The David Caron Rule of X

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Thank you, Neil (Popovic), for the kind introduction. Thank you, Laurel (Fletcher), Karen (Chin) and so many others in the Berkeley community, for all the preparation. I add a special thank you to Susan (Spencer) for your courage.

As I prepared my talk, Professor Stacie Strong wrote to me: "Sadness shared is sadness halved." I am not sure I agree, but I do know that celebration shared surely is celebration doubled. I am deeply honored and grateful to be invited to speak at this celebratory symposium for David.

INTRODUCTION

David and I were friends for over 30 years. On the professional side, I followed him as Chair of the Institute for Transnational Arbitration and he followed me as President of the American Society for International Law. We planned many symposia and programs together. One of the things we agreed on was that luncheon talks should be a bit light—substance with humor, "medicine with a spoonful of sugar." David delivered such talks—as he did so many things—elegantly and (apparently) effortlessly.

To find my bearings—or in David's Coast Guard terminology, to find a mooring for an appropriate arbitration topic—I thought back to the one time David and I were formal co-authors. This was in 1995, when we wrote on International Centre for Settlement of Investment Disputes post-award remedies.[1] Too dry for lunch, he would say.

So I took a look at what David was writing about recently. I found on SSRN the text of his Opening Lecture of the 2017–2018 MIDS Academic Year, which he delivered in Geneva on September 28, 2017.[2] (MIDS is the prestigious Masters in International Dispute Settlement program at the Graduate Institute in Geneva, headed by Professor Gabrielle Kaufmann-Kohler.) The intriguing title

DOI: https://doi.org/10.15779/Z38WD3Q21P

1. Lucy F. Reed & David D. Caron, *Post Award Proceedings Under the UNCITRAL Arbitration Rules*, 11 ARBITRATION INT'L 429 (1995).

2. David D. Caron, *Arbitration and the Rule of X, King's College London Dickson Poon School of Law Legal Studies Research Paper No. 2017-41 (Sept. 28, 2017), https://ssrn.com/abstract=3062537.*

is "Arbitrators and the Rule of X." The SSRN text is "As delivered." and I have confirmed that David had not yet developed it further.

Once I read the lecture and understood how David was using the "Rule of X," I realized that the concept fits squarely with ideas independently percolating with me now that I sit as arbitrator more often. If David were still with us, I surely would have telephoned him and proposed that we co-author something again.

As David is not still with us, I have to develop his "Rule of X" alone. Well, not actually alone, as I seem to have a dialogue going on with him in my head, soon to be put down on paper.

And I have ambitions beyond a paper version of this keynote. My goal is to have the "David Caron Rule of X" become part of the international arbitration lexicon—like the (Alan) Redfern Schedule, the (Neil) Kaplan Early Opening, and the (less well-known) Reed Retreat.

THE ARBITRATOR RULE OF X

What is the "Arbitrator Rule of X"?, you want to know. I am sorry, but this being a light luncheon talk, David would want me to keep you in suspense a while longer.

On that day in Geneva, David introduced his topic as the "far-flung array of individuals who serve as international adjudicators, arbitrators, commissioners and judges," as the people he found "the most difficult group in international courts to predict, to give a logic to."[3] In particular, because he did not agree that their primary driver is reappointment, his research focus was on their being "reappointed by virtue of their reputation."[4]

David emphasized that he was just opening this discussion, and his view "presents a much deeper agenda than currently set out."[5] He acknowledged that arbitration courses (and conferences) address arbitrator ethics and conduct, but only the minimum that the *parties* may expect. In a statement introducing the core of the lecture to come, he said: "Unaddressed to my knowledge is a discussion not of minimums but of *what arbitrators professionally should demand of themselves and each other*."[6]

David then tackled and dismantled the common charge that international arbitrators constitute a "mafia" or a "club."[7] He rejected the criticism that there is an organized and closed group of arbitrators working to perpetuate their own

3. *Id.* at 3. In this connection, David cited his 2011 Lalive Lecture: *International Courts and Tribunals: Their Roles Amidst a World of Courts*, 26 ICSID REV. 13 (2011).

4. Caron, *supra* note 2, at 3.

5. *Id.*

6. *Id.* (emphasis added).

7. In this connection, David cited YVES DEZALAY & BRYANT GARTH, DEALINGS IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 10 (1996) and Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUROPEAN J. INT'L L. 425 (2014).

self-interest through repeat appointments, primarily because of the key role of counsel in tribunal selection. This is not a cartel situation, he said, but rather a market in which users select arbitrators with limited information, relying heavily on reputation.

