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Chapter 20: Trust and Transparency in Arbitrator Time Reporting

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§20.01 INTRODUCTION

In order for arbitration to maintain its position as the preferred mechanism to resolve international business disputes, it is imperative that arbitrators act, and are perceived to act, with integrity and in accordance with the high ethical standards that users may rightfully expect. In this article, we will analyse whether the current system for time reporting of arbitrators meets these standards and expectations and, if not, what can be done to improve it.

The models for remunerating arbitrators may differ depending on, for instance, institutional rules, the local culture at the seat or of a particular industry, or individually-negotiated terms of engagement with the parties.

Remuneration is typically issued according to one of two basic models; either as a *fixed* amount, often proportional to the value of the disputed claim (*ad valorem*); or as a *variable* amount, based on the time spent by the arbitrator. In practice, however, most systems – whether ad hoc or institutional – will often use a blend of these two basic models, and take several other factors into account when determining arbitrators' fees. (1)

In ad hoc arbitration, arbitrators' fees are commonly determined by the time spent. However, many arbitration laws, (2) as well as the UNCITRAL Arbitration Rules, (3) provided that the fees of the arbitrators shall ultimately be 'reasonable', taking into
P 370 account, amongst other things, the value of the disputed claim. As a consequence, arbitrators in ad hoc proceedings will often use an *ad valorem* calculation as a point of reference in determining fees. (4)

Institutional arbitration includes examples of both basic models, with institutes such as the International Chamber of Commerce (ICC) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) principally basing remuneration on the value of the amount in dispute (5) and institutes such as the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR; American Arbitration Association (AAA)) and the International Centre for Settlement of Investment Disputes (ICSID) principally basing fees on time spent by the arbitrators. (6) Certain institutes operate under both basic models, such as the Hong Kong International Arbitration Centre (HKIAC), which allows the parties to agree on arbitrators being remunerated on an *ad valorem* basis instead of on an hourly basis, which is otherwise the default mechanism under the HKIAC Rules. (7)

However, even institutes employing the *ad valorem* approach, such as the ICC, (8) may often take into account the time spent by an arbitrator. For instance, institutes may initially set the remuneration to fall within a certain bracket based on the value of the disputed claim, and then, depending on the time spent by the arbitrator and other factors, (9) fix the final amount to somewhere within that bracket. Another example is when disputes are settled before a final award has been rendered. Although many institutes will take various considerations into account to determine remuneration in such cases, the time spent by the arbitrator may be a relevant factor. A third example is where an arbitrator requests advance payment of his or her fee from the institute. Requests for such advances often invoke the amount of time already spent by the arbitrator.

In summary, regardless of whether the arbitration is ad hoc or institutional, or whether an institute employs an *ad valorem* fee system or a system based on time spent, an arbitrator's hours on a case are often a relevant – and in some cases even the decisive – factor in determining his or her remuneration. As a consequence, the accuracy and reliability of time reporting by arbitrators may often be of material importance.

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Over the years, we have, on occasion, experienced situations where the number of hours reported by an arbitrator appeared suspiciously inflated. Admittedly, these occurrences have been few and far between. However, each time we have found it frustrating, not least due to the fact that we lacked the tools to check effectively, let alone challenge, the correctness of the stated time. (10) As a result, our suspicions have remained mere suspicions with little, if anything, being done to address them.

In light of our own occasional suspicions in these regards, we decided to investigate, by way of a simple survey, how common they were among colleagues in the international arbitration community. In this article, we will report on the answers we received and

analyse whether there is indeed a problem that needs addressing. We will also analyse some of the circumstances likely to be underlying suspicions of inflated statements of time by arbitrators, as well as the current system of controls. Finally, we will provide a few ideas of what may be done to strengthen the system for the future.

§20.02 THE SURVEY

We sent a simple questionnaire by email to 175 arbitration professionals mainly practising out of Europe, United States (US) and Asia, (11) either as counsel, arbitrators or both. The typical recipient was between the age of 45 and 65 and a recognised practitioner (12) with several years of experience in the field of international arbitration. (13)

The survey included the following four questions: (14)

(1) Have you ever suspected that the hours alleged to have been spent by an arbitrator exceeded the hours actually spent?

(2) If the answer is yes to question 1, were the case(s) in question ad hoc and/or institutional arbitrations?

(3) If the answer is yes to question 1, were the alleged hours reviewed by the parties, an arbitral institution, a court or the other members of the tribunal?

(4) Do you believe that institutions sufficiently scrutinise the hours alleged to have been spent by arbitrators?

The overall response rate was about 77% (or 134 out of the 175 to whom the survey was sent). (15)

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Under the assurance of confidentiality, a majority of the responding practitioners also added valuable personal comments and anecdotes to illustrate further and explain their experience and views. Many are reflected, and some even briefly quoted, in this article, albeit in a shortened and anonymised form given the delicate subject matter at hand.

We do not wish to suggest that our enquiries meet the methodological rigours of an academic statistical survey. Nevertheless, the results, as limited as they may be, provide an interesting indication of the collective experience of a substantial group of seasoned arbitration practitioners.

