KEYNOTE SPEECH MAURITIUS CONFERENCE DECEMBER 2014

by Mr. Neil Kaplan CBE QC SBS

IT IS A PRIVILEGE AND AN HONOUR TO BE INVITED TO GIVE THIS KEYNOTE SPEECH AT THIS IMPORTANT CONFERENCE. ALTHOUGH I HAVE BEEN TO MAURITIUS ONCE SOME TIME AGO, IT LONG PRE-DATED THE SUBSTANTIAL EFFORTS OF MANY PEOPLE THAT HAVE TURNED MAURITIUS INTO AN EXCITING INTERNATIONAL ARBITRATION CENTRE.

MAURITIUS SEES ITSELF PARTICULARLY WELL PLACED TO ATTRACT AFRICAN BASED DISPUTES FROM THE TRADITIONAL EUROPEAN CENTRES. HOWEVER, I TRUST THAT IT WILL LOOK EAST AS WELL AS NORTH AND WEST BECAUSE THE GREAT GROWTH IN ARBITRATION HAS BEEN EXPERIENCED IN ASIA. CHINA HAS HAD A LONG HISTORY OF ARBITRATION AND HONG KONG AND SINGAPORE HAVE FOLLOWED IN ITS WAKE. TODAY, BOTH THESE CENTRES ARE A MAGNET FOR INTERNATIONAL ARBITRATIONS AND KOREA IS FAST CATCHING UP. AS ASIAN CAPITAL MOVES WESTWARDS, COUNTER-PARTIES NEED TO BE FLEXIBLE IN AGREEING TO ARBITRAL VENUES, AND MAURITIUS NEEDS TO ATTRACT LIKELY USERS FROM THE EAST AS WELL AS FROM THE TRADITIONAL CENTRES IN EUROPE AND AMERICA.

WHEN IT COMES TO LOOKING AT THE USER-FRIENDLY ARBITRATION CHECK LIST, MAURITIUS HAS MOST OF THE BOXES TICKED. AN UP TO DATE LAW BASED ON THE MODEL LAW, A STRONG AND INDEPENDENT LEGAL PROFESSION, AN OPEN HOUSE ON LEGAL REPRESENTATION IN INTERNATIONAL ARBITRATION AND OF COURSE, MOST IMPORTANTLY, AN INDEPENDENT JUDICIARY WHICH UNDERSTANDS ARBITRATION, AS WELL AS ITS ROLE IN THE ARBITRAL PROCESS.

FURTHER AND CRUCIALLY THE NEW YORK COVENTION HAS BEEN IN FORCE IN MAURITIUS SINCE 1996 AND THE WASHINGTON CONVENTION SINCE 1969.

WHAT IS MORE, IT IS AN ATTRACTIVE VENUE IN MANY OTHER RESPECTS AS WE ARE ALL FINDING OUT.

MAURITIUS IS A NEW CENTRE. HOWEVER, ARBITRATION IS NOT NEW AS IT LONG PRE-DATED STATE COURT SYSTEMS. ITS ORIGINS CAN BE FOUND MILLENNIA AGO. TO QUOTE MY FRIEND AND COLLEAGUE PROFESSOR DEREK ROEBUCK:

> *LITIGATION IS COMPARATIVELY MODERN IN THE HISTORY OF HUMAN SOCIETY. IT CANNOT PREDATE THE STATE, WHICH MUST SET UP THE COURTS WHICH LITIGATION BY DEFINITION REQUIRES. LITIGATION AND ARBITRATION HAVE BEEN ALTERNATIVES SINCE AT LEAST THE 18TH CENTURY BC, WHEN ASSYRIAN MERCHANTS EMPLOYED THEM IN ANCIENT MESOPOTAMIA. BUT ARBITRATION AND MEDIATION MUST BE EVEN OLDER THAN THAT. PRE-STATE SOCIETIES MUST HAVE HAD SOME WAY OTHER THAN VIOLENCE TO RESOLVE THEIR DISPUTES.*

WHAT REALLY FASCINATES ME IS THAT EVERYTHING WE DISCUSS AT ARBITRATION CONFERENCES LIKE THIS HAS BEEN DISCUSSED LONG BEFORE.

ON READING PROFESSOR ROEBUCK'S LATEST VOLUME IN HIS EXCELLENT SERIES ON THE HISTORY OF ARBITRATION, "THE GOLDEN AGE OF ARBITRATION – DISPUTE RESOLUTION IN THE REIGN OF ELIZABETH 1" I CAME ACROSS A DEBATE IN THE HOUSE OF COMMONS IN 1601 WHERE THE THEN MR. FRANCIS BACON MOVED THE ADOPTION OF A BILL ON MARINE INSURANCE. HE TOLD THE HOUSE THAT HIS COMMITTEE HAD CONSIDERED IT NECESSARY TO MAKE PROVISIONS IN THIS REGARD FOR THE PROTECTION OF MERCHANTS. HE ALSO TOLD THE HOUSE THAT THE COMMITTEE PROPOSED THAT ALL DISPUTES ARISING FROM THE ACT SHOULD BE DEALT WITH BY ARBITRATORS. WHY DID HE PROPOSE THIS? WELL, SHORN OF THE FORMALITY OF ELIZABETHAN ENGLISH, HE GAVE TWO REASONS. FIRST, THE COURTS WERE TOO SLOW FOR MERCHANTS AND, SECONDLY, THAT THE JUDGES DID NOT HAVE THE NECESSARY SUBJECT MATTER EXPERTISE.

