

## Essential Rules for Counsel in Preparation for an International Commercial Arbitration

11th Annual International Conference of the Nani Palkhivala Arbitration Centre

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### Introduction

It is a pleasure and an honour for me to address distinguished members of the Indian legal profession and international arbitration community today at this 11<sup>th</sup> annual international conference of the Nani Palkhivala Arbitration Centre. I wish to thank Mr Arvind Datar and Mr Gaurav Pachnanda, Senior Advocates, for inviting me to deliver this year's keynote address.

Last year, my learned colleague and friend, the Honourable Chief Justice of Singapore Mr Sundaresh Menon spoke on "The Role of National Courts of the Seat in International Arbitration".<sup>1</sup> In his address, he outlined five key attributes underlying a successful arbitral seat and noted the significant progress made by India on all fronts. I have had the privilege to be associated with arbitration in India over a number of years both as counsel and as arbitrator. I have watched the progress made by practitioners, the courts and even Government to advance the prospects of arbitration in India. This progress has been considerable. Not only in the Arbitration Ordinance but also in the discussions and reports which preceded it, the deliberations and ultimate pro-arbitration decisions of the Supreme Court in a number of cases which proceeded on the premise that - for good reason - India had a serious ambition to establish itself as a leading hub for international arbitration and therefore to reverse elements of the law which impeded that ambition. I have attended numerous conferences in which that ambition has been spoken of in loud and authoritative terms.

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<sup>1</sup> Sundaresh Menon CJ, *Role of the National Courts of the Seat in International Arbitration*, (2018) 4 SCC J-1, 14-05-2018.

And there was a considerable burden to carry to achieve that aim because India had developed a reputation internationally as a jurisdiction to shun; the courts were too ready to intervene in cases, or to refuse enforcement on dubious grounds. Even in cases not seated in India.

Progress has been considerable and I was looking forward therefore to commending the progress and expressly sharing share Chief Justice Menon's optimism that India can establish itself as a leading international arbitration hub. And commending the Government which explicitly give it that aim.

But that was before I studied the changes to the law proposed in the 2018 Arbitration Bill. This Bill has passed the Lower House but has yet to be considered by the Rajya Sabha, the Upper House. Some of the changes proposed are welcome although some undoubtedly controversial such as the proposal to count the time for completion of the arbitration from the close of pleadings which will make a major change to the flagship provision in the Ordinance to make arbitration swifter; or the provision for blanket confidentiality.

But my concern - and I believe the concern of the international community centres on two other changes. First the proposed provisions for the new body the Arbitration Council of India not merely to promote arbitration as was recommended. But apparently also to regulate it The idea that a government appointed body should regulate arbitration and arbitrators is anathema to the idea of free and autonomous arbitration.

Secondly, the proposals for the required qualifications of arbitrators. These are to be found in proposed new section 43G which provides mandatory requirements for the qualifications, experience and norms for accreditation of arbitrators as specified in the Eighth Schedule:

The first requirement is that

“A person shall not be qualified to be an arbitrator unless he—

(i) is an advocate within the meaning of the Advocates Act, 1961 having ten years of practice experience as an advocate; or ...”

These would appear at a stroke to prohibit the appointment of foreign lawyers as arbitrators in Indian seated Arbitrations. Because you would have to be an Indian advocate to qualify.

And indeed although there are some exceptions for other qualifications eg Indian chartered accountants it will also prohibit the appointment of many experienced and able arbitrators such as the experienced ships masters I used to appear in front of in London shipping cases. And apparently a wide swathe of other experts eg architects and doctors

It is no answer - as I understand is proposed by some - that it is open to the Government to relax these rules in consultation with the new Council. Why should anyone believe that will happen? The conservatism of the Indian legal regulatory bodies in not allowing foreign legal professionals in is notorious. I first came to India nearly 25 years ago as Chairman of the English Bar to argue for a relaxation of the rules on foreign lawyers practicing in India. Due to the opposition of some Indian professional legal bodies we are still waiting. So I do not hold my breath for the monopoly of arbitration appointments to Indian lawyers once given by statute to be easily given up.

What will these changes do if they become law. Foreign businesses will not be prepared to sign up to agreements providing for Indian arbitration if they will not have the chance to appoint arbitrators from jurisdictions with which they are more familiar

They will I predict set back the cause of Indian arbitration by many years, perhaps a generation. Not a case of one step forward and two steps back but 1 step forward and 10 steps back.<sup>2</sup> Having pushed the Sisyphian rock of Indian arbitration painfully step by step up the steep slope of international acceptability it will release that boulder to plummet in free fall back down again.

Though this was not what I had originally intended to say it is I think my most important message. I say this not as a competitor. Not as someone who wants to see Indian

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<sup>2</sup> On 4 January 2019, speaking on the bill establishing the New Delhi International Arbitration Centre in the lower house of Parliament, Indian Law Minister Ravi Shankar Prasad had indicated the government's intentions to develop the centre into a world-class arbitration centre and India as a hub of international arbitration.

arbitration fail or who is worried about any effects on me personally. I say this as a friend of India and of Indian arbitration.

It is not too late. There is a good chance that this Bill will not pass before the election. It should be delayed so better advice can prevail and these pernicious elements removed

These developments also validate the importance of arbitration as a form of dispute resolution. Arbitration has been lauded for its confidentiality, its finality of process, its flexibility, and the ease of enforcement under the New York Convention. Here in India it also offers the promise of resolution of commercial and civil disputes far faster than India's overcrowded court system can offer.

More widely and on the international front arbitration remains very strong even though the controversial debate on how to settle international investment disputes, the so-called ISDS debate, has cast an unflattering spotlight on arbitration. Strictly, this debate should not concern us as it relates to investment arbitration which has particular characteristics not shared by commercial arbitration.