The answers given were as follows: (16)

1. Have you ever suspected that the hours alleged to have been spent by an arbitrator exceeded the hours actually spent?	*2. If yes to question 1, were the case(s) in question* ad hoc *and/or institutional arbitrations?*	*3. If yes to question 1, were the alleged hours reviewed by the parties, an institution, a court or the other members of the tribunal?*	*4. Do you believe that institutions sufficiently scrutinise the hours alleged to have been spent by arbitrators?*
No: 39	Ad hoc: 36	No: 76	No: 48
Yes: 95	Institutional: 28	Yes: 19	Yes: 29
	Both: 31		Varies between institutions: 16
			No opinion: 41
Total number of responses: 134	Total number of responses: 95	Total number of responses: 95	Total number of responses: 134

A minority of respondents (29% or 39 out of 134) answered that they could not recall ever having had suspicions about arbitrators inflating their hours. Some practitioners in this group (8 out of 39) even mentioned having had the opposite experience, *i.e.* that some arbitrators had appeared to be understating their hours, most likely as an effect of poor time recording. A couple of practitioners also mentioned having experienced younger practitioners deliberately understating their hours as arbitrators in an effort to appear efficient. A few also commented on the potential for simple mistakes and misunderstandings in relation to time reporting. Those comments will be revisited later in this article.

However, a substantial majority (71% or 95 out of 134) answered that they had, on one or more occasions, suspected arbitrators of inflating their hours. By way of example, some of the comments from practitioners in this group ranged from 'Indeed, this happens to me
P 373 quite frequently'; 'yes, it has been quite obvious on several occasions'; and 'yes, definitely' through to 'yes, but not frequently'; 'on a few occasions'; 'maybe three or four times'; and 'I can only recall three occasions'; to 'very rarely and certainly not recently'; and 'only once'. (17)

Importantly, the question, as well as most of the answers, concerned mere suspicions. Based on the available information, it was generally difficult to ascertain to what extent

those suspicions had been well-founded. Many answers gave little-to-no-basis for the stated suspicions. If any evidence was referred to, it was mostly circumstantial. (18) A relatively common example was that of a co-arbitrator showing an obvious lack of engagement throughout the proceedings followed by such arbitrator waiting for the other tribunal members first to state their hours and then claim to have spent more or less the exact same amount of time. The absence of detail and transparency around the process of time reporting of hours by arbitrators was also cited as a factor that made it difficult to test the validity of time reporting.

It also needs to be recognised that, even among those stating to have had suspicions of arbitrators inflating their hours, only about 13% (or 12 out of 95) indicated that this occurred with any kind of regularity. The majority only recalled having had such suspicions in no more than a handful of cases over the entirety of their careers, some of which have spanned several decades and likely involved hundreds of cases. About 24% (or 23 out of 95) only answered with a simple 'yes', thus giving no further indication as to the prevalence of their suspicions.

In summary, although a large majority of those answering the survey had occasionally suspected that an arbitrator might be inflating his or her hours, considering the huge number of proceedings in which each practitioner is likely to have been involved and the surveyed group as a whole, such suspicions only seem to have arisen in a minority of cases.

So from what type of arbitrations did most of these suspicions stem; ad hoc or institutional? The answers were relatively evenly distributed, with a slight over-representation of ad hoc arbitrations at close to 38% (or 36 out of 95). Approximately 29% (or 28 out of 95) answered institutional arbitrations, and about 33% answered both ad hoc and institutional arbitrations. (19)

Those, having suspected inflated hours, were also asked if it had resulted in any review of those hours by the parties, an arbitral institution, a court, or by the other members of the
P 374 tribunal. Only a relatively small minority (20% or 19 out of 95) ● answered that, in cases where they had suspected inflated hours, some kind of review had been undertaken. In those cases, the review had mostly been conducted informally either by the chairperson or by an arbitral institution. In most cases, it resulted in the hours being somewhat reduced. Less than a handful (4 out of 95) stated that the matter had been brought before a local court to be formally assessed and decided upon.

However, the large majority or 80% (76 out of 95) answered that effectively no review whatsoever had taken place. Some blamed this on the inherent power and information asymmetries between the parties and arbitrators, leaving parties at a clear disadvantage and discouraging them from pursuing their suspicions. Several practitioners also commented upon the general reluctance of arbitrators to address suspicions that a fellow member of the tribunal may be inflating his or her hours. Another common comment regarded the perceived lack of interest as well as the inadequacy of controls by certain arbitral institutions. Finally, the potential remedy of formally challenging the fees of an arbitrator before the local courts of the arbitral seat appeared unattractive for a number of legal and practical reasons.

The final question specifically regarded whether arbitral institutions do enough to scrutinise hours reported by arbitrators. Certain practitioners stated that they had insufficient insight into the workings of arbitral institutions to express any opinion on this question (41 out of 134). For those practitioners that provided a substantive answer (93 out of 134), their answers appeared to be largely influenced by the individual institutions with which they were mostly familiar. A small majority of respondents (about 52% or 48 out of 93) expressed that current scrutiny by institutions was insufficient and should be improved. Although references to particular institutions were relatively rare in this group, the ICC was cited as one such example. Of those stating that current scrutiny was sufficient (29 out of 93), reference was most commonly made to the LCIA. A few practitioners also mentioned the ICDR (AAA), the Permanent Court of Arbitration (PCA) and ICSID as having sufficient scrutiny. However, a few practitioners indicated the contrary, i.e. that the scrutiny of those same institutions ought to be improved.

