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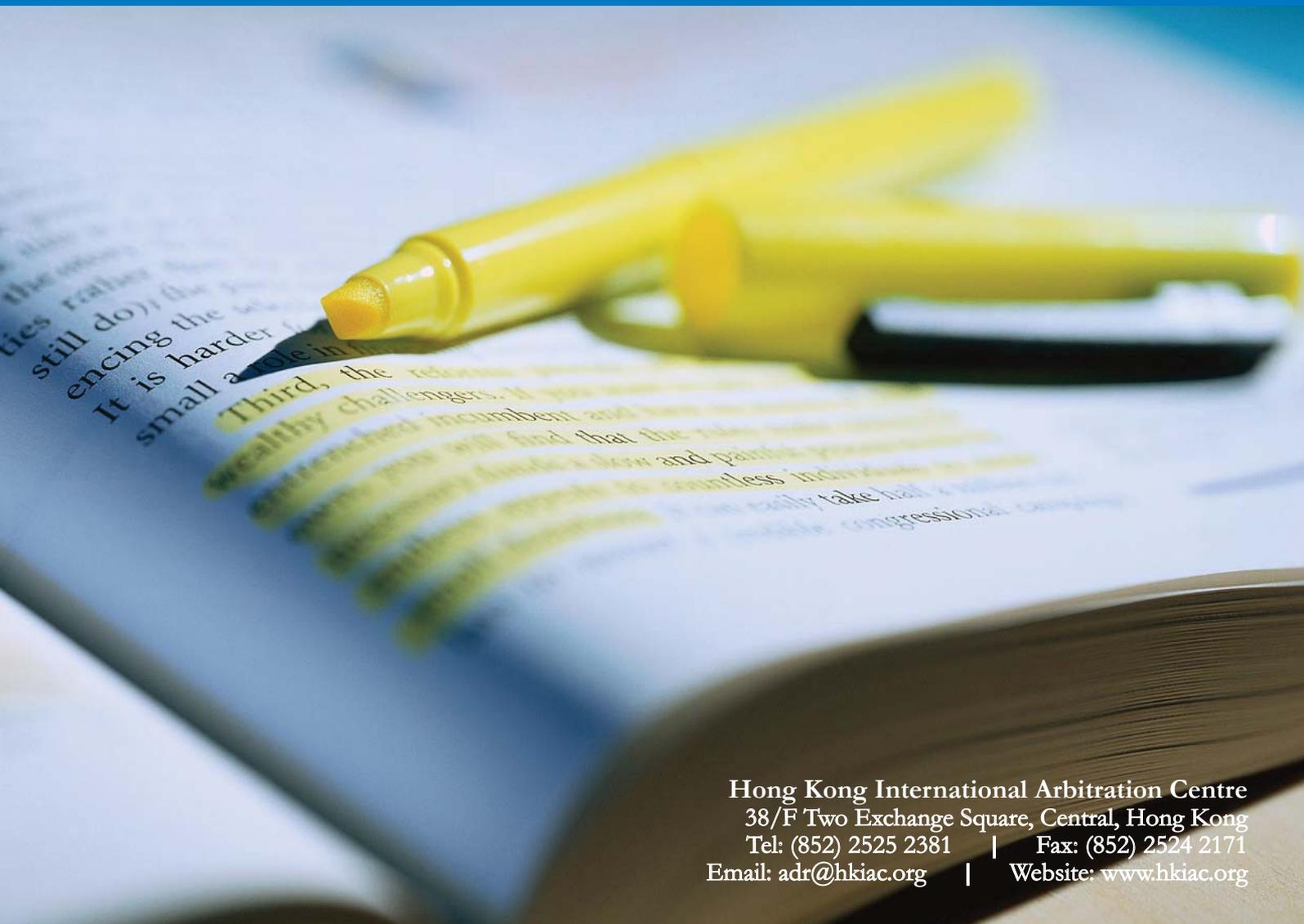
Hong Kong International Arbitration Centre

THE KAPLAN LECTURE

presented by

Mr. Neil KAPLAN, CBE, QC

Monday, 22 October 2007
Hong Kong Club, Hong Kong



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Biographical Details of Mr. Neil KAPLAN, CBE, QC

Neil KAPLAN was Chairman of the Hong Kong International Arbitration Centre from 1991-2004 and was President of the Chartered Institute of Arbitrators from May 1999 until May 2000.