On a parochial note let me answer a question which may be on many minds: what impact will Brexit have on the role of London as popular seat of arbitration. I say "will" with some hesitation as, only 42 days from the deadline when we will leave the EU, it is still uncertain whether we will and, if so, on what terms. If we do leave my short answer is that London will remain a vibrant and popular place to arbitrate. London as a seat satisfies all of the requirements that that Chartered Institute of Arbitrators promulgated at its centenary conference for a safe seat. And membership of the EU is not necessary for arbitration in London. Adherence to the New York Convention is what makes international arbitration effective not the EU treaties of Rome. It is the most widely use tool for enforcing international arbitration awards. The UK is and will remain a signatory to the Convention post-Brexit. Accordingly, London-based arbitral awards will continue to be enforceable in all countries that are signatories to the Convention. London has been a preferred seat of arbitration for many years for reasons such as its arbitration law, complementary judiciary, legal expertise and accessibility – the same aspects being developed in the Indian arbitration architecture – which are all attributes unconnected to the UK's membership of the European Union.

But that is my view and others may have doubts which could result in businesses signing

up to arbitration elsewhere. So there is an opportunity for other centres, such as in India.

I turn then to the topic I had been asked today to speak about; to offer my reflections on the “essential rules” for counsel regarding preparation for an international commercial arbitration. The topic may appear simple at first blush. However, many of us here who have practiced in the field would attest to the protean nature of arbitration which has given rise to unique challenges for counsel and client.

Unlike a domestic litigation, an international arbitration typically involves a host of cross-border elements. India’s top five sources of foreign direct investment are – in no particular order – Japan, Mauritius, the Netherlands, Singapore and the U.S.<sup>3</sup> It is therefore plausible that an arbitration concerning an Indian joint venture dispute will involve a Japanese claimant with Indian lawyers, an American counterparty with American lawyers, and a tribunal with common law and civil law backgrounds. The contract may be governed by English law, the seat of the arbitration may be Singapore, and the parties may have opted for institutional arbitration under the auspices of the Singapore International Arbitration Centre (“SIAC”).

The coalescing of various international elements invariably leads to a diverse number of legal and practical issues: (i) what law governs the jurisdiction, scope and powers of the tribunal? (ii) what rules of evidence apply? (iii) does legal professional privilege apply, and if so, privilege under what law? (iv) can witnesses be prepared? (v) how is foreign law to be proved? The growth of case law and arbitration scholarship dealing with these and other issues attests to the complexities of the field. And these are but a few of the questions which trouble practitioners on a daily basis.

Having spent many years of my early career at the commercial bar in London, the following “essential rules” are lessons I have learnt from the practice of courtroom litigation juxtaposed against the modern practice of international arbitration. Some of these “rules” touch on current trends and perceived excesses in international commercial arbitration. My reflection include some thoughts on how we, as counsel, can practice international arbitration in a way which preserves its unique benefits for our clients.

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<sup>3</sup> India’s Department for Promotion of Industry and Internal Trade, *Foreign Direct Investment in India – Annual Issue 2017*. See the Reserve Bank of India, *2018 Annual Report*, Appendix. India’s top 5 FDI investing countries include Mauritius, Singapore, Japan, the Netherlands, and U.S.A.

## Essential Rule 1 – Know your Tribunal

Many colleagues here will be familiar with the saying “know your judge”. While parties cannot select their judges in a court hearing, parties to an international arbitration can. In nominating an arbitrator, parties and counsel will consider many factors, including the arbitrator’s legal background, industry experience, approach to specific issues of law or evidence,<sup>4</sup> and possibly even the dynamics between tribunal members. Tailoring one’s advocacy to suit the make up of the tribunal can make one’s arguments more persuasive.

Whilst for many the ability to influence the composition of the panel is a key advantage of arbitration, the ability to select one’s arbitrator has long given rise to doubts on the independence of party-appointed arbitrators. In his 2010 lecture at the University of Miami, Professor Jan Paulsson argued that the established practice of unilateral appointments is incompatible with the concept of impartial dispute resolution.<sup>5</sup> He proposed instead that all arbitrator appointments be made by a neutral body. Professor Paulsson’s view has gained some traction. The recent 2018 draft model Dutch bilateral investment treaty has abandoned the party-appointment system, opting instead for appointments by an appointing authority.<sup>6</sup> Likewise, the Canada-EU Trade Agreement, the EU-Vietnam free trade agreement and the EU-Singapore free trade agreement have jettisoned the party-appointment mechanism in favour of a two-tiered investment court system.

Indeed, in respect of investor-state dispute settlement generally, the EU set out its position on a “standing mechanism” for the appointment of adjudicators in a working paper to an UNCITRAL Working Group last month. Its main suggestions are:

- **Full time adjudicators:** Adjudicators would be employed full time and paid

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<sup>4</sup> Common law judges decide the case based on what the parties elect to present. Civil law takes a more active approach in the conduction of proceedings and in the collection of evidence, including the examination of witnesses. *See* Redfern and Hunter, *International Arbitration* (Sixth Edition), pg. 376-377, [6.78] – [6.79], citing a Swiss international arbitration specialist to the effect that even within civil law jurisdictions in Continental Europe, there is no common origin on the rules of evidence and each is dependent on local rules, customs and educational backgrounds of the judges.

<sup>5</sup> J. Paulsson – Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair University of Miami School of Law, “Moral Hazard in International Dispute Resolution” (29 April 2010), available [here](#).

<sup>6</sup> Either the Secretary General of ICSID or the Secretary-General of the Permanent Court of Arbitration.

salaries comparable to those paid to adjudicators in other international tribunals.

- **Appointment process:** The EU has said that neutrality is vital. However, the EU has not put forward a concrete proposal but has said it will seek guidance from the screening mechanisms of other international or regional courts.
- **Ethical requirements:** Adjudicators would be subject to strict ethical requirements, in particular, on avoiding conflicts of interest. Independence from governments would be ensured through a long-term non-renewable term of office combined with a robust and transparent appointment process.
- **Qualifications:** Adjudicators will have comparable qualification requirements as for other international courts, i.e., qualifications required in their countries for appointment to the highest judicial offices.

