INTERNATIONAL ARBITRATION: THE SEARCH FOR THE HOLY GRAIL

2023 KAPLAN LECTURE HONG KONG

1. It is sixteen years since the first annual Kaplan Lecture, in which Neil Kaplan QC (who else?) explained that the purpose of the Lectures was to be "*more practical and more Hong Kong focussed*"[1] than other arbitration-related lecture series, such as the Goff lectures. The passage of those sixteen years means that there have been quite a few topics covered in a series of diverse and interesting lectures, and that there has been quite an accumulation of relevant new experiences and developments. This is particularly attributable to the continued growth in international arbitration, both in terms of traditional international commercial arbitrations, and the more recent ISDS and BIT arbitrations.

2. My aim today is to focus mainly on a number of practical topics many of which have been covered in previous lectures. I would like to concentrate on practical topics in particular partly because that is one of the aims of this lecture series. But it is also because, as a common lawyer, I am rather more at home with bottom-up, case-related issues than with high-level top-down philosophical questions which provide more familiar subject-matter to civil lawyers. Nonetheless, reflecting the lecture topics, I will touch on one or two broader topics which I think are important and relevant Secondly, I want to cover a number of topics rather than one topic. Particularly in these days of short electronic messages and consequential short attention spans, it seems to me that a 45-minute lecture on a single topic is a bit of a challenge. After 20 minutes, the audience starts to lose the will to live, and after 30 minutes, the speaker does too. A talk is likely to be more interesting – or perhaps I should say, less boring – if one covers a number of topics Thirdly, I thought that it might be worth looking back and considering in relation to topics

[1] N Kaplan CBE QC *First Kaplan Lecture* 2007

which had been covered in previous lectures what had been said then and what might be said today.

3. Before turning to the various topics, it is right to mention that, whatever topic is being considered, the ultimate purpose of this lecture is to consider what improvements can be made to the current practices in international arbitration. The aim is to identify the procedural ingredients of a perfect arbitration – hence my reference to the holy grail in the title. I am conscious of a certain irony in that choice of title, because of course the holy grail was never actually found, despite the best attempts of King Arthur and his knights[2]. But I think that this unattainability is in fact apt. While, like the knights of the Round Table, we should be seeking perfection for the arbitral process, we have to accept that we will never achieve it. That is partly because perfection is rarely if ever available for us humans. But it is also because different cases, different parties, different legal systems, indeed different inclinations, will favour different processes. But that is again like the mysterious holy grail, could not only not be found, but writers could not even agree what it was: it was variously described in the literature as a dish[3], a saucer[4], a stone[5],a cup,[6] a platter[7], a sword[8], a wine-mixing vessel[9], and a woven basket[10].

4. But let me move from medieval myth to arbitral actuality. The first stage of the arbitration voyage is the arbitration clause itself. I am not sure how much time it is worth parties spending time worrying about the clause when drafting the contract, unless you know what sort of issue is likely to arise, as unless you know what sort of issue will arise you will not have much idea of what you will want in

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[2] T Mallory *Le Morte d'Arthur* (c 1480)
[3] Chretien de Troyes *Perceval, le Conte du Graal* (c 1190)
[4] Helinand of Frodmont per H Voorbji,, *i Helinand of Frodmont: Vie et Oeuvre* (1993)
[5] Wolfram von Etzenbach, *Parzival* (c1215)
[6] Robert de Boron, *Joseph d'Aramathie* (c 1200)
[7] *Peredur fab Efrawg in Mabinogion* (c ?1300)
[8] N Lorre Goodrich *The Holy Grail* (1993)
[9] E Mueller, *Etymologisches Wörterbuch der englischen Sprache: A–K, chettler*, 1865, p. 461
[10] R Barber, *The Holy Grail: Imagination and Belief*, p 215 (2004).

the clause. Following Jim Spigelman's Lecture[11], it would be sensible to make sure that the applicable law of the arbitration and of the clause itself are specified. in cases of connected contracts with arbitration clauses, the parties and their lawyers may be well advised to consider whether to provide specifically for consolidated arbitrations, and, given the uncertainty in some jurisdictions, it may also be right to consider how wide the scope of the clause should be[12]. And it may be worth spelling out what, if any, input the parties should have in the appointment of the presiding arbitrator. In agreement with Neil Kaplan[13], I think that the parties should also consider whether the arbitration clause should include provisions which stipulate a reasonable time limit for award, which limit disclosure/production, which exclude (or I suppose include) punitive damages depending whether US laws apply, which define the applicable principles of confidentiality, and which provide that, if the amount at stake is less than a specified sum, there will be a sole arbitrator, and the award can contain no reasons.