AS A FOOTNOTE TO THIS, WHEN HE BECAME LORD ST ALBANS HE MUST HAVE BEEN THE FIRST ARBITRATOR TO BE DISGRACED AND REMOVED FROM OFFICE FOR TAKING BRIBES. IT WAS NOT MUCH MITIGATION, THAT HE TRIED TO BE EVEN HANDED BY TAKING BRIBES FROM BOTH SIDES.

HOWEVER, HIS COMMENTS ABOUT THE SPEED OF THE JUDICIAL PROCESS RESONATE TODAY. IN TWO CASES OF WHICH I HAVE KNOWLEDGE IT TOOK

OVER TEN YEARS FOR THE RELEVANT SUPREME COURT TO CONSIDER THE MATTER AND EVENTUALLY ENFORCE THE AWARD. THIS SIMPLY WILL NOT DO AND COURTS AROUND THE WORLD HAVE TO RECOGNISE THEIR STATE'S OBLIGATION UNDER THE NEW YORK CONVENTION AS WELL AS UNDER CERTAIN BI-LATERAL INVESTMENT TREATIES. I AM SURE MANY OF YOU HAVE HAD SIMILAR EXPERIENCES.

SOME JURISDICTIONS ARE REGRETTABLY NOTORIOUS FOR THEIR DELAYS IN DEALING WITH THESE MATTERS AND, IN SOME CASES, THIS DELAY HAS RESULTED IN A CLAIM AGAINST THE STATE BY INVESTORS UNDER BILATERAL INVESTMENT TREATIES. SO, IN SOME CASES THERE CAN BE A VERY REAL INCENTIVE FOR THE JUDGES IN CERTAIN JURISDICTIONS TO GET A MOVE ON.

ONE SIMPLE ARRANGEMENT TO SPEED UP THE PROCESS IS TO ENSURE THAT MATTERS RELATING TO BOTH INTERNATIONAL AND DOMESTIC ARBITRATION ARE DEALT WITH BY SPECIALIST JUDGES. FORTUNATELY NOW IN MANY JURISDICTIONS AROUND THE WORLD, SPECIALIST JUDGES HAVE BEEN NOMINATED TO DEAL WITH INTERNATIONAL ARBITRATION CASES AND THIS NOT ONLY ASSISTS IN SPEED, BUT ALSO ASSISTS IN RELATION TO EXPERTISE. SECTION 43 OF THE I A A OF MAURITIUS ACHIEVES JUST THAT BY PROVIDING FOR DESIGNATED JUDGES TO DEAL WITH ARBITRATION MATTERS.

AS YOU MAY KNOW, THE PROBLEM RELATING TO ENFORCEMENT WAS SO SEVERE IN CHINA THAT THE SUPREME COURT SET UP A SPECIAL REPORTING SYSTEM TO ENSURE THAT IF A LOWER COURT WAS MINDED TO REFUSE ENFORCEMENT OF AN INTERNATIONAL AWARD IT WOULD FIRST HAVE TO REFER THE MATTER TO THE SUPREME COURT FOR ITS DECISION. THIS REPORTING SYSTEM HAS WORKED WELL, BUT UNFORTUNATELY THERE IS A PAUCITY OF RELIABLE STATISTICS AND TOO MUCH INFORMATION IS ANECDOTAL.

THE ROLE OF A JUDGE

OF COURSE IN A PERFECT WORLD THERE WOULD BE NO NEED FOR ANY INTERACTION BETWEEN THE COURTS AND THE ARBITRAL PROCESS. AGREEMENTS TO ARBITRATE WOULD BE HONOURED, ARBITRATORS WOULD BE APPOINTED IN ACCORDANCE WITH THE AGREEMENT, NO CHALLENGES WOULD BE MADE TO THE ARBITRATORS OR TO THE PROCESS, DOCUMENTS WOULD BE PRODUCED WITHOUT DISPUTE AND AWARDS WOULD BE COMPLIED WITH VOLUNTARILY. THAT UNREALISTIC, BUT PERFECT WORLD WOULD OF COURSE PUT MANY OF YOU HERE OUT OF BUSINESS. BUT OF COURSE THE REALITY IS FAR DIFFERENT. AND THUS THE INTERPLAY

BETWEEN THE ARBITRAL PROCESS AND THE RELEVANT JUDICIARY IS OF CRUCIAL IMPORTANCE.

ONE HAS TO HAVE SYMPATHY FOR JUDGES IN CERTAIN JURISDICTIONS WHO HAVE NO EXPERIENCE IN INTERNATIONAL ARBITRATION AND FIND IT RATHER STRANGE WHEN ASKED TO CONVERT AN AWARD SIGNED BY THREE FOREIGNERS INTO A JUDGMENT OF THEIR OWN COURT AGAINST AN INDIVIDUAL OR COMPANY OF HIS COUNTRY. THAT IS ONE OF THE REASONS WHY ICCA HAS PUBLISHED ITS GUIDE FOR JUDGES TO THE NEW YORK CONVENTION AND IT IS WHY ICCA ARRANGES NEW YORK CONVENTION ROADSHOWS AROUND THE WORLD TO FAMILIARISE JUDGES WITH THE NEW YORK CONVENTION AND THEIR ROLE IN THE ARBITRAL PROCESS.

