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A New Contract Between Arbitrators and Parties

We all know about the challenges arbitration faces today: Parties complain of the time and cost. Concerns have been raised about arbitrator disclosures and conflicts and about party conduct that is abusive. Until now, much of the discussion of the problems and criticism has been confined within the arbitration community. We spend many conferences like this discussing them and proposing solutions. Some of them help; others don't. Some solutions are followed by many; others are ignored.

Recently, however, the criticisms have become more public and intense, though also intensely political. As we know, criticisms of the international arbitration process have become a stumbling block in the TTIP negotiations. While the IBA and others have worked to correct many of the misstatements made by the opponents of investment treaty arbitration, the debate about international arbitration generally, not just investment treaty arbitration, is now much more public. And at the same time, parties who have experienced international arbitration continue to have their concerns, as the recent White & Case Queen Mary study showed.

In the past, I have made various proposals to deal with these concerns; many of them have been based on the belief that the problems we face can best be solved by returning to basics. In my Town Elder Model, I urged that arbitrators and parties had to start every case with a blank piece of paper and, while applying their past experience in international arbitrations, use only the procedure necessary and appropriate for that case. In my Seoul Arbitration Lecture last year on Ethics in Arbitration, I pointed out that parties and their counsel know right from wrong and that the core ethical principles of diverse legal systems are very similar and do not provide a basis for, for example, misstating the facts in the record, misrepresenting legal decisions or withholding documents that are covered by a document request without disclosing that fact to the other side and to the tribunal.

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Today, I want to embrace and urge that same philosophy but in a different context. I believe that many concerns about international arbitration can be resolved if we focus more on what the parties and counsel expect from the tribunal and what the tribunal expects from the parties and their counsel. We need a new contract between the arbitrators and the parties that will establish these expectations from the start. It should establish fundamental principles from which more specific behavior can be grounded. My goal today is to describe many of those principles and terms that should be included in such a contract. I hope that, from here, the arbitration community – institutions like the HKIAC, key players like the IBA Arbitration Committee, the corporate counsel community and leading practitioners – can develop such a contract setting forth the terms of engagement of the tribunal members that could actually be signed at the commencement of each case. The contract could also be mutual; it could focus not just on the arbitrators' commitments but also the parties'. In this speech, I will focus on the arbitrators' side of it, and touch briefly at the end on what arbitrators may want parties and their counsel to commit to in such a contract. It is clear that for an arbitration to be successful, both sides to the contract must act reasonably and fulfill their commitments to the other.

Before I do so, let me deal first with an argument that I view as largely an academic exercise. Much has been written on whether arbitrators are hired by the parties or by the institution (except of course in ad hoc cases). There can be no question that ultimately arbitrators owe their duty to the parties who have engaged them, whether directly or through an institution. My proposal reflects this fact and would make moot this argument by creating a contract directly between the arbitrators and the parties. This contract can be separate from the terms of appointment that many institutions now have their arbitrators sign, or it can embody those terms but include more specific commitments by the arbitrators to the parties themselves.

It can be fairly simple to describe what the parties expect of their arbitrators. They are hired to resolve efficiently the dispute between the parties. To do so,

- Arbitrators must of course be independent and impartial and fully disclose any facts that may be relevant to that determination.

- Arbitrators must become fully versed in the factual record of the case and the relevant legal provisions and decisions.

- They must bring their experience to bear by proposing and then applying procedures that are appropriate for the case, that are cost-effective and that will resolve the case as efficiently as possible. (I note that this requirement is written into many national arbitration laws, such as the Hong Kong Arbitration Ordinance, section 46(3)(c).)

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- They must carefully consider procedural issues as they arise and respond promptly based upon this knowledge of the record.

- They must conduct the hearing attentively and make sure that the evidence presented and the issues argued will assist them as effectively as possible in coming to their decision.

- They must issue an award in a timely manner that meets the parties' expectations and resolves the issues that have been put to them. That is, after all, why they have been hired in the first place.

I think there can be little debate that these are the core expectations of the parties. I believe that an implied contract with these terms exists now, but putting these commitments and others into written terms of engagement will sharpen the attention needed to make sure that they are fulfilled.

Unfortunately, too often the parties' experience does not meet these expectations, and arbitrators are in breach of these obligations. Let me focus on a few of the problems that routinely arise.

