Promoting Efficiency in the Conduct of Arbitration

Hon. Peter Vickery [1]

Abstract

In examining the subject 'Promoting Efficiency in the Conduct of Arbitration', let me commence with an examination of the context — what is arbitration all about, what does it seek to provide, and what are its shortcomings?

This may best be illustrated by contrasting arbitration with the traditional court processes in conducting litigation.

Court Litigation Processes

In fundamental respects court litigation has it easy:

- The court is able to apply a pre-determined body of law dealing with procedure and evidence.

- The judge is provided with a ready means of enforcement of procedural directions and orders, and the reception of evidence.

- This covers all procedural aspects of the case, including third party discovery, the issue of subpoenas to third parties to give evidence or produce documents, and the joinder of necessary third parties.

- Courts do not tend to suffer overmuch from 'Due Process Paranoia'. Judges are employed by the state. They are subject to appeal, which will rarely be exercised in case management decisions. Whereas the syndrome is more commonly evident in arbitration, and to the detriment of efficient case management.

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- Finally, tools are provided to the court for direct enforcement of the decision.

Arbitration on the other hand lacks many of these advantages — here in several respects we enter the territory of the 'Wild West'. The following key characteristics, which profoundly affect the manner in which an arbitral process is conducted, illustrate the point:

- First and foremost, arbitration is the process of the parties — they jointly engage the arbitrator to provide a solution to their conflict according to rules of their own making.

- Where there is a gap in party made rules, the arbitrator is expected to facilitate agreement or consensus as to what those rules should be, and only then make a determination as to how to proceed procedurally.

- Arbitration has no ready-made tools of enforcement of procedural directions and orders.

- The appointed arbitrator has no direct facility to make orders directed against third parties who are not parties to the immediate arbitration (such as the issue of subpoenas, joinder of third parties and the like).

- Application of the substantive law needs to be settled at the outset, particularly when parties to an international arbitration come from different legal and cultural traditions. For example, the rules for exemption from performance of a contract may be quite different — the common law sets the bar for frustration of a contract at a high level, whereas in German Civil Law, evidence of mere hardship caused by a frustrating event is sufficient.

  Further, different legal traditions arising for example from the common law, civil law and Sharia investment law, may also have a profound effect on the procedure and the relevance of evidence in an international arbitration. This may arise, for example, in such areas as discovery, use of pre-contractual negotiations, rules for the construction of contractual terms, the reception of evidence going to the subjective intention of parties to a contract and rules relating to the implication of terms by the use of extrinsic evidence.

- Furthermore, with some relatively rare exceptions, Awards and the reasoning of arbitrators are not published, so there is no body of reliable precedent to draw upon.

Considerations such as these render the initial choice of law provision in the contract of significant importance for the applicable substantive law, and the choice of the seat of the arbitration of equal importance for the applicable procedural rules.

Growth of International Arbitration

Why then is arbitration, particularly international arbitration, growing at all?

The School of Arbitration, Queen Mary College, London (part of the federation comprising the London University) is now 30 years old. Since 2006, it has been conducting international surveys of Arbitration through a process of international surveys. The surveys have now been conducted every 2 years over the last 12 years, with the latest published in 2018.

The findings of the latest 2018 Queen Mary International Arbitration Survey[2] conclude that 97% of respondents indicate that international arbitration is their preferred method of dispute resolution, either on a stand-alone basis (48%) or in conjunction with ADR (49%). This is an increase of 7% on the previous survey conducted in 2015.[3]

An overwhelming 99% of respondents were found to be willing to recommend international arbitration to resolve cross-border disputes in the future. This statistic is likely to be a function of the lack of any realistic alternative avenue to resolve cross-border disputes. Most international parties will be reluctant to accede to the jurisdiction of the courts of a foreign State, particularly if that court is the 'home court' of the opponent. Alternative fora such as the Singapore International Commercial Court may provide an option. However, in most cases international arbitration is realistically the only viable facility for international commercial parties in dispute.