IT IS OF COURSE INTERESTING TO OBSERVE HOW THINGS IN MY JURISDICTION HAVE CHANGED OVER THE YEARS. IN 1895 AN ANONYMOUS LETTER TO THE TIMES THOUGHT TO BE WRITTEN BY NO LESS THAN LORD JUSTICE BOWEN SAID

> THE MERCANTILE PUBLIC IS NOT FOND OF LAW. IF LAW CAN BE AVOIDED. THEY PREFER EVEN THE HAZARDOUS AND MYSTERIOUS CHANCES OF ARBITRATION IN WHICH SOME ARBITRATOR WHO KNOWS AS MUCH OF THE LAW AS HE DOES OF THEOLOGY, BY THE APPLICATION OF A ROUGH AND READY MORAL CONSCIOUSNESS, OR UPON THE AFFAIBLE PRINCIPLE OF DIVIDING THE VICTORY EQUALLY BETWEEN BOTH SIDES, DECIDES INTRICATE QUESTIONS OF LAW AND FACT WITH EQUAL EASE.

NOT MANY YEARS LATER LORD JUSTICE SCRUTTON MADE ANOTHER FAMOUS OBSERVATION CONCERNING THE RELATIONSHIP BETWEEN THE COURTS AND THE ARBITRAL PROCESS. I IMAGINE THEY WOULD BOTH BE VERY CONCERNED IF THEY READ THE MODEL LAW AS WELL AS MANY OTHER ARBITRATION STATUTES INCLUDING THE ENGLISH ARBITRATION ACT, WHICH CONTAIN PROVISIONS THAT BASICALLY SAY THAT NO COURT SHOULD INTERVENE EXCEPT AS SO PROVIDED IN THIS ACT. THIS LIMITATION OF THE POWER OF THE COURT TO INTERVENE IN THE ARBITRAL PROCESS IS CRUCIAL. THE ROLE OF THE COURT IS ESSENTIALLY ONE OF SUPPORT FOR THE ARBITRAL PROCESS. IF THE PROCESS GOES WRONG, THEN THE COURT CAN USUALLY PUT IT BACK ON TRACK.

TODAY MOST COURTS ARE OVERWHELMED WITH CASES CONCERNING CRIME, DIVORCE, CHILDREN, PUBLIC LAW AND SO COURTS RIGHTLY HOLD PARTIES' TO THEIR AGREEMENT TO ARBITRATE. ARBITRATION HAS THE ADVANTAGE OF FINALITY, PRIVACY, AS WELL AS EASE OF ENFORCEMENT. I WISH I COULD ADD REDUCED COSTS AND SPEED TO THAT LIST!

THIS CONFERENCE WILL BE CONSIDERING ISSUES RELATING TO CHALLENGES AT THE SEAT AND ENFORCEMENT OF AWARDS WHEREVER THAT IS SOUGHT.

HOWEVER WHAT WE SEE FROM TIME TO TIME IS STATE COURT JUDGES NOT AT THE SEAT BUT AT THE HOME JURISDICTION OF ONE OF THE PARTIES (USUALLY THE ONE MOST PESSIMISTIC OF ITS CHANCES) INTERFERING IN THE ARBITRAL PROCESS BEFORE ANY AWARD HAS BEEN ISSUED BY GRANTING AN INJUNCTION WHICH HAS THE EFFECT OF STOPPING THE ARBITRATION IN ITS TRACKS. WHAT IS WORSE THEY DO SO BASED ON AFFIDAVIT EVIDENCE ONLY FROM THE CHALLENGING PARTY. I HAVE COME ACROSS THIS AND I SUSPECT SEVERAL OF YOU HERE TODAY HAVE AS WELL.

NOW NO ONE SUGGESTS THAT THE JUDGE WOULD NOT HAVE BEEN PERFECTLY ENTITLED TO REFUSE TO ENFORCE AN AWARD AGAINST A NATIONAL OF HIS COUNTRY HAD AN ADVERSE AWARD BEEN TAKEN TO HIM FOR ENFORCEMENT. IF HE HAD BEEN SATISFIED ON THE EVIDENCE THAT THERE WAS INDEED BIAS, HE COULD HAVE RELIED UPON ARTICLE 5 OF THE CONVENTION AND REFUSED TO ENFORCE THE AWARD. WHETHER HE WOULD BE RIGHT OR WRONG IS OF NO IMPORT TO THIS DISCUSSION, BUT HE WOULD HAVE BEEN AT LEAST PLAYING BY THE RULES. HOWEVER, BY MAKING THAT DECISION WHILST THE ARBITRATION WAS PENDING ON THE BASIS OF AFFIDAVIT EVIDENCE ALONE, SUCH A JUDGE WAS, I SUGGEST, SIMPLY USURPING HIS ROLE.