Mr. KAPLAN is a full-time practising arbitrator with Chambers in Hong Kong and London, United Kingdom. From March 1990 until the end of 1994 he was a Judge of the Supreme Court of Hong Kong. He was the Judge in charge of the Construction and Arbitration list. From 1994 until the end of 1999 he was the Convenor of the Dispute Review Group for Hong Kong's new airport.

Mr. KAPLAN was the Chairman of Hong Kong's WTO Review Body on Bid Challenges from 2000-2004 and is currently Chairman of Hong Kong Telecommunications (Competition Provision) Appeal Board.

Mr. KAPLAN was called to the Bar in England and Wales in 1965 and he practised in London until 1980 when he joined the Attorney General's Chambers in Hong Kong. In 1983 he commenced practice at the Hong Kong Bar having become a Queen's Counsel in 1982. Mr. KAPLAN has also been admitted to the Victorian Bar in Australia and the New York Bar.

Mr. KAPLAN has co-authored two books on arbitration in Hong Kong and China, published by Sweet & Maxwell, and has recently co-authored Model Law Decisions (published by Kluwer), a book on cases which apply the UNCITRAL Model Law on International Commercial Arbitration. He has also published many articles. Mr. KAPLAN was General Editor of Arbitration in Hong Kong: A Practical Guide to Arbitration in 2003, published by Thomson / Sweet & Maxwell Asia. He is a Council member of the International Council of Commercial Arbitration ("ICCA").

Mr. KAPLAN is a Fellow of the Chartered Institute of Arbitrators and is a Chartered Arbitrator. He is also a Fellow of the Hong Kong Institute of Arbitrators and the Singapore Institute of Arbitrators as well as a panellist of several other arbitral institutions including CIETAC. He is a member of the LCIA, and has conducted LCIA arbitrations. He has conducted numerous ICC arbitrations. In all Mr. KAPLAN has conducted arbitrations in at least 12 different jurisdictions in Europe, Asia, Australasia and America.

In June 2001 Mr. KAPLAN was awarded a Commander of the Order of the British Empire ("CBE") by Her Majesty the Queen of England for services to international arbitration.

The Inaugural Kaplan Lecture

Monday, 22 October 2007

By Neil KAPLAN, CBE, QC

It is a great honour and privilege to be invited to deliver the inaugural lecture in a new series of lectures, especially one generously named after me.

Naturally this increases the pressure to say something interesting and new.

We live in a time of speedy change and the way in which international commercial arbitration has become the normal way to settle commercial disputes has been rapid and no where has this change been more apparent than in Asia and here in Hong Kong in particular. It is interesting to note that exactly 90 years before the Steering Committee looked into the viability of an arbitration centre in Hong Kong an anonymous letter was published in the London Times on 11th August of 1892 which stated:

“The mercantile public is not fond of law, if law can be avoided. They prefer even the hazardous and mysterious chances of arbitration in which some arbitrator who knows as much of the law as he does of theology, by the application of a rough and ready moral consciousness, or upon the affable principle of dividing the victory equally between both sides, decides intricate questions of law and fact with equal ease.”

What a change there has been in judicial attitude in 90 years!¹

If I was delivering this lecture 20 years ago I could have spoken about the importance of international arbitration in world trade. But you know all about that and if I did you would justifiably want to leave early for dinner.

Similarly, if I discussed the importance of the New York Convention and the Model Law you would also be bored because you have heard it all before. The same applies to the issue of the jurisdiction of arbitrators which was often a topic of interest but has now been put to rest by statute. In an arbitrarily sophisticated place such as Hong Kong, which has for years been at the cutting edge of arbitral innovation, it is hard to find something new and thought provoking to say. Today I am not as lucky as I was in 1995 when I was privileged to deliver the 6th Goff lecture. I was able to choose a subject

¹ It is thought that the letter was written by Lord Justice Bowen. Modern judges may well think this occasionally but would hardly dare to express it in these terms.

which was ripe for consideration and which led to further discussion about problems relating to the writing requirement in the New York Convention and the Model Law, which problem was dealt with by statute in England and Hong Kong and by revision of the Model Law by UNCITRAL.

This series of lectures is not intended to ape the Goff lectures so generously sponsored by the City University of Hong Kong and by Freshfields. They started in 1990 with Lord Goff himself and he was followed by Lords Bingham and Mustill and a variety of arbitral experts.² It is hard to find a common thread although the most recent lecturer, Charles Brower, attempted to do so. This present series of lectures is intended to be more practical and more Hong Kong focused.