5. The next stage I want to consider is the start of the arbitration. These days in particular, when the arbitration process has become pretty procedure-driven, when many arbitrations involve claims for very large sums indeed, and when there is often considerable domestic public interest in the outcome, the need for both parties to be represented by lawyers and counsel who are both competent and honest has never been greater. That may sound rather obvious, but it is underlined by a very recent judgment in the English Commercial Court, *Republic of Nigeria v Process & Industrial*[14], handed down less than three weeks ago. In that case, leading counsel and solicitor acting for P&I were held to have acted "*indefensibl[y]*" in receiving and retaining a succession of Nigeria's internal privileged documents[15], and Nigeria's counsel gave idiosyncratic advice to his client and, at the hearing, did

[11] Thie Hon J Spigelman *The Centrality of Contractual Interpretation: A Comparative Perspective*" 7th Kaplan Lecture 2013

[12] Not all jurisdictions adopt the expansive approach of the UK courts in *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40

[13] Ex rel Neil Kaplan

[14] *The Federal Republic of Nigeria v Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm)

[15] *Ibid*, paras 214-215

not understand many questions put to him by the Tribunal "*not through any lack of clarity on the part of the Tribunal*"[16]. So, one side was apparently represented by unprofessional counsel and the other by incompetent counsel. As a result of the indefensible action (and also because there was bribery involved), after 30 days argument, an award for over $6bn made nearly seven years earlier was set aside. As the judge, Knowles J, said, "*Quite apart from the consequences for the parties, the matter touches the reputation of arbitration as a dispute resolution process*"[17].

6. Fortunately, the facts of *Nigeria v Process & Industrial* are wholly exceptional, but the case is a salutary reminder of the importance of counsel being honest, which most of those of us involved in arbitration, normally take for granted. If that ever ceases, public confidence in arbitration will be well and truly undermined. The case also demonstrates how important it is that parties are represented by competent counsel.

7. I turn from counsel to the Tribunal. In his lecture[18], Neil Kaplan recommended a possible variation to the traditional way of selecting a three-person tribunal, namely the parties appoint a neutral chair and then leave it to the chair to put together a "dream team" based on the chair's knowledge of the case. This is an interesting idea, and would render possible another idea he promulgated, namely that any issue is dealt with by only one member of the Tribunal – so that, for instance, one member deals with procedural issues; another member with technical evidence issues. As far as I am aware, this innovative idea has not been taken up at least to any significant extent. Maybe its time will come.

8. In my six years as an arbitrator, I have been very favourably impressed by the independence and lack of partisanship of party appointed arbitrators – and that applies to arbitrators from many jurisdictions. When presiding, I normally have

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[16] *Ibid*, para 398(2)
[17] *Ibid*, para 14
[18] See footnote 1

to check the record if I want to see which of my co-arbitrators was appointed by which party, as it is quite unclear from the attitude they display to the parties and the arguments. And, in the rare cases where a party-appointed arbitrator is partisan, I have noticed that it is actually counter-productive, as the presider. if they are any good, quickly realises if a co-arbitrator is biased, and then largely or wholly discounts the co-arbitrator's contributions.

9. Once the arbitral panel is constituted, there are directions to be given, and interlocutory steps to be taken. The extent to which the directions should be imposed by the tribunal or agreed by the parties is sometimes a matter of debate. There are those who say that arbitration is a consensual exercise, and so the parties should be entitled to insist in the direction they have agreed, whereas others say that experienced arbitrators know better the counsel, and so the tribunal view should prevail. In my experience, this is something of an academic debate. With reasonable counsel and tribunal members, whether the first draft of the first procedural order is drafted by the tribunal or negotiated between counsel, makes little difference to its ultimate terms.

10. During the period between the giving of directions and the evidentiary hearing, the potential for contrast between different arbitrations is striking. In some arbitrations, after giving agreed directions, the tribunal hears nothing from the parties other than being served with the pleadings as they are circulated, until the tribunal is sent the agreed timetable for the imminent evidentiary hearing. By contrast, in other arbitrations, the tribunal is bombarded almost weekly with requests for decisions on a plethora of points which the parties cannot, or, sometimes, will not, agree. It is tempting to say that lawyers do their clients no favours by adopting an unduly belligerent approach to dispute resolution as (i) it leads to increased costs both directly (as resolving each argument costs money) and indirectly (as unnecessary arguments add to the complexity and that also leads to increased costs), and (ii) a belligerent attitude risks alienating the tribunal. As a general proposition, I think that this is a correct proposition, but I would be falling

into the trap of forgetting what dispute resolution was like t the coalface if I suggest that it is always correct.

11. Turning to the directions which a tribunal may give, there is of course the familiar battle between common law pleadings and memorials. Where the issues have been identified, or perhaps where they can easily be identified, there is much to be said for memorials, but where the parties are unclear as to the other party's case (and particularly where the claimant is unclear about the respondent's case), memorials have obvious problems, as I see it.

12. In her Kaplan lecture[19], Lucy Reed argued for shorter pleadings and memorials. She suggested that the parties should concentrate on quality rather than quantity in their submissions and adopt proper strategies that can guide the tribunal through their case like a clear trail map guides a climber to the top of the mountain. I agree, although this sort of plea is often made and regularly appears to fall on deaf ears when made by an arbitration tribunal. A more robust approach would involve the tribunal limiting the number of pages in each party's case. In fact, that gives rise to something of an obsession of mine. A page-limit requires one then to specify font-size, margin-widths, and line-spacings, which is both tedious and pedantic. Far better, I would have thought, to have word-limit, which is far more difficult to cheat on (except I suppose if you hyphenate every two words) and very easy to check, with word count.