Paulsson's view however, does not seem to have dislodged the established practice in commercial arbitration. Aristotle opined in *Rhetoric Book A* (and I read from a translation):

It is better to prefer arbitration over judicial determination. Because, the arbitrator takes equity into consideration, whereas the judge, solely the law. And it is for this reason that an arbitrator is appointed; that is, in order to apply equity.

There has always been a sentiment that arbitrators, while applying the law, are able to be more sympathetic to an appointee's case. There are other justifications for party-appointment. In terms of legitimacy, Judge Brower of the US-Iran's Claim Tribunal has argued that parties tend to have greater confidence in proceedings in which they have invested through the appointment of an arbitrator.<sup>7</sup> Further, any perceived moral hazard is further discouraged by the need for arbitrators to maintain their reputation of independence.

The debate concerning appointment of arbitrators also has to take account of the possibility of challenge to them and how to insulate them from challenge.

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<sup>7</sup> C. Brower, *The (Abbreviated) Case for Party Appointments in International Arbitration*, in: ABA Section of International Law, 2013, Volume 1, Issue 1, pg. 10-13.

Anecdotally, there appears to be a rise in applications to remove arbitrators who allegedly lack the necessary independence or qualifications, whether out of genuine concern or tactical motives. In the last month alone, two high profile resignations have been reported. Italian arbitrator Loretta Malintoppi resigned as chair of an ICSID tribunal hearing a claim against Colombia after being challenged over her husband's counsel work for Colombia in a separate dispute. Similarly, Belgian practitioner Gaëtan Verhoosel resigned from an ICSID tribunal hearing a claim against Peru over an airport concession after being challenged by the state, although the precise reasons are unclear. I am personally aware of other cases when arbitrators have been challenged as a way of putting pressure on them.

In this context therefore, it is helpful for counsel and client to know their appointees sufficiently well, so as to safeguard against unmeritorious attempts to derail the proceedings whether at inception or at a later stage.

*Cofely Ltd v Bingham & Anor*<sup>8</sup> provides a cautionary tale. There, the applicant successfully applied under section 24(1)(a) of the English Arbitration Act 1996 to remove the first respondent, Mr. Bingham. The Court accepted evidence showing that over the previous three years, 18% of Mr Bingham's appointments and 25% of his income as arbitrator were derived from cases involving the second respondent, Knowles. In fact, in those three years, Mr Bingham had ruled in favour of the second respondent in 18 of 25 cases. The Court found that Mr. Bingham's failure to disclose his relationship with the second respondent suggested either a lack of awareness of the risk of bias, or a conscious effort to conceal his previous involvement with Knowles. A case of apparent bias had been made out.

To address grey areas in the appointment of arbitrators, the International Bar Association in 2014 published its Guidelines on Conflicts of Interest in International Arbitration ("**2014 IBA Guidelines**").<sup>9</sup> For those who are unfamiliar with them, the Guidelines provide helpful indicia on when a conflict may exist. The guidelines are coded "red",

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<sup>8</sup> [2016] EWHC 240.

<sup>9</sup> The IBA Conflict Guidelines may be found at [**Tab 2**]. There were 19 experts involved in the 2004 working group which originated from common law jurisdictions such as Australia, Canada, Singapore, South Africa, the U.K, and U.S.A, as well as civil law jurisdictions such as Belgium, France, Germany, Mexico, the Netherlands, and Switzerland.



“orange” and “green” to denote the level of risks of conflicts of interest in different situations. The ‘red list’ consists of two parts: a *non-waivable* ‘red list’ and a *waivable* ‘red list’. As expected, items on the non-waivable ‘red list’ are fairly clear.<sup>10</sup> They include fairly obvious cases like where the arbitrator has a significant financial or personal interest in one of the parties or the outcome of the case. In such situations, a potential nominee should not accept the appointment. Waivable ‘red list’ situations include where (i) a close family member of the arbitrator has a significant financial interest in the outcome of the dispute; or (ii) the arbitrator’s law firm currently has a significant commercial relationship with one of the parties, or an affiliate of one of the parties.

Situations on the ‘orange list’ which gives rise to justifiable doubts about arbitrator’s impartiality or independence must be disclosed.<sup>11</sup> Dissatisfied parties may make a “timely objection” – 30 days under the guidelines – or be “deemed to have accepted the arbitrator”.<sup>12</sup> Tellingly, the IBA deemed it was necessary to prepare a ‘green list’ of situations where there were “no doubts” as to the arbitrator’s impartiality, presumably to minimise unmeritorious disqualification applications. The green list includes where: (i) the arbitrator has previously expressed an opinion on an issue arising in the arbitration, but not focused on the case at hand; (ii) the arbitrator has contact with another arbitrator or with counsel for one of the parties (e.g. same membership in professional association or organisation).

Based on the IBA’s 2016 report on soft law instruments in arbitration, about 57% out of over 3,000 worldwide arbitrations involving issues with conflicts of interests have made

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<sup>10</sup> These situations include: (1) identity between the party and arbitrator; (2) arbitrator has a controlling influence on parties or entity with direct economic interest; (3) significant personal or financial interests in parties or outcome of the case; and (4) arbitrator or firm regularly advises the party or its affiliate, and the arbitrator or firm from which it derives significant financial income.

<sup>11</sup> These include where (i) the arbitrator’s previous services for one of the parties or other involvement in the case; (ii) the arbitrator’s current services for one of the parties; (iii) the relationship between an arbitrator and another arbitrator or counsel.