Accordingly, I feel bound to and am happy to say something about Hong Kong's arbitral progress over the past 25 years. I suppose all arbitration centres have had their ups and downs but I think I can safely say that no centre has had to face such difficult problems as Hong Kong and it is a credit to so many that HKIAC remains in tact, booming and popular. What then are the problems to which I refer? When in 1982 we first discussed the viability of an arbitration centre in Hong Kong, a small number were against the idea on the basis that it might upset the mainland. The majority viewed the matter differently and HKIAC opened its doors in September 1985. Ever since 1985 HKIAC has enjoyed excellent relationships with CIETAC and other Chinese arbitral institutions.

After the Joint Declaration and the negotiations leading to the Basic Law, many doom and gloom merchants prophesied the end of Hong Kong as we knew it. HKIAC had to live with these doubts which led to many American lawyers, in particular, advising against choosing Hong Kong as an arbitral situs.

Then as 1997 loomed and passed these doubts were repeated. The Asian economic crisis which began in August 1997 did not help.

Then, Hong Kong was faced with an unfortunate court decision which prevented mainland awards from being enforced in Hong Kong³. We all knew that as from 1 July 1997, the New York Convention did not apply as between Hong Kong and Mainland and the authorities were encouraged to put something in its place. This took longer than was anticipated and hoped for and the Memorandum of Understanding was not signed until 21st June 1999. As from that date Hong Kong awards can be enforced

² The other lectures were in order: Lord Goff, Andrew Rogers, Sir Thomas Bingham, Arthur Marriott, Judge Schwebel, Neil Kaplan, Lord Mustill, Jan Paulsson, Pierre Lalive, Fali Nariman, Johnny Veeder, Yves Fortier, Karl-Heinz Bockstiegel and Charles Brower.

³ See *Ng Fung Hong Ltd v ABC* [1998] 1 HKC 213

in the Mainland and vice versa under provisions which mirror the New York Convention⁴.

Now, 10 years after the change of sovereignty, Hong Kong is as successful and vibrant as ever before and perhaps more so. Many journalists who had written Hong Kong's obituary were forced to eat their words without the benefit of Winston Churchill's experience, because he said "*I have often been forced to eat my words and I have found them a most agreeable diet.*" Since 1997 Hong Kong has experienced some of its strongest economic performance. The legal system has performed well and the judges are still supportive of arbitration.

Having set out all these problems which no other centre has had to endure it is remarkable indeed that HKIAC's caseload has continued to flourish.⁵ Almost every year has seen an increase over the year before. The number of domain name disputes has also increased considerably. Parties with no connection with Hong Kong choose to arbitrate here because all the boxes in the user-friendly jurisdiction list are ticked; an up-to-date modern law of arbitration based on the Model Law, a specialist and supportive judiciary, a well-recognised and efficient Centre with excellent facilities, good communications, a pool of talented lawyers and other experts and many experienced and well-trained arbitrators.

Now I do not intend to suggest that all is perfect and that no improvements are necessary. If I thought that, this lecture would be very brief. However, I wish in this lecture to focus on 3 issues. Firstly, the question of the appointment of the Tribunal. Second, on a possible division of power and thirdly, on the vexed question of disclosure of documents.

Appointment

In this part of the lecture I do not intend to refer to the appointment of sole arbitrators and nor do I intend to refer to 3 person tribunals in small cases.

Any of us who has taught a course on arbitration at any level will have touted as one of the advantages of arbitration that, unlike with a judge, arbitrators bring subject matter expertise to the arbitration. What does this mean and is it really true? It is not precisely true because there are several curial centres of excellence around the world where judges do have expertise in certain subjects. The Commercial Court and the Technology Court in London are examples as is the Construction and Arbitration list

⁴ See section 40 of the Arbitration Ordinance

⁵ For the period from 1985 to 2006 HKIAC's caseload has been respectively as follow: 9,20,43,24,45,54,94,185,139,150,184,197,218,240,257,298,307,320,287,280,281 and 394.

in Hong Kong. There are others. But generally the criticism holds good. Judges are lawyers who will not have the necessary technical expertise and considerable time and cost is wasted in teaching them enough about the subject so that they can give an informed judgement. On the other hand, it is possible to appoint an arbitrator who has spent all his working life dealing with the very expertise involved in the dispute.