13. The most notorious exercise which falls to be performed in this period, is, of course, document production. Once one departs from a rule that there is no right to document production, or, at the other extreme, that any party must disclose any document the other party requests, one is in difficulties. That is for two reasons. First, the volume of documentation in this electronic age is enormous. Secondly, interlocutory decisions are frequently harder than final decisions, as one does not

[19] Lucy Reed "*Arbitral Decision-Making: Art, Science or Sport?*" Sixth Kaplan Lecture 2012

know all the facts and only has a nodding acquaintance with the legal issues, and when the interlocutory decision concerns a document which one has not seen, such decisions are even more challenging. The various attempts by the English courts to simplify disclosure, which throws up identical issues, have not been successful by all accounts.

14. In many cases, the parties' arguments on document production are of epic length and go into minute detail, which largely explains why mention of Redfern Schedules results in groans from many arbitrators. In his lecture[20], Neil Kaplan suggested that arbitrators should adopt a far more active and 'hands on' approach when dealing with disputed and complex document production issues. If that means that tribunals should be prepared to adopt what in the accountants' valuation world is referred to as a "quick and dirty" approach, I think it would require the parties' agreement. If it means that a tribunal should be more informed, then it is a little hard to see how that could be achieved without the arbitrators having sight of the documents sought.

15. Neil Kaplan[21] also quoted Yves Derain's proposal that document production orders should be limited to those documents "*without which a party would not be able to discharge the burden of proof lying upon it.*" So, it is suggested that an arbitral tribunal should decline to order the production of a document "*unless it is satisfied that the requesting party actually needs the document to discharge the burden of proof resting upon it.*". I see the attraction of that proposal, although it would need to be expanded in order to be just; thus, if it resulted in the claimant having to produce a note of a meeting at the behest of a respondent, then the respondent should have to produce its note of the meeting – at least if the claimant asked.

[20] See footnote 1
[21] See footnote 1

16. As I have already mentioned, there is a real argument for including in the arbitration clause a provision which cuts down document production. After all, a plethora of documents leads to extra expense in terms of production requests, searching, bundling, submissions and cross-examination. Charles Hollander KC in his work on Documentary Evidence[22], supported "*the view that electronic disclosure is, more than any other factor, responsible for the increase in the cost of litigation in recent years*", and added that "*[i]n recent years electronic disclosure has led to vast costs spent on disclosure*"[23].

17. Of course, there will be cases where detailed document production orders lead to the discovery of a "smoking gun". However, I suspect the great majority of such cases would have been decided the same way and more cheaply without the documents, and, in any event, further down the arbitration road, apparently smoking guns frequently turn out not be smoking or even guns. As Hollander also wrote, "*[c]lients often overestimate the importance of disclosure and expect to see smoking guns that never materialise: thus the spending of disproportionate sums on disclosure is often client-driven. And consultants as well as the lawyers are often keen to propose further and better searches, with the consequence that it has all got out of hand…*"[24].

18. In any event, I question whether the fact that in one or two cases document production has made a real difference justifies the pointless expenditure in the countless other cases where it makes no difference. It is, I suggest, appropriate to consider that issue more globally. There is obvious force in the point that the time-consuming and expensive operation of document production in every case cannot be justified simply because it produces justice in, say, one case in a hundred. It is not merely that the likely value of document production may outweigh the cost and time; it is also that many potential litigants are put off going to arbitration because

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[22] C Hollander *Documentary Evidence* 14th edition (2021), para 9-01
[23] *Ibid*, para 9-02
[24] *Ibid*, p 159

of the costs involved, and, as mentioned, those costs are often substantially increased by document production.

19. It may be attributable to my scientific training, but I must admit to being a bit puzzled by the fact that there is no attempt by the arbitration professionals, by the academics, or by the arbitration institutions to investigate the cost-effectiveness of our procedure in arbitrations. It is fair to say that the same sort of comment can be made about litigation, where the public interest in effective procedures is even greater, but it does not alter the force of the point in relation to arbitration. Thus, there should be real interest in establishing the value of document production, and I would suggest that it might be feasible to conduct a survey of parties and tribunals after final awards, to inquire, for instance, as to the extent of documents ordered pursuant to document production requests, the amount of time spent on those documents, and the extent to which the documents made a difference to the outcome. Of course, the responses in each case may be inconsistent and somewhat impressionistic, but it would at least be worth trying, bearing the amount of money spent on, and as a result of, document production requests in arbitrations across the world each year.

