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Rediscovering the Simplicity of Arbitration

Cavinder Bull SC[*])

I. Introduction

It is a pleasure and privilege to deliver the keynote address at the 2025 Vienna Arbitration Days.

Sincere thanks are due to the organising committee for the invitation to address such a distinguished and diverse audience. It is an honour to contribute to the discussions and to engage with the impressive lineup of speakers and panels that have been organised for the event. Warmest congratulations are also extended to VIAC on occasion of its 50th anniversary.

It is appropriate when such milestones are celebrated that we take the opportunity for reflection. We gather as colleagues in the arbitration community, and we believe in the efficacy of the arbitral process, a force for good in resolving disputes. However, we also know that there is much room for improvement.

Arbitration was once heralded as the simpler and more efficient alternative to traditional litigation. As Alan Redfern once said, arbitration was originally conceived of as *"a system of justice, born of merchants, which allies law and trade usage"*.[1]) So, arbitration was meant to be an effective and business-like method of resolving commercial disputes. It was supposed to be a simple, straightforward means of resolving a dispute before a commercially-minded decision maker, who may or may not be a lawyer. In contrast to litigation, arbitration promised a streamlined process that would be less formalistic, quicker, and less expensive.

This almost romantic paradigm of a simpler, more commercial, quicker and cheaper way of resolving disputes, contrasts sadly with what arbitration often looks like today. The arbitral process of today has become marred by unnecessary complexity – with proceedings becoming longer, more expensive, and increasingly bogged down by needless procedural hurdles. Many of us would agree that counsel and arbitrators spend far too much time involved in arguments over how to get the dispute resolved, rather than actually resolving

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[*]) Sincere thanks are due to the efforts of Tan Yuan Kheng and Charlotte Tang from Drew & Napier in the preparation of this paper.

[1]) *Alan Redfern*, Stemming the Tide of Judicialisation in International Arbitration (2008) 2 World Arbitration & Mediation Review 21 (**"Stemming the Tide"**) at 22.

the dispute. This has led to growing criticism and discontent over the many inefficiencies and often eye-wateringly high costs in getting a dispute arbitrated.

One of the major problems facing arbitration today is the judicialisation of arbitration. This has occurred because over the years, arbitrators and counsel who are accustomed to litigation before the national courts have brought to arbitration the processes and practices of litigation with which they are familiar and comfortable,[2]) so much so that Thomas Stipanowich called arbitration "the new litigation".[3]) As more and more litigation practices get ported over to arbitration, counsel and arbitrators come to expect cookie-cutter models of arbitration resembling court processes, without putting any real thought into how the procedure may be tailored to the needs of the dispute in question. The end result is that instead of being a true alternative to litigation, arbitration today has essentially become litigation by a different name, with all the complexity and rigidity that litigation entails. The severity of the judicialisation of arbitration has not gone unnoticed. Speaking at the 2018 ICCA Congress in Sydney, former Chief Justice James Allsop observed that *"arbitration has developed the same process-driven costs that accompany poorly managed litigation"*, which he described as a *"cancer"* in the body of both.[4])

The original idea was very simple. Arbitrators would be appointed, and they would then have the flexibility to design a bespoke procedure to deal with the dispute at hand. If document production was not needed, they would dispense with that. If cross-examination of a class of witnesses was unnecessary considering the documentary record, then there was no need for those witnesses to appear in person. Unfortunately, we've lost sight of that as more and more focus has been given to designing an arbitral process that can take care of any and every type of case. It is difficult to say whether this is a symptom of the over-judicialisation of arbitration or whether it is its cause. It is probably a little of both.

It is true that the disputes being heard in arbitration have, over the decades, increased in complexity. Commerce has become more sophisticated and advancements in technology affect almost every industry. Lawyers and arbitrators have to grapple with many technical issues that surpass our experience and expertise. However, the growing complexity of disputes does not mean that arbitral procedure should become more complex. Just because the substance of what arbitrators have to decide has become more complex, it does not mean that the way in which arbitrators conduct proceedings should become

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[2]) *Alan Redfern,* Stemming the Tide at 25, 28.

