Defending and Promoting Arbitration: Make it Simple!

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Over the last couple of decades, arbitration, its practical aspects, but also its very notion, have faced severe attacks from a variety of critics: politicians, members of civil society, users, etc. While arbitration practitioners are actively tackling many areas of reform, the majority of these denunciations appear, for the most part, biased and overly simplistic. Yet, these critiques have pervaded the public discourse, probably due to a lack of effort to educate, convey, and promote the spirit of arbitration. In sum, the general opinion on this unfamiliar form of justice is all the more biased given how little is known about it.

This failure to adequately educate the uninitiated has led many to see this process as inaccessible, as a system only in place for high-level or very technical disputes. Even when setting aside cost considerations, this layer of complexity has further burdened the perception that arbitration is primarily designed to cater to the elite, accessible only to a privileged few. Meanwhile, discussions about arbitration are generally (and rightly so given the wealth of topics to address) academic and abstract, and therefore less accessible to the general public. In light of these circumstances it seemed necessary to bring the debate into other spheres, through a different medium than dense and lengthy articles, in order to popularize and simplify the debate. The point is, when asked, "What exactly *is* arbitration?", to avoid answering: "Well, it's complicated." Thus, to fill an obvious gap for which we, as arbitration practitioners, may bear some responsibility, one approach could be to stop convincing and speaking to ourselves and perhaps be less elitist and more

… user-friendly.

Although far from being the first to do so, I had the idea of creating a short animation, spanning less than 10 mins, with the aim of connecting with non-practitioners, as though I were explaining my interest in arbitration to a relative, such as my grandmother or my daughter. Given the habits of consumption and communication now prevalent today, it seemed natural to explore these new avenues, by using online videos to offer a more user-friendly introduction to what should paradoxically be perceived as a modern form of dispute resolution. The arbitration world has already understood the power of using audio-visual tools to connect and communicate ideas. This is demonstrated, for example, by the training video that was released by the Singapore International Arbitration Centre (SIAC), which offers a step-by-step breakdown of an arbitration under the institution's Rules. Of course, there is also technology, such as video conferencing, recommended by some ICC Reports for the sake of efficiency, with even some discussion about the specific legal issues that that may arise. Setting aside the modern technological means for now, what about the substance?

The increasingly harsh condemnation of arbitration calls for a response centered on the basics: a clear explanation of the process and its objective pros and cons. This effort must be addressed not only to the general public, but also to less-knowledgeable legal practitioners. By increasing awareness and curiosity about arbitration, the hope is to further the development and interest in this process while also addressing its failings. In fact, the popularization of specialized research has been shown to increase its academic value. The danger, therefore, lies is sitting back and leaving it to those who, rightly or wrongly, have adopted an anti-arbitration stance.

These pitfalls, well-founded or not, are familiar to many of us: arbitration is viewed as (too) expensive; lacking in transparency because of its confidentiality; "undemocratic" (in contrast to the judiciary) and a threat to the rule of law, (given the tendency of arbitrators to apply, sometimes unpredictably, rules of equity). Finally, in the case of investor-state arbitration, the process is criticized as being overly protective of the interests of investors from capital-exporting countries, to the detriment of developing, capital-importing countries.

Naturally, the arbitration community, mindful of the importance of a positive perception of arbitration, is now actively involved in improving it. For instance,

there is a genuine attempt to achieve greater diversity – whether in terms of gender, culture, race or age – in the making of arbitral tribunals, to promote the global reach of arbitration, reinforce its legitimacy, and popularize the tool in other spheres. Similarly, investor-state arbitration, which bears the brunt of most attacks, is actively being reformed, as evidenced by the forthcoming revision of the ICSID Rules, the current round of meetings of Working Group III of the UNCITRAL, and the trend in the EU to reduce the potency of intra-EU BITs.

Despite the criticism, arbitration remains the preferred method of dispute resolution for international commercial disputes, as shown by the overwhelming majority of respondents in the International Arbitration Survey performed by the Queen Mary University.

The reasons for this preference are mostly positive. Reasons that are cited include: a greater enforceability of the awards through the New York Convention, ratified by most States worldwide; the confidentiality of the process; the ability to select specialized arbitrators adapted to the subject-matter at hand; and the flexibility of the proceedings. The conclusion that the court system is ill-equipped to meet the needs of international commercial disputes is certainly another important factor in the recourse to arbitration. In response to this, some jurisdictions, such as Singapore and France, have recognized the importance of adapting the judiciary system to address the specific nature of these disputes. To provide a recent example, France has recently responded by creating international commercial chambers within its court system. This trend – whether it will pay off or not – shows the general absence, outside of arbitration, of a specific justice system for international disputes.

Finally, as a neutral forum, arbitration has powerful potential in handling critical conflicts. It possesses the unique ability to remove sensitive matters from the public debate and provide the circumstances to facilitate a calmer discussion between the parties, whether at the State level, such as with diplomatic matters concerning border conflicts, or in commercial matters subject to political forces. As we were recently reminded by a remarkable contribution from the Stockholm Chamber of Commerce (SCC), the role of arbitration as a means to promote peace cannot be underestimated.

Arbitration is inherently a just and fair process, and this powerful message is worth being conveyed in simple terms.