The Paper Tsunami in International Arbitration
Problems, Risks for the Arbitrators' Decision Making and Possible Solutions

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This paper examines the problems arising from the growing flood of information in international arbitration, which is still largely presented in paper form, and the risk that this flood poses to the arbitral process. While the cost effects of this flood have been mentioned on several occasions, much less attention seems to have been devoted to the difficulties for arbitrators to absorb and understand the mass of information provided and to extract from it the elements that are truly relevant for their decision. The threat that this development poses to arbitral decision making and the parties' right to be heard requires serious attention from the international arbitration community. This paper indicates some directions for possible arbitrator-friendly solutions.

1. The growth of information and documents

International arbitration is plagued by growing quantities of information. There may be differences between cases as regards the volume of information, depending on the type of dispute, the origin of the litigants and the practical orientation of counsel, but the general trend of increasing flows of information seems to be universal.

The causes for this increase are diverse. They include the availability of rapid and cheap copying facilities, progress in information technology, the complexity of international projects and related transactions and disputes, the export of domestic litigation practices to the field of international arbitration and growing numbers of different specialists involved in the preparation and the conduct of the arbitration.[2]

It is not uncommon that, by the end of the procedure, when it has to deliver its award, the arbitral tribunal has received a great number and variety of documents and files that may be composed of thousands, hundreds of thousands and sometimes millions of pages of documents[3] in the form of:

- written submissions (often two rounds of submissions before the hearing and one or two rounds of post-hearing submissions thereafter; and in many cases additional submissions on specified issues of substance or procedure);
- many folders of documentary evidence, often with translations;
- folders with legal authorities;
- witness statements, often followed by rebuttal statements;
- demonstrative exhibits;
- correspondence on procedural or other interlocutory matters, often extensive writings on controversial points; and
- transcripts of the hearing(s).

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[2] P. Hobeck, V. Mahnken and M. Koebke, 'Time for Woolf Reforms in International Construction Arbitration', 11(2) *International Arbitration Law Review* (2008) pp. 84, 87.

[3] Numbers mentioned by a small sample of colleagues at a recent meeting of arbitration practitioners included: a single exhibit of several tens of thousands of pages, a single submission accompanied by 780 lever arch files, documentary evidence of altogether 1.2 million pages in one arbitration.

Despite great progress in information technology and its increasing use in international arbitration, a very large part of the information submitted to the arbitrators still takes the form of paper documents.

2. The problems and risks

This vast amount of information, submitted mainly on paper, causes a number of problems, among which the high and increasing costs for the parties in the preparation and the conduct of the arbitration proceedings. These increasingly high costs aggravate the consequences of inequalities between parties with different levels of available resources. Such differences in the available resources have always been a problem and a concern in international arbitration, as they limit the access to international justice for parties with insufficient financial means. The increase in cost caused by the expansion of the information presented in the arbitration seriously aggravates this problem.

One of the most serious problems resulting from this often overwhelming wave of paper in large arbitration cases, for which the term "tsunami" does not seem exaggerated, arises at the level of the arbitrators. There is a striking imbalance in document-intensive international arbitration cases. On the one hand, the parties in these cases are often assisted by large numbers of lawyers of all levels and with different qualifications and by claims consultants, accountants and experts in different fields of learning. On the other hand, one or, in cases of some complexity, three individuals are expected to perform their duties as arbitrators alone and without any assistance.

These three individuals must face the plethora of information and material assembled by the parties, which is often disorganised and generally selected with the objective of contradicting the material submitted by the opponents. From these conflicting accounts of factual allegations and the accompanying documents, the tribunal is expected to extract a coherent story, absorb contradictory technical explanations and understand them to a point where it can form a considered opinion about the decisive issues. These efforts must culminate in a decision about the claims brought before the tribunal, a decision that must be issued with expedition and must be accompanied by reasons that give the loosing party, if not a sense of reconciliation with its defeat, at least the assurance that, despite the adverse ruling, its case has been carefully considered by the tribunal.