[3]) Thomas Stipanowich, Arbitration: The 'New Litigation' (2010) University of Illinois Law Review 1 at 8–9.

[4]) *Former Chief Justice James Allsop*, ICCA Congress 2018, Sydney, opening keynote address, Commercial and Investor-State Arbitration: The importance of recognising their differences (April 16, 2018), accessed on October 31, 2025 at <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/speeches-former-judges/chief-justice-allsop/allsop-cj-20180416> (**"Allsop"**) at 38–39.

more complicated. Far too often, complex disputes are handled in unnecessarily complex ways, only deepening the inefficiencies that already plague the arbitral process. We seem to have forgotten how powerful the simplicity of arbitration can be.

The foundation for international arbitration's success is the commercial world's confidence in it as a powerful tool to resolve disputes and therefore to keep the wheels of international commerce turning. That confidence was originally won by a system that was simpler, more commercial, faster and cheaper than litigation in court. However, if we continue to forget the simplicity of arbitration, if we continue to inject unnecessary complexity into arbitral processes and if we continue to engage in over-judicialisation, then arbitration will provide no efficiencies over litigation, and we will lose our way. As former Chief Justice Allsop previously forewarned, "*if arbitration cannot exist as an efficient and cost-effective means of dispute resolution, then it will simply not find favour with commercial parties*".[5])

In the 2021 edition of the White & Case Queen Mary University of London survey, 59 % of the participants stated that their preferred approach for dispute resolution was not arbitration alone, but rather a combination of arbitration and other alternatives such as mediation.[6]) In other words, arbitration was not enough for more than half of the participants in that survey. Only 31 % chose arbitration as a standalone method.[7]) This was down from 56 % who chose arbitration as a standalone method in the 2015 survey.[8]) When interviewed, participants in 2021 stated that they were increasingly resorting to other methods of dispute resolution "*in the hope that a swifter and more cost-efficient resolution could be found before resorting to arbitration*".[9]) This is tragic. From a beginning where arbitration was portrayed as a simpler, less formal and more efficient way to resolve commercial disputes, it is now being characterised as the slower and less efficient mode of dispute resolution from which one seeks change.

This keynote contribution includes the thesis that we can help make arbitration become more efficient, even in today's complex world, if we rediscover the simplicity of arbitration. We need to go back to our roots and re-learn why arbitration was introduced; why it was, in the beginning, seen as

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[5]) *Former Chief Justice James Allsop*, Allsop at 39.

[6]) Queen Mary University of London and White & Case, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World, accessed on October 31, 2025 at <https://www.qmul.ac.uk/arbitration/research/2021-international-arbitration-survey/> (**"2021 QMUL Survey"**) at 5.

[7]) 2021 QMUL Survey at 5.

[8]) Queen Mary University of London and White & Case, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, accessed on October 31, 2025 at <https://www.qmul.ac.uk/arbitration/research/2015/> at 5.

[9]) 2021 QMUL Survey at 6.

such a streamlined process which could quickly resolve commercial disputes in a straightforward manner. If we root out unnecessary complexities and rediscover the power behind the simplicity of arbitration, we will see efficiency flourish again in our international arbitration community.

II. Rediscovering the Simplicity of Arbitration

What does rediscovering the simplicity of arbitration mean, exactly? This will be explained in practical terms, with reference to the life cycle of an arbitration.

A. Memorials

Let's begin with memorials.

Memorials used to be concise documents which explained the party's position. They were of modest length so that they could communicate well, bearing in mind that arbitrators were not necessarily lawyers but included "commercial people". This is no longer the case. As unfortunate as it is, it has become commonplace to see memorials taking the form of much less disciplined documents, written in rampantly free-flowing prose, spanning hundreds of pages, with piles and piles of footnotes at the bottom of each page. Memorials, mammoth in scale, and churned out by an army of associates, have now become par for the course in almost all arbitrations that we see today. They are position papers, the walls of the city which the opponent is challenged to assault. Much less thought is given to communicating simply and clearly, than to ensuring that every angle is covered off regardless of materiality.