It is likely no coincidence that the institutions that most practitioners found wanting for effective scrutiny principally remunerate arbitrators on an *ad valorem* basis, whilst those that were mostly found to have adequate procedures in place principally operate a time-based system. One would intuitively expect institutions principally basing their remuneration on hours spent to have more processes and controls in place to scrutinise the hours reported.

A small minority (16 out of 134) answered neither yes nor no to the question, but rather noted – no doubt correctly in light of the answers given by others – that the adequacy of any scrutiny was likely to vary considerably between different institutions.

In summary, a large majority of those answering the survey had, on one or more occasions, suspected an arbitrator of inflating the hours reported. Such suspicions had arisen in both ad hoc and institutional arbitrations, although they were slightly more common in the former. In most cases, little-to-no review of the hours had been made by the parties, other members of the tribunal, an institution, or the local courts at the

P 375 arbitral seat. With regard to institutions, a small majority held the view that the current scrutiny of reported hours was insufficient. However, out of those respondents that referred to specific institutions, the majority expressed general approval for the current control mechanisms of institutions principally operating on an hourly fee basis, particularly the LCIA.

§20.03 POTENTIAL REASONS FOR ARBITRATORS BEING SUSPECTED OF INFLATING THEIR HOURS

What may be causing these occasional suspicions to arise? The underlying circumstances will undoubtedly vary. However, a typical situation mentioned by respondents to the survey is where there is a considerable discrepancy between the hours reported by two co-arbitrators, working on the same case and having performed essentially the same tasks. Such discrepancies may provoke suspicions of deliberate inflation by the arbitrator reporting the most number of hours. (20) However, in many cases, the explanations for such discrepancies may be much less sinister.

First, arbitrators may be more or less efficient due to, for example, differences in knowledge and experience. In some cases, these differences may be quite substantial. By way of example, an experienced co-arbitrator, who is also a native English speaker, may potentially review lengthy and complicated submissions, witness statements and expert reports much quicker than a relatively inexperienced co-arbitrator, who is not a native English speaker and who may, therefore, take longer time to review the case material. Upon reporting the time spent on the case, this may lead to considerable differences between these two co-arbitrators, even though they have performed essentially the same tasks.

Second, arbitrators may pay varying attention to detail. Some arbitrators may, for instance, be meticulous in their reading of submissions, diving into each and every exhibit and checking all of the references and calculations made to assess whether the evidence submitted and the statements made are reliable and correct. Other arbitrators may find it sufficient just to read through the main body of those same submissions, relying on the other side's counsel or experts to identify any errors or weaknesses in the underlying materials. Again, these varying approaches may result in considerable differences in the time spent on a case.

Third, the time available to an arbitrator may influence the time the arbitrator actually spends on a matter. An arbitrator with a lot of time may slowly and methodically review all of the documents upon receipt from the submitting party. By contrast, an arbitrator who is pressed for time may choose to give submitted documents no more than a cursory review, saving any more detailed reading until later. If the case settles before that later point in time is reached, the number of hours spent by these two arbitrators will be vastly different.

Fourth, there is no universally accepted method for arbitrators to record their time. Some arbitrators may simply be using hours as a minimum unit for recording purposes. Others
P 376 may, for instance, break down each hour into units of six minutes. Once aggregated, such differences in the time-units used may lead to very different results.

Fifth and finally, some arbitrators may not even routinely record their time at all, especially not in institutional cases under *ad valorem* systems. When subsequently being asked about the number of hours spent, they may have to resort to guesswork or simply assume that they have spent roughly the same time as their co-arbitrators. In both cases, this may well be done in good faith.

All in all, there are many factors that may explain even considerable differences in the time stated to have been spent by two co-arbitrators. Although some of them may potentially be characterised as inappropriate, such as having to guess in retrospect the number of hours in the absence of any contemporaneous recording of the actual time spent, they are still a far cry from deliberately making misleading statements.

However, even if some of the suspicions may be the result of relatively innocent factors, it would be naïve not to acknowledge that some arbitrators may be wilfully inflating their time reports. Again, there could be varying reasons underlying even such deliberate misstatements.

First, some arbitrators may, of course, simply be inflating their hours in order to increase their fees. Especially in ad hoc arbitrations, where the remuneration is often primarily driven by time spent and where effective mechanisms of control are particularly lacking, some arbitrators may find the opportunity for such behaviour difficult to resist. As one of the surveyed practitioners put it; 'I believe arbitrators are quite aware in ad hoc cases that the parties are in a very difficult situation when it comes to verifying time spent.'