20. Another controversial and difficult directions issue which not infrequently arises is whether or not to bifurcate, or, in common law parlance, whether the tribunal should determine some preliminary issues. There are English cases where Judges have warned that it can be a dangerously seductive course, and so it can, as dividing up a case, which goes all the way, can easily give rase to more delay and more costs than if the more traditional course of a single hearing were adopted. But there are cases where it is a sensible option to adopt. It is not easy to give guidance on this, as so much depends on an individual case In his Kaplan lecture[25], Sir William Blair recommended what he called "*early determination applications for both the claim and defence*" in "*international financial disputes of*

[25] Sir W Blair "*Arbitrating Financial Disputes – Are They Different and What Lies Ahead?* 15th Kaplan Lecture, 2021,

high value", arguing that this could "*encourage conciliation at an early stage as well as bring forward any issues needed to preserve assets*".

21. I move on from interlocutory issues to the evidentiary hearing, and I have quite a lot to say about both factual witnesses and expert witnesses. So far as factual witnesses are concerned, there are three fundamental problems, which in stark summary terms are as follows. The first problem is that factual witnesses are often unnecessary. The second is that they are generally unreliable. The third problem is that arbitrators, like judges, are not very good at telling liars from truth-tellers.

22. Turning first to necessity, many, in fact probably most, commercial arbitrations involve issues of contractual interpretation, and in most cases oral factual evidence is at best of questionable value on such an issue. In a common law case at least, one cannot take into account the parties' actual intentions and understanding s to what the contract meant or was to mean; nor can one take into account what we said or not said in negotiations[26] when interpreting a contract: such evidence is, strictly speaking, inadmissible in law, although it si only right to add that such evidence is potentially admissible, and in some cases turns out to be crucial, in those cases where one party is seeking rectification, but such cases are relatively rare.

23. Although factual evidence is therefore mostly irrelevant in a dispute as to contractual interpretation, in many cases a tribunal has to listen to a number of factual witnesses. The excuse for such evidence is that, while actual intentions and understanding, and the negotiations are irrelevant, the surrounding circumstances, the so-called matrix of facts in which the contract was agreed is relevant to its interpretation. That matrix includes in particular relevant facts known to both parties and relevant commercial realities at the time the contract was made. But the relevant factual matrix is normally obvious or anodyne, and, even when it is not, it should

[26] See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 and *Arnold v Britton* [2015] AC 619

be capable of being agreed without much difficulty. I suspect that client pressure plays a part in the parade of irrelevant witnesses which a tribunal sometimes sees: the desire to explain one's case is understandable, especially if trhe other side are calling irrelevant witnesses, and, at least in some cases, lawyers will not be popular with their clients if they stand in the way – and to be blunt, proofing and calling unnecessary witnesses may have some financial attraction for the parties' lawyers.

24. So far as reliability of witnesses is concerned, Toby Landau KC in the fourth Kaplan Lecture[27], relying on legal principles and scientific evidence to show that witness memory is not as reliable as it seems to be and may be easily manipulated, making much of the way that proofing and witness statements distort or alter a witness's recollection, and also showing that the manner of presentation in court makes things worse. I agree with that, but what makes matters worse is that, even without the procedures imposed by our dispute resolution rules ahead of and during a hearing, a witness's evidence would be unreliable.

25. The problem was graphically described by Leggatt J (now Lord Leggatt) in the 2013 *Gestmin* case[28], where he discussed "*the unreliability of human memory*", explaining that he did "*not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony*", and added that we are mistaken in our beliefs "*(1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate*". He also pointed out that "*memory is particularly vulnerable to ... alteration when a person is presented with new information or suggestions*". Echoing Toby Landau, Leggatt J said that "*[t]he process of civil litigation itself subjects the memories of witnesses to powerful*

[27] Toby Landau KC "*Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration*", 4th Kaplan Lecture, 2010

[28] *Gestmin SGPS S.A. v Credit Suisse* [2013] EWCA 3560 (Comm), paras 16-22

biases" so that "*[c]onsiderable interference with memory is also introduced in civil litigation by the procedure of preparing for trial*".

26. Accordingly, Leggatt J concluded

> "*The best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts*"

He nonetheless accepted that oral evidence could be of some possible use although he added that "*its utility is often disproportionate to its length*". It's just as well that he accepted oral evidence had some value, as otherwise presumably criminal trials would be documents only, and in many cases oral evidence is the only evidence there is, as there is no "*documentary evidence*", and no relevant "*known or probable facts*".

27. But that highlights the third problem with factual witnesses – we humans, including judges and arbitrators, are poor assessors of witnesses. A 2005 study[29] involved some observers watching live witnesses and others watching witnesses on video, in each case assessing whether the witnesses were telling the truth or not. The accuracy rate for both groups was very close to 50% - i.e. you might as well toss a coin, as it would be equally reliable and cost much less and be far quicker. Further, there was a significant negative correlation between accuracy and confidence. In other words, the observers were more confident when making an incorrect judgement of truthfulness than they were when making a correct judgement. This is confirmed by much other research[30], including a paper by Daniel

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[29] S Landstrom, P Granhag and M Hartwig, *Witnesses Appearing Live vs on Video: Effects on Observers' Perception, Veracity Assessments and Memory* (2005) 19 Applied Cognitive Psychology 913, as described in M Green, footnote 23 below, p 32.