In a fascinating article, Professor Jörg Risse described the burgeoning length of memorials in the following manner.[10]) Consider an arbitration in which 10,000 pages of memorials are filed. Assuming the arbitrator takes six minutes on average to read a page, and therefore reads ten pages an hour, reading the 10,000 pages of memorials would require 1,000 working hours – equivalent to over *six months* of concentrated reading for a full-time lawyer. And that is just to read the memorials *once* through, without taking into account the time he or she would need to refresh their memory of what had been read weeks or months earlier.

Professor Risse recognises that 10,000 pages of memorials is an extreme illustration, though he gives the example of some complex windfarm project

[10]) *Jörg Risse*, An Inconvenient Truth: The Complexity Problem and Limits to Justice (2019) Arbitration International 291 (**"An Inconvenient Truth"**) at 292–294, cited in Chief Justice Sundaresh Menon, The Complexification of Disputes in the Digital Age, 9 November 2021.

arbitrations.[11]) Having said that, Professor Risse was not even including the witness statements, documentary exhibits and legal authorities that accompany memorials and which we all behave as if the arbitrators must read in full. It is not uncommon for documentary exhibits to run into a thousand pages. Legal authorities will also often contribute another 1000 pages. Add those to the page count for witness statements and the text of the memorials, it is no stretch of the imagination for each of four main memorials to reach 2,500 pages in total. In one case, involving a disputed amount of less than US$10 million, the claimant filed about 4,500 pages of papers in an uncontested arbitration. Professor Risse's example of ten thousand pages of memorials is no exaggeration.

In any case, the point Professor Risse makes rises above the illustration he uses. Are we being realistic in expecting arbitrators to read prolix written materials, to remember what is read and to be able to apply all the materials in their decision-making?

This is the sad reality of unnecessary complexity and attendant inefficiency that bedevils the arbitral process today. Many of us here would admit to having previously used Artificial Intelligence ("**AI**"), or even a junior associate, to highlight key points and summarise memorials received from parties or from opposing counsel. The need for such summaries confirms the existence of the problem it addresses, namely, that memorials today are far too long for any human to reasonably read and digest. Much of this may be attributed to what Jan Paulsson has described as "*endless over-lawyering*",[12]) where counsel prepare memorials with the intention of leaving all options open as opposed to narrowing the case to specific points in issue.

What can we do to rediscover the simplicity of arbitration, particularly in terms of memorials? One simple way would be to keep memorials within reasonable limits through the imposition of page limits. This is not a new idea. It is noteworthy that default page limits play a prominent role in the Ad Hoc Rules implemented by Derains & Gharavi for their standing ad-hoc arbitration tribunal launched earlier this year. In recognition of the fact that the arbitral process has become besieged with inefficiencies and unnecessary complexities, the Ad Hoc Rules have imposed default page limits not only for pleadings, but also for witness statements and expert reports.[13])

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[11]) *Jörg Risse*, An Inconvenient Truth at 292, 294.

[12]) *Jack Ballantyne*, Paulsson warns of 'over-lawyering', *Global Arbitration Review*, 3 June 2024, accessed on October 31, 2025 at <https://globalarbitrationreview.com/article/paulsson-warns-of-over-lawyering> (**"Paulsson"**).

[13]) Article 22 of the Derains & Gharavi Ad Hoc Rules of Arbitration in force as of January 31, 2025 states that *"Unless otherwise agreed by the parties or directed by the Arbitral Tribunal, the Statement of Claim and Statement of Defense (and counterclaim(s) if applicable) shall not exceed 100 pages, and any Reply and Rejoinder shall not exceed 50 pages"*. Article 24 states that *"Unless otherwise agreed by the parties or directed by the Arbitral Tribunal, [witness statements and expert reports] shall be limited to 20 and 40 pages, respectively for the first round, and to 10 and 20 pages for the second round"*.

