If It Ain't Broke, Don't Change It

Neil Kaplan

When it was once suggested to Groucho Marx that he should do something for posterity he famously replied, "What has posterity ever done for me?" I do not think for one moment that Official Referee George Alexander Scott (1862–1933) thought the schedule which now bears his name would be used in its various forms 80 years after his death.

For those not familiar with it, the "Scott Schedule" is simply a way of setting out claimed defects with columns for both parties to summarise briefly their arguments on each point and a blank column for the judge or tribunal to write in its decision.[1] Not only is the Scott Schedule format used to list defects in construction cases; it can also be used just as efficiently for listing a multiple range of topics that need a decision by a tribunal.

Alan Redfern has booked his place in posterity as the founding co-author of an excellent book on international commercial arbitration. However, just to be sure, he adapted the Scott Schedule into the "Redfern Schedule" which we all now use for itemising disputed document requests.[2]

Lucy Reed was probably too young to worry about posterity when she suggested the "Reed Retreat"—more of which later.

A suggestion made by Klaus Sachs in a paper given in Rio became labelled the "Sachs Protocol". This was a method by which the tribunal and the parties worked together with experts to attempt to determine precisely what had happened in a complex project.[3]

Even I have made a modest attempt to create an eponymous schedule which is a pro-forma schedule to be used for itemising costs claimed in an arbitration.[4]

The purpose of this article is to suggest something new which I guess might be called the "Kaplan Opening" (KO).

Before exploring it further let me set out the relevant background.

When I started practice at the bar far more reliance was placed on oral advocacy. Over the last 30 years or so there has been a substantial increase in the use of written advocacy at the expense of orality.

A crucial piece of oral advocacy was the opening of a case. In those days the judge rarely had an opportunity of getting to know the case and had frequently been given the papers only the night before. There were not as many specialised lists as there are today and case management as we know it today was more a thing of the future.

Thus, the opening of a case was absolutely crucial. You had the judge or tribunal in your hands. You could explain the case to them whilst at the same time making it clear that they could only decide the matter in your client's favour. You took them through the agreed bundle (far more skeletal that its fleshier modern counterparts) and by the time you had finished you could be sure that the tribunal fully understood your case.

At the end of an opening, however good, things could only go downhill. Witnesses might not come up to proof. The judge might see a point you had missed or avoided. Your opponent

[1] Examples of Scott Schedules are set out in John Tackaberry and Arthur Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, Vol.2 (London: Sweet & Maxwell, 2003), paras A54-071, A54-073 and A54-074.

[2] For an explanation of Redfern Schedules see Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 5th edn (Oxford: Oxford University Press, 2009), paras 6.113–6.116.

[3] See Alison Ross, "A Sachs-y New Approach to Expert Evidence?" (2010) 5(3) *Global Arbitration Review*. Available online at: *http://globalarbitrationreview.com/journal/article/28513/a-sachs-y-new-approach-expert-evidence* [Accessed February 18, 2014].

[4] See Neil Kaplan, "Problems at Both Ends" in S. Kroll, L. Mistelis, P. PeralesViscasillas and V. Rogers, *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (London: Wolters Kluwer, 2011), pp.284, 288–290.

might have dented one or more of your witnesses in cross-examination—or just been very persuasive.

There is a story, more likely to be true than apocryphal, that when two well-known QCs were against each other in a construction case, the one acting for the plaintiff stood up and immediately referred the judge to p.1 of the agreed bundle. Opposing counsel, sensing that his learned friend would be taking the judge through the bundle by reading out each page, immediately intervened and suggested to the judge that it might be of assistance if instead both counsel gave a 15-minute summary of their respective cases. Plaintiff's counsel turned green as his introduction to the bundle was contemporaneous with that of the judge. A short adjournment enabled him to find out from his instructing solicitor what the case was about.

How different it all is today. By the time the case gets to an oral hearing the tribunal will be drowning in the claimant's memorial on the merits, with witness statements and documents relied upon, the respondent's defence memorial with witness statements and documents relied upon, claimant's reply, and if necessary the defence to counterclaim and at least one rejoinder. On top of all that there may be skeletal opening arguments some of which will be far from skeletal.