<sup>12</sup> See pg. 27, para. 3 of the IBA Guidelines: “The orange list thus reflects situations that would fall under General Standard 3a, with the consequence that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made, as established in General Standard 4(a).” “Timely objection” is defined under General Standard 4(a) as “30 days after the receipt of any disclosure by the arbitrator, or after a party otherwise learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator”.

reference to the 2014 IBA Guidelines.<sup>13</sup>

Adhering to the letter or the spirit of the guidelines may not be sufficient to prevent spurious attacks. However, recent Court decisions suggest that judges do not entertain casuistic or unmeritorious applications. In *Allianz Insurance v Tonicstar*<sup>14</sup> the English Court of Appeal reversed the High Court's decision holding that a QC with 10 years of experience in insurance and reinsurance *law* did not meet the criteria in the arbitration clause, which so far as relevant, required "not less than ten years' experience of insurance or reinsurance". The Court of Appeal held that there was no distinction to be had between insurance and reinsurance "*itself*" and insurance and reinsurance *law*.

In more interesting circumstances, in *P v Q*,<sup>15</sup> Popplewell J dismissed a Section 24 application to remove two party-appointed arbitrators on grounds that they had improperly delegated their decision-making functions to their tribunal secretary by asking for his views on certain procedural applications. Popplewell J found that the evidence fell short of establishing a failure to properly conduct proceedings or "substantial injustice" as required by section 24.

Issues concerning the selection and appointment of tribunals continue to be a complex area in international arbitration which we, as counsel, need to pay close attention to, particularly given the proclivity of using this as a means to derail arbitration proceedings. While the above decisions suggest that ill-advised attempt will ultimately be frowned upon, they serve as a timely reminder that the power to select one's arbitrator comes with the responsibility of doing so wisely.

## **Essential Rule 2 – Understanding the Applicable Rules and their Limits**

In *A Theory of Justice*, John Rawls said:

"There is no reason to suppose ahead of time that the principles satisfactory for

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<sup>13</sup> See IBA, *2016 Report on the Reception of the IBA Arbitration Soft Law Products*, pg. 31, [108]. Furthermore, in cases involving allegations of arbitrators' conflicts of interests, more than 90% of arbitrations conducted in Hong Kong, Singapore and South Korea have referred to the guidelines. In the U.K, about half of the arbitrations involving allegations of conflicts of interests consider the guidelines as well.

<sup>14</sup> [2018] EWCA Civ 434.

<sup>15</sup> [2017] EWHC 194 (Comm).

the basic structure hold for all cases... it is natural to conjecture that once we have a sound theory [...], the remaining problems of justice will be more tractable in the light of it.”

There, Rawls was attempting to devise a set of universal principles which would apply justice in all cases. Given the similarity between litigation and arbitration, one would have thought the general principles of litigation would be identical. Not so.

In the context of domestic litigation, the parties’ obligations in respect of the disclosure of documents are typically governed by strict rules of evidence and civil procedure. In the English Civil Procedure Rules (CPR), a party is required to disclose documents on which it relies – that is uncontroversial. But it is *also* under a positive obligation to disclose documents which could adversely affect its case.<sup>16</sup> India and Singapore adopt the same approach. The same rules and relevant case law also prescribe a variety of sanctions on wayward parties, including in extreme cases, the striking out of a claim,<sup>17</sup> a finding of contempt of court,<sup>18</sup> or adverse cost orders.<sup>19</sup>

Disclosure in the realm of international arbitration is significantly different. Rather than clear and strict rules prescribing the parties’ disclosure obligations, what is expected of the parties often depends on the tribunal’s wide discretion. Typically, national arbitration laws devolve issues concerning evidence and procedure to the tribunal. For example, Section 34(1) of the English Arbitration Act expressly provides that: “It shall be for the

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<sup>16</sup> English CPR 31.6 provides that a party is to disclose “(a) the documents on which he relies; and (b) the documents which – (i) adversely affect his own case; (ii) adversely affect another party’s case; or (iii) support another party’s case; and (c) the documents which he is required to disclose by a relevant practice direction.”

<sup>17</sup> *UK*: CPR 3.4(2)(c) provides: “(2) The court may strike out a statement of case if it appears to the court – (c) that there has been a failure to comply with a rule, practice direction or court order.” *India*: 1908 India Code of Civil Procedure, The First Schedule, Appendix C, Order XI, r. 21 provides: “Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out ...”. *Singapore*: Under Order 24 r.16(1) of the Singapore rules: “If any party who is required by any Rule in this Order, or by any order made thereunder, to make discovery of documents or to produce any document for the purpose of inspection or any other purpose, fails to comply with any provision of the Rules in this Order, ... the Court may make ... an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.”

<sup>18</sup> English CPR 81.4; 2014 Singapore Supreme Court of Judicature Act (Chapter 322, Section 80) O.24 r.16, subsection 2.

<sup>19</sup> English CPR 3.1, subsection 5 provides; 2014 Singapore Supreme Court of Judicature Act (Chapter 322, Section 80) O.59 rr.5 and 7.

tribunal to decide *all* procedural and evidential matters, subject to the right of the parties to agree any matter.” Similarly, rules of international arbitration institutions – which are often incorporated by reference – leave questions on the rules of evidence to the tribunal.<sup>20</sup>

In other areas arbitration has moved away from court litigation. No longer the poor cousin of litigation arbitration has developed its own rules national and transnational. It would be negligent to attempt to practise arbitration by simply relying on one’s knowledge of home state litigation and without familiarising oneself with the particular rules and practices of the relevant system of arbitration. All the institutional rules have their own versions and though many have great similarities - often largely based on the UNCITRAL model rules - but there are many differences, sometimes subtle but often very important. They have been developed carefully with the input of experienced practitioners and often try to deal with particular procedural problems; there are differences for example on the extent to which the rules provide for confidentiality of proceedings.