Is this too simplistic a solution or too blunt a tool to be accorded serious consideration? Arguably not. The power and wisdom of default page limits should not be underestimated. With such limits, counsel and parties will be forced to evaluate their case and pick their best arguments from an early stage of the proceedings, instead of adopting the usual kitchen-sink approach. While tribunals always have the discretion to grant an increase in page limits, the existence of defaults would set a baseline norm for parties. Such baselines would, over time, allow experienced arbitrators and arbitral institutions (if their users allow) to actively reset what the norm should be for the length of memorials. Not so that arbitrators can be lazy, but so that parties and lawyers can reclaim the opportunity for advocacy that memorials used to present, and so that arbitrators can be better assisted by counsel in understanding the case.

It's quite a simple point really: concise memorials communicate better. Succinct memorials are more persuasive. This is supposed to be a simple process where commercially-minded arbitrators are presented with a case in writing which they can understand and then apply their wisdom and experience to solving. There should be no prizes for building the haystack within which the needle is found.

It is recognised that everything is relative. There are arbitrations where there are so many issues that a 50-page memorial may not be sufficient. A one-size-fits-all approach is certainly not advocated. However, the prevailing norms for length of memorials have gone beyond the pale and something must be done to achieve a reset.

If norms are established for 'big', 'medium' and 'small' arbitrations, we will still need arbitrators to have the steel to enforce these norms. Arbitrators must, of course, have the flexibility to design the procedure appropriate for each case. It is precisely the abdication of this duty that has resulted in the burgeoning length of memorials. However, if we are to achieve a reset, we first have to give arbitrators a new norm to work from, and then we will need arbitrators to seriously apply their minds at the first procedural meeting to whether and to what extent deviation from page limit norms should be permitted.

At the GAR-LCIA roundtable held last year, the common sentiment amongst participants was that tribunals play a crucial role in imposing page limits, as there are no real incentives for counsel or parties to police themselves.[14]) In particular, it was remarked that from counsel's point of view, it is always easier to draft more than to draft less. Mark Twain's famous quote was also recited: *"I didn't have time to write a short letter, so I wrote a long one instead"*.[15]) Even if counsel may not wish to be verbose, they are sometimes

[14]) Report of the GAR-LCIA Roundtable (October 2024), accessed on October 31, 2025 at <https://www.lcia.org/News/gar-lcia-roundtable-recommendations.aspx> (**"GAR-LCIA Roundtable Report"**) at 12, 17 19–20, 33.

[15]) GAR-LCIA Roundtable Report at 27.

forced to by clients who think that more pages mean better quality. From the parties' point of view, no in-house counsel wants to restrict their lawyers to a certain page count as they rely on external counsel to know what is acceptable and effective.[16])

While the views shared at the roundtable are largely agreed with, it may be worth highlighting that perhaps there is one important point that has not been sufficiently emphasised. If we really think about this, there *are* incentives for counsel to strive for brevity. The role of each party and each counsel is to effectively communicate their case. We would do it better being succinct. Disputes lawyers love to win, so why don't we see that the prolix, rambling memorial takes us further away from victory, not closer? We would be so much more effective if we would bravely seek to deliver the well-drafted and focussed memorial rather than the verbose and lengthy tome. As Jan Paulsson put it, it is "*wonderful to answer a 300-page brief with a 30-page answer*".[17])

So, whether from the arbitrator's perspective or counsel's, page-limited memorials would be more efficient and effective. In the 2021 Queen Mary survey cited earlier, 61 % of arbitration users expressed that they would be most willing to do without unlimited length of written submissions, if that would make their arbitrations cheaper or quicker.[18])

Focussed and page-limited memorials are the first step to rediscovering the simplicity of arbitration. Setting default page limits to achieve a reset of our norms can be simple and powerful. This will go a long way in clarifying the issues in dispute and also, simplify the document disclosure process. This leads to the next point.