Second, some arbitrators may be inflating their hours to conceal the fact that they have spent very little time on a matter. An overly busy arbitrator, having deferred working on the file until later, may realise when the case suddenly settles that his or her hours are but a small fraction of those reported by the other two arbitrators. In such situations, it may be tempting to misstate the hours as being largely aligned with those of the other two arbitrators, rather than being transparent with the fact that no or very little work has

been done. Fear of reputational damage may be the primary driver for such behaviour, rather than strict pecuniary motives (although it may, of course, be a combination of both). This would explain why suspicions of inflated reporting of hours also appear in cases where fees are primarily determined on an *ad valorem* basis.

Third, some presiding arbitrators may try to cover up the fact that work has indeed been done on the file, including in writing the award, but by someone else, typically a junior lawyer at the arbitrator's firm or chambers. The arbitrator may then simply report the hours of this junior lawyer as the arbitrator's own time. A handful of the surveyed practitioners specifically mentioned having had suspicions of this kind of behaviour in relation to a chairperson or a sole arbitrator.

Fourth, an arbitrator may inflate his or her reported hours under pressure from one or both of the other arbitrators, as a way of avoiding awkward questions. One of the surveyed practitioners recalled being approached by a co-arbitrator, encouraging him to significantly increase his hours in order to become better aligned with the vastly exceeding number of hours allegedly spent by the co-arbitrator. He politely declined to do so.

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The above are examples of unethical behaviour. However, it is important to recognise that an alignment of fees between arbitrators may sometimes be perfectly legitimate. For example, this may be so where the arbitrators are required by the applicable law or arbitration rules to ultimately charge a 'reasonable' fee, with time spent being only one of many factors to consider. In such cases, the hours actually spent by the two co-arbitrators may vary significantly, but the tribunal may still decide on a fee to be evenly split between those same co-arbitrators and with an uplift for the chairperson (by way of example a 30-30 split between the co-arbitrators and 40 to the chairperson). There would be nothing untoward in such an arrangement. Notably, however, the alignment in such cases is in regard to the fee and is determined by the applicable law or arbitration rules. It is not in regard to the hours spent, which should, of course, always be truthfully reported.

In summary, and although one can typically only speculate as to what may be the reasons underlying suspicions of inflated hours in a particular case, it is likely often caused by relatively innocent factors, such as differences in working methods or in the recording of time. At the same time, it has to be recognised that, for better or worse, arbitrators are human. As a result, there can be little doubt that wilful misstatements with respect to the number of hours are sometimes made.

§20.04 CURRENT MECHANISMS OF CONTROL

As mentioned above, a small majority of the respondents to the survey expressed that current scrutiny by institutions was insufficient and should be improved. Whilst relatively few respondents made references to particular institutions, several respondents stated that they believed the ICC could improve its scrutiny of reported hours. By contrast, the LCIA, and to a varying extent the ICDR (AAA), the PCA and ICSID, were mentioned as having sufficient mechanisms in place for scrutinising reported hours.

The following section provides a brief overview of the current review mechanisms in place for ad hoc arbitration, and some of the institutions referred to in the survey. (21)

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Ad hoc arbitration

In most ad hoc proceedings, the only possibility for the hours of the arbitrators to be challenged is in connection with a subsequent request by a party to have the fees of the arbitrators reviewed by a local court. For instance, section 41 of the Swedish Arbitration Act allows a party to bring an action in the local district court regarding the reasonableness of the compensation to the arbitrators as determined in the arbitral award. Many other jurisdictions provide for a similar recourse. (22) However, in our experience, such actions are rarely brought. Although there could be a number of reasons for this, one important factor is likely the difficulty facing a party in trying to demonstrate to the court that the number of hours was unreasonable. Save for exceptional cases, where the hours reported (if any) are manifestly disproportionate, the absence of contemporaneous, detailed timesheets or other similar evidence will often place the aggrieved party at a critical disadvantage. It is also fair to assume that courts may afford arbitrators a certain margin of appreciation in fixing their fees, giving the arbitrator the benefit of the doubt unless the fees can be considered to be manifestly excessive. As a result, the chance of having the fees of the arbitrators reduced by a court will, in many cases, be quite limited.

In addition, a party may be further discouraged to bring an action before the local courts since such action may make the arbitration, including the arbitral award, public. Furthermore, the winning party will seldom have reason to bring any such action, as the fees of the arbitrators will typically be borne by the losing party. The losing party may, in turn, be more preoccupied with the unsuccessful outcome of the case itself, including its likely liability for the winning party's legal costs. Those costs will, in most cases, far

exceed the fees of the arbitrators. (23)

In this connection, it should be recalled that in ad hoc arbitrations conducted under the 2010 UNCITRAL Arbitration Rules, parties have the right, pursuant to Article 41(4)(b), to refer the arbitral tribunal's determination of its fees to the appointing authority. If no appointing authority has been designated or agreed upon, the party may instead refer the issue to the Secretary General of the PCA. If the fee is 'manifestly excessive', the fee shall be adjusted in order to ensure that it is reasonable within the meaning of Article 41(1). (24) Thus, in arbitrations under the 2010 UNCITRAL Arbitration Rules, a specific control mechanism is provided for, in addition to any court review that may be available under the applicable law. However, 'manifestly excessive' is a relatively high threshold and may discourage parties from making use of this control mechanism.

