

Editorial 90.2

In this issue, Professor Doug Jones writes about ‘*Flexibility in International Commercial Dispute Resolution*’, while Dr Monique Sasson explores whether there is a ‘*Usable “Civil Law Approach” to Document Production in International Arbitration*’. I am grateful to these two eminent commentators of the field for their contributions to the *Journal*.

Drawing on his extensive arbitrator experience, Professor Jones sets out his views on what he considers to be an effective management of arbitration process on a number of issues, including document production, management of experts and witnesses. For Doug, the key element which distinguishes international arbitration from court processes is flexibility. He notes that ‘*flexibility during the arbitral process and the need to adjust the process within the bounds of predictability and fairness*’ is necessary for tribunals ‘*to handle the exigencies inevitably arising in any arbitration*’.

On her part, Dr Sasson focuses on document production in international arbitration. She looks through various editions of the IBA rules on the taking of evidence, starting from the inaugural rules in 1983, and she offers a wonderful overview of the evolution of the practices on document production in the last forty years. What this evolution shows, as Dr Sasson points out, is the ‘*common law’s triumph in overtaking the document production process*’. For Monique, while this triumph should be accepted as ‘inevitable’ now, civil law-inspired practices can add ‘sensitivity’ to the process of document production which can ‘temper’ some common law excesses.

Zooming out from the specifics of these two contributions and their practical proposals, it is clear that both commentators share the same overarching concern, namely how to ‘*make arbitration great again*’ (I hope Doug and Monique will excuse my pun). They are not alone in their concern. There has been a growing sense of dissatisfaction among commentators and users of international arbitration with inefficient, yet common, practices of process which we continue to follow in international arbitration. Another commentator, for example, has noted the arbitration procedure has become ‘highly legalistic’, set out in ‘a vast range of statutory and case law material, international conventions, soft law declarations of best practice [and] shifting and competing juristic opinion’, converging with that of ‘top-end court litigation’.¹ Similarly, Christopher Vadja contributing to this *Journal* last year on ‘What Makes a

¹ Professor Neil Andrews at his 2016 Roebuck Lecture.

Good Arbitrator' noted how important it is '*that arbitrators "get to grips" with an arbitration at an early stage, particularly where the arbitration is complex, and do not simply allow the parties to make the running*' adding quickly that, sadly, '*this is not always the case*'.

There is a growing sense of inevitability that, as disputes become more complex (or at least they are often presented as such by counsel), the arbitration process is also becoming more complicated. Indeed, counsel tend to make more procedural requests and applications that it used to be the case (e.g., determination of preliminary matters, security for costs, applications to exclude evidence, several requests for document production, introduction of new claims and counterclaims), while many procedural issues often become unnecessarily contentious (e.g., time-tables, mode of hearing, hearing bundles).

Against this backdrop of growing dissatisfaction, many commentators have presented some thoughtful proposals aiming to increase the efficiency of arbitration proceedings. For example, David Rivkin has unveiled the Town Elder rules which focus on the resolution of matters on an issue-by-issue basis, while Lucy Reed has proposed that the procedural timetable includes an in-person meeting (a 'retreat') for the tribunal to study the file with the goal of arriving together at targeted directions to the parties for the hearing. The proposals presented in this Issue by Doug and Monique will be added to the list.

The main question, of course, is whether these thoughtful proposals for procedural innovation will find their way to practice.

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