- **Arbitrators must become fully versed in the factual record of the case and the relevant legal provisions and decisions.**

Too often, parties feel that arbitrators have not demonstrated sufficient knowledge of the case when they are called upon to make decisions on procedural issues, such as document production, bifurcation or hearing a preliminary issue. Perhaps the arbitrators are waiting to read the submissions until just before the hearing, or perhaps the parties have not yet provided them with sufficient information. For similar reasons, arbitrators often are timid in dealing with disruptions to the schedule, such as late requests for extensions, late submissions of evidence or document production, or unsolicited submissions. These of course are problems caused by the parties, but arbitrators must be prepared to deal with them effectively.

Even at hearings, arbitrators often appear insufficiently knowledgeable about the record. As an advocate, I hate making an opening statement to a tribunal that asks no questions. If they have thoroughly read our papers and the opposition's, they must have some questions about certain aspects of them or wonder how to synthesize differing arguments or factual assertions made by the opposing parties. Moreover, a lack of confidence in the record often prevents tribunals from exercising control over the hearing by excluding irrelevant evidence or telling counsel when they know that factual or legal

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assertions are not accurate. It also prevents the tribunal from offering guidance on what issues and evidence it most needs to hear – more on that later.

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Arbitrators too often simply follow a routine schedule provided in their Procedural Order number 1. Or they blindly follow the schedule proposed by the parties' counsel, which may or may not reflect the actual needs of the parties. Arbitrators also do not think about the costs effects of their decisions. It is easier for tribunals to let the parties have what they want and then sort through what is important at the hearing or later. Document requests are granted without considering carefully whether the request meets the standards of the IBA Rules or other appropriate standard, what the cost will be in producing them – particularly now in the age of electronic discovery -- or whether there are ways to limit the production to achieve the same purpose. Arbitrators very often ask for voluminous sets of exhibits to be copied again and brought to the hearing so they do not have to travel with them – and then we watch as they are barely opened or not annotated as the hearing progresses.

Similarly, arbitrators rarely consider the costs of post-hearing briefs. If arbitrators have not come to some conclusions after having read voluminous written submissions and having sat through a week or two of the hearing, they have not been paying careful enough attention. They have not prepared for the hearing, and they have not asked the right questions of the parties and of the witnesses during the hearing. Nevertheless, they ask parties at that stage to write complete post-hearing briefs on all of the issues in the case, which can cost hundreds of thousands of dollars. They do so in order for the parties effectively to do the tribunal's job: pulling together the relevant evidence in a form that can simply be plugged into the award.

- **Arbitrators must conduct the hearing attentively and make sure that the evidence presented and the issues argued will assist them as effectively as possible in coming to their decision.**

A well-prepared tribunal can do this, and as described in a moment, provide guidance to the parties on the issues and evidence on which the hearing should focus. As noted, a well-prepared tribunal will also be more confident in excluding irrelevant and immaterial evidence. The fear held by many arbitrators of the award being overturned because the tribunal exercised control is misplaced. Courts have made very clear that the

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parties have vested in tribunals the power to exercise such control, and the rules of many institutions have been largely rewritten over recent years to make clear that the parties have ceded that control through their agreement to conduct arbitration under those rules.

- **Arbitrators must issue an award in a timely manner that meets the parties' expectations and resolves the issues that have been put to them.**

This commitment – at the core of the tribunal's duties, the one key thing the parties have hired them to do – is unfortunately the one that arbitrators most often fail to meet. Too many arbitrators appear to believe simply that they can take as long as they wish to issue the award; they appear to turn to drafting when their schedule is not otherwise occupied. I am waiting right now for awards in two cases more than 18 months after the hearings were concluded, and this is not unusual. We all know that many cases often take longer. In the latest White & Case Queen Mary Survey, lack of speed was cited as one of the top facts that the participants would change about arbitration.

Moreover, when arbitrators do not even deliberate until months after the hearing is completed, how can they possibly recall the record as well as they knew it at the hearing? When an arbitrator is drafting an award a year or more after the hearing, either much time is being spent redundantly in refreshing his or her knowledge of the record or the arbitrator is simply paying less attention to it. Neither alternative is a good one.

So how can we cure many of these ills? I believe that a new contract between the arbitrators and the parties, based on mutual trust, professional integrity and the objective to resolve the dispute as effectively and efficiently as possible, would focus both sides on how to achieve their goals and to serve the system of international arbitration. Let me now set out some of the key arbitrators' commitments in that contract and touch briefly on how they could meet those commitments.