But I think it necessary to see what happens in practice to ascertain whether this so-called advantage is actually achieved. Naturally, I can only speak of my own personal experience and those with whom I have discussed the subject but I think what I am about to say reflects modern practice.

In an Article published in the Journal of the Chartered Institute of Arbitrators in 2004 I said:

“If one takes the typical construction case, for instance one involving tunnelling, with a large claim for damages, the ideal tribunal might be thought to be an engineer with tunnelling experience, an accountant to assist on the financial claims and a lawyer to deal with the law and procedure.

However, in practice how often does one see this dream team? I would suggest rarely because the parties do not consider the attributes of the whole tribunal but only the attributes of the person appointed by them. In practice, the third arbitrator is either appointed by an institution or by the two appointed arbitrators. I would suggest that both of these methods of appointment fail to achieve, in most cases, the required expertise.

Unless the parties get together once a dispute arises and apply their joint minds to the sort of tribunal they require for the dispute which has actually arisen, it will not usually have the necessary subject-matter expertise. Unfortunately, once the dispute arises the parties can usually agree on nothing, let alone something as important as the required skills of the tribunal.”⁶

Although the vast majority of party-appointed arbitrators are independent and neutral and decide each case according to the law and the facts, we all know that there are just a few who see their role and main objective as the success of the party who appointed them. Sometimes this conduct is overt, but on other occasions it can be more subtle. It would however be foolish to deny that such behaviour exists.

Accordingly the proposal that I am making will serve at least two purposes. First, it will ensure that a “*dream team*” is more often achieved than hitherto and it will substantially minimise the risk of having on the tribunal an arbitrator whose mind is closed to rational argument.

Before outlining my proposals let me say just a word about party autonomy because I

appreciate that an important aspect of party autonomy is the fact that each party has a say in the composition of the tribunal and this often helps to accept an adverse result. But if party autonomy does not result in the creation of a dream team and occasionally results in at least one closed minded member of the tribunal, is not the time right to suggest an alternative?

I see two alternatives to combat the problems I have identified.

The first proposal is that the parties should initially appoint a neutral chair and then leave it to the chair to put together a “*dream team*” in the light of the chair’s knowledge of the case. If the parties cannot agree on the neutral chair then the usual default mechanisms will apply. They could, of course, agree the identity of the chair in the arbitration agreement itself. This suggestion maintains a link with party autonomy but its drawback is that the chair will not know too much about the case at the stage when a choice of other members of the tribunal has to be made. The chair will not be able to speak to the parties separately to ascertain the true nature of the case.

The second proposal may seem to be more radical but in my view it addresses these two identified problems and, as will be seen, several others as well.

This proposal envisages that parties would agree on arbitration in the usual way but instead of the present method of constituting the tribunal they will instead agree, in their arbitration agreement, to appoint an Appointment Neutral (“AN”) whose task will be to choose, on behalf of both parties, an appropriate tribunal for the actual dispute that has arisen: “*The Dream Team*”.

It may be advisable to choose this person early and name the AN in the arbitration agreement itself. If not they would have to choose the AN once the dispute has arisen and there would need to be a default mechanism in case of failure to agree.

It is implicit in this arrangement that the AN is given an irrevocable authority by both parties to choose the appropriate tribunal for the particular case.

Once asked to act, the AN would firstly have to familiarise himself with the nature of the claim, defences and counterclaims. The AN would be free to see the parties separately or together and would be free to call for such documents as necessary to assist him to make an informed decision. Any and all discussions with the AN would be confidential and inadmissible in the arbitration.

Having ascertained the outline facts of the case and defence, the AN will then be able to choose three arbitrators with appropriate skills, expertise and availability to conduct the arbitration. The parties would be contractually bound to ratify the AN’s choice by

a final appointment. I anticipate that the AN would also decide which of the three chosen arbitrators would chair the proceedings.

I see a number of advantages in these proposals.

- (1) there would be subject-matter expertise within the tribunal;
- (2) availability would have been determined;
- (3) neutrality would be assured;
- (4) cultural and legal differences would be accommodated;
- (5) fees would have been agreed;
- (6) expenses would have been considered;
- (7) conflicts would have been dealt with.

