. Moreover, given the experience that institutions have with the arbitrators on their panels, they should be able to move with greater dispatch in naming arbitrators when they are required to do so or in proposing arbitrators to the parties.

It is enormously frustrating for the parties not even to be able to start the arbitration for such an extended period of time. Certainly, of course, if the case is filed in court, they can begin immediately. Recently, we had perhaps an extreme example of the delays that can occur at this phase. Last May, Occidental Petroleum filed an ICSID arbitration only two days after its properties in Ecuador were expropriated. In the request, Occidental asked for provisional measures, which by definition have some urgency. We had informed the ICSID Secretariat that these measures would be sought and that we would be filing the complaint promptly if expropriation occurred. Nevertheless, it took nine months to constitute the tribunal. By the time we finally had the hearing on our request for provisional measures, the nature of the relief we sought had to change considerably.

A number of institutions, including the AAA's ICDR, have implemented procedures to name arbitrators almost instantly when emergency measures are sought. So far, on the few occasions when these provisions have been tested, the institutions have succeeded in naming an appropriate arbitrator quickly. If appointments can be done so quickly in these circumstances, then surely we can shorten the calendar and start arbitrations in a much shorter time than now. A good goal would be roughly a month after they are filed.

Another difference between litigation and arbitration in which litigation may fare better is the availability of procedures for the early disposition of the case. A substantial minority of cases in court can be terminated through a mechanism such as a motion to dismiss or for summary judgment in the United States or in England. Through such a device, a court can determine that a claim has no merit or is meritorious without hearing all of the evidence on every issue. Naturally, this can result in substantial time and cost savings, and it is equally fair to the parties to decide a case in such a matter.



Arbitrators remain generally reluctant to take such steps. Many continue to believe that in arbitration they must allow the parties to present the evidence they feel is relevant, whether or not it will play a role in the ultimate determination. However, arbitrators have recently been given the tools and the encouragement to do just that – in the cases where it is appropriate. Article 16 of the AAA International Arbitration Rules provides that the arbitrators may “direct the parties to focus the presentations on issues the decision of which could dispose of all or part of the case.” Similarly, the IBA Rules of Evidence provide, “Each arbitral tribunal is encouraged to identify to the parties as soon as it considers to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate.” The LCIA rules give arbitrators the power to “take the initiative in identifying the issues and ascertaining the relevant facts and the applicable law or rules of law,” and they also reflect the general duty of arbitrators set forth in the English Arbitration Act “to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense.”

The intention of these rules is not to permit broad or unnecessary motion practice, but rather to provide the opportunity to dispose of cases at an earlier stage where it may be appropriate and possible to do so. Examples of when it may be appropriate to determine a case on a preliminary issue include the applicability of a time limitation, the validity of the release, the application of *res judicata* or collateral estoppel, or the application of law to undisputed facts. In one case a few years ago, for example, we were representing a political risk insurer. The claim raised a number of coverage issues that could be determined only through the hearing of extensive evidence. However, it was also clear that the insured had not met several different conditions precedent to coverage, such as filing the claim in a timely manner or providing appropriate information to the insurer over the course of the policy. We asked the arbitrator to apply the AAA rule I mentioned a minute ago to determine if the insured had met these conditions precedent. The arbitrator received evidence only on the facts necessary to make that determination, and after doing so, he agreed that the conditions to coverage had not been met and dismissed the claim. It would have been foolish for the arbitrator to hear all of the evidence on all of the potential issues only to decide that our client was correct on these limited grounds.

Similarly, in a recent case where I sat as chair of the tribunal, we ruled that the claimant’s claims had already been disposed of through a prior release signed by the parties and by judicial determinations made in an earlier case between the parties.

In many ways, these procedures available in arbitration are superior to the comparable court procedures. That is because arbitrators have the ability to hold limited factual hearings on these particular issues, rather than simply decide, as court rules generally require, whether or not the claim as stated constitutes a valid claim.