In cases of the type described, this task is virtually impossible if the arbitrators are expected to proceed as they used to do: reading the submissions and the evidence, hearing the parties and their witnesses and experts and rendering the award, all without any outside assistance. Leaving the arbitrator alone in the struggle against an uncontrolled flow of overwhelming quantities of information creates the risk that argument and evidence are overlooked or not fully understood. The arbitral tribunal's decision-making process is inevitably affected by this risk, and so are the parties' right to be heard and due process.

From this perspective, the "paper tsunami" must be seen as a threat to the very essence of arbitration as a dispute resolution process. Reference to the problem is made when the growing costs of arbitration are discussed.[4] However, there still seems to be insufficient

[4] See, for instance, the *Report of the ICC Commission on Arbitration on Techniques for Controlling Time and Costs in Arbitration*, ICC Publication No. 843 (2007); David W. Rivkin, 'Towards a

awareness of the impact that the paper tsunami may have on the work of the arbitrators and the threat that it poses to the process. The recent debate on the OGEMID discussion forum[5] may be taken as an indication of the extent to which professional circles continue to expect the arbitrator to work on his own with no assistance except, at most, in administrative matters. In this debate, as in others, very little attention seems to have been devoted to the question how arbitrators can confront the overwhelming masses of information without assistance and what can be done to provide relief.

3. Possible directions for dealing with the problem

The purpose of the present paper is to raise awareness of the problem in the hope of starting a debate about possible solutions. There is probably no single magic solution; rather, a combination of measures would seem to be required. Most of these measures are known and have been described elsewhere. What is necessary is their systematic development and use in combined approaches, adjusted to the specific needs of each case.

Basically, the problem can be approached by (a) limiting the submission of documents to the arbitrators and (b) facilitating the task of the arbitrators in dealing with those documents that have been submitted to them.

a. Reducing the volume of documentation submitted to the arbitral tribunal

- **Restricting the number of documents or the number of pages of submissions**
  This approach is used occasionally and may provide some relief. It is a mechanical solution with the risk of not responding to the true needs of the parties and the tribunal. In some cases, large numbers of documents are required to cover all issues. The numbers fixed are normally arbitrary; they may be too high or to low.

- **Requiring a considerate selection by counsel**
  If lead counsel of a party's team were required to read and understand each document produced, just as arbitrators are expected to do, the number of documents submitted would probably be reduced substantially. While the application of such a rule would be difficult to monitor and enforce, much progress could be achieved if the party submitting a document were required to identify its specific relevance for the case and the arbitral tribunal's decision.

- **Providing the arbitral tribunal with summaries of certain types of evidence**
  For instance, when accounting issues are at stake, it may not be necessary to produce the full set of accounting records. Instead, the parties' experts, or an expert of the tribunal, may inspect the records and report on their findings, so that the tribunal has to inspect the records only insofar as differences remain.

- **Providing for the production of a common bundle, a core bundle or both**
  It is becoming increasingly frequent in cases with large quantities of documents that, in preparation for the hearing, the parties assemble the documents submitted during the

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New Paradigm in International Arbitration—The Town Elder Model Revisited', *Arbitration International* (2008) pp. 375, 382.

[5] Oil, Gas, Energy, Mining and Infrastructure Disputes (OGEMID), Internet discussion forum (ogemid@jiscmail.ac.uk), January 2009.

preceding stages of the proceedings, presenting them in a common bundle of all documents deemed relevant to the hearing and the decision of the case. If handled properly, this can be of considerable assistance both for the parties at the hearing and for the arbitrators. In cases where the common bundles still are very large, the parties sometimes also produce a "core bundle", a set of the most important documents, for each arbitrator. Both the common bundle and the core bundle, if they are produced only for the hearing, normally do not reduce the volume of documentation but actually increase it, as they lead to repeated productions of the same documents. They thereby tend to penalize the arbitrators who read and annotate the documents when they are submitted, rather than waiting until the hearing to study the file.