In coming to these conclusions on the appropriate tribunal for the particular case, the AN would ensure that the tribunal has all the skills and attributes needed to conduct this particular arbitration effectively. The AN would be able to take into account a vast array of factors in coming to a decision, including expense, expertise, nationality, language, cost and legal and cultural differences. The AN background checks on prospective appointees would flush out conflicts in inappropriate appointees more effectively than the present system, whether ad hoc or institutional.

I hope the institutions would not see this as a way of depriving them of a role in the appointment process. Rather, I would have thought they would be glad that a neutral third party is prepared to take on the responsibility of constituting the whole tribunal whereas at present institutions are most often only involved in the appointment of the Chair. It should be noted that when the Permanent Court of Arbitration is invited to make an appointment they delegate this to an experienced arbitrator who in reality acts like an AN but without all the tasks that I have allocated to him.

I appreciate that objections can be raised to this proposal. However the issue is whether we want to improve the quality of arbitral tribunals and bring to bear on individual cases the right degree of expertise. There is so much expertise out there but it needs harnessing to appropriate cases. Rather than put up objections we should strive to ensure that they are met by careful drafting and reliance on men and women of ability and integrity. If cost is said to be an inhibiting factor just ponder on the costs wasted when tribunals are inexperienced and things go wrong.

A Division of Power?

In November 2000 in the Journal of the Chartered Institute of Arbitrators I raised the idea of splitting procedure from substance. I was concerned with construction contracts at that time and with the debate as to whether a lawyer or an Engineer made

the better sole arbitrator in a construction case. On the one hand, it was thought that an experienced lawyer would be able to handle the procedure and law better than an engineer but on the other it was argued that if the dispute was of a technical nature then an expert in that field who was also an experienced arbitrator might be better. I considered the argument finely balanced and so proposed a system that would achieve the best of both worlds.

Why not split procedure from substance? Appoint an experienced arbitrator to deal with procedure and get the case into shape and then hand over to the expert to decide the technical issues. This would avoid the lawyer being bogged down in technical matters which he might find hard to digest and the engineer being bamboozled (if that was possible) by devious lawyers.

One of the problems today is that there are frequently huge interlocutory skirmishes that take on a life of their own and tend “*to relegate the substantive issues, after all the whole purpose of the proceedings, to the background.*”⁷

Clearly an ideal tribunal is one with mixed expertise but I hope I have at least sown a doubt in your mind that this is more theoretical than actual. So in choosing a sole arbitrator the problem becomes even more acute. My suggestion is to split the functions of procedure from substance. Each function will be carried out by a separate person at far less cost than with the traditional three person tribunal. After all, it is not unheard of to split liability from quantum and have different persons decide these separate issues. So why not appoint one arbitrator to case manage and the other to determine the technical issues. We are all being exhorted to case manage and now that has been translated into a statutory duty in the Arbitration Ordinance.⁸

I set out in the Article how this would work in practice and can do no better than replicate my reasoning:

“The jurisdiction of Mr Procedure will be to do all things necessary to get the arbitration ready for a substantive hearing. He will be able to fix dates for the hearing in conjunction with the parties and Mr Engineer. But he will have sole jurisdiction to deal with the following matters:

1. *all jurisdictional issues;*
2. *any challenges to Mr Engineer;*
3. *how the parties are to plead their case and provide particulars, if necessary;*
4. *all issues of discovery and production of documents;*

⁷ Redfern and Hunter, *The law and Practice of Commercial Arbitration*, 3rd edition (Sweet & Maxwell, London, 1999), The preface.

⁸ See section 2GA of the Arbitration Ordinance

5. *the manner in which evidence will be given at the hearing;*
6. *security for costs and any other application for interim relief;*
7. *the venue for the hearing;*
8. *the nature of transcription services to be provided;*
9. *all issues relating to translation and interpretation;*
10. *preparation of trial bundles and core bundles;*
11. *preparation and format of opening submissions and memorandum of law;*
12. *division of time at the hearing;*
13. *whether there should be closing submissions and if so in what form;*
14. *whether liability should be split from quantum.*

Now apart from the obvious advantage of expertise in the two different phases I can see other benefits from this dichotomy. Mr Procedure will not be a decider of fact and thus will be able to play a more active role in helping the parties narrow the issues. In doing so, he can introduce an element of realism into the procedural stage which the decider of fact may find impossible to achieve. So I envisage Mr Procedure playing the role of the settlement judge which we find in the USA and I believe elsewhere. Because he will not be the decider of fact he will be able to say things that the decider of fact could not or would be fearful of saying at that stage.