AS APPEALS ON THE MERITS AGAINST INTERNATIONAL ARBITRATION AWARDS ARE PREVENTED DISGRUNTELED LITIGANTS SEEK OTHER MEANS OF CHALLENGING THE PROCESS OR THE ARBITRATORS. THE VAST MAJORITY OF THESE ARE UNMERITORIOUS AND ALTHOUGH COURTS CANNOT STOP THEM BEING LAUNCHED THEY CAN AND IN MY VIEW SHOULD SHOW THEIR DISPLEASURE.

FIRSTLY SUCH APPLICATIONS NEED TO BE HEARD SWIFTLY OR ELSE THE DELAY WILL BE PLAYING INTO THE HANDS OF THE CHALLENGING PARTY WHO IS USUALLY SEEKING TO PUT OFF THE DATE OF PAYMENT.

AN OBVIOUSLY UNMERITORIOUS DELAYING APPLICATION CAN BE MET BY AN ORDER THAT THE SUM IN DISPUTE OR PART SHOULD BE PAID INTO COURT PENDING THE RESULT OF THE APPLICATION.

THIS GIVES THE AWARD HOLDER SOME PROTECTION.

FINALLY WHEN THE COURT DOES DISMISS THE UNMERITOURIOUS APPLICATION IT SHOULD MAKE ITS DISPLEASURE KNOWN BY ORDERING THE UNSUCCESFULL CHALLENGER TO PAY THE AWARD HOLDERS COSTS ON AN INDEMINITY BASIS.

A TREND TO THIS EFFECT IS APPARENT FROM HONG KONG AND ENGLISH AUTHORITIES AND DOUBTLESS ELSEWHERE AS WELL. IN HONG KONG IT WAS PUT NEATLY BY TANG VP OF THE HONG KONG COURT OF APPEAL IN 2012 WHERE IN THE KEENEYE CASE HE SAID;

> "EXPERIENCED JUDGES OF THE CONSTRUCTION AND ARBITRATION LIST HAVE ADOPTED THE APPROACH THAT, IN PROCEEDINGS ARISING OUT OF OR IN CONNECTION WITH ARBITRAL PROCEEDINGS, IN THE ABSENCE OF SPECIAL CIRCUMSTANCES, THE COURT WILL NORMALLY CONSIDER IT APPROPRIATE TO ORDER COSTS ON AN INDEMNITY BASIS"

AS REYES J PUT IT AN EARLIER CASE HONG KONG CASE AT FIRST INSTANCE;

> "SUCH A STATE OF AFFAIRS WOULD ONLY ENCOURAGE THE BRINGING OF UNMERITORIOUS CHALLENGES TO AN AWARD. IT WOULD TURN WHAT SHOULD BE AN EXCEPTIONAL AND HIGH RISK STRATEGY INTO SOMETHING WHICH WAS POTENTIALLY "WORTH A GO". THAT CANNOT BE CONDUCIVE TO THE CIVIL JUSTICE REVIEW AND ITS UNDERLYING OBJECTIVES.

HOWEVER IN AUSTRALIA, AT LEAST IN VICTORIA THE SITUATION IS NOT SO CLEAR. THE VICTORIAN COURT OF APPEAL HAS STATED THAT

> "UNSUCCESSFULLY RESISTING ENFORCEMENT OF A FOREIGN AWARD IS NOT AN ESTABLISHED CATEGORY OF SPECIAL CIRCUMSTANCES IN AUSTRALIA"

TO BE FAIR TO THE COURT OF APPEAL THE CASE BEFORE THEM WAS NOT UNMERITORIOUS BECAUSE THEY ALLOWED IT AND THUS THEIR OBSERVATIONS PERHAPS WENT WIDER THAN REQUIRED FOR THAT CASE.

IN ANY EVENT CHIEF JUSTICE MARTIN OF THE SUPREME COURT OF WESTERN AUSTRALIA HAS THIS YEAR ORDERED INDEMNITY COSTS IN RESPECT OF AN APPLICATION FOR A STAY WHERE COURT PROCEEDINGS WERE WRONGLY INSTITUTED. PERHAPS THE JURY IS STILL OUT IN AUSTRALIA BUT HOPEFULLY NOT FOR TOO LONG. AS THE CHIEF JUSTICE OF THE FEDERAL COURT OF AUSTRALIA, JAMES ALLSOP, HAS WRITTEN;

> "THE REAL QUESTION FOR AUSTRALIAN COURTS IS WHETHER THE APPROACH TO ENFORCEMENT PROCEEDINGS ADEQUATELY REFLECTS THE PUBLIC POLICY CONSIDERATIONS THAT SHOULD PROPERLY ATTEND THEM. THE SHORTCOMING OF AUSTRALIA'S POSITION MAY BE THAT WHILE THE PRESUMPTION OF PARTY/PARTY COSTS ARGUABLY DELIVERS A JUST OUTCOME IN ORDINARY PROCEEDINGS, ENFORCEMENT PROCEDINGS IN THE CONTEXT OF ARBITRAL AWARDS ARE DIFFERENT IN CHARACTER."

PERHAPS THE JURY IS STILL OUT IN AUSTRALIA BUT HOPEFULLY NOT FOR TOO LONG.