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Institutional arbitration

SCC

The SCC remunerates arbitrators on an *ad valorem* basis. Accordingly, Article 2 of Appendix IV to the SCC Rules provides that the fees of the arbitrators shall be based on the amount in dispute in accordance with the Schedule of Costs. The SCC may only deviate from the amounts set out in the Schedule of Costs in exceptional circumstances. Furthermore, Article 49(3) of the SCC Rules provides that, in finally determining the fees of the arbitrators, regard shall be had to the extent to which the arbitrators have 'acted in an efficient and expeditious manner, the complexity of the dispute and any other relevant circumstances'.

Although Article 49(3) theoretically opens up for the possibility to take into account the hours spent in determining the fees of the arbitrators, the SCC does not request that arbitrators submit time reports as a matter of course. Indeed, in practice, it is quite rare for the SCC to do so.

In the rare instances where the SCC does request arbitrators to provide timely reports, there will be particular circumstances prompting such a request to be made. Furthermore, in those rare cases, the time reports are primarily used by the SCC to affirm the reasonableness of the compensation to the arbitrators. Rarely do such time reports have any real impact on the determination of the final fee by the SCC. In addition to the amount in dispute, the SCC will also take into account what has transpired during the course of the arbitration, such as the number and length of submissions, the number of procedural orders and the length of any evidentiary hearing. As such, even if the number of hours reported by an arbitrator seems to be unreasonably high, the SCC has the discretion to disregard it simply.

Given that arbitrators are to be compensated based on the amount in dispute and the principles set out in Article 49(3) of the SCC Rules, the time spent by arbitrators is seldom relevant. As a result, there is little need for the SCC to carry out more than superficial scrutiny of any reported hours. (25)

The ICC

The ICC has a similar system to the SCC, whereby the fees of the arbitrators are primarily calculated on an ad valorem basis.

However, while the SCC rarely requests time reports from arbitrators, the ICC routinely does so. For all cases administrated under the ICC Rules, the ICC requests that arbitrators complete a Statement of Time and Travel for Work Done (available on the ICC website) setting out the time spent on various tasks identified in the statement. This information will then be made available to the members of the ICC Court when fixing the fees of the
P 380 arbitrators. The members of the ICC Court will also be informed of the hourly rate of the arbitrators assuming that the fees of the arbitrators will either be determined at the low, medium or high level set out in the scale of fees in Appendix III of the ICC Rules. Accordingly, as stated in Article 2 of Appendix III of the ICC Rules, the number of hours reported shall be taken into account when fixing the fees of the arbitrators.

Based on the information received from the respondents to the survey, as well as our own experience, the ICC rarely takes specific measures to scrutinise the number of hours reported by particular arbitrators, beyond comparing them with the number of hours declared by any co-arbitrators or assessing their apparent reasonableness in light of what has transpired during the course of the proceedings. This approach may be explained by the fact that, if the ICC Court believes that the number of hours may be inflated, it is free to disregard the time reporting of the arbitrator and fix the fee having regard to other factors, such as the diligence and efficiency of the arbitrator and the complexity of the dispute. This assumes, of course, that the unreasonableness of the number of hours is sufficiently apparent to the ICC. If not, the number of hours reported may well end up influencing the ICC Court's decision.

The LCIA

Based on the survey, the LCIA received praise from several respondents for its current mechanisms of control. In this regard, the LCIA stood out among the arbitration institutions referred to in the survey.

Pursuant to section 5(iii) of the LCIA's Schedule of Arbitration Costs, an arbitrator's request for payment of fees needs to be supported by 'a fee note, which shall include, or be accompanied by, a detailed breakdown of the time spent at the rates that have been advised to the parties by the LCIA, and the fee note will be forwarded to the parties prior to settlement of the account.'

The fee note and the detailed timesheets are required to be submitted at regular intervals and are reviewed and scrutinised by the Secretariat's case administrators. If the case administrator is of the view that the fee note or the timesheets may not be correct or would seem unreasonable in the relevant circumstances, Counsel and the Registrar will conduct a further review and may, where required, speak to the arbitrator in question to inquire about the hours spent. In the event that the discussions with the arbitrator do not entirely resolve the issue, the fees of the arbitrator in question will be referred to the LCIA Court for its consideration. (26)

As provided by section 5(iii) of the Schedule of Arbitration Costs, the fee note will be sent to the parties before any payment based on the note is made to the arbitrators. If the parties have any concern about the fees, they may raise a dispute under section 5(iv) of the Schedule of Arbitration Costs, which will then be considered and determined by the LCIA Court.

As the fees of arbitrators in LCIA arbitrations are calculated on the basis of an hourly rate,
P 381 the arbitrators are typically asked to provide details of their current fees ● and their anticipated future fees at regular stages, so that the LCIA secretariat may propose interim advances on costs as the case progresses, including a final estimate approximately four months before the final hearing.