B. Document Disclosure

Document production has become overly costly and time-consuming in recent years, often with very little perceived benefit or effect on the outcome of the case. In a 2023 survey conducted by FTI Consulting and the ACICA,[19]) participants shared that more so than expert evidence and witness evidence, they were likely to spend greater than 20 % of the value in dispute for the preparation of documentary evidence.[20]) This is worrying, especially when one

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[16]) GAR-LCIA Roundtable Report at 10, 19–20.

[17]) *Jack Ballantyne*, Paulsson.

[18]) QMUL 2021 Survey at 13.

[19]) Australian Centre for International Commercial Arbitration.

[20]) FTI Consulting and the Australian Centre for International Commercial Arbitration, 2023 Evidence in International Arbitration Report, accessed on October 31, 2025 at <https://acica.org.au/evidence-in-international-arbitration-report/#:~:text=The%202023%20Evidence%20in%20International%20Arbitration%20Report%20indicates%20that%20expert,representation%20and%20other%20key%20trends> (**"2023 Evidence in International Arbitration Report"**) at 30.

considers the oft-occurring mismatch between the volume of material presented to the tribunal, and the volume of material that actually motivates the tribunal's determinations.[21])

Let's begin with the Redfern Schedule. The Redfern Schedule was designed in the year 2000, as a tool for addressing disputed requests for the production of documents. In that case, counsel for the parties, three major oil companies, had spent several months in correspondence and discussions about their respective requests for document production, with the picture changing constantly as some requests were met, others were withdrawn, and others still were added to each party's lists. Finally, when the parties' counsel had done all they could to reach agreement, the tribunal was given an agreed bundle of emails and memoranda and asked to rule on the remaining disputed requests. This meant that the tribunal would have had to examine the ebb and flow of the parties' communications to find out what precisely were the requests on which it was expected to make a ruling. This was somewhat unrealistic but also completely inefficient.[22])

Accordingly, it was proposed that each requesting party should draw up a schedule showing in the first column what documents it wanted to seek production of, and in the second column, why these documents were relevant and material to the case. This schedule would then be sent to the opposing party who would then state, in the third column, its objections to production of the documents requested. The schedule would then be forwarded to the tribunal for its decision on the disputed requests.[23]) In this manner, the Redfern Schedule was conceived as a useful tool to make the document production exercise efficient.

This was the simplicity of arbitration on display. There was a complicated set of communications that the arbitrators were asked to review, and the arbitrators came up with a simple solution. Let's formulate a table which would *succinctly* set out requests and responses to document production.

It can be assumed that the tribunal which conceived the Redfern Schedule back in 2000 would be distressed by what has become of Redfern Schedules today. Instead of the narrow columns naturally forcing lawyers to be concise, counsel have insisted on being verbose and their entries in the narrow columns run for pages. This is perhaps why the Stern Schedule – which really is just a Redfern Schedule turned on its side – was created. But the problem was not the format of the Redfern Schedule or that the columns were narrow. That format was supposed to incentivise brevity.

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[21]) 2023 Evidence in International Arbitration Report at 38.

[22]) *Nigel Blackaby*, *Constantine Partasides* and *Alan Redfern*, Redfern and Hunter on International Arbitration (OUP, 7th Edition, Feb 2023) (**"Redfern and Hunter"**) at 6.100–6.102.

[23]) *Nigel Blackaby*, *Constantine Partasides* and *Alan Redfern*, Redfern and Hunter at 6.100–6.102.

Aside from issues with Redfern Schedules, document production is frequently criticised as a major cost of arbitration. It is often a time-consuming process which takes up a significant bulk of the procedural calendar. This has been further aggravated in recent times with the proliferation of electronic document production. Yet, in spite of this lengthy and expensive process, the benefits of document production are not always immediately apparent. A smoking gun is seldom found. In view of this, why is it that parties and counsel still get caught up in protracted rounds of document production today?

One reason is that counsel have a natural desire to be thorough, to leave no stone unturned. This results in numerous requests, many of them overly broad. Another reason is that some parties engage in guerilla tactics and procedural abuse, seeking to delay proceedings by making hundreds of requests. This is often justified by a misguided attempt to say that above all, parties want to win; as if this validates guerilla tactics or justifies waste of time and costs even if there is a positive result.