This then takes us to transnational guidelines such as the 2010 IBA Rules on the Taking of Evidence (“**IBA Rules**”).<sup>21</sup> The IBA Rules, which have been in circulation for close to ten years, are now a staple of international arbitration. They – and other such rules and guidelines – have evolved to meet the problem of different national rules and experiences of counsel and parties from different tradition.

However, counsel looking for bright lines will be disappointed. The architecture of the rules is such that a party will disclose documents it relies on, and can make request for relevant documents it considers are in the possession, custody or control of the other

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<sup>20</sup> In general, major institutional rules grant the Tribunal the discretion to consider the application of rules of evidence, and to order production of documents or evidence. For the former, see 2016 SIAC Arbitration Rules, Article 19.2: “*The Tribunal shall determine the relevance, materiality, and admissibility of all evidence. The Tribunal is not required to apply the rules of evidence of any applicable law in making such determination.*” For the latter, see Article 25(5) of the 2017 ICC Arbitration Rules, Article 22 of the 2014 LCIA Arbitration Rules, which accords additional powers to the Tribunal, and Article 27(h) of the 2016 SIAC Arbitration Rules which underscore the tribunal’s broad power to order parties to produce evidence.

<sup>21</sup> The IBA Rules may be found at [Tab 3]. See also IBA, *2016 Report on the Reception of the IBA Arbitration Soft Law Products*, [27] and [54]. The IBA Arbitration Guidelines and Rules Subcommittee found that the IBA Rules of Evidence were referenced in only 33% of arbitration proceedings in India, and considered binding in 50% of cases in India.

party. Should one party inexplicably fail to produce a document ordered by the tribunal without satisfactory explanation, the tribunal is entitled to draw adverse inferences in respect of that non-disclosure.<sup>22</sup> The extent to which this is done is however mixed. Too often parties get away with inadequate disclosure and tribunals are too timid to deal with that failure.

Critics would argue that the comparatively toothless nature of the IBA Rules encourages parties to take calculated risks in withholding adverse documents. Recent developments in the ongoing enforcement saga in *Stati v. Kazakhstan*<sup>23</sup> – an investor-state arbitration applying the IBA Rules<sup>24</sup> – suggest such a view is not untenable. After the claimants obtained a US\$ 500 million damages award, through the use of a subpoena in US courts, documents were discovered showing that the claimants may have dishonestly inflated the costs paid in relation to a liquefied petroleum gas plant and concealed these facts from the Tribunal and the respondent.<sup>25</sup>

Given the dearth of robust sanctions, counsel may need to turn to local courts for assistance. In order to minimise curial intervention, the English and Singapore Courts have imposed certain limitations in deciding when arbitrating parties can seek their assistance in the area of evidence. Section 44 of the English Arbitration Act provides that courts can only make orders for the preservation of evidence or assets in cases of urgency,<sup>26</sup> and in non-urgent cases, can only do so with the permission of the tribunal or the parties' agreement in writing.<sup>27</sup> Further, in either case, it can only act to the extent the

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<sup>22</sup> 2010 IBA Rules on the Taking of Evidence, Article 9(5): "If a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce to which it has not objected in due time or fails to produce any Document ordered to be produced by the Arbitral Tribunal, the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party." C.f. Article 9(6).

<sup>23</sup> *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Kazakhstan*, SCC Case No. V 116/2010 ("*Stati v. Kazakhstan*").

<sup>24</sup> *Stati v. Kazakhstan*, Award (19 December 2013), pg. 23, which referred to the Tribunal's previous order ('Procedural order No.2 on Production of Documents').

<sup>25</sup> *Anatolie Stati, Gabriel Stati, Ascom Group S.A., Terra Raf Trans Trading Ltd. v The Republic of Kazakhstan* [2017] EWHC 1348 (Comm), [21]-[37].

<sup>26</sup> 1996 English Arbitration Act, section 44(3): "If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets."

<sup>27</sup> 1996 English Arbitration Act, section 44(4): "If the case is not one of urgency, the court shall act only on the application of a part to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or agreement in writing of the other parties."

tribunal is unable to act effectively.<sup>28</sup> Section 12A of the Singapore International Arbitration Act is in *pari material* and contains the same requirements. Section 27 of the 1996 India Arbitration and Conciliation Act appears to be more permissive. A tribunal or a party with the permission of the tribunal may apply to Court for assistance in taking evidence without any express ‘urgency’ requirement.

Depending on where the parties and potential witnesses are based, another possible tool could be an application under Section 1782 of Title 28 of the United States Code in the US Courts.<sup>29</sup> This provision allows discovery in aid of proceedings in “*a foreign or international tribunal*”. Although there is an extant debate on whether Section 1782 can be used to obtain evidence for international arbitration proceedings,<sup>30</sup> dicta from the Supreme Court in *Intel v AMD*<sup>31</sup> suggests that the phrase “*foreign or international tribunal*” in the provision includes foreign arbitration panels, and most recently, the section was applied by a New York District Court in *In re Kleimar N.V.*, 2016 WL 6906712 (SDNY Nov. 16) in relation to an international arbitration under the rules of the London Maritime Arbitration Association. Under Section 1782, there is no need to obtain permission from the foreign tribunal.<sup>32</sup>

While it may be frustrating for some to have to address evidential gaps through such piecemeal approaches, this may well be a necessary consequence of a system which caters

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<sup>28</sup> 1996 English Arbitration Act, section 44(5): “In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”

<sup>29</sup> 28 U.S. Code § 1782: “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.”