Another area where Mr Procedure would be freer is in dealing with applications for security for costs. Sometimes offers of settlement become relevant and no harm will be done if Mr Procedure hears of them.

I intend no criticism to the technical arbitrator in saying that some are better at their expertise than at complicated procedural matters. I mean no disrespect to the legal arbitrators who have dual qualifications. But for most of us we fall into one camp or the other and this proposal intends to blend the best of both worlds in the same case. Naturally I accept that a clause providing for these procedures will need careful drafting but they are not beyond the wit of man let alone able drafters.

I believe this proposal achieves the appropriate expertise at the right time and will assist in efficiency, expedition and economy.

DOCUMENTS

I could not let this opportunity pass without commenting on the perennial problem of

document disclosure in both international and domestic commercial arbitration. Dr. Klaus Sachs has observed that the number of requests for the production of documents in international commercial arbitration cases has shown a sharp rise in recent years regardless of whether the parties are from a civil law or common law background.⁹

Professor Gabrielle Kaufman-Kohler, in discussing the topic of the globalisation of procedure in international arbitration, has observed that “*document production in arbitration is one of the most remarkable examples of a merger between different civil procedure approaches*”.¹⁰

At times I wonder whether counsel appreciates just how much pressure they place on a tribunal with lengthy and detailed contested document requests. All this in the vain hope of finding the occasional ‘*smoking gun*’. The main problem facing the arbitrator is that he or she is called upon to rule upon difficult questions of relevance at a time when they just do not know enough about the case to make the right call in many instances. I wonder how many times a tribunal, during the hearing or when drafting the award, had wished that its decision on disclosure had gone the other way.

Yves Derains, a former Secretary-General of the ICC Court of Arbitration, takes some arbitrators to task for going into the substance of the case too late in the proceedings, i.e. when they are preparing for the hearing.¹¹ His approach may be a counsel of perfection but is it rooted in reality? At least with a three person tribunal the chairman should be sufficiently au fait with the case to be able to assist his colleagues in appreciating the arguments relating to relevance. But at that early stage of the proceedings some points are in danger of not being fully appreciated until set in the appropriate factual and legal context and after persuasive and forceful advocacy.

But what happens in practice is that the tribunal is swamped with a huge number of bundles of documents often totalling thousands of pages much of which can include detailed technical or financial data which will need careful explaining. No one is capable of digesting this material in its raw form. Of course, arbitrators will have read the documents referred to in pleadings, statements and submissions, as well as those used in cross-examination. As for the rest, they will not be looked at until referred to (if ever) and in those circumstances one wonders why they are there.

⁹ K. Sachs, ‘Use of documents and document discovery: “Fishing expeditions” versus transparency and burden of proof’, *SchiedsVZ* 2003, 193 at 197.

¹⁰ G.Kaufmann-Kohler, ‘Globalization of the Arbitral Procedure’, (2003) 36 *Vand. J.Transna'l L.* 1313 at 1325.

¹¹ Yves Derains, ‘Towards greater efficiency in document production before arbitral tribunals – A continental viewpoint’, 2006 Special Supplement ICC International Court of Arbitration Bulletin at 83.

I hope the time has now come when arbitrators insist that they will only receive the core documents that are referred to in the pleadings, statements and submissions and that other documents only get added if they are specifically referred to. Another useful tool is to request the cross-examiner to give to the tribunal, the other side and the witness, a folder of documents to which reference will be made in cross-examination with each document also clearly showing its place in the core or main bundles. The documents used in cross-examination and the core documents should be the totality of the material that trouble the tribunal.

Lest you think that the above is a personal cri de coeur let me just quote again the words of Yves Derains who said:

“One of the present pitfalls of international arbitration is the extent to which arbitrators are swamped with documents. In complex cases, parties have a tendency to attach to their memorials hundreds, if not thousands, of documents that few arbitrators are able to read, let alone store. At the end of the proceedings only a small proportion of them actually will have been used, and an even smaller proportion will constitute decisive evidence. Such an avalanche of documents is particularly inefficient and should be resisted. There is no reason why the production of documents by the parties in a specific case should exceed the core bundle that they eventually use as evidence at the hearing or as a basis for their post hearing briefs.”¹²

It has to be said that such complaints from arbitrators and judges are not new. Judge Wayne Alley of the U.S. Federal Court for the Federal District of Oklahoma was faced with a discovery problem in 1989 and he made an order that only judges can get away with but which must also be the envy of most arbitrators. His Order stated:

“Defendants motion to dismiss or in the alternative to continue trial is denied. If the recitals in the briefs from both sides are accepted at face value, neither side has conducted discovery according to the letter and spirit of the Oklahoma Country Bar Association lawyer’s creed. This is an aspirational creed, not subject to enforcement by this court, but violative conduct does call for judicial disapprobation at least. If there is a hell to which disputations, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.”