[30] See e.g. C. L. Hart, D. G. Fillmore and J. D. Griffith, *Indirect Detection of Deception: Looking for Change* (2009) 14 Current Issues in Social Psychology 134

Kahneman (of *Thinking Fast and Slow*[31] fame) who reports that confidence is a highly misleading guide to accuracy in decision-making.[32]. A 2008 paper[33] summarised the results of over 25 studies considering the accuracy of professional investigators' attempts to judge the veracity of statements, and they were successful in identifying truth in about 56 per cent of cases.

28. There is thus force in the view expressed by one researcher who wrote that *"[t]he legal systems employed in common law countries are based, in part, on a fundamentally flawed principle … that the human beings who are charged with the task of discriminating truthful from deceptive evidence are able to do so accurately and consistently*"[34].

29. To put the point another way, it is easy to confuse a good witness with good testimony. A good witness is a person who appears impressive to the tribunal when giving evidence, but that does not mean that the testimony they give is any more reliable than if it had been given by an unimpressive witness. The certainty which is so suspect when it is felt by a judge or arbitrator when assessing the testimony of a witness is equally suspect when it is expressed by a witness about their recollection of evets, and yet many tribunals are impressed by a confident witness. That is dangerous. The same point can be made with equal force about verbally articulate or personally engaging witnesses. And judges and arbitrators can be affected by other influences when assessing witnesses' testimony. I vividly recall a case early on in my career as a trial judge, listening to a witness, and realising that I was doing my best to make myself believe him although his evidence was plainly inconsistent with the contemporary documents. I then realised that this was because his mannerisms and appearance reminded me of my late father.

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[31] D Kahneman, *Thinking, Fast and Slow* (2011)

[32] D Kahneman and G Klein, *Conditions for Intuitive Expertise: A Failure to Disagree* (2009) 64 American Psychologist 515 at 522.

[33] A Virj, *Detecting Lies and Deceit: Pitfalls and Opportunities* (2008).at 187-8, described in M Green, footnote 28 below, p 33

[34] M Green, *Credibility Contests: the elephant in the room* (2014) 18 Int'l J Evidence and Proof 28, 29

30. This part leads me to a wider point about the arbitrator's role, and it extends to the assessment of not just the evidence but also the arguments advanced by counsel. In her Kaplan lecture[35], Lucy Reed identified certain biases and similar subconscious features which justify questioning the reliability of arbitral and judicial and indeed any decisions, or to be more positive, which any conscientious arbitrator or judge should be aware of and should try to allow for. These include:

(i) Anchoring Effect. This effectively means that arbitrators should avoid being influenced by an initial fact which is in their minds from the start; in particular when carrying out a quantification, arbitrators should ensure that they are not being influenced by a figure which has been in their mind from the start sometimes for almost random reasons[36],

(ii) Hindsight Bias. Arbitrators should resist the temptation of hindsight. This is especially so on causation issues or claims in negligence. Most of use exaggerate our ability to have predicted an event when we know it has happened, and so an event may seem inevitable, or at least foreseeable now it has happened[37]. I should add that there is a danger that consciousness of this risk can mean that there is a danger of leaning over backwards, so that one becomes too forgiving,

(iii) Egocentric Bias. Arbitrators should avoid relying on preconceptions, and they should make sure that they are not subconsciously searching in the material in the case for confirmation of their preconceptions,

(iv) Cultural Cognitive Biases. This is controversial and difficult area, and research is at an early stage, and not all of it appears reliable, and

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[35] Lucy Reed "*Arbitral Decision-Making: Art, Science or Sport?*" Sixth Kaplan Lecture, 2012

[36] CR Drahozal *Behavioural Analysis of Private Judging* 67 Law & Contemp Probs 105,110 (2004)

[37] Guthrie et al *Inside the Judicial Mind* 86 Cornell L Rev 777,799 (2001)

(v) Extremeness Aversion. This means that arbitrators and judges should not be unduly influenced by the tendency to compromise – to go down the middle in valuation cases for example. A 2001 study of over 4,000 arbitration awards[38] suggest that, although there could well be a problem in this connection, arbitrators are less susceptible to extremeness aversion than is generally supposed. Again I would add a word of caution: sometimes the right answer involves going down the middle, so do not suffer from moderation aversion either.

31. Two other features raise particular difficulties – namely intuition and common sense. Both are important weapons in a decision-maker's armory, but both can be dangerous. It is not only that people my disagree as to the intuitive or common sense answer. As to intuition, all I can usefully say is that some people have better intuition than others, but nobody's intuition is by any means always right. Turning to common sense, particularly in the common law world it is not infrequently invoked by decision-makers. Although there are undoubtedly times when relying on common sense can be justified, I would suggest that arbitrators should be careful of invoking it simply because they cannot think of any other basis on which to justify the conclusion they want to reach. The reason that they cannot find another basis may well be because their conclusion is wrong. Particularly on a point of law, the right answer may not accord with common sense in the particular case, as common sense is not an infallible guide, and when it comes to points of law, while their application to the facts can generally be expected to produce a common sense answer, that is not always the case.