ICCA

I EARLIER MENTIONED THE ROLE OF ICCA AND I WOULD LIKE TO ADD THAT IN MAY NEXT YEAR ICCA WILL BE HOLDING ITS FIRST JUDGE'S FORUM IN HONG KONG. JUDGES FROM SEVERAL JURISDICTIONS PRIMARILY IN THE ASIA PACIFIC REGION ARE EXPECTED TO ATTEND. I HOPE THAT THESE JUDICIAL FORA CAN BE REPEATED IN OTHER PARTS OF THE WORLD. ONE EXCITING PROPOSAL THAT WE HAVE IS TO SET UP A VIRTUAL JUDGES FORUM TO ENABLE JUDGES ANYWHERE IN THE WORLD TO CHAT, I SUPPOSE IS THE CORRECT TERMINOLOGY, WITH EACH OTHER IN A HIGHLY CONFIDENTIAL ENVIRONMENT ABOUT PROBLEMS ARISING FROM INTERNATIONAL ARBITRATION. I HOPE THAT THIS VIRTUAL FORUM WILL BE LAUNCHED IN THE NEAR FUTURE AND THIS IS A TRULY GROUND BREAKING AND EXCITING VENTURE. BEING A JUDGE CAN BE A LONELY LIFE AND HAVING TO DEAL WITH PROBLEMS THAT ARE COMPLETELY OUTWITH YOUR PROFESSIONAL EXPERIENCE IS A DAUNTING PROSPECT. WE HOPE THAT BOTH THE GUIDE AND THE VIRTUAL FORUM WILL ASSIST IN THIS RESPECT. I SHOULD HAVE MENTIONED THAT THE GUIDE IS NOW TRANSLATED INTO XX LANGUAGES.

ROLE OF COUNSEL

THUS FAR, I HAVE BEEN DISCUSSING THE PIVOTAL ROLE OF THE COURT IN INTERNATIONAL ARBITRATION. I WOULD NOW LIKE TO SAY A FEW WORDS

ABOUT THE EQUALLY IMPORTANT ROLE OF COUNSEL IN INTERNATIONAL ARBITRATION**.**

IT IS A COMMON COMPLAINT THAT WE HEAR FROM ARBITRATORS THAT THEY ARE OVER-LOADED WITH DOCUMENTS, SUBMISSIONS AND WITNESS STATEMENTS. THE RECORD IN SOME OF THE LARGER CASES SOMETIMES EXTENDS TO TENS OF THOUSANDS OF PAGES AND IT IS WORTH REMINDING OURSELVES WHAT LUCY REED HAS SAID, NAMELY

> *"FOCUS NOT SO MUCH ON WHAT MAY GO ON IN AN ARBITRATOR'S HEAD BUT MORE ON HOW MUCH CAN FIT IN AN ARBITRATOR'S HEAD"*

ALTHOUGH THE REDFERN SCHEDULE FOR DEALING WITH DOCUMENT REQUESTS HAS BEEN A MOST USEFUL TOOL, IT HAS MORE RECENTLY BECOME A VEHICLE FOR SOME EXTREMELY LENGTHY AND COMPLEX DOCUMENT REQUESTS. IT IS WORTH NOTING THAT THESE DOCUMENT REQUESTS COME AT A STAGE IN THE PROCEEDINGS WHERE THE ARBITRATORS THEMSELVES ARE UNLIKELY TO HAVE A GOOD FEEL FOR ISSUES OF RELEVANCE AND MATERIALITY.

I WILL RETURN TO THIS POINT SHORTLY. IN ONE CASE, ONE OF MY ARBITRAL COLLEAGUES WAS GOING THROUGH A 230 PAGE REDFERN SCHEDULE AND WHEN HE CAME TO THE LAST PAGE HE NOTED THAT COUNSEL WHO WAS RESPONDING TO THIS REQUEST AT THE END OF THE PAGE HAD WRITTEN "LOST THE WILL TO LIVE". I CAN CERTAINLY SYMPATHISE, AND I AM NOT THE ONLY ONE TO DO SO. IN 1989, AN OKLAHOMA FEDERAL JUDGE ISSUED A PROCEDURAL ORDER DEALING WITH DOCUMENT PRODUCTION ISSUES IN WHICH HE GOT RATHER CARRIED AWAY BECAUSE HE ENDED IT BY SAYIN*G;*

> *IF THERE IS A HELL TO WHICH DISPUTATIOUS, UNCIVIL, VITUPERATIVE LAWYERS GO, LET IT BE ONE IN WHICH THE DAMNED ARE ETERNALLY LOCKED IN DISCOVERY DISPUTES WITH OTHER LAWYERS OF EQUALLY REPUGNANT ATTRIBUTES*

ANOTHER UNFORTUNATE FEATURE OF INTERNATIONAL ARBITRATION IS THE INABILITY OF SOME COUNSEL TO EXERCISE **ARBITRAL TRIAGE**. TOO MANY BAD POINTS ARE THROWN INTO THE MIX AND AGAIN THIS IS SIMPLY, I WOULD SUGGEST, BAD ADVOCACY. THIS IS NO NEW POINT BECAUSE THE ROMAN JURIS **QUINTILLIAN** SAID IN THE FIRST CENTURY BC:

> "*WE MUST NOT ALWAYS BURDEN THE JUDGE WITH ALL THE ARGUMENTS WE HAVE DISCOVERED, SINCE BY SO DOING WE SHALL AT ONCE BORE HIM AND RENDER HIM LESS INCLINED TO BELIEVE US"*

IT SEEMS TO ME THAT ONE OF THE PROBLEMS THAT WE ARE SUFFERING FROM STEMS FROM THE RECENT TREND TO SHY AWAY FROM ORAL ARGUMENT IN FAVOUR OF **WRITTEN MATERIAL**.

