Too Much Information or When Information Relating to Arbitration Obscures rather than Clarifies the Landscape

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The following thoughts are written aware of the fact that a blog is personal and informational and not a substitute for an academic article. In this spirit the thoughts expressed here are, while fundamental in many respects, also preliminary and tentative in some others.

The quest for more transparency in international (commercial and investment) arbitration captures the attention of novices and veteran insiders and outsiders of this area of dispute resolution. In this respect also the calls for publication of arbitral awards is not entirely new (Julian Lew, Klaus-Peter Berger and Martin Hunter have written on the issue since the late 1970s). The debate about transparency does not automatically exclude or eliminate certain private or confidential characteristics of arbitration, such as the private nature of arbitral deliberations, or the private or even confidential nature of most commercial arbitration hearings. Indeed, as far as I know only one LCIA award has ever been published although some other awards have been discussed in specific circles or to a very limited extent in court proceedings. While confidentiality is currently being challenged, many arbitration rules and some laws depart from a near absolute confidentiality. The situation is different in investment and sports arbitration.

We have witnessed the most recent "celebration" of transparency in the work of UNCITRAL, in particular the 2013 Transparency Rules, the Transparency Registry and the 2014 UN Transparency Convention (adopted by the UN General Assembly on 10 December) that will be known as the Mauritius Transparency Convention and will be opened for signature from March 2015. This is arguably quite timely, if one reads the criticisms towards Investor State Dispute Settlement (ISDS) expressed by German newspapers or anti-globalisation NGOs, particularly in the context of the EU-Canada negotiations for CETA (Comprehensive Economic and Trade Agreement), the EU-US negotiations for TTIP (the Transatlantic Trade and Investment Partnership) and TPP (Trans-Pacific Partnership). It is peculiar that certain NGOs try to use ISDS as the floodgate (or is it Trojan horse?) of these modern trade and investment agreements and apply pressure on governments, while the governments are clear that these agreements will go ahead with or without ISDS, but most likely with! It is certainly not for this blog posting to explore the ISDS question further and this will require another specific posting. Note that the Arbitration Institute the Stockholm chamber of Commerce maintains a very interesting ISDS Blog.

Perhaps, however, the most important, at least intellectually, contribution to the transparency discussion, is, in my view, the speech of Justice Geoffrey Ma, the Hong Kong Chief Justice. The speech

was delivered in October during the Hong Kong Arbitration week 2014 and was reported in Global Arbitration Review by Douglas Thompson. In essence, Justice Ma stressed that arbitrators and the arbitration community "need to do more to maintain public confidence in the international arbitration system." In particular, he acknowledged that arbitration does play a significant role in promoting "rule of law in making governments accountable and holding parties to their contractual obligations". Nonetheless, he also pointed out that arbitration may fall short of rule of law expectations, at least if one compares it with national courts. He then identified some key areas where arbitration seems to be inferior, in "rule of law" terms, as compared with court litigation:
1. Court justice is "open for the world to see", hearings are public and judgments are reasoned and published;
2. The judiciary is independent and unbiased and they are not paid by the parties, unlike arbitrators; of course he does not imply and expressly commented that he did not doubt the independence of arbitrators;
3. Closely linked to the point above, arbitrators are "challenged from time to time for not being truly independent".

Justice Ma also discussed briefly the "emergence of codes of ethics and standards of conduct" introduced to soft regulate arbitrator and counsel conduct in arbitration proceedings.

It would be useful to give an arbitration lawyer's perspective to the three issues raised by Justice Ma. It is also important to admit the criticisms expressed by Justice Ma are both legitimate and constructive. They are constructive because he departs from the premise that arbitration and litigation co-exist and they will continue to co-exist and hence it is appropriate to safeguard this multiple dispute resolution landscape. They are legitimate because the arbitration community can no longer remain complacent and even introvert but has to engage with the critics in a forward looking and honest debate. In this regard, the School of International Arbitration and its five published surveys of corporate attitudes towards arbitration have sparked a useful and on-going dialogue between the arbitration community (arbitrators, arbitration institutions and arbitration counsel) and the users of arbitrators (corporate counsel and states).

Back to Justice Ma and the three aspects of rule of law and arbitration:

First, in my view, open courts do not always or necessarily inspire confidence in the wider public and extending this level of transparency to arbitration would not benefit the arbitration process or the disputing parties. I could use here two extreme court litigation examples, the Oscar Pistorius and the O J Simpson trials. Both attracted wide publicity, people attended parts of the trial on TV, they were easily accessible, journalists analysed and popularised every part of the trial but the wider public was left with the impression that something was not right with the outcome. I do support open trails but the level of scrutiny by the press and the public may place the court and/or the jury under extreme pressure. The mere fact that publicity is available does not necessarily entice the public to attend or follow the case. This is also true in relation to arbitration: in cases where arbitration tribunals opened the doors for the public to attend hearings the attendance was very poor in the first days and there was no audience whatsoever in the final days of the case. Technically, public hearings do not equal openness: the non-legally trained audience would hardly understand the procedural technical nuances or the legal reasoning and conflict of laws issues. I do agree that publication of awards should be welcomed, ideally with the consent of the parties or with awards being published in an edited and sanitised fashion, as is the case in most civil law jurisdictions. One should also point out that most arbitral awards are longer in comparison to court decisions. For example, French cour de cassation decisions are notoriously laconic and inaccessible to the untrained eye. Of course, in some instances court decisions have an elegant legal reasoning while often arbitral awards balance the recount of the facts with application of legal norms ranging from hard to soft law and occasionally simulating the honeybee collecting legal reasons and norms from an anthology of sources. I would