In particular, in relation to high value disputes arising from international construction and engineering and technology contracts, arbitration is commonly used and is likely to grow as the resolution mechanism of choice. In terms of the Energy and Construction sectors, the use of arbitration has for some time been found to be the preferred method of dispute resolution. The 2013 Queen Mary survey found that international arbitration was preferred in these sectors, and by some margin.4 The trend appears to be continuing.

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[2] Queen Mary, University of London, School of International Arbitration, '*2018 International Arbitration Survey: The Evolution of International Arbitration*', Professor Stavros Brekoulakis, Mr Adrian Hodis (White & Case Research Fellow) and Professor Loukas Mistelis, — 'Executive Summary — International Arbitration: The Status quo'.
[3] Queen Mary, University of London, School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (Sponsored by White & Case LLP, 2015) <http://www.arbitration.qmul.ac.uk/research/2015/> 5. [Last observed 13 July 2018].
[4] Ibid. 'Executive Summary — The Future'.

Respondents to the 2018 Queen Mary study believe that the use of international arbitration is likely to increase in the specialist areas of Energy, Construction/ Infrastructure, Technology, and Banking and Finance sectors.[5]

Benefits of Arbitration

The benefits of arbitration as opposed to proceeding to trial before a court may be summarised as follows:

- Capacity for parties to select an independent arbitrator. The corruption and delay associated with so many court systems in the world today is avoided.
- Integrity and impartiality of arbitrators is a critically important attribute to give confidence to the process.
- Confidentiality, which is another important attribute of arbitration, and should be jealously guarded by arbitrators. Many Asian cultures in particular place particularly great store in preserving confidentiality in resolving their disputes.
- Flexibility in dispute resolution is another feature of arbitration. Adapting the 'forum to fit the fuss' is a key attribute of arbitration.
- Selection of an arbitrator or panel of arbitrators can introduce into an arbitration the desired level of expertise, both legal and technical. For example, a tunnel arbitration can include a panel with legal expertise, and the necessary expertise in Underground Works such as geology and tunnel engineering.
- Strict limits on the capacity to appeal on the merits of the case decided by the Arbitral Tribunal.
- The proceedings in arbitration may be conducted in a manner which is more sensitive to cultural differences. Numbers of the cultures of Asia prefer arbitration to trial in a common law court, which traditionally is robustly adversarial and confrontational and where aggressive cross-examination may feature.

[5] Ibid.

Promoting Efficiency in the Conduct of Arbitration

However, all is not entirely rosy in the garden. 'Cost' continues to be seen as arbitration's worst feature identified in the 2018 Queen Mary study, followed by a number of factors including 'process delay'.

These findings point to the need for a greater level of cost consciousness in the arbitral process, combined with a greater level of efficiency, proportionality and expedition in the procedural management of an arbitral proceeding and its ultimate disposition.

Given this context, how best should arbitration be conducted to promote the necessary efficiency?

1. The Arbitrator Needs to Instil Confidence

Some rules of arbitration in some seats do confer limited authority in the arbitrator to determine procedural issues where the parties are not in agreement. However, almost universally, there is no direct means of sanction provided to deal with a party who contravenes procedural directions or orders.

An important tool in the hands of the arbitrator to substitute for the authority conferred on the judge is to instil confidence in the parties to accept his or her rulings and procedural determinations.

In this context, a degree of persuasion becomes critical to achieve this end.

There are some golden rules of persuasion described in Aristotle's work '*Rhetoric*' of 367–322 BCE. Aristotle identified three core elements of persuasion — ***Ethos***, ***Pathos***, and ***Logos***.

Ethos is the quality of credibility in the presenter (in an arbitration context this may be generated by the initiation and maintenance of credibility throughout the process).

Pathos is the appeal to the emotions of the audience (in an arbitration context this may be generated by appeal to a variety of consequences eg costs incurred or to be saved if a particular procedure is adopted; or if delay is a likely outcome when an adjournment is sought; or if the calling of additional evidence of marginal value will slow proceedings and incur additional costs for all parties, … and so on).

Logos is the appeal to logic, facts and figures (in an arbitration this may be generated by the arbitrator preparing the case thoroughly in advance, mastering the applicable rules of the seat, and gaining knowledge of the facts and figures of the case from the outset).