As I said, the contract should also include commitments by the parties, but today I will focus on the arbitrators' side of it.

Most importantly, arbitrators have to commit that they have sufficient time in their schedule to conduct the case efficiently and – here is a key point – that they will not in the future schedule themselves so fully that they do not have time for the work to be done on the case. This does not just mean time having the time to slot in a week's hearing and perhaps a procedural conference some time soon after appointment. This means having enough time to read all submissions promptly when they are made, so that if procedural issues arise, they can be determined based on actual knowledge of the case at the time. It means having sufficient time for some pre-hearing deliberations by the

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arbitrators, so that the hearing itself can be focused on the issues that are truly relevant to their decision. It means having and scheduling enough time after the hearing to deliberate and to write the award. Frankly, too many arbitrators schedule themselves so fully that they move from hearing to hearing, week to week, and never leave themselves time to undertake their other responsibilities (reading the papers and particularly deliberating and writing the award). Arbitrators now commit to sit in their chair through a hearing, but they also must commit to sit in their chair in their office, or wherever they want to work, to write the award afterwards. Deliberations and award drafting cannot simply be fit into the free days and weekends that happen to occur between hearings in other matters.

I will give some examples in a few minutes of how this might occur, but before leaving this subject I must add that arbitrators who have dozens of cases simply cannot reasonably commit that they have time to devote sufficient attention to each matter, and they should turn down new appointments when that is the case. Arbitrators often justify taking on new matters even when they are too busy by saying that rejecting the appointment would deprive a party – or an institution – of its choice of arbitrators. I strongly disagree with such an assertion. Once appointed, each arbitrator owes a duty to both parties, and to any institution administering the case, and if he or she cannot fulfill that duty, he or she must politely decline the appointment. I have done so on more than a few occasions. Excessively busy arbitrators also justify nevertheless taking on new cases because some cases settle. That is of course true, but the possibility of settlement can be dealt with by applying appropriate cancellation fees; it should not justify taking on a new matter that will impact the arbitrator's ability to fulfill his or her obligations to an already existing matter.

Many institutional terms of appointment and disclosure forms now ask arbitrators to confirm that they have the time available to handle the new matter. These efforts should be sharpened by also requiring, as part of this new contract, that each prospective arbitrator disclose the days or weeks in the next year or two that are already then committed to other cases or other obligations that make them unavailable. However, current terms of appointment generally do not contain the forward-looking and equally important commitment that the arbitrator will not take on new appointments that will conflict with his or her responsibilities to the case to which he or she is then being appointed. Both of these provisions are important in the new contract.

These general obligations can be reinforced by specific commitments focused on the core expectations as I have described them above.

- **Arbitrators must become fully versed in the factual record of the case and the relevant legal provisions and decisions.**

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While it should go without saying, the contract should include a provision that the arbitrator will read each submission in detail when it is made. Waiting to read the papers until shortly before the hearing makes it impossible to deal with procedural issues as they arise. In institutional arbitration, the parties might consider asking arbitrators to submit time records on a more regular basis so that the institution can determine if in fact the arbitrator is staying current as submissions are made.

- **Arbitrators must bring their experience to bear by proposing and then applying procedures that are appropriate for the case, that are cost-effective and that will resolve the case as efficiently as possible**

- **They must carefully consider procedural issues as they arise and respond based upon this knowledge of the record.**

Many of these obligations can most easily be met by a carefully considered and more detailed procedural schedule, fixed at the outset of the case.

- The arbitrator should commit should hold an early procedural conference after constitution of the tribunal. In that conference, the tribunal should ensure that they have enough information to decide the case. If the pleadings have been cursory, the tribunal can ask the parties each to do a more extensive presentation of their case so that there can be a proper discussion of the appropriate, efficient procedures for the case.

- The arbitrators can commit that at that procedural conference, the tribunal will create a procedural schedule that focuses on efficiency and establishes all procedural steps, including all hearing dates. Once established, the tribunal should stick to that schedule.

- That schedule should potentially include consideration of preliminary issues that might be resolved in a limited hearing and that might dispose of some or all of the case. Tribunals are using this technique more often, but it is still under-used. A party should not have to submit evidence on potential damages, for example, which can be quite extensive and often requires expert testimony, if it had a valid contractual or legal basis to avoid such damages. One of the advantages we have over the courts is that a court can only issue summary judgment if there is no issue of fact. We can issue a decision on a preliminary question and decide some or all of the case even if there is an issue or fact that can be resolved in a shorter hearing than if all the evidence is heard. And when there is a pure issue of law or contract interpretation, a hearing might not even be necessary.

