Back To The Roots of Arbitration

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„The children now love luxury; they have bad manners, contempt for authority […]. They contradict their parents […] and tyrannize their teachers." This complaint sounds familiar, but the quote is actually attributed to Socrates. As every generation after him seems to have had the same sensation, children's behaviour must have constantly deteriorated over the last 2400 years. Or is it that every generation is looking at the past with a certain degree of romanticization? As always, the truth arguably depends on the perspective and lies somewhere between the extremes.

But what does all of this have to do with arbitration? Maybe nothing. However, Socrates' quote comes to mind when one speaks to arbitration users or practitioners who recount with shining eyes that back in the good old days of international arbitration, commercially sensible decisions were taken within a very reasonable period of time and in the framework of simple and inexpensive proceedings. By contrast, so they say, today's arbitral process has become so over-sophisticated, over-lawyered and suffocated by a plethora of detailed laws, rules and guidelines that arbitration is hardly any more efficient than state court proceedings in trusted jurisdictions.

Some of this criticism might likewise result from a certain degree of romanticization. There have been very lengthy and costly arbitrations in the past, and complaints about proceedings being too slow and costly are not a completely new phenomenon either. However, this does not mean that today's persistent criticism is unjustified. One can hardly deny that there is some truth to the wide-spread sensation that, on average, arbitrations have become significantly more expensive and time-consuming, and that this has something to do with a new level of sophistication of the arbitral process, especially from the side of parties' counsel. Extensive document production requests, overly voluminous written submissions and frequent challenges of arbitrators appointed by the other side are just some well-known examples for what has made the arbitral process more lengthy and costly. Accordingly, when asked in the 2010 Queen Mary Survey about what contributes to the length of arbitrations, the top three answers given by arbitration users were (1) disclosure, (2) written submissions and (3) constitution of the tribunal. Since all three typically involve much more work on the part of counsel than on the part of arbitrators, it is hardly surprising that based on ICC statistics roughly 80% of the total costs of arbitral proceedings are lawyers' fees.

In large disputes, the stakes involved can of course justify today's level of sophistication. However, in many other cases, the cost and time of arbitration have come to be regarded as a serious problem. In the 2006 Queen Mary Survey, when asked about the disadvantages of arbitration, the top answers by users were (1) expenses and (2) time. In the 2013 edition of the survey, users were presented with seven perceived advantages of arbitration, among them cost and speed, and were asked to rank them – cost was ranked lowest by a clear margin, followed by speed. Given the 2006 survey results, it is doubtful whether participants would have even mentioned cost and speed as advantages had they not been asked to rank them. This perception of today's arbitral process is striking, given that in

earlier times speed and cost-efficiency were seen as decisive advantages of arbitration compared to state court proceedings.

Against the background of this worrying development, the authors could not resist the temptation to launch a project that in some respects tries to go back to the roots of arbitration. The Court of Innovative Arbitration (COIA) aims to more closely resemble the following description given in Redfern and Hunter on International Arbitration: "In its early days, arbitration would have been a simple and relatively informal process. Two merchants, in dispute over the price or quality of goods delivered, would turn to a third whom they knew and trusted".

The COIA tries to achieve this goal mainly by relying on two pillars: First, the procedure is kept as simple as possible, not only to minimize the time and cost factors mentioned above, but also to give the arbitrator more leeway in adopting the most suitable approach for the case before him or her. Second, ex aequo et bono is strongly encouraged. Those two pillars, of which in particular the latter will meet scepticism, will be presented in the following.

As to the procedure, COIA arbitrations are seated in Switzerland, thus benefiting from its liberal approach to the arbitral process. One crucial aspect of COIA arbitration is that all cases are decided by a sole arbitrator, who is appointed by the institution from a list of (currently) eight arbitrators. The parties may agree on an arbitrator within a short time limit, otherwise the institution will appoint one. The idea behind this mechanism is of course to significantly reduce the time needed for constituting the tribunal. The arbitrators have been carefully selected with a view to safeguard integrity, quality of work, responsiveness and experience in ex aequo et bono.