Preliminary issues should also be used effectively to reduce the scope of the case, even if it will not decide the case altogether. For example, it is common for claimants to seek substantial lost profits. It is also common for a contract to exclude consequential damages, which may include lost profits. The proof of lost profits is a substantial and time-consuming exercise, often involving the hiring of experts who submit detailed and expensive reports. Therefore, if a party has a legitimate argument that the contract excludes lost profits or some other element of damages, it behooves arbitral tribunals to determine that issue first, before the parties have to undertake the time and expense of submitting proof on this issue.

Again, all of this derives from the Town Elder model that I posited before. If one were simply sitting with the Town Elder and describing the case, the Town Elder would first think what evidence he or she needs to

decide the dispute as presented. Where only limited evidence is necessary because a preliminary issue may be determinative, the Town Elder would ask only for such evidence. If in fact the evidence does not prove that a claim should be determined in this certain way, then the Town Elder can move on to hear whatever other evidence is necessary.

Thus, the Town Elder model also calls for more frequent phasing of arbitration. In each case, the arbitral tribunal and the parties should decide together whether it would be more efficient to hear liability and damages together or separately. The pros and cons of such bifurcation are well known, so I will not spend long on them. On the one hand, proof of damages is frequently both extensive and quite different from the evidence that needs to be presented on liability, so it is a waste of the parties' and the arbitrators' time to present and to hear evidence on damages if there is no liability. On the other hand, arbitrators will not be in a position to determine liability, of course, at the beginning of a case, and if evidence in a hearing on damages is delayed until after a finding of liability, it could significantly extend the course of the arbitration. Depending on the nature of the dispute, in addition, a finding that a respondent is liable may still avoid the necessity of a damages phase, because it may be more likely to lead to a settlement at that point.

Phasing can be used effectively in other circumstances, too. A Town Elder, presented with 100 different claims in a construction dispute, would not say to the parties: First, you tell me about all 100 of your claims, and then you respond. Instead, he or she would ask which claims have the most monetary value and which claims have overlapping facts or overlapping issues, so that the determination of one such claim would indicate how he or she would rule on the rest, and then ask for the necessary evidence on those claims only. After deciding a few of them, the parties would be in a much better position to work out the rest between themselves.

In order for this technique to be useful, the parties also have to be co-operative and understand the effect of the arbitrator's initial rulings. I spoke recently to the General Counsel of one construction company, who said that arbitrators had engaged in exactly this technique in the hope that after the first ruling or two the parties would find a settlement. Unfortunately, the General Counsel said, despite the fact that each ruling went against the other side, that party continued to fight until the arbitrator had determined all of the rest of the issues against it as well.

Similarly, this technique has to be combined with a focus on just the evidence necessary to decide each of these issues. This requires self control by the parties and a firm hand by the arbitrators.

Phasing of the case is not the only means by which arbitrators can and should encourage settlement. The Town Elder, in many circumstances, may, after hearing the parties, ask if he or she can propose a solution. The desire of arbitrators not to show any prejudice of the case is important. On the other hand, by the time of a hearing, for example, both sides will have had an opportunity to present a substantial part of their case through their written submissions. It is not wrong for the arbitrators to have formed some opinions by then. Similarly, hearings are often split because of difficulty in finding time on everyone's schedules. While breaking from one set of sessions, that might also be an appropriate time for arbitrators to see if they can help the parties.

This may take a variety of forms. Arbitrators can ask if they can give some preliminary thoughts. They may say they think one side will have a tough time demonstrating what it needs on one issue or the other has not yet presented evidence to prove something else. Or arbitrators can ask if they can propose a general solution. Or if it would be helpful to discuss with the parties where they stand on arbitration and to offer their

perspectives to help accelerate that process. Unlike a mediation, this should not involve private meetings with the parties, because the arbitrators may have to decide the case eventually and they should only hear what the other party also hears. And notice that I always suggested that these conversations have to be with the consent of the parties. Nevertheless, arbitrators should be more proactive in offering to assist in this manner. They certainly see the case in a manner neither party can, and they frequently have a good idea where the decision is headed at an early stage. Again thinking of the old model, this is exactly what the Town Elder might have done after hearing enough from each side to make a useful suggestion.