As for the arbitrators who find themselves presented with numerous document production requests, being diligent people, they inevitably feel that they have to go through each one substantively, resulting in great inefficiencies. What is to be done, then?

There is a need for a fundamental shift in the attitude towards document production. A renewed focus on rediscovering the simplicity of arbitration and on rediscovering how arbitration was supposed to function is encouraged. Document production used to be far more restrained. Influenced by European procedural norms, the starting point was that parties were expected to prove their case or defence with the documents they had. Certainly, they would have to decide whether to start arbitration proceedings or defend arbitration proceedings on that basis, not on the basis of what documents they might hope to find during document production. The inclusion of document production in arbitration proceedings generally was a good thing. However, the putative commercial person would not have thought arbitration was an avenue to ransack the other side's files to find material to build a case.

There are a few things we can do. First, we need to re-educate ourselves as arbitration practitioners. We need to realise that it is just a waste of time and costs for us to engage in extensive document production exercises. We also need to realise that we are much more likely to have the tribunal's full attention if we have a small number of requests, each of which are narrowly focused. Simplifying our approach to requesting document production will make us more effective. We need to be brave enough to learn this and to teach this to the next generation of arbitration counsel.

Secondly, we should welcome limitations on document production. Whilst a blunt tool, arbitrators should consider limiting the number of document production requests. If the arbitrators know the case and hear counsel briefly on how many document production requests are needed, a fair number can be stipulated for both parties to abide by. Thirdly, tribunals should consider

putting page limits on Redfern Schedules. If we put page limits on written submissions, why would we not do the same for Redfern Schedules which are essentially a submission on document production. Fourthly, tribunals could consider being more stringent about the amount of time that they will allow in the procedural calendar for the document production phase.

While arguments against each of these suggestions can immediately be identified, serious efforts to improve the efficiency of arbitration, will enable experienced arbitrators to use deploy of these measures in the right circumstances to limit the excesses of document production.

C. Written Opening Submissions

Next, let us consider the written opening statement submitted just before the evidential hearing. Sometimes this is in the form of a written submission. Other times, it is in the form of a powerpoint presentation that the arbitrators are taken through orally at the start of the hearing.

Far too often, such written openings are a wasted opportunity. Instead of being used as a piece of written advocacy that draws the tribunal's attention to the key points in one's case, written openings are frequently prepared without much thought and end up being a cut-and-paste of vast chunks of memorials over which the tribunal has already laboured. While this is wholly inefficient, it is regrettably still the prevalent practice today. Tribunals have time and again been disappointed by opening submissions that are all too often just a re-run of the arguments in the memorials, with no focus on the key issues.

Instead, written openings should be pitched at the level of an exchange between highly informed persons. It should be a discourse between people who have already spent hours studying the papers. The opening should not start with "once upon a time". Instead, it should be the final chapter, the climax of a novel. Necessarily, it would be direct and to the point, and waste no time repeating what has already been said in the memorials.

The antithesis to an impactful opening submission is the lazy powerpoint. A rambling presentation that tries to capture every single point in the memorials without highlighting the main points on which the case will turn.

We would be rediscovering appropriate simplicity in arbitration procedure if we used oral and written openings to highlight key points and to articulate the main thrust of a case or defence. Achieving this is easy with page limits on written openings and parties being given a shorter amount of time for oral openings. That is much more like the simple and straightforward model that arbitration was supposed to be.

D. Post-hearing Briefs

There is an interesting article by Campbell Walker and Gilbert Walker titled, *"International Arbitration: Return to Eden?"* There, the authors say that the practice of filing post-hearing briefs came about in the mid-1990s.[24]) However, it was likely not envisaged that post-hearing briefs were originally intended to run into hundreds of pages like they often do today, followed by lengthy reply briefs.