32. Much of what I have said so far about witnesses and arbitral biases applies to expert witnesses, but there are one or two further points worth making on that topic.

[38] RW Naimark and SE Keer *Arbitrators Do Not 'Split the Baby' Empirical Evidence from International Business Arbitration* 18 J Int'l Arb 573 (2001)

33. The constant messaging from almost every judge and every arbitrator when it comes to expert evidence is that expert witnesses should tell the truth and should bear in mind that their duty is to the court not to the party whom is paying them, and that duty involves giving their honest view. It is an easy principle to state and to understand, but it appears to be very hard indeed to comply with it, and to be fair it is easy to understand why. Party-appointed experts are paid by the relevant party, they often attend conferences at which the party's legal team discuss how to win the case, their reports are analysed with a view to "improving" them in that party's interest, but nonetheless they are required to remain utterly impartial and to give their views accordingly. I have the honour of being President of the Academy of Experts, and probably our main function is to drill this basic principle into our members' heads, and to consider the judgments which continue to be given in which expert witnesses are criticised for partiality.

34. Let me offer three thoughts about this problem. First, tempting though it is in many cases where it is possible (e.g.valuation cases), arbitrators should be very chary of splitting the difference or going down the middle. The message it can send is that an expert witness could well be harming their client by being honest: if, for instance a purchaser's expert is honest and the seller's witness gives a biased high figure, going down the middle will reward bias and punish honesty. In other words, this aspect of expert evidence makes it particularly important for a tribunal to avoid extremeness aversion.

35. Secondly, there is much to be said in such cases for a pendulum arbitration or a flip-flop arbitration, which involves the arbitrator having to accept one of the two figures presented by the experts – thus, having arrived at a valuation, the arbitrator has to award the figure advanced by the expert who has got closest. I would have thought that that would concentrate the minds of the experts - and indeed the parties – on putting forward a realistic figure. It would also improve the prospects of settlement, and, if the case does not settle, it would also avoid the risk

of extremeness aversion on the part of the tribunal. When I was in practice at the bar, I was involved in many valuation arbitrations, and I often suggested to clients that they should consider agreeing that the forthcoming arbitration be on a flip-flop basis. As far as I am aware, the suggestion was never adopted, so I suspect that making this suggestion this evening is unlikely to lead to any change in practice.

36. My third thought, which is not meant entirely seriously, involves raising the possibility that maybe we have it all wrong, and should give up trying to achieve the impossible, namely ensuring that expert witnesses give unbiassed evidence. Instead, we should face up to reality and accept that expert witnesses can be a biased as they like. This would at least arguably help to ensure a more level playing field, as well as according more with human nature. However, it would also have serious problems, as a tribunal could not rely on its view that a particular witness was honest, as any sort of guide – although that may not be as much of a problem as some may think in the light of human fallibility when it comes to assessing honesty.

37. A different aspect of expert evidence was discussed by Donald Donovan in his Kaplan Lecture[39], As he pointed out, most, maybe all, arbitration laws and rules are not prescriptive as how arbitral tribunals resolve issues of foreign law, and he expressed the view that arguments on questions of foreign law) should ideally be presented as submissions by the parties' legal representatives, rather than by expert testimony through expert legal witnesses. He made the point that the arbitrator should be skilled at making decisions on law and applying legal reasoning, and hence it is better for them to engage vigorously directly with the parties' advocates. I entirely agree, and I note that in his Kaplan Lecture[40], James Spigelman described "*the use of expert evidence as the mechanism for informing the court of foreign law*" as "*generally inadequate*".

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[39] DF Donovan "*Re-examining the Legal Expert in International Arbitration*" 11th Kaplan Lecture 2017
[40] Hon J Spigelman, *The Centrality of Contractual Interpretation: A Comparative Perspective*" 7th Kaplan Lecture 2013

38. Partly reflecting the quaint if well-established common law notion that a tribunal's findings as to foreign law are findings of fact, and partly reflecting the notion that the arbitrators do not have the ability to evaluate foreign law themselves, foreign law issues are traditionally the subject of expert evidence in common law, so that each side calls a foreign lawyer who produces a report as to his or her view of the foreign law, and who is then cross-examined by the opposing counsel – just like an expert accountant surveyor or engineer. This is a slower, clunkier and more obscurantist way of proceeding than the obvious alternative and natural course of the foreign lawyers each making submissions on behalf of the parties in the same way as counsel make submissions on the issues of law of the arbitration. Competent arbitrators should be well able to assess points of law in any jurisdiction, possibly more reliably in areas in which they cannot profess any deep experience.

39. A lawyer making submissions is not committed to the legal propositions which they raise in the same way as a lawyer who is stating their expert view of the law. And cross-examination of a lawyer is not so much a testing of their views as an attempt to undermine their views, and therefore it turns into a battle where neither party is concerned with the right outcome: each is concerned to win. An arbitrator engages with a lawyer with a view to testing the lawyer's submissions and seeking the right answer. And if cross-examination of foreign law experts was such a good idea, why don't opposing counsel cross-examine each other rather than making submissions?