By these means, considerable credibility can be generated by the experienced arbitrator.

2. The Arbitrator May Use an Introductory Letter to Set the Tone

An opening letter to the parties may be a useful tool to set the tone of the arbitration and indicate what is expected of the parties by their participation. It also enables the arbitrator to set some ground rules and take a leadership initiative, thereby confirming the knowledge, experience and authority of the arbitrator from the commencement of the arbitral proceeding.

Styled in an appropriately diplomatic way to the legal practitioners of the parties, or to the parties directly, the introductory letter may include the following elements:

- Confirmation of the appointment as arbitrator.

- Confirmation of the choice of law (if any).

- Confirmation of the applicable seat of the arbitration and the body of procedural rules agreed upon.

- An outline of the matters to be covered in the Pre-hearing Conference, in accordance with an enclosed agenda, and who should attend.

- An invitation to the legal practitioners and the parties to attend the Pre-hearing Conference in person, or failing that, attending by video conference, telephone or similar means of communication.

- A short statement of the proposed ground-rules for the conduct of the arbitration, including the basic principles of 'flexibility, efficiency, and fairness'; [6] to ensure as far as possible a cost-effective and expeditious process, together with an expectation of the active cooperation of the parties and their legal advisors in achieving this goal.

- An invitation extended to the legal practitioners of the parties and their clients to exercise initiative and provide input into the management of the case so procedural directions are appropriately tailored to meet the needs of the case.

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[6] See: P N Vickery 'Evidence in International Commercial Arbitration – Exploring a New Framework' (2019) 38 *The Arbitrator & Mediator.*

- An indication that, although a key issue to be resolved at the first Pre-hearing Conference is the setting of a date or dates for the evidentiary hearing, also to be discussed will be a number of other important procedural matters. For this reason, it will be important for the legal practitioners of the parties to confer with their clients and with opposing counsel prior to the first Pre-hearing Conference concerning the check list of items to be addressed in the proposed agenda for the first Pre-hearing Conference in an endeavour to arrive at agreement or identify points of difference.

3. The Pre-hearing Conference

Pre-hearing Conferences are a common feature of arbitration. They are held at an early stage of the arbitral process with the practical objective of clarifying procedural issues and developing procedural time schedules.

The Pre-hearing Conferences play an important part in advancing the core overarching principles for an arbitration of procedural flexibility and expedition, efficiency and cost effectiveness, as well as the core overarching principle of a fair hearing.

Hearings of this nature are now a common feature of international arbitrations. Some international arbitration rules make specific provision for a 'case management conference' or 'preliminary meeting' or 'early organisational hearing' or a 'procedural conference'. Here I will call the facility a 'Pre-hearing Conference'.

Other bodies of rules are silent on the process.

For example, the Hong Kong International Arbitration Centre (HKIAC) website [7] highlights a 'soft administration' approach in describing its 2013 *Administered Arbitration Rules*:

> *The 2013 Rules continue the tradition of the 2008 Rules, adopting and developing best practice within a "soft administration" framework inspired by the 2006 Swiss Rules of International Arbitration, providing a balance between the more hands off approach of the UNCITRAL Arbitration Rules and the practice of very structured administered arbitration, often associated with other institutions.*

[7] http://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules [Last observed 28 July 2018].

> *This "light touch" approach respects the importance of party autonomy, which has always been a fundamental feature of arbitration in Hong Kong, while also allowing parties to focus on the essential issues of their dispute rather than the technicality of the procedures.*

In keeping with this approach, the *HKIAC Rules* provide in Section IV 'Conduct of Arbitration' for a very flexible approach to procedures. This confers a wide discretion on the arbitral tribunal to 'adopt suitable procedures for the conduct of the arbitration'. How this is achieved is left entirely for the tribunal. However, within the scope of the general procedural powers conferred upon the arbitral tribunal, a facility to convene a Pre-hearing Conference as an ancillary facility in the exercise of general management powers, is clearly to be implied in most bodies of international rules such as the *HKIAC Rules*.