A little after Judge Alley’s order, the IBA grappled with this problem without the aid of eternal damnation. The IBA Rules on the Taking of Evidence in International Arbitration are very commonly used as a guide and a useful one at that. Yet despite their introduction, the problem of over-reaching requests still exists.

¹² Yves Derains, ‘Towards greater efficiency in document production before arbitral tribunals – A continental viewpoint’, 2006 Special Supplement ICC International Court of Arbitration Bulletin at 85 para 9.

The use of the Redfern Schedule has produced a most helpful tool for attempting to isolate, in tabular form, the differences between the parties. The first column sets out the document or class of documents requested. The second column sets out the applicant's contentions on relevance. The third column sets out the respondent's contentions on relevance or other reasons for non-disclosure, and the final column is left blank for the tribunal's disposition. Helpful though this is as a tool for collating the arguments it does not act as a controlling mechanism on the breadth of requests - nor was it so intended.

Professor Honatiau has suggested that the IBA Rules contribute to inefficient document production. Yves Derains has however suggested that the problem lies not with the rules themselves but with a loose interpretation given to them.¹³

Derains reminds us that the Rules require that parties requesting document production provide "*a description of how the documents requested are relevant and material to the outcome of the case*"¹⁴.

Derains is of the view that too many arbitrators fail to see this request in the context of the burden of proof. Article 3.6(1) invites the tribunal to determine that

"the issues that the requesting party wishes to prove are relevant and material to the outcome of the dispute."

Derains continues by observing that,

"Arbitrators all too often grant requests for document production as soon as they appear to relate to facts that are relevant and material to the outcome of the dispute and disregard the additional requirement that the party making the request actually has the burden and the need to prove these facts in order to succeed. The result is an avalanche of needless documents. In the arbitrators' defence it should be said that it is not always possible for them to broach the question of burden of proof, either because the request is not challenged or because it occurs at a time when they are not in a position to assess the evidence already existing in the file."

To achieve an efficient document production, Derains suggests that its purpose should be to highlight not just any document relevant and material to the outcome of a case "*but documentary evidence without which a party would not be able to discharge the burden of proof lying upon it.*" So it is suggested that arbitrators should decline to order the production

¹³ B. Hanotiau, 'Civil law and common law procedural traditions in international arbitration: who has crossed the bridge?' in *Arbitral Procedure at the Dawn of the New Millennium* (Brussels: Bruylant, 2005) 83 at 90.

¹⁴ IBA Rules Article 3.6(i).

of a document “*unless it is satisfied that the requesting party actually needs the document to discharge the burden of proof resting upon it.*”

This requirement can be underscored if the tribunal includes in its Procedural Order relating to disclosure wording along the following lines:

“in order to establish relevance and materiality a request to produce each document or each specific category of documents shall refer to specific factual allegations made in the submissions filed by the parties to date.”

One ICC tribunal has gone so far as saying that “*(T)he purpose of such document requests, rather, is to obtain documents to prove specific factual allegations previously made by a party in its pleadings.*”¹⁵

Professor Hanotiau expressed his views by stating explicitly:

“...when a party alleges that its opponent has failed to proof a submission it has made and requests that party to produce the relevant evidence, this request should in most cases be dismissed. It is possible that the mere fact of reminding a party that it has most probably not satisfied the burden of proof lying upon it in relation to the allegation in question will cause it to spontaneously provide the requested documents.”

Professor Hanotiau also correctly suggests that:

“Prudent arbitrators may wish to point out in their procedural order that, to use the words of an ICC tribunal, ‘(i)n ruling on the request for document production, the Arbitral Tribunal will rule on the prima facie relevance of the requested documents, having regard to the factual allegations made by the Parties in the submissions filed to date...the tribunal will not be in a position to make any ruling on the ultimate relevance of the requested documents to the final determination of the Parties’ claims and defences.”