<sup>30</sup> There are a handful of cases supporting the notion: *In re Roz Trading*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006); *In re Hallmark Capital*, 534 F. Supp. 2d 951 (D. Minn. 2007); *In re Application of Babcock Borsig AG*, 583 F. Supp. 2d 233 (D. Mass. 2008); *In re Winning (HK) Shipping Co.*, 2010 WL 1796579 (S.D. Fla. April 30, 2010). On the other hand, these cases suggest the statute was meant to aid public (court) proceedings and not private tribunals: *In re Grupo Unidos Por El Canal S.A.*, 2015 WL 1815251 (N.D. Cal. April 21); *In re Arbitration in London, England*, 626 F. Supp. 2d 882 (N.D. Ill. 2009); *In re Operadora DB Mex., S.A. de C.V.*, 2009 WL 2423138 (M.D. Fla. Aug. 4); *La Comisión Ejecutiva Hidroeléctrica Del Rio Lempa v. El Paso*, 617 F. Supp. 2d 481 (S.D. Tex. 2008).

<sup>31</sup> *Intel v. AMD*, 542 U.S. 241, 259 (2004).

<sup>32</sup> *In re Malev*, 964 F.2d 97, 101 (2d Cir. 1992).

for a myriad of different parties and plethora of legal traditions.

The foregoing presupposes that arbitrating parties and counsel generally prefer the rigour of the common law's approach to evidence. I pause to note that there has been a shift towards *even* less disclosure. In December 2018, a new set of evidential guidelines to rival the IBA rules was published. The so-called "Prague Rules" were prepared by some 50 arbitration practitioners with civil law backgrounds who argue that the common law approach – as encapsulated within the IBA Rules – has led to dissatisfaction with excessive time and costs incurred in arbitration proceedings. In an earlier draft of the Prague Rules, the committee argued that "[t]he procedures for taking evidence, particularly document production, using multiple fact and expert witnesses and their cross-examination at lengthy hearings ... are, to a large extent, reasons for [the] dissatisfaction [with time and costs]." To counteract this, the Prague Rules favour the use of the civil law "inquisitorial model of procedure" and a "more active role of the Arbitral Tribunal".

Early responses to the Rules have been mixed.<sup>33</sup> One Czech arbitrator suggested that the Rules would promote "efficient, cheap, fast and professional" arbitration.<sup>34</sup> On the other hand, an English barrister interviewed at the launch suggested that the increased use of an inquisitorial approach may pose enforcement risks: allowing tribunals to take a selective approach to the evidence or share preliminary views without the clear consent of the parties could give rise to challenges to enforcement.<sup>35</sup>

It is difficult at this stage to evaluate the potential success of the Prague Rules but they may find traction with clients and lawyers from civil law backgrounds. Indian parties frequently contract with counterparties from China, Korea, Japan, and the Netherlands, and in the right case – perhaps one involving contractual interpretation – counsel may well prefer the Prague Rules.

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<sup>33</sup> See commentary on the Prague Rules: (i) GAR, "Are the Prague Rules the answer?", 7 January 2019 [Tab 4A]; (ii) Miroslav Dubovsky, Ben Sanderson and Nikki O'Sullivan, "The Prague Rules: 'Civil' War On The Evidence In International Arbitration", DLA Piper, 24 January 2019 [Tab 4C].

<sup>34</sup> A comment by Czech arbitrator Alexander Belohlávek as reported in Jack Ballantyne and Alison Ross, "Prague rules premiere in Czech Republic", GAR, 7 January 2019 [Tab 4B] at page 2.

<sup>35</sup> A comment by Hilary Heilbron QC as reported in Jack Ballantyne and Alison Ross, "Prague rules premiere in Czech Republic", GAR, 7 January 2019 [Tab 4B] at page 2.

### **Essential Rule 3 – Understanding Tools for Efficiency**

The third rule that I want to touch on, concerns counsel’s need to utilise all available tools to make arbitration more efficient.

It has been said in some quarters that arbitration has reached its “golden age”.<sup>36</sup> In a recent speech, the former Attorney General of Singapore Mr V.K. Rajah provided statistics to show how civil litigation in Australia and Singapore has declined, while the caseloads of major arbitral institutions such as the ICC, SCC and LCIA increased by as much as 200%.<sup>37</sup> While there is no evidence to show a direct correlation between these trends, they nonetheless signal a trend in cross-border dispute resolution.

However, the maturity of arbitration as a mode of dispute resolution has also meant more scrutiny over perceived excesses. Over recent years, surveys on international arbitration, conducted by Queen Mary University report that “costs” and “lack of speed” are two of arbitration’s worst features.<sup>38</sup> Users of arbitration must therefore ask: given we are unfettered by strict rules, how can we use arbitration’s flexibility to improve its efficiency?

Cognisant of some of these issues, my firm, Debevoise & Plimpton, first published an “efficiency protocol” in 2010, and recently updated it in 2018.<sup>39</sup> Some examples of our suggestions include:

- (1) Getting arbitrators to confirm their availability to administer the case before appointing them. We also suggest obtaining a confirmation that arbitrators will not take on new appointments which would reduce their ability to conduct the arbitration efficiently. The Indian Arbitration Act, as amended in 2015, also provides for a similar provision. It requires a potential arbitrator to disclose any

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<sup>36</sup> ICCA Congress 2012, Opening Plenary Session, International Arbitration: The Coming of a New Age for Asia (and Elsewhere), Sundaresh Menon, SC.

<sup>37</sup> VK Rajah, ‘W(h)ither adversarial commercial dispute resolution?’ (2017) 33 *Arbitration International* 17, 18-20.

<sup>38</sup> 2018 International Arbitration Survey: The Evolution of International Arbitration, Queen Mary University and White & Case, pg. 2; 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, pg. 24-32; International Arbitration: Corporate attitudes and practices 2008, pg. 2.

<sup>39</sup> Debevoise Efficient Protocol 2018, [Tab 5].



circumstances “which are likely to affect his ability to devote sufficient time to the arbitration within a period of twelve months”.<sup>40</sup>

- (2) Requesting an early procedural conference to establish the procedure for the case. As appropriate, we also suggest that clients and opposing clients be invited so as to give meaningful input on aspects of case procedure.
- (3) Using electronic filings and encouraging paperless arbitrations.
- (4) Avoiding having multiple witnesses testify about the same facts.
- (5) Encouraging the use of the chess-clock process at the merits hearing (*i.e.*, fixed time limits).