This implication is further supported given by the critical role conferred on the arbitral tribunal to have the final word on the procedure to be adopted and given the importance of achieving the Efficiency Objective and the Fair Hearing Requirements. Indeed, the procedure may be regarded as having become part of a suite of best practices in arbitration. [8]

On the other hand, the procedure of the Pre-Hearing Conference is expressly highlighted in other bodies of international arbitration rules. A notable example is provided by the International Chamber of Commerce (ICC) publication *Techniques for Controlling Time and Costs in Arbitration Report from the ICC Commission on Arbitration.* [9]

The ICC introduced amendments to its rules in 2012 which expressly included a new provision introducing a case management conference at the outset of an arbitration. Under Article 24 this became a mandatory process. Previously, under the *ICC Rules*, the arbitral tribunal was merely empowered to adopt 'such procedural measures as considered to be appropriate', which the parties were required to comply with.

By way of underscoring the importance of the Pre-hearing conference, the new approach was supplemented by a new Appendix IV to the *ICC Rules* which provide a detailed check list of case management practices which are open for adoption by the parties and the arbitral tribunal. [10]

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[8] Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices: Irene Welser/Giovanni De Berti, 81-84. http://www.chsh.com/fileadmin/docs/publications/Welser/Beitrag_Welser_2010.pdf [Last observed 24 July 2018].

[9] ICC Publication 843, http://gjpi.org/wp-content/uploads/icc-controlling-time-and-cost.pdf [Last observed 2 August 2018].

[10] Appendix IV to the *ICC Rules*. ICC Publication 880-4 ENG ICC Arbitration Rules; The Arbitral Proceedings. https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ [Last observed 2 August 2018].

Article 24 of the *ICC Rules* provides for a detailed regime under the heading 'Case Management Conference and Procedural Timetable', commencing with Article 24.1:

> 1. *When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.*

Then follows a requirement to establish a procedural timetable (Article 24.2); a facility for further procedural measures or modification of the procedural timetable (Article 24.3); and a description of a flexible regime to conduct a Pre-hearing Conference — either by meeting in person, by video conference, telephone or similar means of communication (Article 24.4).

The development of the *ICC Rules* was directed to achieving efficiencies in the arbitral process and point to Pre-hearing conferences being considered to be an integral part of a contemporary arbitration regime to achieve these objectives. The *ICC Rules* in fact provide a useful barometer for the future in relation to the continued use and development of Pre-hearing conferences in arbitration.

Other examples of international arbitration rules which specifically provide for Pre-hearing Conferences recognise the value of the facility. They include: the *London Court of International Arbitration Rules* (*LCIAC)* (Article 14.1-3); the *Singapore International Arbitration Centre Rules* (*SIAC*) (Article 19); the *Stockholm Chamber of Commerce Rules (SCC)* (Article 28); and the *International Bar Association Rules (IBA)* (Article 2.1).

The Purposes of the Pre-hearing Conference?

Irene Welser and Giovanni De Berti [11] have defined best practices in arbitration as '…..standards for conducting arbitral proceedings which arbitrators and counsel should apply to provide users of arbitration with the highest possible level of efficiency and fairness in the resolution of their business disputes.' They say further: *'* …. as a working thesis, we would like to suggest that an early organizational hearing is, broadly speaking, common practice and may be considered to be "state of the art" and therefore one widely accepted 'best practice' in international arbitration.*'*

[11] *International Bar Association Rules,* 79.

The authors describe a range of 'Soft Factors', such as establishing a cooperative spirit among the disputing parties and the arbitrators and in addition describe a range of 'Hard Factors', such as establishing of the Terms of Reference, a Timetable and a Procedural Framework regulating the structure of the proceedings.

Soft Factors

Arbitration is a facility for resolving the human experience of conflict in a commercial setting. 'Soft Factors' have a part to play in a successful process which achieves the respect and co-operation of the parties and their confidence in the ultimate award.
Engagement of the parties in the process from the outset through a Pre-hearing Conference is likely to contribute positively to these outcomes.