- **Handling the submission of documents as part of an interactive management of the case**

  Through such management, the arbitral tribunal may identify the decisive issues early in the case, in consultation with the parties, and limit evidence to these issues. It may also determine uncontested facts, again in consultation with the parties,; if that is done, the evidence produced can be limited to the facts which remain contested and which relate to the issues which have been identified as relevant.. There are other methods that may be used in this context, including a more flexible handling of the evidentiary process, for instance by distinguishing between specified offers of proof and the actual production of the evidence or by establishing a core bundle. The essential aspect here is an early and continuing involvement of the arbitral tribunal in the practicalities of the presentation of the case, while respecting that the responsibility for the preparation of the case and its presentation remains with the parties and their counsel.

b. Assisting the arbitral tribunal in using the documentation

- **Organising the filing system of the documents produced**

  Far too often, documents are submitted to the tribunal in a manner that makes it difficult if not impossible for the tribunal to find the right document at a later stage of the proceedings. From the beginning of the proceedings, the tribunal and the parties should employ a system of classification that allows the tribunal to find its way through the files. Instead of numbering documents in the sequence of their presentation, a presentation by categories may be used. For instance, there may be a file with the contract documents, another file with certificates, one with invoices and one with correspondence in chronological order. The choice of such a system depends on each case and can be agreed only when it is known, at least in general terms, what the evidence can be expected to be.

  In this context, it is important to understand that there may be large numbers of documents that are not decisive for the outcome of the dispute but which the arbitrators may wish to consult nevertheless: they would do so not so much for the direct evidentiary value of these documents but in order to improve their understanding of the context of the dispute. Especially in disputes concerning contracts of duration, correspondence, minutes of meetings and other documents may assist the arbitrators in understanding practices that the parties followed in their relations and in placing the controversial issues in the context of all those situations in which the parties cooperated constructively or overcame their differences.

- **Using information technologies for submissions and evidence**

The tools provided by these technologies do not reduce the number of documents that the arbitrators must consult (the availability of such tools and the ease of communication that they offer often create the temptation to produce more information than what would be submitted without them). However, they can greatly facilitate the arbitrators' tasks in searching for the required information, provided the arbitrators have the disposition to use the tools and the parties develop them in accordance with the arbitrators' needs and preferences.

- **Providing assistance to the arbitrators**

  The arbitrator has important management functions. Properly handled, such management assists both the parties and the tribunal in the understanding of the dispute. The ultimate objective of such management should be the arbitrator's understanding of the legal, factual and technical issues and the identification and retrieval of the relevant evidence and arguments. The tribunal's analysis of the case is advanced by the confrontation of differing views and perspectives in the deliberations and, as the final test, by drafting the decision and the reasoning that supports it.

  In this process, there are activities that are essential for the decision making and others that are peripheral. Requiring that all activities must be performed exclusively by the arbitrators leads to an inefficient use of the arbitrator's skills. More attention should be devoted to identifying the essential activities, distinguishing them from those that may be delegated, and there should a more thorough analysis of what assistance can be provided to the arbitrators in the exercise of their essential activities.

  Such delegation and assistance brings into play secretaries to the tribunal and experts that assist the tribunal in understanding the parties' respective cases rather then simply delivering an opinion on an identified issue. Experts as assistants to the arbitral tribunal have been used by a variety of tribunals at different places of arbitration. As shown in another article,[6] the use of experts as assistants to the tribunal can be an important method by which an arbitral tribunal manages the information and documents submitted to it in an efficient manner, thus assuring a proper understanding of the parties' case.

[6] Michael E. Schneider, The Tribunal's Expert: Assisting the Arbitrators or Replacing Them? In PMG (ed), Prevention and Resolution of Disputes, St Sulpice, Suisse 2008, pp. 39 - 47.