In addition to what counsel can do, legal institutions have kept pace by introducing rules which would increase efficiency. Members of the audience will be familiar with the use of summary judgment or strike-out in litigation proceedings.<sup>41</sup> This allows for the early disposition of claims or particular issues without a full hearing.

Prior to 2016, none of the rules of the leading arbitral institutions expressly empowered a tribunal to deal summarily with a key issue in the dispute. This is quite a major drawback of arbitration. But this has changed: the SIAC, ICC<sup>42</sup> and Stockholm Chamber of Commerce (“SCC”)<sup>43</sup> have now all introduced summary procedures in various forms.<sup>44</sup>

Rule 29 of the SIAC rules for example allows a party to ask for early dismissal in case of manifest lack of jurisdiction and manifest lack of merits.<sup>45</sup> There is no particular time

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<sup>40</sup> Arbitration and Conciliation (Amendment) Bill 2015, Bill No. 252, amendment of section 12 in the principal Act.

<sup>41</sup> See English Civil Procedural Rules, at Rule 3.4. c.f. See *Three Rivers District Council v. Bank of England No 3* [2001] UKHL 16, [117].

<sup>42</sup> ICC, “Note to Parties and Arbitral tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration”, 1 January 2019, [74]-[79].

<sup>43</sup> SCC Rules, Article 39.

<sup>44</sup> C. Rae, “ICC Court Clarifies Summary Dismissal Procedure in Arbitration”, Latham & Watkins, 5 December 2017, available [here](#).

<sup>45</sup> K.C. Lye and S. Leong, “SIAC Arbitration Rules 2016 come into effect”, Norton Rose Fullbright International Arbitration Report, September 2016; E. Attenborough, M. Secomb and A. Sartogo, “A new dawn for summary determination in international arbitration: the revised SIAC Rules”, White & Case Client Alert, 1 August 2016.

limit imposed.<sup>46</sup> The 2017 SCC Rules introduced a “summary procedure” of the disposition of issues of fact or law. Article 39 of the SCC Rules allow the tribunal to decide on “one or more issues of fact or law by way of summary procedure, without necessarily undertaking every procedural step that might otherwise be adopted for the arbitration”.<sup>47</sup> In 2017, the ICC updated its “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration” clarifying that a summary procedure was available as part of the tribunal’s general case management powers under Article 22. Such “expeditious determination” could be made in respect of “claims or defences [which] are manifestly devoid of merit or fall manifestly outside the arbitral tribunal’s jurisdiction”.<sup>48</sup>

The ICC, SIAC and SCC procedures require tribunals to grant the parties a fair and reasonable right to object to summary dismissal,<sup>49</sup> thereby minimising any due process concerns. The ICC Court in particular, scrutinises any award made on an application for expeditious determination, in principle, within one week of receipt by the ICC Secretariat.<sup>50</sup>

#### **Essential Rule 4 – Understanding Due Process and Enforcement Risk**

The last rule I will discuss today concerns counsel’s awareness of due process issues and enforcement risks. The life cycle of an international arbitration normally ends with the winning party receiving payment from the losing party or starting enforcement proceedings in jurisdictions where the losing party has assets.

One benefit of international arbitration is the ease of enforcement under the New York Convention. However, the Convention also sets out various grounds on which enforcement can be refused. Of note is the “due process” ground under Article V(1)(b),

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<sup>46</sup> ICLG, *International Arbitration 2018 – Summary Disposition Procedures in International Arbitration*, 25 July 2018, available [here](#) [Tab 6].

<sup>47</sup> SCC Rules, Article 39.

<sup>48</sup> ICC, “Note to Parties and Arbitral tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration”, 1 January 2019, [74]-[79].

<sup>49</sup> Kartikey M. and R. Raheja, *Recognition of Summary Procedures under the ICC Rules: Considerations, Comparisons and Concerns*, Kluwer Arbitration Blog (4 December 2017) available [here](#) [Tab 7].

<sup>50</sup> ICC, “Note to Parties and Arbitral tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration”, 1 January 2019, [79].

which provides:

“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...] The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case”.

Surveys of court decisions shows that NY Convention Article V(1)(b) claims are among the most popular grounds raised to resist enforcement. This has led to a phenomenon called “due process paranoia” where arbitrators fear that their award may be set aside on due process grounds. Such paranoia results in tribunals allowing the arbitral process to be protracted by the parties’ disruptive attempts to present their case.<sup>51</sup> A recent survey<sup>52</sup> highlights common instances of dilatory conduct which a tribunal may acquiesce on the basis of this paranoia:

- (1) when a party seeks repeated extensions of time;
- (2) when a party provides unsolicited submissions;
- (3) when a party submits evidence after a cut-off date;
- (4) when a party introduces late claims;
- (5) when a party asks to reschedule a hearing.

As is apparent, a tribunal’s paranoia is fertile soil for abuse. Whereas such dilatory conduct may not be tolerated before a local Court, disruptive parties may capitalise on a tribunal’s fear.

What is interesting to note, however, is that a careful review of case law across several jurisdictions suggests that this phenomenon of “due process paranoia” is unfounded. A

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<sup>51</sup> Kenneth Beale and Nelson Goh, ‘Due Process Challenges in Asia: An Emerging High Bar’ (2017) *Asian International Arbitration Journal* 1 [Tab 8], 3.