Often, these post hearing briefs restate a party's entire case, repeating what was in the memorials. That should not be the case. Post-hearing briefs should be limited to addressing the evidence that has been seen for the first time at the hearing, how it supports a party's case or how, despite first impressions, it does not damage a party's case. Perhaps parties doubt that arbitrators have read their lengthy memorials from before the hearing and that is why they insist on restating their entire case in the post-hearing briefs. However, if we keep memorials short and arbitrators demonstrate at the hearing through intelligent questions that they are fully across the materials in the memorials, parties can be more confident in limiting their post-hearing briefs to addressing the evidence of witnesses who testified at the hearing and the questions that the tribunal posed. That would be much more efficient and would accord with keeping the arbitral process simple and straightforward.

It has been suggested that tribunals should not allow or require post-hearing briefs except where it is truly necessary to pull one's case together. As one author put it, *"just because one side asks for post-hearing briefs, that does not mean that the arbitrators should permit them. Arbitrators frequently do so in order to be fair and to give parties every opportunity to present their case. However, by then, the parties will already have had substantial opportunities to present their case, and they are not entitled to one more shot".*[25])

If post-hearing briefs are allowed, they should be page-limited, and their scope clearly defined by the tribunal. Ideally, that scope would be only to address the oral evidence and specific questions that the tribunal have. A growing number of tribunals do this, often to good effect.

E. Utilising Tools to Help Achieve Efficiency

We have now walked through the key stages of the arbitral process. Some thoughts have been shared about how we can help ourselves rediscover the simplicity of arbitration and reject unnecessary complexity within the main architecture of an arbitration. These steps will not only make the arbitration

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[24]) *Campbell T. Walker* and *Gilbert Walker*, International Arbitration: Return to Eden? (2008) New Zealand Law Journal 301 (**"Walker"**) at 302.

[25]) *David W. Rivkin*, Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited (OUP 2008, Volume 24, Issue 3) at 384–385.

more efficient, they will also allow parties to be more effective in presenting their cases. Before concluding, a few words will be said about two vital tools that will help us be more efficient throughout the arbitral process. The first is active case management and the second is the use of technology.

First, on case management, various things that arbitrators need to do to make proceedings more efficient have throughout been addressed, some more difficult than others. Arbitrators will have to have some steel in them to make these directions and that really is the key to effective case management. Indeed, the discretion of an arbitral tribunal has been described as a *"one of the foundational elements of the international arbitral process"*.[26]) The principle that an arbitral tribunal may conduct the arbitration in such manner as it considers appropriate is a trite one. It is not only enshrined in the UNCITRAL Model Law but is also a mainstay in every institution's arbitration rules.

This is the epitome of the simplicity of arbitration. Arbitration was supposed to be a simple process where the rules essentially helped parties to commence arbitration and select their panel. Then, the arbitrators would design a straightforward process for the case. This quintessentially requires active case management guided by an early and accurate understanding of the case.

Arbitrators will also need to eschew the litigation mentality of exercising discretion only where necessary and instead take the reins in managing the arbitral process.[27]) Initial pleadings like Requests or Notices of Arbitration, and the Answers, need to be studied. There needs to be a real discussion about the issues at the first procedural meeting. Arbitrators may need to help parties to frame the issues and to indicate early to the parties which issues deserve more attention. Only then will the Procedural Calendar and Procedural Order No. 1 be a truly effective output of active case management.

With that said, effective case management should not be bandied around as the magic antidote to all of arbitration's ills. In fact, it is possible for case management to be counter-productive and for it to introduce unnecessary complexity and inefficiency in arbitral proceedings. For example, active case management may result in a proliferation of protocols to address a host of issues such as the overall framework of the proceedings, confidentiality, document disclosure (including e-discovery), and the hearing. The proliferation of such protocols would open up further avenues for parties to get caught up in satellite disputes. It would be a pity if these protocols, which are meant to aid parties in resolving the substantive dispute, end up luring parties into needless

[26]) *Gary B. Born*, International Commercial Arbitration (Kluwer Law International, 3rd Edition, 2021) at §15.03.