WRITTEN MATERIAL IS ALL VERY WELL PROVIDED YOU ARE SATISFIED THAT IT HAS BEEN READ AND, MORE IMPORTANTLY, UNDERSTOOD. HOWEVER, WE SHOULD NOT FOOL OURSELVES. NO ORDINARY MORTAL CAN READ, DIGEST AND UNDERSTAND MATERIALS CONTAINED IN 25 LEVER ARCH FILES OR EVEN IN A VERY SMALL MEMORY STICK. IT IS JUST NOT POSSIBLE WITHOUT PROPER ASSISTANCE.

OF COURSE IT MAY BE SAID THAT ASSISTANCE WILL COME DURING THE COURSE OF THE HEARING, BUT I WOULD SUGGEST THAT THAT IS TOO LATE.

EARLY OPENING

WHEN I WAS AT THE BAR ONE OF THE THINGS I ENJOYED MOST WAS OPENING MY CASE BEFORE THE JUDGE OR THE ARBITRATOR. IN THOSE DAYS THE JUDGE HAD RARELY HAD AN OPPORTUNITY OF READING INTO THE CASE AND SO YOU GAVE HIM THE AGREED BUNDLE AND TOOK HIM THROUGH IT AND INVITED HIM TO UNDERLINE THE VARIOUS POINTS THAT YOU WANTED HIM TO REMEMBER AND YOU MADE YOUR SUBMISSIONS WHILE YOU WERE GOING ALONG.

THE END OF YOUR OPENING WAS, OF COURSE, THE HIGH WATER MARK OF THE CASE. IT COULD ONLY GET WORSE AFTER THAT. BUT WHETHER YOU WON OR LOST, AT LEAST YOU HAD AN OPPORTUNITY OF KEEPING THE JUDGE ON TOP OF THE DOCUMENTS.

UNFORTUNATELY THAT DOES NOT HAPPEN TODAY AND I THINK WE NEED A COMPROMISE SOLUTION. OF COURSE, THERE IS NO QUESTION OF A RETURN TO A SITUATION WHERE THE ARBITRATOR HAD NOT READ ANY OF THE PAPERS BEFORE THE HEARING. MOST ARBITRATORS ARE EXTREMELY ASSIDUOUS, BUT HOWEVER HARD WORKING THEY MAY BE, IT IS NOT ALWAYS POSSIBLE TO READ HUGE VOLUMES OF DOCUMENTS AND PUT THEM IN THE CONTEXT OF THE CASE BEING ADVANCED. WE TALK OF EFFECTIVE CASE MANAGEMENT BUT REGRETABLY WE SEE VERY LITTLE OF IT IN PRACTICE.
THE COMPROMISE I SUGGEST IS TO REQUIRE COUNSEL TO APPEAR BEFORE THE TRIBUNAL AFTER THE FIRST ROUND OF PLEADINGS AND WITNESS STATEMENTS AND TO OPEN THEIR CASE IN ADVANCE OF THE MAIN HEARING. IN MY VIEW THIS PROCEDURE HAS A NUMBER OF **ADVANTAGES**:

1. IT WILL ENSURE THAT THE WHOLE TRIBUNAL WILL READ INTO THE CASE AT A FAR EARLIER STAGE THAN HITHERTO;
2. IT WILL ENABLE THE TRIBUNAL TO UNDERSTAND THE CASE GOING FORWARD AND WILL INFORM ITS SUBSEQUENT CASE PREPARATIONS;
3. IT WILL ENABLE THE TRIBUNAL TO HAVE A MEANINGFUL DIALOGUE WITH COUNSEL ABOUT PERIPHERAL POINTS, UNNECESSARY EVIDENCE, AND GAPS IN THE EVIDENCE;
4. IT WILL FACILITATE THE TRIBUNAL PUTTING POINTS TO THE PARTIES TO WHICH THEY WILL THEN HAVE TIME TO CONSIDER AND RESPOND;
5. IT WILL ENABLE THE TRIBUNAL TO MEET AND DISCUSS THE ISSUES FAR EARLIER THAN HITHERTO AND THUS MEET THE ASPIRATIONS OF THE REED RETREAT (HER IDEA THAT THE TRIBUNAL SHOULD MEET WELL BEFORE THE HEARING FOR A “BRAINSTORMING SESSION”);
6. IT WILL ASSIST IN ENSURING SPEEDIER AND, I WOULD SUGGEST, BETTER AWARDS; AND
7. BY BRINGING THE PARTIES TOGETHER, WITH THEIR TRIAL COUNSEL, WELL IN ADVANCE OF THE HEARING, THERE IS A CHANCE THAT, AT LEAST PART OF THE CASE MAY BE SETTLED, OR POINTS OF DISAGREEMENT MINIMIZED.