40. As Donovan pointed out, many civil law jurisdictions involve foreign lawyers making oral or written submissions on foreign law, rather than giving evidence. It also seems to me that the notion of foreign lawyers making submissions rather than giving evidence is also consistent with the current procedural direction of travel with experts generally. The relatively new idea of concurrent evidence or hot-tubbing involves reducing the cross-examination and increasing the judicial questioning of experts.

41. I do not have much to say about hearings, which in my experience have generally been conducted fairly and efficiently. Nor do I have much to say about closing submissions, whether oral at the end of the case, oral at a later date, post-hearing written briefs or a combination. Indeed, all I would say is that it is sensible to agree a provisional arrangement in advance (not least because it is obviously desirable to fix any date for later oral submissions well ahead of time) but to determine the appropriate form towards the close of the hearing, as events during the hearing may influence the appropriate form.

42. When it comes to the award itself, there are two principal points which I would like to make, one stylistic, the other substantive. The stylistic point is a plea that arbitrators should keep their awards as short as they reasonably can. Generally speaking, arbitral awards, like UK court judgments, are getting longer and longer, and there is often no need for this. Clarity and concision are not inconsistent with thoroughness and fairness. Just as arbitrators do not welcome over-lengthy written submissions, so, they should bear in mind, the parties do not generally not welcome very lengthy over-elaborate awards. I note that the Mauritius MARC Rules[41] provide that a tribunal "*may ... state its reasons as succinctly as possible without any need to re-state the procedural history of the arbitration or the parties' submissions save to the extent necessary for such reasons*." It is tempting to suggest that the word "may" could usefully be replaced with the word "should".

43. As to the substantive point, while they should of course avoid being rash or unfair, arbitrators should be brave, because, like honesty and truth, justice always eschews cowardice and requires fearlessness. There has always been a need for fearlessness in tribunals because arbitrators have a duty to apply and uphold the law, and failure to do so will lead to an undermining of public confidence on arbitration. However, the growth of investor-state arbitrations and other arbitrations involving large claims against states and state bodies has resulted in what Robert Spano

[41] Mediation and Arbitration Centre, Mauritius, Rules, rule 33.4

referred to in his Lecture[42] as arbitral tribunals having "*increasingly... to reconcile conflicting interests of the protected investor .... and the pubic interest invoked by national authorities*", which reinforces the requirement of fearlessness Let me give three examples where fearlessness is called for. First, tribunals should not be frightened about dealing – and dealing robustly – with challenges to their jurisdiction. This was a topic addressed in Bernard Rix's penetrating analysis of the law in his lecture on *kompetenz-kompetenz*[43]. In the UK and other jurisdictions, a wide scope has been given to arbitration clauses on the understandable assumption that, to put it simply, the parties intended all their disputes relating to their relationship to be dealt with by one tribunal[44].

44. Secondly, as pointed out by Yves Fortier in his lecture[45], Tribunals should not be scared of concluding and stating that there has been corruption, where it is alleged and established. There have been cases where tribunals have shied away from finding corruption when, in the light of the evidence, they owed it to the parties, indeed to the rule of law, to find it established. In world where corruption and other criminality are increasing problems, those responsible for the rule of law, and that includes arbitral tribunals, should not be unduly reluctant from calling it out when they see it, as the Judge did in the *Nigeria v Process & Industrial* case, where the contract had been obtained by bribery and the party that obtained the contract then paid further bribes to keep the original bribery from the Tribunal[46].

45. . The third point is also exemplified by the *Nigeria v Process & Industrial* case, where the Tribunal accepted the claimant's expert evidence and awarded a massive sum of over $6.5bn in its favour[47], despite a number of factors which, although Nigeria failed to raise them, were known to the Tribunal and which could

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[42] R Spano, *Investor-State Arbitration, a New Frontier? = Investor Protections, the State's Regulatory Space and the Margin of Appreciation*, 16th Kaplan Lecture, 2022

[43] The Rt Hon B Rix *The Importance of Being Competent* 5th Kaplan Lecture, 2011

[44] See *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40

[45] The Hon L Y Fortier, *Arbitrators, Corruption and the Poetic Experience* Eighth Kaplan Lecture, 2014

[46] See footnote 13, paras 401-405

[47] *Ibid*, para 396

have significantly reduced that award[48]. In my view, particularly when it comes to issues such as damages based on DCF calculations, tribunals must be ready to take a critical view of some pieces of evidence even in cases where the evidence is not challenged or is ineffectually challenged – indeed, perhaps particularly in such cases. Where such a course is taken, a tribunal should ensure that any points of concern are put to the relevant witness or counsel.