Welser and DeBerti helpfully describe the 'Soft' factor attributes of a Pre-hearing Conference. [12] These factors may be summarised:

- The 'getting to know' aspect is important. Arbitrators have sometimes not met before, especially if they come from different states, different legal backgrounds, cultures or profession.

- It helps to create a first impression of the way the arbitral tribunal intends to handle the proceeding, the allocation of tasks and how the cooperation between the members of the arbitral tribunal will be organised in the process.

- The Pre-hearing Conference serves the important purpose of bringing the parties together, therefore avoiding different expectations. Bridging different cultures, as well as possibly a different legal approach should be one goal of any first hearing.

- Another important purpose is to develop a common understanding of the proceedings, or even agree on a way how to proceed: How will the procedure be structured? What will be expected from the parties? Will discovery and inspection take place? How will the evidence-taking be structured? Will there be discovery and inspection or not? Will the parties have to prove the applicable law?

- In this context, it is important for the Arbitral tribunal to offer its own views and guidelines, but at the same time also to consider the expectations and wishes of the parties.

[12] Best Practices in Arbitration: A Selection of Established and Possible Future Best Practices: Irene Welser/Giovanni De Berti, http://www.chsh.com/fileadmin/docs/publications/Welser/Beitrag_Welser_2010.pdf [Last observed 31 July 2018].

To these considerations, I would add the importance of impressing upon the parties at the Pre-hearing Conference the goal to apply the core principles of arbitration, namely those of Flexibility, Efficiency and Fairness [13] through the co-operation of the parties.

Hard Factors

As to the 'Hard Factors', it is difficult to go past the new Appendix IV to the *ICC Rules* earlier mentioned. These provide a detailed check list of case management practices which are open for adoption by the parties and the arbitral tribunal. [14]

To the ICC check list, I would add for discussion and resolution at a Pre-hearing Conference a further 'hard' factor — that is, resolving the laws of evidence to apply to the arbitration.

Fact finding is a critical function of an arbitration. The evidentiary rules which govern the fact-finding process are equally critical.

This segment builds on the keynote address delivered at the 8th International Society of Construction Law Conference held in Chicago in September 2018 to launch the Society of Construction Law, North America, entitled Process and Evidence in International Construction Arbitration — 'Tap Root' Principles. [15]

The 11 bodies of Sample International Arbitration Rules referred to in the address are: The UNCITRAL 'Model Law' on International Commercial Arbitration (the '*Model Law*'); [16] the *ICC Rules*; [17] the *LCIA Rules*; [18] the rules of the Dubai International Arbitration Centre (*DIAC Rules*); [19] the rules of the Dubai International Financial Centre-London Court of International Arbitration (*DIFC-LCIA Rules*); [20] the

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[13] See: P N Vickery 'Evidence in International Commercial Arbitration— Exploring a New Framework' 3 May 2019 (2019) 38 *The Arbitrator & Mediator*.

[14] Appendix IV to the *ICC Rules*. ICC Publication 880-4 ENG ICC Arbitration Rules — The Arbitral Proceedings. *https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/* [Last observed 2 August 2018].

[15] See: P N Vickery 'Evidence in International Commercial Arbitration – Exploring a New Framework' (2019) 38 *The Arbitrator & Mediator*.

[16] In this paper the *Model Law* means: the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006). The *Model Law* has been open for adoption by Nation States. Australia for example has closely adopted the *Model Law* in its *International Arbitration Act 1974 (Cth)*, as amended. Under Division 2 of the Act by s 16, the *Model Law* has the force of law in Australia.[16] Further, the Uniform Commercial Arbitration Acts which govern Australian domestic arbitrations, and which have been enacted in every State and Territory other than the Australian Capital Territory, similarly give effect to the *Model Law*.

[17] The Rules of Arbitration of the International Chamber of Commerce make provision for establishing the facts of the case. The *ICC Arbitration Rules* are those of 2012, as amended in 2017 (the *ICC Arbitration Rules*). They are effective as of 1 March 2017.