INVESTMENT ARBITRATION AWARDS

ARBITRATION HAS MANY VIRTUES BUT ONE OF THE MAIN REASONS IT IS CHOSEN IS THAT OF PRIVACY. GENERALLY SPEAKING WHAT GOES ON IN THE HEARING IS NOT REPORTED NEXT DAY IN THE PRESS – NOT EVEN GAR. THE ISSUE OF CONFIDENTIALITY IS A WIDER ISSUE WITH NO CLEAR CONSENSUS. SOME JURISDICTIONS LIKE HK HAVE GONE THE ROUTE OF STATUTORY CONFIDENTIALITY.

HOWEVER ONE CAN STILL SAY THAT THE VAST MAJORITY OF AWARDS IN COMMERCIAL AND CONSTRUCTION CASES ARE IN FACT CONFIDENTIAL.

THIS IS IN SHARP CONTRAST TO AWARDS IN INVESTMENT CASES WHERE THE AWARD IS OFTEN ON GAR AND ELSEWHERE BEFORE THE INK IS DRY ON THE SIGNATURES. MOST ICSID AWARDS ARE MADE PUBLIC UNLESS THE PARTIES AGREE OTHERWISE.

THIS DIVERGENCE OF APPROACH HAS HAD SOME INTERESTING CONSEQUENCES. IT IS NOW POSSIBLE TO READ IN FULL INVESTMENT AWARDS THAT DEAL WITH A WIDE RANGE OF ISSUES EQUALLY RELEVANT TO COMMERCIAL CASES.

IN FACT SINCE APRIL 2014 UNCITRAL HAS IN PLACE A SET OF RULES DEALING WITH THE TRANSPARENCY OF INVESTMENT AWARDS SUCH THAT THE COMPLETE FILE CONTAINING ALL PO'S, DECISIONS AND AWARDS IS MADE PUBLIC

ALTHOUGH THERE IS NO FORMAL PRECEDENT VALUE IN THESE AWARDS THEY DO PROVIDE GREAT ASSISTANCE AND ARE RELIED UPON FOR THEIR REASONING.

AND SO IT IS THAT IN INVESTMENT AWARDS IT IS POSSIBLE TO GET GUIDANCE ON A WHOLE RANGE OF ISSUES.
A NUMBER OF RELEVANT ISSUES HAVE BEEN DEALT WITH IN INVESTMENT ARBITRATION AWARDS. THESE INCLUDE THE FOLLOWING.

(1) SEVERAL AWARDS HAVE CONSIDERED HORNBOOK ISSUES SUCH AS ONUS AND BURDEN OF PROOF AND DRAWING OF ADVERSE INFERENCES;

(2) I KNOW OF ONE ICSID AWARD THAT CONSIDERS IN SOME DETAIL THE QUESTION OF LEGAL PROFESSIONAL PRIVILEGE AND MEDIATION PRIVILEGE AND WHAT LAW GOVERNS THESE.

(3) WIDER ISSUES AS TO PRIVILEGE HAVE ALSO ARISEN – EG, IS PRIVILEGE APPLICABLE TO STATES? THERE HAS ALSO BEEN DISCUSSION OF PUBLIC INTEREST IMMUNITY.

(4) A NUMBER OF AWARDS SHOW HOW TRIBUNALS HAVE DEALT WITH THE VEXING ISSUE OF CORRUPTION.

(5) SOME BIT CASES HAVE DISCUSSED THE CORRECT APPROACH TO INTERIM MEASURES AND THE CONSEQUENCES OF NON-COMPLIANCE WITH THEM.

(6) COMPENSATORY AWARDS IN BIT CASES FREQUENTLY CONTAIN SIZABLE SECTIONS ON THE ASSESSMENT OF LOSS. THESE INVOLVE ANALYSES OF EXPERT EVIDENCE CONCERNING, FOR EXAMPLE, THE CORRECT APPROACH TO DISCOUNTED CASH FLOW METHODS, DEALING WITH COUNTRY RISK ETC.

(7) CHALLENGES TO ARBITRATORS IN BIT CASES ARE PUBLIC AND THEREFORE PROVIDE GUIDANCE ON HOW THEY ARE DEALT WITH. THESE DECISIONS CAN ASSIST NOT ONLY PRACTITIONERS CHALLENGING ARBITRATORS BUT ALSO ARBITRATORS OR ARBITRAL INSTITUTIONS THAT HAVE TO DECIDE CHALLENGES.

(8) A NUMBER OF INVESTMENT AWARDS ADDRESS WHAT IS MEANT BY A SUBDIVISION OR AGENCY OF A STATE. COMMERCIAL ARBITRATION CASES INVOLVING STATES CAN RAISE THE SAME ISSUES.

(9) APPROACHES TO DOCUMENT PRODUCTION AND THE TAKING OF EVIDENCE ARE ALSO TO BE FOUND IN INVESTMENT AWARDS.

(10) FACTORS TO BE TAKEN INTO ACCOUNT WHEN AWARDING COSTS AND INTEREST ARE DISCUSSED IN INVESTMENT AWARDS ON A FREQUENT BASIS.