generally agree to the publication of awards but this is something entirely in the hands of the disputing parties and the arbitration institutions. The task of the arbitrator is to ensure due process and render an award. And since the establishment of the Yearbook of Commercial Arbitration in the late 1970s and with the contribution of the ICC, CRCICA and other institutions, several awards with interesting legal questions have been published in some form.

Second, in domestic cases the parties also pay the judges, albeit indirectly through taxation and court fees. An argument is also often made, and there is some truth to it, that in international court cases the local parties have a "home advantage" which at least is undisputed in terms of familiarity with the court culture and procedures. And there is also empirical evidence that repeat users usually fare better. Justice Ma does not consider that there is a major problem with arbitrator independence and impartiality and accepts that a great deal has been done in the last few years. For example, the LCIA with the publication of reasoned decisions relating to challenges of arbitrators has shown leadership and shed light on the process. The IBA has elaborated guidelines on conflicts of interest with the most recent edition adopted on 23 October 2014. In investment arbitration most arbitrator challenge decisions also attract interest and are scrutinised by the community once rendered (although the reasoning tends to be scarce when the challenge is dismissed). Again, the control of how (and by whom) challenges of arbitrators can be handled and how much information can be released in relation to such decisions is in the hands of arbitration institutions and the disputes parties.

Finally, it is indeed inevitable that challenges sometime are successful. There are even successful cases for lack of independence in relation to the judiciary. One can possibly recall the Pinochet case in the House of Lords to name but just one. And it is undisputed that often the arbitration is as good as the arbitrators. It is also true, however, that it is the parties that own (and to some extent control) the arbitration while the arbitrators merely navigate with the parties, strive for equality, fairness and commitment to due process in the voyage towards a decision.

It would be fair to say that while Justice Ma spoke to the arbitration community, rather than to the arbitration users, he effectively suggested structural improvements which are best co-ordinated by arbitration institutions, given that there is no single global arbitration organisation.

Recently, there has also been an initiative for more publicly available information about arbitrators.

First, The IA Reporter, edited and published by Luke Peterson, compiled arbitrators' profiles, listing cases in which the arbitrators were involved and news items relating to the arbitrators. Second, in Arbitrator Intelligence a "jumpstart project" led by Professor Catherine Rogers, Alex Wiker and Professor Chris Zorn, featured also in the Kluwer Arbitration Blog. Arbitrator Intelligence is supposed to introduce a level playing field and assist disputing parties to make an informed decision when selecting and appointing an arbitrator.

One key methodology for Arbitrator Intelligence is the collection of published and unpublished awards. It also "aims to promote transparency, fairness and accountability." It seems to me that the methodology is flawed: many, if not most, arbitral institutions observe a strong confidentiality policy and a policy of no publication of awards without express consent of the parties. In fact many parties take no action at the end of their arbitration and certainly have no interest in publishing the award, especially if they did not prevail on the merits. If institutions publish, they normally produce an extract rather than a full award, at least in commercial arbitration cases. Accordingly, the methodology is unattainable and to the extent that the information about arbitrators is incomplete and scarce, it is also "impressionistic" and possibly misleading. There is also a flaw in relation to the mission statement: when a party is confronted with the task of appointing an arbitrator for a case, the party would rely on word of mouth, the reputation of the individual, any prior known experience, ranking in relevant directories etc. And ultimately one also looks at soft skills: the character and social

skills of the potential arbitrator as well the ability of the person to interact efficiently with the possible chair of the tribunal and the other party-appointed arbitrator. Such decision-making by a party is quite esoteric and impossible to quantify, as there are so many such variables. Accumulation of data would not provide any meaningful insight about arbitrators and the way they act or think or reason as in many three-member-tribunal cases, even if they are decided by majority, arbitrators do not render a dissenting opinion. It would be wrong to assume that an arbitrator agrees 100% with all points of the award of the majority.

Perhaps I should also state that I do agree that more information must overall be seen as a positive and welcome development. However, caution must be exercised in putting this data to the correct use. As we have seen above, raw data alone are of rather limited use. As a matter of fact, access to information even when information is abundant (as in the cases of Pistorius and O J Simpson trials) is not always enlightening and certainly is not the single adequate criterion to reach a decision about arbitrators. The situation is much more challenging where information is sparse and incomplete; the consequences may well be forming the wrong impression and making ill-informed decisions. It is not just about information and data as analysis can only be “safe” if based on comprehensive, relevant and accurate data.