There are several circumstances when this procedure is especially appropriate: when each side has a problem proving an important part of its case; when there is a clear middle ground that is beneficial to both sides; or when a written award may cause difficulty for both sides, no matter who wins.

A well-known arbitrator recently described another solution he had used: After the hearing, and before any post-hearing briefs were submitted, the tribunal issued its intended statement of facts for the opinion and asked the parties to comment on anything they found wrong. The parties saw clearly where the case was headed and settled promptly.

I want to be clear that I am not encouraging settlement in the manner ascribed to one medieval Chinese arbitrator, who was confronted with claims by two individuals, that each of them were the incarnation of a Chinese god. The arbitrator turned on both parties, drew his sword and said: "I am the one possessed in the spirit of the god. You two are both charlatans and deserve to be put to death." Not surprisingly, both parties withdrew their claims.

Another technique that the Town Elder might use, which is more sound than the coin flip or an archery contest, but is almost equally efficient, is known as "last-offer arbitration" or in the United States, "baseball arbitration," because this is how baseball salaries can be determined if the player and club cannot reach agreement. This technique should be used far more than it is. Each side submits a damages figure, and the tribunal must choose one or the other, nothing else. This can be used most effectively when the issue is not liability but rather how much is owed. A pricing dispute, for example. But it can also be used effectively -and it is rarely done- in a phased arbitration after a finding of liability. Having to propose a reasonable figure, lest the tribunal choose the other side's number, frequently draws the parties close enough that they can settle. If a hearing is necessary, it can be significantly more focused than a hearing where any damages number may be awarded.

Assuming none of these settlement techniques work, how much procedure is necessary for many cases? Using the Town Elder model, we should impose only so much as is appropriate for each case. The Court of Arbitration for Sport has streamlined procedures that were originally designed for doping and eligibility cases, but which are now applied in the hundreds of commercial cases CAS has each year, involving football contracts and other high value disputes. Nevertheless, in these cases, the basic system has been that each side simply makes one written submission setting out its entire case: brief, witness statements, exhibits. No extensive pleadings; rarely any discovery. And then there is an oral hearing and usually no post-hearing submissions. These cases are thus completed in a much shorter time than large commercial cases at other institutions. This simplified procedure is not right for many complex disputes, but it can be used far more often than it is.

Under the Town Elder model, he or she should consider for each case, for example, whether any discovery is needed and whether the case is best heard in writing (witness statements and memorials) or orally. There are

many cases—for example, those that turn principally on credibility—where a mountain of written submissions may not be as useful as simply scheduling a prompt hearing and letting each side cross-examine the other’s main witnesses. In others, where the facts are especially complex—for example, a dispute involving changes in the energy industry over a long term—it may be more appropriate for virtually all of the evidence to be submitted in writing, where it may be more easily understood, and to limit the oral hearing to a few key witnesses, fact or experts.

Discovery will tax even the wisest arbitrators. Since one could devote an entire speech just to that subject, I will touch on just two aspects of it: timing and the discovery of electronic documents. The norm is to allow the parties to issue document requests at the beginning of a case, before the principal substantive submissions. The IBA Rules tried to temper this by providing that each side would submit first the documents on which it relies, before any request for production could be made. That technique is not used as often as it could be, even by those adopting the rules or referring to them for guidance. Some European arbitrators have perhaps an even better idea: have the parties first make their substantial written submissions and provide for document discovery only after these submissions. This timing has the dual benefits of allowing the parties to frame their requests in a more focused way and, even better, of permitting the arbitrators to make more informed decisions about what discovery is truly material and relevant to their decision. Again returning to the Town Elder model, that arbitrator would likely have heard both sides present their case based on what they knew and only after doing that, determine if there could be evidence in the other side’s possession that might be helpful in testing certain points.