It is not an exaggeration to say that in many cases the tribunal will have received hundreds and sometimes a thousand or more pages of submissions alone.

When the hearing commences provision might have been made for an hour or two for brief written openings then straight into the cross-examination of the claimant's first witness.

The present procedure whereby everything is put in writing at length and effectively dumped on the tribunal is perhaps a reaction to the present state of the common law which has taken away all immunity of counsel in the conduct of litigation and arbitration, hence making it a necessary safeguard (especially in particularly litigious jurisdictions) to throw in everything in order to protect the advocate from possible suit—mostly frivolous.

However, the modern procedure is based on a fallacy and that is that the tribunal is capable of taking in and processing all this material. Lucy Reed in her lecture in Hong Kong in December 2012 explained how important, even crucial, it is for a counsel in international arbitration to

> "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".[5]

This is not new. As the Roman lawyer, Quintilian, said in the first century AD:

> "[W]e 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".[6]

Advocacy is after all the art of persuasion. To be persuasive you need to be succinct.[7]

[5] Lucy Reed, "Tribunal Decision-Making: Art, Science, Sport?", available online at: *http://neil-kaplan.com/#kaplan-lecture* [Accessed February 18, 2014].

[6] Quintilian's *Institutes of Oratory*, Book V, Ch.12.8. Quintilian's treatise on the art of oratory is an exhaustive analysis of Roman educational practices, treasured for centuries by Western scholars. Available online at: *http://rhetoric.eserver.org/quintilian/* [Accessed February 18, 2014].

[7] As to the benefits of brevity in pleadings, Lucy Reed said this in her 2012 Kaplan Lecture ("Tribunal Decision-Making: Art, Science, Sport?", available online at: *http://neil-kaplan.com/#kaplan-lecture* [Accessed February 18, 2014]:

> "My first position as a lawyer was as law clerk to a US federal trial judge, the Honorable Barrington D. Parker. One case in front of Judge Parker involved a challenge by the US Postal Service to a private company that was delivering business mail in competition with the Postal Service and, allegedly, in violation of the US Constitution Article I, Section 8(7), which gives the federal government sole authority '[t]o establish post offices and post roads.' The company and the Postal Service filed extensive written submissions and evidence, and spoke at length in the hearing. The postal workers union, represented by one Mozart Ratner, entered the case as amicus. Mozart Ratner filed, in my memory, a 10-page brief that elegantly framed the Constitutional arguments. Mozart Ratner spoke at most for a few minutes at the hearing. The end of the story? His presentations effectively became Judge Parker's opinion in favor of the Postal Service.
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> You will surmise that I am a fan of the Mozart Ratner approach to pleading."

Christopher Newmark has sensibly made the point that, to improve

> "the tribunal's understanding of the case early in the proceedings is not difficult, but it does require a deliberate effort on the part of both counsel for the parties and the tribunal. Counsel should appreciate that there are significant advantages to be gained in terms of case management from developing the issues in the case more fully from the outset. And the tribunal must commit to reading and becoming familiar with the written materials it is sent from the start of the proceedings. If this is done, then the tribunal can work with the parties to develop bespoke procedures that are suitable for the case, thereby taking advantage of the flexibility that arbitration offers."[8]

How then do we achieve this? This leads me nicely to my proposal which I believe will ameliorate the problems to which I have adverted.

At a convenient time in the arbitration, probably after the first round of written submissions and witness statements but well before the main hearing, the tribunal should fix a hearing at which both counsel will open their respective cases before the tribunal. They may be required to serve skeleton arguments in advance. After the openings any expert witness should make a presentation of his or her evidence and explain the areas of difference from the expert of like discipline on the other side.

What are the advantages of this proposal?

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 from that point on, 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 in putting points to the parties which they will then have time to consider and to respond to.
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.
6. It will assist in ensuring speedier and, I would suggest, better awards.
7. Bringing the parties together, with their trial counsel, well in advance of the hearing, means that there is a chance that at least part of the case may be settled, or points of disagreement minimised.