46. Finally, let me turn to an important, broader topic, namely, the increasing demand for transparency. Confidentiality has always been one of the major attractions of arbitration, and until recently it was taken for granted in the arbitration world. However, there are, I think, three reasons for questioning that assumption. First, that conducting hearings and giving decisions in public both assists public confidence in the court system and ensures that judges and counsel live up to high standards, and the same can be said to apply to tribunals. Secondly, there are increasing numbers of arbitration decisions which have a significant effect on taxpayers, and on public bodies: it can be said with some force that the public have a right to know what went on in the arbitration, and why the decision went the way it did. Thirdly, as pointed out by Beverley McLachlan in her Lecture[49], in a world where "*more and more, it is arbitrators rather than the courts which are dealing with cutting-edge issues of commercial law*", there is a real "*danger*", especially in a common law system where precedent plays such a vital part, "*that the guidance for the future that the law should provide will be undercut by arbitration*", if awards continue to be confidential. As she also pointed out, confidentiality means that "*arbitrators will not have the benefit of knowing what other arbitrators on cases similar to theirs have ruled*".

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[48] *Ibid*, para 398

[49] The Rt Hon B McLachlan *A Judicial Perspective on Arbitration: Where Are We Headed?* 13th Kaplan Lecture, 2019

47. As Christopher Greenwood said in his Lecture[50], "*like judgments of international courts, awards in inter-state cases are almost invariably public*", and, as he pointed out, ICSID arbitration decisions are only published with the consent of the parties, but they are now routinely published. which is to be welcomed. In his Kaplan Lecture[51], David Caron said that "*transparency has strengthened the integrity of the investment arbitration system*". Although he thought it "*unlikely that the demand for transparency [would] spill over into*" international commercial arbitration, it is worth noting that many of the arbitration institutions include rules which permit publication of awards but only if all parties agree. Such rules are, I think, very rarely invoked.

48. I accept of course that it would be inappropriate to impose publication on parties to a normal commercial arbitration if there was any risk of they or their employees being identified, and anyway no arbitration institution would want to risk losing business by seeking to deprive parties of the benefit of confidentiality. However, it would be a small, but significant and arguably worthwhile step for institutions to contemplate whether to place greater emphasis on such rules, or even whether to encourage parties to consider authorising publication of awards, maybe on anonymised basis. Indeed, if an award which deals authoritatively with an important point of principle or practice. can be redacted so as to remove any risk of the parties being identified, it is hard to see why it should not be published on a redacted basis.

49. As explained by Michael Hwang in his Kaplan Lecture[52], confidentiality in the arbitration context is not as simple or binary as it appears. There are a number of circumstances in which an award may be made available either publicly or to strangers to the arbitration, and different systems give different scope to the

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[50] Sir Christopher Greenwood KC, *Is the Age of Arbitration in International Law Drawing to a Close*, 11th Kaplan Lecture, 2018

[51] D D Caron, *Light and Dark in International Arbitration: The Virtues, Risks and Limits of Transparency*, 9th Kaplan Lecture, 2015

[52] M Hwang (with K Chung) *defining the Indefinable: Practical Problems of Confidentiality in Arbitration* 2nd Kaplan Lecture, 2008, published in J Intnl Arb 26(8) 609 (2009)

principle of confidentiality. The most obvious example of loss of confidentiality occurs when an award is appealed

50. Before concluding, it is right to acknowledge that, while I have drawn on thirteen of the sixteen past Kaplan Lectures, I have referred to some more than others and I have not referred at all to three - Jan Paulsson's elegant lecture demolishing the concept of abuse of rights[53], Michael Pryles's erudite analysis of the law relating to the waiver of an arbitration agreement[54], or to the late lamented Johnnie Veeder's interesting history of four heroes of modern arbitration[55]. The simple reason is that, as I explained at the outset, my aim has been to reflect one of the main aims of the founder of the lectures, namely to be practical, and some of the Kaplan Lectures, and those three lectures in particular, were on a more purely intellectual plane or were concerned with substantive legal problems.

51. In this talk, I have, I hope, identified some aspects of arbitration which are worth looking at, some which could be improved, and some of which are probably unavoidable. What I have failed to do is to identify the perfect arbitration system as signally as King Arthur's knights failed to find th Holy Grail. However, I hope I can take some comfort from the words of that pre-eminent arbitrator commercial judge, and writer, Michael Mustill who famously wrote[56]:

> "*The world of arbitration is a fascinating mosaic. Lines of fracture run everywhere. Theory and practice. International and domestic. Status and contract. Civilian and common law. Court-free and court-related. Factual and legal. Ritualistic and free-wheeling. Macro and micro. Expert and legal. The opportunities for a broad conspectus, a unifying study, seem irresistible. Yet they have been resisted. Perhaps because the*

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[53] J Paulsson *Omnipotence Fantasies* 14th Kaplan Lecture 2020

[54] M Pryles *When is an Arbitration Agreement Waived?,* Third Kaplan Lecture, 2009, published in J Intnl Arb 27(2) 105 (2010)

[55] V V Veeder, *Lessons for the Future from the Past: Individual Hedgehogs and Institutional Foxes*, 8th Kaplan Lecture, 2016

[56] MJ Mustill, *Sources for the History of Arbitration*, Arbitration International, Vol 1, pp 235–236 (1996)

practice seems mundane to the scholar whilst the theory is too rarefied for the practitioner; and perhaps also because the logistical difficulties are a powerful deterrent."

52. Thank you.

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Hong Kong
13th November 2023