ICSID

Similar to the LCIA, ICSID remunerates arbitrators based on time spent. (27) The arbitrators are requested to report to ICSID on a quarterly basis the number of hours worked on the case by submitting the Claim for Fees and Expenses Form. (28)

Counsel in charge of the case at ICSID will scrutinise the number of hours reported in light of the work that the Arbitral Tribunal has done over the relevant period. Counsel is normally heavily involved in the case as secretary to the Arbitral Tribunal and can, therefore, make such an assessment with relative ease. Once Counsel has completed the review, the cost claims of the arbitrators are sent to the Secretary General for final review and approval. If Counsel believes that there may be an issue with respect to the hours reported, Counsel will bring this to the attention of the Secretary General. (29) Depending on the outcome of Counsel's review, Counsel may need to speak to the arbitrator in question to inquire as to the hours reported. Sometimes, the Secretary General or the President of the arbitral tribunal takes on the role of speaking with the co-arbitrator in question.

If the number of hours seems unreasonable, it is rare that parties raise this with the arbitral tribunal or with ICSID. A plausible explanation for this is that the parties are only informed of the costs of the arbitral tribunal as a collective when they receive the interim financial statement. The fees of each individual arbitrator will, however, be included in the final financial statement provided to the parties in connection with the rendering of the final award.

Overall, ICSID appears to operate control mechanisms that largely resemble those of the LCIA. This makes it difficult to explain why, in contrast to the LCIA, several survey respondents indicated that the current controls of ICSID ought to be improved (although several others indicated that it was sufficient). Further enquiries into this topic may be able to resolve or rectify this apparent disparity.

§20.05 IS THERE A PROBLEM THAT NEEDS ADDRESSING?

As a starting point, it may be worth repeating that suspicions of arbitrators inflating their hours only appear to arise in a minority of cases. Furthermore, mere suspicions may often
P 382 – although not always – be the result of simple misunderstandings or ● mistakes. Consequently, one should be careful not to overstate the magnitude of any potential problem suggested by the survey findings.

At the same time, the fact that so many experienced practitioners appear to have had suspicions of hours being inflated at least occasionally, and a few even regularly, cannot be ignored. The judicial services of an arbitrator are based on the utmost confidence and trust. As such, they must be seen to meet the highest standards of professional integrity, including in connection with the reporting of time.

Especially in ad hoc arbitrations, arbitrators are in a unique position in that they are typically (30) allowed to determine their own fees, without providing any details or being subject to any prior review by an institution. (31) They may also have those fees secured by advance payments from the parties and ultimately enforce them through an arbitral award of their own making. By way of comparison, legal counsel billing a client will typically be required to provide detailed timesheets and will not be paid unless he or she can first persuade the client both as to the correctness and reasonableness of those timesheets as well as that of the resulting fee. If unconvinced, the client may simply

refuse to pay, ultimately forcing counsel to either lower the fee or initiate legal proceedings. The absence of similarly effective checks and balances in respect of arbitrators' fees can only reasonably be tolerated if arbitrators act, and are perceived to act, with the utmost integrity. (32)

As with the proverbial wife of Caesar, arbitrators must be above any suspicion if they are to enjoy the trust ultimately required for parties to feel comfortable submitting their disputes to arbitration. As a consequence, regardless of whether the majority of suspicions may be based on simple mistakes or misunderstandings, the suspicions as such pose a problem in need of a remedy.

§20.06 WHAT MAY BE DONE GOING FORWARD?

As mentioned above, even the mere suspicion of arbitrators occasionally inflating their hours carries with it the potential risk of undermining the trust in the arbitration system as a whole. Adequate control mechanisms should therefore not only be put in place to
P 383 detect and address rare instances of intentional inflation of hours but also to instil ● general confidence in the arbitrator remuneration system in the minds of parties and their counsel.

Effectively scrutinising the hours reported by arbitrators is challenging, of course. As mentioned above, there may be many legitimate reasons why, for example, a party-appointed arbitrator has spent considerably more time on a case than the other party-appointed arbitrator. Even such benign reasons may still trigger suspicions. On the other hand, a sufficiently shrewd arbitrator, who is determined to beat the system and be compensated based on wilfully inflated time reporting, will in many cases be able to do so, regardless of the mechanisms of control. However, for the great majority of arbitrators, the implementation of a few basic checks and balances will likely be ample in terms of providing sufficient scrutiny and control.

What more can and should be done? One key step would be to ensure that arbitrators are more transparent with the parties as to how they record their time and agree in advance on the standards to be used. Such standards of time recording and transparency could include the following.

First, during the course of the arbitration, each arbitrator should keep a reasonably detailed record of the time spent, including the date of the work done, the nature of that work, and the time spent. When describing the nature of the work done, an arbitrator may choose to use neutral and less specific wording in order not to disclose, for example, confidential issues in relation to the tribunal's deliberations. This should not pose a significant problem and should not be used as a reason for not keeping a record capable of later being disclosed to the parties.

Second, the arbitrators ought to at least agree amongst themselves – and preferably with the parties – as regards the recording unit to be used. As mentioned above, the manner in which arbitrators record their time may have a significant impact on the total number of hours reported. For example, if a co-arbitrator records time in units of 60 minutes, whereas the other co-arbitrator uses units of tenths of an hour, substantial differences could arise in the overall hours reported for the same amount of work.

Third, the co-arbitrators should send copies of their timesheets to the chairperson or the institution on a regular basis, such as every quarter. The chairperson or the institution may then review those timesheets and raise any issues with the co-arbitrator in question.