The methods for framing the scope of document requests for paper documents—even following the narrowing standards of the IBA Rules of Evidence—simply do not work in the electronic world. Even if they are narrowly framed, they can require difficult and costly searches for electronic documents. Instead, a Town Elder approach would insist on focused, electronically based search criteria for electronic communications and databases. The techniques for doing so are still being developed, but they include framing requests not on subject matter (such as “documents relating to”) but rather based on particular search terms, databases or other means of electronic organization. I am pleased to report that the AAA has formed a special task force to investigate these issues and to offer guidance on techniques to the arbitration community, and the IBA Arbitration Committee is doing the same and will collaborate with the AAA group. Hopefully, by the time of a future Grotius Lecture, there will be positive developments to report on this subject.

There are a variety of witness management techniques that are becoming more common and that can help accelerate arbitration proceedings. Because they are generally known, I will not spend long on them here, except to encourage that they be used more broadly: Witness conferencing can bring together all the witnesses on a particular subject, often experts, and subject them to simultaneous examination. This certainly helps the arbitrators better understand the key points of disagreement, and the basis for each witnesses’ position. It also leads to many more points of agreement. That can also be achieved by using the English method of the experts’ meeting (which is also embodied in the IBA Rules). When the experts have to meet without counsel and write a statement of points on which they agree and disagree, they frequently agree on many points—often even to the point where they are no longer needed at the hearing. The experts, after all, often know each other and want to be respected by the other.

I recently posited at an LCIA Symposium that virtually every case can be tried in two weeks or less. I was pleased to receive almost universal agreement on that point. But if that is the case, then why do so many hearings take so much longer? I believe that with proper use of the tools I have described—chess clocks, direct witness statements, expert meetings or conferencing—it should be the rare case that would require

longer. I have certainly tried cases that have run longer, but in each of them the witnesses presented all their evidence orally and the arbitrators allowed almost all the evidence either side wanted to present. Each of them could easily have been tried in under two weeks, even though they were very complicated disputes.

A Town Elder might, after hearing the parties present their cases, want them to summarize them in writing. Very often, however, he or she would not. Nevertheless, post-hearing briefs are now the norm, sometimes with even two rounds. Arbitrators should not allow or require post-hearing briefing except where it is truly necessary to pull the case together. It can be time-consuming and costly. This is particularly true in cases where, for example, the case turns on credibility of witnesses, and those witnesses have been cross-examined. It is unlikely in those circumstances that the arbitrators have not already made up their minds on credibility by the time the hearing ends. Just because one side asks for post-hearing briefs, that does not mean that the arbitrators should permit them. Arbitrators frequently do so in order to be fair and to give parties every opportunity to present their case. However, by then, the parties will already have had substantial opportunities to present their case, and they are not entitled to one more shot.

If the Town Elder did want to hear more after the hearing, it is unlikely that he or she would have asked the parties simply to retell their stories. Instead, the Town Elder would have asked them to focus on the few points that needed further clarification. Unfortunately, arbitrators today are reluctant to do that, as they fear it will show prejudgment. Frankly, I would not want an arbitrator who did not have a clear idea by the end of a hearing on which points the decision will turn. If that is so, then the arbitrator should ask for limited post-hearing briefs only on those issues.

In order to achieve this new paradigm, every element of the international arbitration community must be involved. In particular, arbitrators must be more proactive and willing to assume control. They must learn as much as they can about the case at an early stage. And they should not be afraid to push the parties towards adopting those techniques that they feel are necessary to decide the case –and only those procedures– or even requiring them if necessary. There is an age-old debate about who is in charge of the arbitration: the parties or the arbitrators. Recently, the view has become more common that it is the arbitrators. When the major institutional rules were re-written in the late 1990s, all of them adopted provisions that gave the arbitrators the power to determine what evidence would be admitted and otherwise to exercise more control over the proceedings. (The AAA's Rule 16, which I read earlier, is one such example). The IBA Rules of Evidence also clearly contemplate a more proactive arbitrator. One way of achieving agreement on more limited procedures is to include the clients –and not just the counsel– in the process, because the clients may have more incentive to agree to a shorter, less expensive process.