I think this suggestion ties up neatly with a problem identified above, namely, that at the time the tribunal is called upon to rule on relevance it might not, even with a good dollop of due diligence, be in a position fully to appreciate all the nuances of relevance.

I hope the above comments and analysis indicate that experienced arbitrators are doing their best to keep document production within bounds. Time does not permit

¹⁵ See Virginia Hamilton, Document Production in ICC Arbitration, 63 Document Production in International Arbitration – 2006 Special Supplement ICC International Court of Arbitration Bulletin, at page 71.

me to consider other relevant factors such as confidentiality, privilege and over-burdensome requests. However, the point I wish to make is that arbitrators need the help of counsel at all stages of an arbitration but particularly at the document production stage. Counsel will know far more about the case than the tribunal and we must avoid what Sir Michael Kerr referred to as “*international disputology*” creeping into the document production stage.¹⁶ Counsel must see their role as one of assisting the tribunal and not engaging in a scattergun approach of which most of us have had experience over the years. It is after all nearly 10 years since Lord Mustill mourned the loss of “*the culture of compromise*”.

Discovery is a large element in the cost of most arbitrations. As has been said countless times arbitration must not ape litigation or it will not be providing a true alternative. International tribunals have to take into account the very different expectations that parties and counsel from different jurisdictions have with regard to document production. They also have to take into account a wide range of other factors such as the amount in dispute and the nature of the issues. One thing is clear – each case has to be considered individually and caution has to be shown when attempting to take a discovery order from one case and applying it blindly to another. Finally time must be built into the schedule for each case to deal with document requests which in my experience will invariable arise.

Arbitrators need to adopt a far more active and ‘*hands on*’ approach when dealing with disputed and complex document production issues. These applications are important and need to be given the time and attention they deserve. This may add to the cost of the case but it may save costs in the long run. Parties can be warned that they may be penalised in costs if they go overboard in their document requests but few seem to heed the warning and I wonder how often in practice the threat materialises. Rather than be threatened parties should be expected and encouraged to keep their document requests focused and they should expect tribunals to be rigorous in their consideration of relevance and the other criteria. For their part tribunals should be prepared to give their time and attention to the document production phase rather than to sanction broad requests in the hope that on the day they will be able to sort everything out.

I indicated earlier that it is often hard to find new issues because over the centuries most topics have been around several times. We like to think that we are innovative but history teaches us that this may not be true. We know that arbitration has a very long history and mediation too. 2500 years ago the Spartan King Archidamus II who lived between 469 and 427 BC was appointed arbitrator by 2 men. He took them to a sacred

¹⁶ See Concord and Conflict in International Arbitration published in Arbitration International Vol. 13 No. 2 p.121 at page 123 (1997).

place and made them take an oath to abide by whatever he determined. The men having taken the oath were told by the King “*This is my award. You must not leave this holy place before you have become reconciled with one another.*”¹⁷ A neat solution which may today run foul of the disputants’ civil liberties!

A distinguished arbitrator, Cedric Barclay, is reported to have expressed his concern at the way arbitration was evolving. He said;

It is not the motivation which one abhors, but the endless expositions and padding which we find infiltrating our system. Brevity is the essence of wit; justice needs no adornment.”¹⁸

But the Roman Poet Martial in his Anagrams expressed the same concerns over 2000 years ago when he wrote about a simple case where the advocate was one Posthumus:

*My action is about 3 goats.
My neighbour stole them so I sue.
The judge thinks that’s the issue too.
But you refer to poisoned throats
Assault and battery and worse
Rome’s darkest hours in foreign battle
And politics and tittle tattle
Of bygone blackguards. Zeus! I curse
You, Posthumus: stick to your brief and get my goats back from the thief.*¹⁹

So there really is nothing new under the sun as long as one excludes technology!

Thank you very much for being such a patient audience.

¹⁷ The source of this story is Plutarch in *Moralia: Apophthegmat Laconica* 218. See Roebuck’s *Ancient Greek Arbitration*, Oxford, and Holo Books: The Arbitration Press 2001 page 263.

¹⁸ Cited in *Arbitration International* Vol. 5 No.2 (1989) p.102 at p.105.

¹⁹ Topic: Judges: Epigrams Book V1, ep. 19. The quote above is a free translation of the original for which thanks are due to Professor Derek Roebuck.