Fourth, at the termination of the arbitration and upon the request of a party, the chairperson or the institution may provide copies of the tribunal's timesheets to the parties. Before doing so, the chairperson or institution should review, and where appropriate redact, details in entries that may, for example, disclose confidential information concerning the deliberations of the arbitral tribunal. Any such redactions should preferably be done in consultation with the arbitrator having made the entry.

The suggestions set out above would provide a reasonably detailed record possible of being disclosed to the parties, which may reduce the risk of any subsequent suspicion of inflation of hours. In addition, the suggestions may help to foster ethical arbitrator
P 384 working practices. As mentioned above, the manner in which arbitrators will ● review the submissions of the parties may vary. Some arbitrators will study the submissions with great care as soon as they are filed, whereas others may only give them an initial cursory glance, if at all, and postpone properly reviewing them until closer to the hearing. If the arbitrators were to keep a running record of their time, with such records being submitted regularly to the chairperson or the institution and ultimately to the parties upon request, many arbitrators would likely feel less inclined to postpone their comprehensive review of the parties' submissions. Increased transparency in this respect could, therefore, potentially have the positive flow-on effect of arbitrators being more active and engaged throughout the arbitral proceedings, thereby improving the overall quality of the arbitration itself.

Arbitrators may also want to consider providing parties with advance budget estimates, which could include an estimate as to the prospective number of hours to be spent during different stages of the arbitration. If the arbitrators later on in the proceedings

come to believe that the actual number of hours will exceed the estimate, they may inform the parties accordingly. Although noncommittal, budget estimates may, if done properly, further reduce the risk of inflated hours being reported.

Currently, the practice of requiring arbitrators to submit regular timesheets tends to be limited to institutes principally remunerating arbitrators on an hourly basis, such as the LCIA and ICSID. Such a practice, however, may also be useful for institutes primarily remunerating arbitrators on an *ad valorem basis*, in case a record of the time spent may later be required (e.g. by the ICC) or exceptionally asked for (e.g. by the SCC).

To the extent that time spent is a factor to be considered by the institute when determining the fees of the arbitrators, regular and standardised time reporting by arbitrators should reasonably contribute to fees being determined on hours actually spent on the case. If, in addition, the timesheets are shared with the chairperson or the institution on a periodic basis, this will increase the possibility to identify and address any issue with the reporting and reduce the risk of a suspicion of inflated hours emerging later on.

When considering the mechanisms to be used to come to terms with inflated hours, one should bear in mind that the practice within certain institutions to approach the arbitrator in question and inquire as to the correctness of the hours reported can be very efficient. In ad hoc arbitrations, this task could be undertaken by the chairperson or the appointing authority. As previously mentioned, approximately 20% of survey respondents stated that, in cases where they had suspected inflated hours, and this had resulted in some kind of informal review and contact with the arbitrator in question, either by the chairperson or by the institution, the hours reported had in most cases been reduced. More frequent use of this informal practice would not only result in better control of the number of hours but should reasonably also deter from reporting an inflated number of hours.

In summary and considering that many experienced arbitration practitioners appear to have had suspicions of hours being inflated at least occasionally, and a few even on a regular basis, it may be worthwhile developing guidelines set out best practice in this
P 385 area. Clear, consistent guidelines will help to improve transparency and ● trust between arbitrators, institutions and the parties they serve. Such guidelines could, for example, be developed within the International Bar Association or the Chartered Institute of Arbitrators. Hopefully, some of the suggestions mentioned in this article could prove useful in relation to any such initiative.

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References

1) *See, e.g.*, Article 41 of the UNCITRAL Arbitration Rules and Article 2(2) of Appendix III to the ICC Rules.
2) *See, e.g.*, section 37 of the Swedish Arbitration Act and section 64(1) of the Arbitration Act, 1996 (England, Wales, and Northern Ireland).
3) Article 41(1) of the UNCITRAL Arbitration Rules provides as follows: 'The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.'
4) In the authors' experience, it is not uncommon for this to be done by checking what would have followed from the fee schedule of an institute operating an *ad valorem* system, such as the ICC or the SCC. In fact, some arbitrators may even allow those fee schedules to determine their fees, regardless of time spent, most likely due to a combination of convenience and caution.
5) *See*, Article 49 and Article 2 of Appendix IV of the SCC Rules, and Article 38 and Article 2 of Appendix III of the ICC Rules.
6) *See*, Article 28.1 of the LCIA Rules and Article 2(i) of LCIA's Schedule of Arbitration Costs, Article 35(1) of the ICDR Rules, and Regulation 14 of the ICSID Administrative and Financial Regulations.
7) *See*, Article 10 of the 2013 HKIAC Administered Arbitration Rules.
8) The SCC may also sometimes take hours spent by an arbitrator into account, but to a lesser extent than the ICC and not as a standard part of the institute's assessment of fees.
9) *See, e.g.*, Article 2 of Appendix III to the ICC Rules.
10) The reasons for the lack of effective tools are further analysed below.
11) Somewhat more than half of the recipients were European practitioners, with the rest mostly being based in US and Asia, but also in some other countries including – amongst other – Australia, Canada and Dubai.
12) Most recipients were recognised and ranked in the fields of arbitration and dispute resolution by publications such as Chambers & Partners and Who's Who.