After quoting Shakespeare's Iago—this was David, after all—that "Reputation is an idle . . . imposition, oft got without merit and lost without deserving,"[8] he astutely observed that "no arbitrator can maintain an undeserved reputation for long."[9]

One can agree or disagree with his impatience with the mafia charge; even he footnoted the problematic "double-hatting" by counsel and arbitrators. But his real impatience was to move beyond the facile mafia argument. He submitted that the simplicity of the argument risks keeping our focus away from more important issues. More provocatively, he argued that "certain aspects of a club [actually] would be desirable to improving both the diversity and conduct of arbitrators."[10]

David observed that it is the arbitral institutions, which are the most club-like parts of the international arbitration system, that are leading efforts to advance the diversity of the arbitrator pool. They do this by increasingly offering training and by developing—in an admittedly disjointed fashion—standards of conduct for arbitrators.

David's target in Geneva was the arbitrators themselves, in particular the "*disruptive practice*" of over-commitment.[11] It is trite that over-trading can contribute to unnecessary delay. What David added, though, is that over-trading also can contribute to lower quality arbitration and, in extreme cases, to lost opportunities for new arbitrators. I will return to this.

David also added that the disruptive practice of over-commitment is "more nuanced and widespread" than the particularly packed schedules of particularly busy arbitrators.[12] It is also the province of the practitioner with only one or two arbitrations, "which are difficult to mix with the unrelenting demands of clients," and the academic with only one or two arbitrations, "which are difficult to accommodate within teaching schedules."[13]

David examined the cause of over-commitment. He said that often it is paranoia—an arbitrator is reluctant to say no to a new appointment, for fear he

8. William Shakespeare, *Othello*, act 2, sc. 3, 268–70.
9. Caron, *supra* note 2, at 8.
10. *Id.* at 10.
11. *See* David W. Rivkin, *Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited*, 24 ARBITRATION INT'L 375, 386 (2008); DAVID W. RIVKIN, HKIAC ARBITRATION WEEK KEYNOTE ADDRESS: A NEW CONTRACT BETWEEN ARBITRATORS AND PARTIES 6 (Oct. 27, 2015), https://sccinstitute.com/media/93206/1000973790v2-hkiac-keynote-address.pdf (last visited Nov. 27, 2018).
12. Caron, *supra* note 2, at 10.
13. *Id.* at 10–11.

or she will not be asked again, will then be moved out of play, and ultimately lose reputation.

Those in the field know that there have been external responses to over-commitment. The International Chamber of Commerce International Court of Arbitration, for example, now requires each arbitrator candidate to disclose how many tribunals he or she is sitting on and chairing, and to block out unavailable dates on a three-year calendar, rather than just making a one sentence declaration "I have capacity."

However, as David pointed out, the purpose of such institutional efforts is to provide information to the parties to help them make informed choices in arbitrator selection. These tools do not impose uniform limits on service, or specific numbers of cases. Nor could they, for the important reason that, as David said, "the individual circumstances and capacities of arbitrators vary tremendously."[14]

David's proposition is that, in addition to such external steps, there is a critical need for *internal* discipline. In his words, arbitrators "need to reflect on the number of appointments they are reasonably able to handle . . . and the needed internal commitment is gained by . . . the Rule of X."[15]

Now you have it. David's "Rule of X," in simple form—Davidesque elegant form—is that each arbitrator should "set a number—X—as the upper limit of cases that he or she is capable of *responsibly* sitting on at the same time."[16] This of course varies with individual circumstances: experience, age, energy, full versus part time arbitrator service, the nature of other work – practice or academics?, legal culture, use of tribunal secretaries. "X" will also vary over time, and over a career.

One critical variable, or complication, arises with the responsibility of serving as chair. This led David to identify two "X"s: an arbitrator's total number of arbitrations, and the subset of arbitrations as chair. If he had had more time, no doubt he would have expressly elaborated on more variables: treaty vs. commercial cases, complex vs. modest cases, personal factors like family-life balance, intellectual challenge, the sheer fun that can come with sitting with certain other arbitrators and hearing certain counsel.

But, however many the variables and however subjective the exercise, David considered the consequences of *actually having an "X"* to be profound.

The first consequence: Having an "X" benchmark forces an arbitrator to assess each appointment more carefully, especially when one is at "X-minus-1." Speaking personally, David said: "I began to think very seriously about the characteristics of the arbitrations I most seek to be part of—is a state or

14. *Id.* at 13.
15. *Id.*
16. *Id.* (emphasis added).

government agency a party, who are the other arbitrators, the counsel, what is the issue?"[17]

Arbitrators at "X," or close to "X," turn down arbitrations that are smaller or otherwise no longer of substantial interest to them. The follow-on consequence is that those arbitrations can go to the next generation of arbitrators. This, said David, is "the opportunity that may increase the pool – and increase the diversity of the pool of arbitrators."[18]