[18] The London Court of International Arbitration (LCIA) is one of the world's leading international institutions for commercial dispute resolution. The current Rules of the LCIA are effective from 1 October 2014.

[19] The Dubai International Arbitration Centre's 2018 Rules (New Rules) are awaiting final approval before being enacted by Decree of His Highness the Ruler of Dubai.

[20] The DIFC-LCIA Arbitration Centre adopted the ***DIFC-LCIA Arbitration Rules*** to take effect for arbitrations commencing on or after 1 October 2016. In all material respects, the ***DIFC-LCIA Arbitration Rules*** **replicate the** *LCIA Arbitration Rules*.

HKIAC Rules; [21] the *SIAC Rules*;[22] the *SCC Rules*;[23] the rules of the New Zealand International Arbitration Centre (*NZIAC Rules*);[24] and the IBA Rules on the Taking of Evidence in International Arbitration [25] and the rules of the International Centre for Dispute Resolution (*ICDR Rules*).[26]

Core Evidence Principles identified in the paper govern the Burden of Proof, Standard of Proof and Relevance in the reception and assessment of evidence.

The most developed of these rules in terms of evidence are the *IBA Rules*, which provide a useful backstop of exclusionary principles for the taking of evidence in international arbitration. The *IBA Rules* are not uncommonly applied by international arbitrators with the consent of the parties.

In the absence of any rules applying or agreed, a set of default arbitration evidence rules may be adopted, again desirably with the consent of the parties, and adopted to avoid a vacuum of relevant evidentiary principles applying to the arbitration.

It is clearly desirable to define these evidentiary rules at an early stage of the arbitral process. Once the evidentiary basis for the Arbitration has been defined, the parties are placed in the position of preparing their cases for the Evidentiary Hearing, and minimising the time and cost associated with later objections to evidence proffered at the hearing. The Pre-hearing Conference presents as an ideal opportunity to achieve this goal.

The following suggested evidentiary principles are derived from international commercial law of general application. As best adapted to International Arbitration, they are:

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[21] The Hong Kong International Arbitration Centre (HKIAC) introduced new rules in 2013 known as the *2013 Administered Arbitration Rules*. The Rules were developed after five years' experience in the use of the original *2008 Administered Arbitration Rules*, several rounds of public consultation, review by the HKIAC Rules Revision Committee and extensive consultation with practitioners, arbitrators and other stakeholders.

[22] The Singapore International Arbitration Centre (SIAC) introduced the 6th edition of the Rules on 1 August 2016.

[23] The *SCC Rules;* the *Arbitration Rules* and the *Rules for Expedited Arbitrations*, entered into force on 1 January 2017.

[24] The New Zealand International Arbitration Centre (NZIAC) provides a forum for the settlement and determination of international trade, commerce, investment, and cross-border disputes in the Trans-Pacific region. NZIAC has developed Standard Arbitration Rules which apply to all arbitrations in which the claim is for an amount greater than or equal to NZ$2.5 million. In other cases, a different suite of rules applies, depending upon the amount of the claim.

[25] The International Bar Association Rules on the Taking of Evidence in International Arbitration were adopted by a resolution of the IBA Council on 29 May 2010. The revised version of the IBA Rules of Evidence was developed by the members of the IBA Rules of Evidence Review Subcommittee which comprised 22 leading practitioners representing a range of legal systems and cultural backgrounds.

[26] The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association. The current ICDR rules as amended are effective from 1 June 2014.

Burden of Proof

Each Party will bear the burden of proving the facts relied upon to support its Claim or any affirmative Defence.

Admission of Evidence

Material will be received as evidence in the arbitration which will assist the arbitral tribunal to deliver an award which is rationally made and supported by relevant and probative evidence (the 'Relevance Test'). Material proffered which, in the opinion of the arbitral tribunal does not satisfy the Relevance Test, will not be received as evidence.

The arbitral tribunal may receive material in evidence on a provisional basis, pending a final determination as to whether it satisfies the Relevance Test.

The arbitral tribunal may adopt Article 9 of the *IBA Rules* as grounds for the exclusion of material proffered as evidence.