Further, the fact that the parties are physically in front of the tribunal tends to engender more of a reasonable approach, which is quite different to the aggressive way that lawyers often communicate with each other when not before the tribunal. Much of what is produced as a result of this aggressive display is not helpful to the tribunal. It is worth pointing out that whereas it is easy to write offensively it is far harder to replicate this verbally in front of three arbitrators and the other side without losing credibility or sympathy.

I hope it can be said that taking an approach like this would be complying with the exhortation contained in the Hong Kong Arbitration Ordinance s.46, which requires the tribunal

> "to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving dispute to which the arbitral proceedings relate".[9]

One possible objection may be that it will increase the cost of the arbitration. I do not believe that this is necessarily so, as it may in fact result in the dropping of some issues and may

[8] Christopher Newmark, "Controlling Time and Costs in Arbitration" in Lawrence Newman and Richard Hill, *The Leading Arbitrators' Guide to International Arbitration*, 2nd edn (New York: JurisNet LLC, 2008), p.83.

[9] Also see the UK Arbitration Act 1996 s.33.

assist in ensuring that the main hearing proceeds more expeditiously and thus more economically. But in any event it will ensure a better informed tribunal which will assist in ensuring a better award and a speedier one too. But even if it does increase the costs marginally it is surely a worthwhile price to pay to enjoy the obvious benefits it will provide.

Too many counsel think that they should control the way in which a case is presented to a tribunal. Most experienced tribunals, however, have their own way of organising the proceedings and if this proposal catches on counsel will just have to understand that this procedure will assist not only the tribunal but also the parties.

This early dialogue with counsel may also help to prevent the service on the tribunal, fairly late in the day, of a large number of authorities. The tribunal will be able to remind counsel of the wise and practical words of Lord Diplock in *Lambert v Lewis* in the context of counsel citing cases to illustrate a well-established principle:

> "The citation of a plethora of illustrative authorities, apart from being time and cost-consuming, presents the danger of so blinding the court with case law that it has difficulty in seeing the wood of legal principle for the trees of paraphrase."[10]

It is also surprising how much space is taken in written submissions explaining to an experienced tribunal such complex issues such as "offer and acceptance" and the implication of terms! Although not all tribunals are comprised of legal geniuses, it ought to be assumed that a tribunal chosen by the parties or appointed by an institution will at least understand the basic principles of law. Is it really necessary to cite *Carlill v Carbolic Smoke Ball Co*[11] or *Donoghue v Stevenson*[12] to a common law tribunal?[13]

In my view, there is also a lot to be said for imposing reasonable page limits. I accept that it might be difficult to arrive at a fair figure for the early rounds of submissions, but by the time one gets to closing written submissions, surely, it must be reasonable for a tribunal to impose page limits. In my experience, too many arbitrators are reluctant to do this, but I think that it does concentrate the mind of the drafter so as to enable him or her to be succinct in the final summary of the case. If it is not possible, at the end of the case, with all that has been said and written previously, to be able to summarise succinctly where your case has ended up, something must have gone wrong.

I am pleased to be able to end by stating that this article is not theoretical. I have used it in a technical case where I was sole arbitrator and had no expert of my own, nor assessor. The KO took place three months prior to the hearing and I found it of immense benefit in my preparation for the hearing. I believe counsel found it valuable too. It certainly flushed out some issues which were then dealt with in the time available prior to the hearing. Had these issues only been raised at the main hearing a real problem would have been created.

I therefore encourage my colleagues to consider using the KO because I am sure they and the parties will benefit from its advantages. So to adapt a slogan used many years ago: "KO rules—OK?"

[10] [1982] A.C. 225 HL at 274–275.
[11] [1893] 1 Q.B. 256.
[12] [1932] A.C. 562; 1932 S.C. (H.L.) 31; 1932 S.L.T. 317.
[13] I accept, of course, that different considerations might apply with a mixed tribunal.