The second consequence: If an arbitrator with X arbitrations applies the "Rule of X" rigorously, and turns down appointments, the "good news for arbitration and the parties in the X arbitrations is that [he or she] will have a clear strong incentive to more promptly finish some of the X arbitrations."[19]

The third consequence: Following the personal "Rule of X" leads arbitrators to serve with "a more robust conception" of the role, and thereby to improve the quality of their own arbitrations and arbitration in general.[20] David connected this to the *true* cost of over-commitment, namely that "over-commitment in the number of arbitrations is under-commitment to any particular arbitration."[21]

David concluded his lecture in Geneva with a description of the virtuous circle that could be unleashed with the "Rule of X": "[fewer] cases in the hands of a few, and a few cases in the hands of many, with new arbitrators rising from more diverse backgrounds."[22]

MIDS Professor Zachary Douglas reported that David's lecture resonated well, not surprisingly with most impact on the arbitrators present. Zachary wrote to me that the core message reflected the sort of person David was: "he described one of the evils of arbitrators accepting more appointments than their appropriate 'number' is that it prevents a younger generation of arbitrators from gaining the requisite experience as there are less cases to go around."[23]

Perhaps David's diversity prediction is overly optimistic, and it certainly is a long-term proposition. The other benefits of the "David Caron Rule of X"—and that is what it should be called from now on—would be apparent more quickly. By this I mean the benefits of *self-imposed* restrictions on the number of cases each arbitrator can manage, not just reasonably, but also with *excellence*.

All I can really add to David's MIDS lecture is my recent experience that the algebra of "X" is not artificial, but natural. As I said, before I read the lecture, I had independently realized that I had found an equilibrium in my own arbitrator

17. *Id.* at 12.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* In connection with diversity issues, David cited Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429 (2015); and Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration*, 35 U. PENN. J. INT'L L. 431 (2014).
23. Email from Professor Zachary Douglas to the author, 20 August 2018.

caseload. David and I had many discussions about the rewards and responsibilities of being an academic and sitting as arbitrator—but it seems he forgot to caution me against taking on too many cases at one time. I did that and, because they were all new cases on similar timetables, it proved very difficult to balance the work.

Just this spring, walking to campus, I—without knowing it—applied the "David Caron Rule of X" and found I was (pretty much) at "X." I found myself saying to myself, I now have the right number of cases. I am both challenged by and comfortable with my caseload of treaty and commercial cases, with my cases as presiding and co-arbitrator. The hearings fit well with my other work and teaching schedule, and leave priority time for family and friends.

To maintain this equilibrium, I will have to continue to turn down appointments. Like David, I will be thinking carefully about the legal interest and importance of the cases, the balance of my caseload, my looming calendar, the (at least) double work of presiding, and other factors like the place of arbitration. I admit it: all other things being equal, the opportunity for a hearing in a country new to me is attractive enough to get me from "X-minus-1" to "X," while returning to a familiar venue is not.

In turning down appointments, do I fear not being asked again? No. I explain that I lack the capacity, which prompts more appreciation than criticism. What I fear is not being able to perform the arbitrator work I already have to David Caron professional standards and compromising my reputation. I acknowledge that I am in a privileged position to be approached so often to serve as arbitrator and to be able to say no—and genuinely hope that David will prove right, and these cases will go to more diverse up-and-coming arbitrators.

I agree with David that "X" has to be subjective. For me right now, as a professor and director of an international law research center, it is a maximum of eight to ten cases, in different stages and permutations. For the legendary Pierre Lalive, it was five or six cases.[24] I sit with some arbitrators with notoriously high caseloads, and find them absolutely on top of our shared case and quick to share informed positions on all issues. I work with others, with either low or high caseloads, who clearly are not doing the heavy work themselves. Others are attentive but slow, a trait I think they should take into account in setting their own "X" factors.

There may be many permutations for "X"—but *all* require the type of self-awareness, self-discipline, and professional pride that David flagged in his lecture.

Going forward, I will be raising the "David Caron Rule of X," in terms, with colleagues. This does not mean asking others for a numerical "X"—that is

24. *Q&A with Professor Pierre Lalive*, 3 GLOBAL ARBITRATION REV. 3 (Nov. 1, 2008), https://www.arbitration-icca.org/media/4/68645270843168/media01231910475880008_10_14_gar-pla_interview.pdf.

understandably variable and private—but instead urging potential arbitrators to identify the relevant factors and run their own "X" equations.

This will be my way to honor David's intentions, expressed in his MIDS lecture, to develop his concept of the "Rule of X" in international arbitration and, perhaps more ambitiously, to start work on a lecture with recommendations on *ad hoc* International Court of Justice judging.

I hope the "David Caron Rule of X" catches on. If it does, it will be one more way to keep David with us.

Thank you.