(11) LAST BUT NOT LEAST, MANY INVESTMENT ARBITRATIONS DELVE IN GREAT DETAIL INTO WHAT IS MEANT BY DIRECT AND INDIRECT CONTROL OF A COMPANY.

I HAVE ONE PLEA RELATING TO ANY AWARD THAT IS LIKELY TO BECOME PUBLIC. PLEASE WILL THE TRIBUNAL PREPARE A HEADNOTE SO AS TO AVOID HAVING TO READ 450 PAGES TO FIND THAT PEARL OF WISDOM THAT YOU KNOW IS IMBEDDED SOMEWHERE. IT IS DAUNTING TO HAVE

PLACED BEFORE YOU A HUGE AWARD SAID TO BE RELEVANT WITHOUT A ROUTE MAP TO CHECK THAT IT IS INDEED RELEVANT AND WHERE.

I SAID I HAD ONE PLEA BUT IN FACT I HAVE ANOTHER. WE HEAR CONSTANT COMPLAINTS ABOUT DELAY AND EXPENSE AND THERE IS LIMITED SCOPE FOR THE TRIBUNAL TO AVOID THESE AS MUCH IS IN THE HANDS OF THE PARTIES AND THEIR COUNSEL.

HOWEVER THERE IS ONE IMPORTANT THING THAT THE TRIBUNAL CAN DO AND THAT IS TO MAKE ITS AWARD SHORTER. I AM NOT ADVOCATING ELIMINATING THE DISCUSSION OF THE TRIBUNAL ON THE RELEVANT ISSUES. BUT I AM ADVOCATING THE END OF AWARDS THAT RUN TO HUNDREDS OF PAGES – A LARGE CHUNK OF WHICH IS THE PROCEDURAL HISTORY AND THE RECITATION OF THE PARTIES RESPECTIVE ARGUMENTS.

ACCORDINGLY I ADVOCATE THAT THE PROCEDURAL HISTORY WHICH IS AFTER ALL A MATTER OF RECORD BE PLACED INTO A SCHEDULE SO AS NOT TO CLUTTER UP THE AWARD.

NO USEFUL PURPOSE CAN BE SERVED BY REPEATING THE PARTIES CONTENTIONS IN FULL. THEY KNOW WHAT THEY CONTENDED AND THEY DON’T NEED IT ALL REPEATED SOMETIMES VERBATIM. WHAT THEY NEED TO SEE IS THAT WHEN THEN TRIBUNAL DEALS WITH THE ISSUES THEIR CONTENTIONS HAVE BEEN UNDERSTOOD EVEN IF REJECTED. WHAT HAS HAPPENED TO THE ART OF PRECIS?

ANYONE WHO HAS SAT ON A SCRUTINISING COMMITTEE AND HAD TO SCRUTINISE AWARDS WRITTEN BY OTHERS WILL I AM SURE SUPPORT THIS APPROACH. THE SHORTER AND MORE SUCCINT AN AWARD THE EASIER IT IS TO FOLLOW. THE SAME APPLIES TO JUDGES ASKED SET ASIDE AWARDS OR DEAL WITH ENFORCEMENT ISSUES.

WE ARE ALL TO BLAME FOR THIS. I AM SURE SOMEONE WILL SAY TO ME BUT WHAT ABOUT YOUR AWARD IN X – IT WAS 300 PAGES. MY ANSWER IS BUT IT WAS 500 BEFORE I STARTED PRUNING – BUT I APPRECIATE THAT THERE IS ROOM FOR IMPROVEMENT.

CONCLUDING REMARKS

WE ARE ALL PRIVILEGED TO BE INVOLVED IN INTERNATIONAL ARBITRATION. NOT ONLY DOES IT TAKE US TO PLACES LIKE MAURITIUS, BUT IT PRESENTS THE MOST INTERESTING LEGAL, FACTUAL AND CULTURAL ISSUES. FURTHERMORE, THE BIT CASES RAISE FASCINATING POINTS OF INTERNATIONAL LAW AND TOUCH ON POLITICAL ISSUES AS WELL.

I CAN DO NO BETTER THAN END BY QUOTING THE WONDERFUL LANGUAGE OF LORD MUSTILL WHO SAID:

> THE WORLD OF ARBITRATION IS A FASCINATING MOSAIC. LINES OF FRACTURE RUN EVERYWHERE. THEORY AND PRACTICE. INTERNATIONAL AND DOMESTIC. STATUS AND CONTRACT. CIVILIAN AND COMMON LAW. COURT-FREE AND COURT-RELATED. FACTUAL AND LEGAL. RITUALISTIC AND FREEWHEELING. MACRO AND MICRO. EXPERT AND LEGAL.

WE HAVE A FASCINATING AND INTERESTING PROGRAMME AHEAD OF US AND I AM SURE THAT BY THE END OF THIS CONFERENCE WE WILL ALL BE BETTER ACQUAINTED, BETTER FED AS WELL AS BETTER INFORMED.

I THANK YOU FOR YOUR ATTENTION AND NOW HAVE THE PLEASURE OF INVITING THE SOLICITOR GENERAL OF MAURITIUS TO ADDRESS US.

THE END