<sup>52</sup> K. Berger and J.O. Jensen, “Due process paranoia and the procedural rule: a safe harbour for procedural management decisions by international arbitrators”, *Arbitration International*, 2016, pg. 425-428.

widely-cited study in 2008 suggests that up to ninety percent of parties who bring due process claims are unsuccessful.<sup>53</sup> What is more, a recent paper<sup>54</sup> in the Asian International Arbitration Journal has found that enforcement courts typically adopt a robust approach, by the following means:

- (1) rigorously examining the record to discourage challenges based on trivial matters. Courts tend to look closely at relevant correspondence, transcripts and the award.
- (2) Courts will attempt to identify if the decision sought to be impugned was essentially a case management one. Courts prefer to show deference to tribunals on case management decisions.
- (3) Substantively, for a due process challenge to succeed, the applicant must show that the tribunal exercised its procedural powers in such a way as to deprive the applicant of a *real* chance to present its case on a material issue.
  - (a) The applicant's non-participation or its failure to take steps available to it would rule out any chance of success.
  - (b) Furthermore, the prejudice must be significant and the violation must be material to the outcome.<sup>55</sup>

A robust approach was demonstrated by the Privy Council decision in *Cukurova Holding AS v Sonera Holding BV*.<sup>56</sup> Here, the applicants, Cukurova, applied to set aside a US\$ 932 million award arguing, amongst other things, that the award was made without the tribunal having heard its key witness, one Mr Berkmen, who was undergoing a medical procedure during the time of the main hearing.

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<sup>53</sup> Herman Verbist, "Challenges on Grounds of Due Process Pursuant to Article V(1)(B) of the New York Convention" in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards*, (United Kingdom: Cameron May, 2008), pg. 679, 692 ff. Cited in Maxi Scherer, "Violation of Due Process, Article V(1)(b)" in Reinmar Wolff (ed), *New York Convention* (Hart Publishing 2013), pg. 280 [130] and L. Reed, 'Ab(use) of due process: sword vs shield', (2017) *Arbitration International*, 372.

<sup>54</sup> Kenneth Beale and Nelson Goh, 'Due Process Challenges in Asia: An Emerging High Bar' (2017) *Asian International Arbitration Journal*.

<sup>55</sup> Kenneth Beale and Nelson Goh, 'Due Process Challenges in Asia: An Emerging High Bar' (2017) *Asian International Arbitration Journal* 25.

<sup>56</sup> *Cukurova Holding AS v. Sonera Holding BV* [2015] 1 ALL ER (Comm) 1087 (Privy Council).

The record showed that the tribunal in fact asked for proposals to deal with Mr. Berkman's evidence. The parties agreed that in post-hearing briefs the applicant would provide the tribunal a list of areas in which Mr Berkmen's evidence would be decisive. The applicants failed to do so and merely reiterated its general stance that Mr Berkmen should be heard. Consequently, the tribunal concluded that it was not necessary to hear Mr Berkmen in person. Thus, although Mr Berkmen's testimony may have been critical, the Privy Council found that Cukurova had every opportunity to present its case. It did not seize its opportunity and could not complain.

The Singapore High Court's reasoning in a recent due process case, *Triulzi Cesare SRL v Xinyi Group Co Ltd*,<sup>57</sup> is instructive: the right to be heard does not mean that a tribunal has to "sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party"<sup>58</sup> ... [nor that a tribunal is duty-bound to ensure that] a party [takes] the best advantage of the opportunity to which he is entitled".<sup>59</sup>

Thus, as the foregoing suggests: it may be easy to allege a lack of due process but not less easy to succeed. The high bar is underpinned by a policy of supporting the efficient and autonomous administration of the arbitral process by independent arbitrators.

That does lead into one further point.

What the comparative secrecy of arbitration should not be allowed to do is to sanction behaviour which would not be countenanced in an open court; indeed would not even be attempted in an open court. Lawyers should not do things they would not do in a court room under the eyes of a watchful judge. Here is an area which needs more thought and development.

How do you sanction bad professional behaviour in an arbitration? It is not easy for the arbitrators themselves to sanction the lawyers – and it is not even clear they have the power to do so. My personal preference is for recognition that the rules of professional

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<sup>57</sup> *Triulzi Cesare SRL v Xinyi Group Co Ltd* [2015] 1 SLR 114 ("*Triulzi v Xinyi*").

<sup>58</sup> *Triulzi v Xinyi*, [151], quoting from Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law, 1989) pg. 551.

<sup>59</sup> *Triulzi v Xinyi*, [152], quoting *Sugar Australia Pty Ltd v Mackay Sugar Ltd* [2012] QSC 38 at [33].

conduct which govern what we do in court should also apply to what we do in arbitration. To do that does also require recognising and, if need be, amending rules of arbitration to allow that any confidentiality that applies in the arbitration should not apply to providing information to a regulator in respect of counsel's conduct. Or else any complaint could simply be stymied.

## **Conclusion**

The “essential rules” I have mentioned highlight particular aspects of international arbitration which counsel should pay attention to so as to be able to guide their clients through the life cycle of the process. Equally, I have in the discussion of these “essential rules” highlighted some of the perceived excesses in international arbitration which we would do well to combat.

Indeed, it is surprising to see some of the abuses or forms of guerrilla tactics I have alluded to above. The flexibility afforded in the private consensual arena of international commercial arbitration should not be used as a means for clients or counsel to take steps they would not take in an open court setting.

But I end by hoping that Government will think again about the proposed new amendments to the Arbitration law. Do not set back the progress which has already been made by some ill thought out requirements.

Efficient and fair arbitration promotes the rule of law, and encourages commercial parties to have trust that their disputes can be resolved meaningful in their forum of choice. One can do no better than to repeat the words of Holtzmann and Neuhaus:

“The autonomy principle is critical to an effective system of commercial arbitration for international cases because in such cases there is a special need to be free of unfamiliar local standards...*it expresses a profound confidence in the ability of parties and arbitrators to conduct the arbitration in a fair and orderly manners so as to arrive at a just resolution of a dispute.*”<sup>60</sup> (emphasis added)

In closing, I repeat my thanks to the organisers for inviting me to share my reflections and

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<sup>60</sup> Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law, 1989), pg. 564.

wish you a fruitful time at this year's conference.

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