Assessment of Evidence

At the point of assessing the admitted evidence, the weight to be attached to it is a matter for the arbitral tribunal which has been entrusted by the parties to decide the issue to its reasonable satisfaction, having regard to the matter to be proved.

4. The Arbitrator May Use Specific Procedures Derived from Litigation Case Management

Here is a summary of three techniques which can be applied to international arbitrations with a view to promoting efficiencies.

Lists of Issues (Terms of Reference)

Experience in the Technology, Engineering and Construction List (the TEC List) of the Supreme Court of Victoria has demonstrated the value of directing the parties to prepare lists of issues in the proceeding at an early juncture.

In the first instance, the parties may be directed to consult together with a view to producing a common agreed lit of issues. In the absence of agreement, the competing issues identified by the parties may be presented to the adjudicating judge to settle.

The advantages of this process have been considerable in a number of complex cases in the TEC List, and could be readily adapted to an arbitration process:

(a) Points of claim and defence in the pleadings of complex cases can be unduly lengthy and complex. Reduction to a simpler List of Issues can provide a considerably more workable management tool. From the time of adoption, the List of Issues it can operate as a framework for preparation of evidence, determining the relevance of proposed evidence, including documentary evidence in a discovery exercise, preparation of opening submissions, preparation of closing submissions, and ultimately preparation of the judgment (or in arbitration, the award).

(b) Adopting a common List of Issues can play a significant part in avoiding a 'ships passing in the night' syndrome, where parties present cases which fail to meet the case put by an opposing party, or present their cases which are not structured in a common form. This in turn makes the task of fair adjudication of the issues by the trier of fact more difficult and can contribute to delay.

(c) Perhaps of greatest importance, the advantage of the List of Issues in focussing the minds of the parties and the arbitral tribunal on the real issues in dispute.

The List of Issues tool is a process already in use in Arbitrations under the 'terms of reference' procedure. This is well illustrated in the ICC Rules in Article 23 under the heading 'Terms of Reference':

ICC Rules[27]

Article 23: Terms of Reference

1) *As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:*

a) ……..

c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;

[27] The ICC Rules are the 'ICC Arbitration Rules' of 2012, as amended 1 March 2017.

d) ***unless the arbitral tribunal considers it inappropriate, a list of issues to be determined****;……..."*
[Emphasis added]

Bifurcation

The bifurcation or 'splitting' of a trial has also been a useful procedure in the Technology, Engineering and Construction List (the TEC List) of the Supreme Court of Victoria. It has commonly been employed to hive off a hearing in relation to the assessment of compensation (damages) from the issue of liability (whether a party is liable to pay compensation of damages).

In the words of *Massimo v Benedettelli's* [28] written in his article '*To Bifurcate or Not To Bifurcate? That is the (Ambiguous) Question'*:[29] 'In the jargon of the international arbitration community "bifurcation" indicates the split of the arbitral proceedings in distinct phases, each contemplating ad hoc pleadings, possibly hearings, and ending with a decision on a discrete matter.'

The procedure has the advantage of potentially generating savings of costs and time in the ultimate disposition of the proceeding. If a claimant party does not succeed on the bifurcated issue, the conduct of the arbitration in relation to the remaining issues in the proceeding may be avoided.

There is no reason why bifurcation could not be applied to splitting a case into a number of sequential phases. [30]

Another significant potential advantage of bifurcation is that an opportunity is opened up for the parties to pursue settlement once there is a determination and an interim award delivered on the bifurcated issue or issues.

The process of bifurcation can be readily adapted to arbitration through the mechanism of delivery of interim awards, as illustrated by the ICC publication 'Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives', 2014. [31] Section 4, 'Early Determination of Issues' deals with the question: In what circumstances would it be beneficial to break out certain issues for early determination by the arbitral tribunal in a partial award?