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- Arbitrators should not be afraid to push back on a schedule that the parties have decided on if the arbitrators think that schedule is not necessary, either because there might be a preliminary issue or because it simply is too long a schedule. If the tribunal requires the attendance at the procedural conference of the actual parties and not just their counsel, it is often much easier to achieve this.

- As described in a moment, the procedural schedule should include dates for the tribunal's deliberations, both before and after the hearing.

- The arbitrator should also commit that the tribunal will assist the parties, if they wish, in investigating alternative means to resolve their dispute.

- **Arbitrators must conduct the hearing attentively and make sure that the evidence presented and the issues argued will assist them as effectively as possible in coming to their decision.**

To meet this commitment, the contract can provide that the procedural schedule will include specific dates on which the arbitrators will deliberate throughout the case, including prior to the hearing. Deliberations should begin after receiving the parties' initial submissions. If there are two rounds of prehearing submissions, a deliberation between the two rounds -- usually by conference call -- can help the parties focus the next round of submissions and make sure that issues the tribunal considers important are adequately briefed in the next round. Another deliberation should be scheduled between the close of final submissions and the hearing, in person or more likely by phone or video, so that the tribunal can discuss what they have read, their view of the issues and on which issues and evidence the hearing should best be focused. If possible, this deliberation should be held sufficiently in advance of the hearing that the tribunal can provide guidance to the parties on how to focus the hearing. At the very least, the tribunal should schedule to meet the day before the hearing to discuss the case in detail. Not to be too skeptical, but these prehearing deliberations can not only help focus the hearing, but simply make sure that each arbitrator has fully read and absorbed the submissions.

Arbitrators are often too cautious about providing guidance to the parties before rendering their decision; they worry that any comments will be seen as prejudging the matter and might be a basis for overturning the award. This fear is misplaced. Courts simply have not so ruled. Moreover, the parties' agreement to the procedural schedule would make it impossible for them later to make this argument. In any event, it is not pre-judging a case, because the parties have already submitted so much of their case prior to the hearing. So it is perfectly appropriate for the tribunal, based on a preliminary view of what they have already read, to identify the issues on which the parties should focus in

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the hearing. (One federal judge in my home district in New York issues preliminary opinions prior to any trial that she is hearing without a jury, after receiving submissions similar to what we ordinarily provide in arbitrations. As an advocate, I would like that procedure in an arbitration. If I am losing, I would like to know what I need to do to change the tribunal's mind; if I am winning, what I should do to reinforce it. In any event, it focuses the hearing on what the tribunal considers important.)

With respect to the hearing itself, each arbitrator should commit:

- To pay complete attention, to not do emails, Sudoku puzzles or engage in other distracted behavior.

- To engage with the parties' counsel and witnesses in a meaningful manner.

- To reign in inappropriate counsel behavior during witness questioning and argument, including irrelevant questions and arguments that are not supported by the record or the case law.

- To maintain respect and neutrality in questioning experts and witnesses.

- To ensure that the parties' respective allocations of time, if so agreed, are respected and enforced.

- **Arbitrators must issue an award in a timely manner that meets the parties' expectations and resolves the issues that have been put to them.**

As I have described, this is perhaps the most important commitment and the one that is most often breached. To meet it, the arbitrators' contract should commit that they will schedule at the beginning of the case both the date by which an award will be rendered and also precisely when the arbitrators will deliberate after the hearing in order to issue the award by that date. Leaving such scheduling until after the hearing – as always occurs now -- necessarily causes an extended deliberation schedule, because of schedule conflicts and other commitments that each arbitrator will have booked in the meantime. Moreover, locking in the dates then will make it easier for the arbitrator to comply with the general obligation I mentioned earlier not to accept new matters that may cause him or her to be unable to fulfill the arbitrator's duties in this case. Setting even the deliberation dates well in advance enables the arbitrator to know what will be required of him or her in the case.

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Arbitrators should also determine at the beginning of the case what kind of award the parties desire. They may prefer, for example, that the often-extensive descriptions of the procedures and arguments advanced by the parties –with which the parties are already aware – be more narrowly summarized.

