Kluwer Arbitration Blog

Arbitration 2015: The Best of Times or the Worst of Times? A Debate

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This was the title of one of four sessions comprising the dispute resolution module held as part of the fifth Institute for Energy Law (IEL) and IBA Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL) International Oil and Gas conference, which took place in London on 3-5 June 2015. The dispute resolution module was presented by the Institute for Transnational Arbitration (ITA).

The debate saw leading practitioners going head-to-head on the pros and cons of some of arbitration's most "recent developments and 'innovations'". Batting for Team 1 was Sophie Lamb, of Debevoise & Plimpton and Dr. Jan Kleinheisterkamp, of the London School of Economics. Vera van Houtte, of Van Houtte Partners and Christopher Newmark, of Spenser Underhill Newmark LLP, took up the charge for Team 2.

Jacomijn van Haersolte-van Hof, LCIA Director General was appointed as judge. However, in a fitting innovative twist, it was the delegates, not Haersolte-van Hof, who were required to cast their votes via their mobiles on each of the four motions put forward by the teams. The advocates were keen to point out from the beginning that their views were not to be construed as necessarily their own or representative of their firm or institution. Delegates logged in and mobiles at the ready, the debate kicked off.

Motion 1: Rules of counsel conduct, including cost allocation mechanisms, are a laudable innovation in international arbitration. Newmark spoke for the motion. He argued that recent rules on counsel conduct, such as those of the IBA or LCIA, are not only laudable but "essential to the success of arbitration". In arbitration's potential "wild west" environment, he suggested that such rules not only "discourage bad behaviour but also legitimize good behaviour." Querying whether an arbitral tribunal was an effective body to enforce such rules, Newmark stressed that it was and in doing so, the tribunal does not take on a regulatory function; it is simply well placed to assess the impact of any problematic counsel conduct on the proceedings and to take necessary steps to safeguard the process. Arguably such steps could amount to nothing more than a "gentle wrap on the knuckles". However, since "lawyers don't like getting told off" the potential sanctions could nonetheless act as an effective deterrent, Newmark suggested. In conclusion, he also argued that the rules might also give counsel an effective tool to persuade clients as to appropriate

conduct.

Kleinheisterkamp provided a robust response. He first criticised the suggested contrast between having either a "wild west" or "international harmony" in arbitration. Instead of the latter begin realised, the innovation of rules on counsel conduct has instead brought about increased complexity and uncertainty regarding the duties owed by counsel and which may apply, Kleinheisterkamp argued. In this context, he recalled the criticisms of Michael Schneider on the IBA Guidelines on Party Representation. Kleinheisterkamp argued that we are not "dreaming the transnational dream" but instead left at a point when the only things that can potentially be agreed upon are the "lowest common denominator". Rather than various rules on counsel conduct, what we instead need, he argued, are arbitrators willing to intervene as necessary to ensure efficiency of proceedings; we need arbitrators with the "courage to discipline parties".

The vote? Motion passed with a 63% majority.

Motion 2: Tribunals do not fulfil their mandate unless they are proactive. In a similar vein as Kleinheisterkamp, van Houtte argued that tribunals need the "courage" to "roll up their sleeves" and be proactive. A key driver for this, van Houtte argued, was the need to ensure parties are not put off arbitration and resort to other dispute resolution mechanisms. Van Houtte appeared to argue that a cooperative approach was necessary; the tribunal should make enquiries with the parties as to how proactive they would like it to be, with consideration paid to the parties' capability to organise themselves and manage their own proceedings. Querying how the tribunal should go about doing this, van Houtte noted that terms of reference can be very beneficial although the tribunal should be open to these being amended later if necessary. She also suggested a tribunal's mandate should include it having its "eyes open" at all time on whether negotiations as to mediation and/or settlement can be resumed.

Speaking against the motion, Lamb first noted it was ironic she was adopting such a position, as she is known as an advocate for proactive tribunals. She would nonetheless venture five things: first, an observation: tribunals cannot always save parties from themselves, not matter how proactive they are. Second, a criticism: terms of reference and other case management techniques are not always useful; they can be formulaic, adversarial, costly and time-consuming, and ultimately lead to increased "bureaucracy" of proceedings. Third, an objection: Lamb queried whether tribunals should be tasked with "administering a wider system of justice", noting that sophisticated parties will know when to mediate and how. Fourth, Lamb advised that parties should build their own proceedings "up from scratch" and consider what are the particular requirements for their specific case. Fifth and finally, a prophecy: Lamb described the arguable simplicity of sports arbitration proceedings and that certain lessons could be learnt from this (for example, time and costs savings).

The motion was opposed by a very small majority of 51%.

Motion 3: Governments should support international arbitration as a relevant and legitimate means for resolution of investor-state disputes.

Kleinheisterkamp most notably argued that the rule of law can be preserved through strong government support of investor-state disputes (ISD) (i.e. entering into bilateral investment treaties (BITs)). He suggested that it is arguably for this reason that politicians should "risk their political capital" and taxpayers' monies. In response, van Houtte argued that the issues encountered in ISD are not those of "everyday business" and commercial arbitration. For example, arbitrators may lack the requisite specialisms for dealing with public international law. There may also be concerns as to the transparency of the proceedings and the likelihood of interested non-party participants (for example, NGOs). Rather than advocate governments disengage from ISD mechanisms entirely, van Houtte instead pleaded a case for a new supra-national court which BITs could refer.

The motion was passed a 59% majority.

Motion 4: Emergency arbitration proceedings are not window dressing. Lamb spoke for the motion, suggesting first that to argue anything to the contrary would be to go against the recent practice and rules of the world's leading arbitration institutions (such as, of course, Haersolte-van Hof's LCIA). Lamb noted that the rules for emergency arbitration proceedings had been drafted very carefully to maximise their effectiveness and to also contain sanctions as to their misuse. Various institutions are seeing the measures being increasingly used and in inventive ways, the conclusion being that they are seen as useful and user friendly, Lamb argued.

Newmark responded strongly. He first queried the effectiveness of the so-called "emergency" proceedings when the process could take up to two weeks and could not be used on an ex-parte basis. Noting that local courts may be required to enforce any resulting award, Newmark suggested that it was questionable why parties didn't simply seek court relief from outset in such circumstances. In this respect, he suggested that a key reason for seeking such relief, to avoid unfavourable local courts, became obsolete. Newmark also raised issues as to costs and uncertainty of outcomes. In conclusion, he suggested that emergency arbitration was still a "novelty" and "new toy to play with"; he suspected its popularity will not last much longer than the "honeymoon period" it was currently enjoying.

The final vote? Motion opposed with a majority of 64%.

The other dispute resolution sessions at the conference covered a case study focused on a fictional oil and gas company facing parallel civil litigation, regulatory and criminal proceedings, issues in arbitration involving re-opening of gas prices, and oil and gas technology disputes. The conference also included modules focused on updates from various regions, legal challenges and M&A trends involved in operating in unconventional and mature basins, and debt and equity financing for E&P companies.

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