[27]) *Alexander Baykitch* and *Edmund Bao*, A Return to Innate Arbitration Culture: Implications from a Cost and Efficiency Perspective (OUP, 2019, Volume 35, Issue 1) at 66.

disputes about *how* to arbitrate and detract from the task of actually resolving the dispute.

Proposing active case management as a way to promote efficiency in arbitration also presumes that tribunals are able to make the right decisions on case management. Where an arbitrator, learned in the law but inexperienced in procedural matters, makes all the wrong case management decisions, this could be a catastrophe for the arbitral process. For instance, an arbitrator caught up with due process paranoia may end up acceding to every request by the parties however unreasonable, so as to avoid being the subject of natural justice complaints. Such an arbitrator would also be completely ineffectual in curbing abuses of the arbitral process.

Last but not least, a word will be said about technology. Arbitration has a track record of being at the forefront of adopting technology. And we should continue to uphold this ethos. We take it as a given today that arbitral hearings would have hearing room technologies such as real-time transcripts and videoconferencing, but we should not forget that many of these tools gained traction in arbitration before local courts adopted them.

This leads to the topic of Artificial Intelligence (AI). There has been a steady uptick in the use of AI in arbitration; arguably more so than in local courts. Many of us would be familiar with how AI is already supporting lawyers in performing traditional tasks. It is becoming an invaluable tool in areas such as legal research, drafting and preparing summaries. In fact, lawyers are increasingly relying on a variety of platforms to perform legal tasks that were once time-consuming and resource intensive.

Take, for example, the area of document review. AI platforms have revolutionised the process of document production through the use of predictive coding, particularly in identifying documents responsive to a document request or tribunal order. Instead of the traditional method where a lawyer would have to manually review each and every document in the case, a lawyer need only review a sample set of documents on the platform and mark them as "relevant" or "not relevant". Using machine-learning algorithms, the platform then identifies patterns in the marked documents and applies them to the wider set of documents, thereby reducing the number of documents that need to be reviewed manually. Using AI in this manner would obviously increase efficiency in arbitration.

Of course, the use of AI could quickly result in unnecessary complexities and inefficiencies if not properly managed. It can be a source of much satellite dispute. Guidance is needed and some arbitral institutions[28]) are already publishing guidelines on the use of AI in arbitrations.

We need as a community to harness this powerful tool for efficiency by coming up with guidance on crucial issues such as (a) whether the use of

[28]) For example, the Stockholm Chamber of Commerce (SCC) Arbitration Institute and the Silicon Valley Arbitration & Mediation Center.

predictive coding must be disclosed to or agreed with the opposing party; (b) whether the user of predictive coding is subject to any obligation to ensure its reliability, and the consequences for failing to do so; and (c) whether the user of predictive coding must disclose how many documents were reviewed manually for purposes of machine-learning, and the accuracy level of the platform used. Without such guidance, it will not be long before parties get caught up in protracted satellite disputes over the algorithms and methodology used in predictive coding. It would be a tragedy if what could be a significant tool to promote simplicity in arbitration, instead brings unnecessary complexity to the process.

III. Concluding remarks

Arbitration was initially conceived as a cheaper, quicker means of resolving commercial disputes. It was marked by speed, affordability, simplicity and practicality. It also promised to offer flexibility and efficiency that local courts lacked. Unfortunately, arbitration has strayed from its simple origins. As one commentator put it: *"Having started life as a sleek but risky sports-car, international arbitration has come to resemble a cumbersome charabanc"*.[29]

We need to rediscover the simplicity of arbitration. We need a generation of brave and decisive arbitrators who will impose page and time limits, and weed out unnecessary complexity from arbitral procedures. We need a generation of enlightened arbitration counsel who will know that less is more, that short memorials persuade better than the rambling thesis and that focusing on the tribunal's questions in post-hearing briefs is more effective than repeating their entire case yet again. We need, all of us, arbitrators and counsel, to rediscover the simplicity of arbitration.

[29]) *Campbell T. Walker* and *Gilbert Walker*, Walker at 303.