13) At the time of responding to the survey, none of the surveyed practitioners had less than ten years of experience as counsel and/or arbitrator and many had considerably more.
14) The phrasing of the questions has been slightly adjusted to fit the format of this article.
15) Lack of time is likely to have been at least part of the reason for some practitioners not responding. In some cases, it is also possible that the email with the questionnaire simply never reached the intended recipient due to a faulty email address or other technical issue. It is also possible that some recipients felt uncomfortable with the sensitive theme of the questions and therefore chose not to answer.
16) Six of the participants did not provide straightforward yes or no answers, requiring some interpretation from our side. In undertaking that interpretation, we tried to be as fair as possible and, when in doubt, chose to interpret answers to the first question to mean 'no' rather than 'yes'.
17) As noted above, many, if not most, practitioners provided comments and the ones quoted are mere examples to illustrate the wide range of comments received.
18) Some answers included relatively detailed accounts amounting to much more than a mere suspicion. In order to preserve confidentiality, these specific accounts have been omitted from this article.
19) The numbers suggest an almost even distribution between ad hoc and institutional arbitrations, albeit with a slight over-representation of the former. However, at least in recent years and with the exception of certain fields of industry, institutional arbitration appears to have gained in popularity over ad hoc arbitration (*see, e.g.*, the Queen Mary University of London and White & Case 2015 International Arbitration Survey, p. 17). If this is indeed the case, then the larger number of institutional arbitrations may in itself lead to more opportunities for suspicions to arise as well as for those surveyed to be more exposed to such arbitrations. The difference between the two basic types of arbitration may, thus, potentially be larger than suggested by the survey.
20) A few of the surveyed practitioners in fact pointed to the opposite situation, i.e. when the hours of the arbitrators are extremely closely aligned. This may create a basis for suspecting that the hours of at least one of the arbitrators are inflated.
21) Apart from the distinction that can be made between ad valorem and hourly based systems, and although there are similarities between the institutions, each institution is organised and operated differently with its own specific characteristics. It should therefore come as no surprise that they approach the issue of potentially inflated hours in somewhat different ways and attribute various weight to the time reporting of arbitrators. The purpose of this section of the article has not been to review and address the approach of all major arbitral institutions with respect to controlling the time reported by arbitrators. Rather, we have chosen to limit the review of current control mechanisms to the few institutions most commonly mentioned in the survey. As a result, certain major arbitral institutions such as the HKIAC, SIAC, Swiss Chambers and CIETAC do not feature in this section of the article.
22) *See, e.g.*, section 64(2) of the Arbitration Act, 1996 (England, Wales, and Northern Ireland) and section 77 of the Hong Kong Arbitration Ordinance.
23) A survey by the ICC indicates that the costs of an arbitral tribunal will typically only account for up to 15% of the overall costs of an ICC arbitration. The remaining 85% or more are made up of party costs (83%) and ICC administrative expenses (2%), *see,* ICC Commission Report on Decisions on Costs in International Arbitration (2015).
24) Article 41(1) of the 2010 UNCITRAL Arbitration Rules provides that '[t]he fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.'
25) That being said, sometimes the SCC receives unsolicited time reports from arbitrators. This is almost invariably done by arbitrators accustomed to other institutions, such as the ICC, in order to illustrate that the case has become more complex than initially anticipated and that the advance on costs therefore ought to be increased. However, even in these situations, the hours indicated very seldom have much of an impact on the advance on costs or the final fee determined by the SCC.
26) The LCIA Court is responsible for finally determining the fees of the arbitrators in accordance with Article 28.1 of the LCIA Rules.
27) Regulation 14(1) of the Administrative and Financial Regulations. ICSID is proposing to make certain changes to the remuneration of arbitrators, *see*, Proposals for Amendment of the ICSID Rules – Working Paper, ICSID Secretariat, 2 August 2018.
28) The standard form is available on the ICSID website.
29) ICSID has a three-step process to scrutinise claims for accuracy and reasonableness. However, the first step concerns the screening of the expenses by a financial officer and is therefore not relevant for the subject matter of this article.

30) If the ad hoc arbitration is conducted under the 2010 UNCITRAL Rules with an appointing authority, Article 41 provides that the arbitrator shall submit its fee proposal to the parties, who in turn may refer it to the appointing authority for review. The appointing authority may adjust the proposed fee rate or method to the extent it is not reasonable. Also the final determination of the fees may be subject to review.
31) As developed above, the potential for parties to subsequently challenge the reasonableness of those fees before the local courts at the seat is often not an attractive remedy and, consequently, seldom used.
32) Another difference is that counsel regularly delivers advice and other work products manifesting the work done for the client. By contrast, an arbitrator's main task up until the hearing is normally to read and analyse the parties' various submissions and to issue decisions, when needed. Apart from the communications with the parties and the procedural decisions issued, the work of an arbitrator prior to the hearing will rarely provide much in the way of an external manifestation of the work done.