In addition, the COIA Arbitration Rules encourage limiting the number of written submissions, even though of course the arbitrator will be mindful of the parties' due process rights when deciding on how to proceed after the request for arbitration and the answer (if any). Also, hearings – not necessarily in person – are only held if both parties so request or if the arbitrator finds that this is needed. In general, time limits will be short compared to traditional arbitration, and the procedure will be paperless to the furthest extent possible. Moreover, in order to further reduce time and cost, in particular in simple debt collection cases, if Respondent does not file an answer to the request of arbitration, the arbitrator may issue an award without reasons if Claimant so requests. In all other cases, the award will be reasoned.

Regarding ex aequo et bono, this is not mandatory in COIA arbitration. However, if parties use the unmodified model arbitration clause, they expressly empower the arbitrator to decide ex aequo et bono. Likewise, if there is no express agreement on the applicable law (or on ex aequo et bono), the COIA Arbitration Rules allow the Arbitrator to decide ex aequo et bono unless he or she finds it more appropriate to apply the law most closely connected to the dispute.

The idea behind this "bias" towards ex aequo et bono is simple: International arbitrators frequently have to apply legal systems in which they have not been trained. This often leads to one of the following situations: In some cases, both parties submit expert opinions on foreign law, which more often than not both sound perfectly reasonable but reach different results. In other cases, only one party is in a position to submit an expert opinion, while the other party may rely on its own research or not submit anything. Still in other cases, neither party makes any (helpful) submission on the applicable law. None of those situations is particularly desirable, and none of them helps saving time and costs.

The application of ex aequo et bono obviates the need for researching foreign law or providing expert testimony on this issue, thus obviously saving time and cost. But is a decision ex aequo et bono a price that parties should be willing to pay in order to simplify the arbitration? Commentators tend to

be critical of ex aequo et bono, mainly based on the argument that the outcome is completely unpredictable. If that were so, parties should indeed engage in ex aequo et bono arbitrations only in special cases and when both of them know the arbitrator very well.

However, in the authors' experience, ex aequo et bono *in practice* does not result in the lack of predictability that is posited in scholarly writing. The authors have had the benefit to closely monitor more than 700 arbitrations conducted ex aequo et bono (the authors' law firm created and administers the Basketball Arbitral Tribunal or BAT, a court of arbitration deciding contractual disputes in professional basketball worldwide). In the vast majority of those cases, the arbitrators do one simple thing: they apply the parties' contract. Only in rare circumstances do arbitrators feel compelled (and in fact empowered) to disregard a contractual provision on the basis of general considerations of justice and fairness. In such case, arguably most jurisdictions would likewise invalidate the clause. Also, due to the publication of BAT awards, persuasive case law has developed for certain issues, thus providing additional predictability (it should be added that anonymized publication is possible also under the COIA Arbitration Rules subject to certain preconditions).

Obviously, there is always a certain degree of unpredictability about whether or not a given clause will be found sufficiently unjust to be disregarded by a certain arbitrator. But is this so different from traditional international arbitration, where there is a wide-spread sensation that arbitrators applying foreign law tend to take a decision that they deem fair and sensible as long as the foreign law appears to allow for it? Also, most jurisdictions anyway include blanket clauses or vague concepts that allow invalidating contractual clauses for reasons closely connected to justice and fairness. In addition, it is quite frequent that at least one party is unfamiliar with the legal system governing the contract. In particular, in the many cases in which the applicable law has been agreed upon only after most of the contract had already been drafted, this can lead to unpleasant surprises when the governing law contains unknown provisions altering what the parties agreed on.

In the authors' view, therefore, there is not that much of a "predictability gap" between traditional international arbitration and ex aequo et bono arbitration, at least in contractual disputes.

Whatever position one takes on ex aequo et bono, it will be exciting to see whether arbitration users who wish themselves back to the good old days of arbitration are willing to test a system that attempts to turn back the time in some respect.