It is critical that this deliberation schedule include at least the day or two, depending on the size of the case, immediately after the close of the hearing. Even if there will be post-hearing submissions, deliberations then will allow the tribunal to shape the memorials to only what it needed to help them make their decision. (For the reasons mentioned earlier, there is certainly no basis to fear that offering preliminary views or guidance at that stage could be considered pre-judgment.) Too often, arbitrators fly off immediately after the hearing, making it impossible to deliberate any time soon and failing to take advantage of them all being in one place while the evidence is fresh. I can say that as a counsel, when you have conducted a fantastic cross-examination or replied thoroughly and effectively to the opponent's arguments, you want that memory to be fresh on the minds of the arbitrators when they are deliberating; that is simply not possible when the deliberations occur weeks or months later.

Besides the day following the hearing, the schedule should include, for example, a second deliberation a few weeks later (or promptly following any post-hearing submissions) to see if any views have changed on further reflection and review of the record; another deliberation on a fixed date to review an initial draft of the award – this also has the benefit of ensuring that the Chair or other arbitrators drafting a portion of the award will set aside the time to undertake the drafting before that date -- and a final deliberation if necessary to confirm agreement to the final award before the agreed issue date. As mentioned, all of these dates should be built into the original procedural schedule to lock them in, so that the arbitrators do not schedule conflicting commitments and so that the parties can have confidence when they are going to receive an award.

A few arbitrators have committed that, when they are Chair of a tribunal, they always leave the week following the hearing unscheduled to begin writing the award immediately, when the record, the evidence and the arguments are all fresh. Such a requirement might make sense in any contract to be signed with a tribunal Chair.

If a jurisdictional issue or other preliminary issue is raised, the schedule should similarly provide for deliberation and decision of that issue. For jurisdiction, parties and arbitrators should consider in those circumstances a technique we have used with success: The tribunal agrees to issue by a certain date a thumbs up/ thumbs down decision, while setting the procedural schedule for the remainder of the case already at its outset. If the decision is that there is no jurisdiction, the tribunal can take as long as it wants to issue that decision. If the tribunal finds that it has jurisdiction, then a brief statement to that

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effect will inform the parties to proceed with the rest of the established schedule, and the reasons for the decision may follow.

Some may say that it is unrealistic for the tribunal to set a date for the award at the outset of the case when they do not know enough about how the parties will argue the case or the key issues to decide. That problem can often be resolved by asking the parties for more detailed explanations of the case at the first procedural hearing. Moreover, committing to a date may make the arbitrators more forceful in dealing with dilatory party conduct in order to meet that commitment.

You will have noticed that I also included in my list of the parties' reasonable expectations of the arbitrators that they should be independent and impartial and that they should disclose any information relevant to that decision. Given my allotted time, because so much has been written on that subject, because all rules have detailed provisions about it, and because institutional terms of appointment already focus on this issue, I have not included any discussion of the subject here today. However, provisions for such disclosure and commitments of neutrality should naturally be included in the contract between the parties and the arbitrators. Similarly, if the contract includes commitments by the parties, it should include an agreement not to engage in frivolous or repeated challenges of the arbitrators.

As I mentioned at the start of this speech, I have focused today on conduct by arbitrators that too often does not meet the parties' expectations or that should be included in a contract with the parties at the outset of the case. I have often spoken about party conduct and the need for parties and their counsel to focus on more efficient procedures and their obligations to the arbitrators and the system. As a result, and given the time I had today, I have not described the provisions governing party and counsel conduct that could be included in a contract with the arbitrators. However, to mention a few, the parties should commit:

- To adhere to the agreed and ordered procedural schedules
- To present only evidence and arguments necessary to the ultimate determination of the case
- Not to present arguments that are not based in the record or case law and not to misrepresent the evidence
- Not to make baseless challenges to arbitrators
- To abide by the IBA Guidelines for Conduct by Party Representatives, which cover so many aspects of the procedures.

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In conclusion, we cannot take for granted that the current system of international arbitration will endure. If we do, the system will disappear for other alternatives. The debate over TTIP has shown this. Domestic courts, such as the Singapore International Commercial Court or the DIFC Court, are creating new mechanisms to attract international disputes. Mediation will continue to grow in popularity to provide quick and business-focused solutions to disputes.

Therefore, we need to act creatively and extensively, and to act now, to improve the system and to make sure we are meeting the needs of the parties that use international arbitration. I hope that my speech today and my proposal of a written contract between the parties and the arbitrators can foster a useful discussion to make sure that those expectations are met in each and every case.

Thank you for your attention.

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