To those arbitrators who believe that control of the proceedings should be left to the parties, I point to the following story, told in Derek Roebuck's excellent book, *The Miscellany of Disputes*:

*“A hungry wolf had his eye on two rams in a field. As he came close he saw they were quarrelling. Being inquisitive he asked what it was all about. They told him they did not know how to divide their ancestral field and asked him to arbitrate. The wolf agreed but asked the rams how he should proceed. ‘Well’, said the rams, ‘why don’t we settle it this way? You stand in the middle of the field. We will each set off from opposite ends and the one who gets to you first wins all.’ So it was agreed. They raced full tilt and arrived at the same time, butting the wolf in the belly, and scampered away, leaving him for dead.”*

Arbitrators must also do more to control the schedules: their own and the parties'. Parties should not find themselves in a position –as we do in two cases now– where three arbitrators cannot find a single free day in 6 months for a hearing on a jurisdictional motion that has been fully briefed or find a mutually free week for a one-week hearing in the fall of 2008, 18 months from now! And they should not easily accept a party's desire to stretch out a process by asking for a prolonged schedule. Arbitrators want to be fair, but they must be fair to both sides. Finally, they also have to exercise more self-discipline to issue awards more promptly after the hearings are concluded. (I do not exclude myself from that criticism!).

Similarly, counsel must not be afraid to test new techniques or to present their case using less than the full panoply of procedures. Parties, who are paying the bills both for their lawyers and for the arbitrators, must question their counsel about what procedures are necessary and which are not, how much discovery is truly needed, and whether there is not some more effective way to reach a determination or a settlement in the case.

Finally, institutions must also play an active role in achieving these goals. They can train arbitrators to understand better how the rules give them control but at the same time also train more on effective means to control the proceedings while achieving consensus with the parties. They can more effectively share knowledge about new techniques developed by arbitrators in their cases to achieve efficient results. And they need to improve their own internal procedures to act more quickly when they are required to do so, such as in appointing arbitrators.

My hope is that by presenting this paradigm today, we can have more discussion of how to achieve the goals of efficient and fair arbitration in this age of large and complex disputes. We should strive as much as possible to return to the day of the Town Elder, when disputes could be quickly and appropriately resolved. For those Town Elder arbitrators who adopt these techniques, there is a reward. Prof. Roebuck also tells the story, originally told by Herodotus, of one of the first arbitrators, Deioces, who lived in fifth century BC Greece. He did such a good job of “professing and practicing justice” that people from all over Media came to see him. And eventually, they made him King.









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Deseo recibir gratuitamente los próximos números de los Documentos de Trabajo de la Serie “Arbitraje Internacional y Resolución Alternativa de Controversias” del Instituto Universitario de Estudios Europeos de la Universidad CEU San Pablo:

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**Resumen:** El documento valora la posibilidad de disminuir la carga procesal del procedimiento arbitral para afrontar el colapso que el arbitraje internacional está sufriendo por el número de asuntos introducidos y por el coste de los mismos.

**Palabras clave:** Arbitraje, modelo Town Elder, Cámara de Comercio Internacional, procedimientos, laudos, mecanismo de ejecución, reglas de la IBA, American Arbitration Association.

**Abstract:** The document considers the possibility to face the collapse that international arbitration is suffering due to the quantity and cost of the cases.

**Keywords:** Arbitration, Town Elder model, International Chamber of Commerce, proceedings, sentences, enforcement proceeding, IBA Rules, American Arbitration Association.