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[28] Freshfields Bruckhaus Deringer, partner; Universita degli Studi Aldo Mora, Bari, Professor of International Law. This article develops a presentation made at the XI Congress of the Comite Brasileiro de Arbitrage, organized in Porto Alegre on 13–15 Sep. 2012 on the 'Economic Aspects of Arbitration.
[29] *'To Bifurcate or Not To Bifurcate? That is the (Ambiguous) Question'* by Massimo v Benedettelli, Arbitration International, Volume 29 Issue 3, 493, LCIA 2013, 493.
[30] See: *Ying Mui & Ors v Frank Kiang Hoh & Ors* (Ruling No 1), Supreme Court of Victoria, [2016] VSC 519.
[31] https://cdn.iccwbo.org/content/uploads/sites/3/2017/05/effective-management-of-arbitration-icc-guide-english-version.pdf [Last observed 31 July 2018].

However, bifurcation may only be appropriate in some cases. [32] Most international arbitration rules do not expressly deal with bifurcation as an available tool. However, under the general and wide power of case management conferred upon the arbitral tribunal under the Sample Rules, a facility to direct bifurcation in the appropriate case, may be readily implied.

The *ICDR Rules* [33] provide an exception in this regard, and do make express provision for bifurcation in the following Article 20.3: [34] '20.3 [T]he tribunal may in its discretion direct the order of proof, **bifurcate proceedings**, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.' [Emphasis added]

Use of IT

More than half of respondents (61%) in the 2018 Queen Mary Survey are reported to be of the view that 'increased efficiency, including through technology' is the factor that is most likely to have a significant impact on the future evolution of international arbitration.[35]
This points strongly to the need for international arbitrators to adopt case management and document management technology, to reduce cost, improve efficiency and thereby speed up the process of delivery of the award.

Large document cases are becoming particularly prevalent. Astoundingly, a major commercial bank now generates 2 Terabytes of information every minute. With the commonplace use of ever more powerful computers in commerce and industry, the collection and storage of electronically stored information (ESI) is growing at an exponential rate.

In this context, a problem for arbitrators is to contain the costs of document discovery within reasonable bounds and manage large volumes of documents with maximum efficiency. One way to manage ESI in arbitration is by 'Using technology to beat it at its own game.'

Common technologies in use in litigation include de-duplication and predictive coding (Technology Aided Review or 'TAR') and associated analytic tools to review and recall relevant documents from the discovery pool and, if necessary, provide translations of documents for use of the parties and the Arbitral tribunal.

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[32] See*:' To Bifurcate or Not To Bifurcate? That is the (Ambiguous) Question'* at n 33.
[33] The International Centre for Dispute Resolution (ICDR) is the international division of the American Arbitration Association (AAA).
[34] *ICDR Arbitration Rules*, art 20.3.
[35] Queen Mary, University of London, School of International Arbitration, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (Sponsored by White & Case LLP, 2015) <http://www.arbitration.qmul.ac.uk/research/2015/> 5. [Last observed 13 July 2018] - 'Executive Summary – The Future'.

In large document arbitrations, it may be essential to develop an electronic discovery protocol to harness the appropriate technologies, commencing at the Pre-hearing Conference.

Conclusion

Within the existing parameters of international arbitration rules and practices, it is certainly possible to promote efficiencies in the conduct of Arbitration in a manner which will work towards neutralising the twin vices of costliness and delay.

Professor Carbonneau in his essay '*Darkness and Light in the Shadows of International Arbitration'*[36] has opined on a renewed approach to the problem based on his observations of the American experience of arbitration: [37]

> *The streamlining of adjudication is achieved by a deliberate elimination or severe constraint of adversarial histrionics, by keeping the parties focussed on their real – as opposed to postured – conflicts, by obliging the parties and their representatives , in a word, not to abandon their rationality and common sense in their struggle for a decision [decided with] reason and a sense of the ultimate resolutory objective.*

In the end, an effective arbitrator applying skill, experience and perseverance should be committed to manage an arbitration for the ultimate benefit of the parties to the dispute with these objectives clearly in mind. The ongoing success of the arbitral process demands no less.

[36] 'Carbonneau On International Arbitration Collected Essays', Thomas E. Carbonneau, 2011 Chap. 5 '*Darkness and Light in the Shadows of International Arbitration'*.
[37] Ibid at 162.