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Is Arbitration Changing?

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One can observe two rather opposing trends. On the one hand there is a steady (and more recently significant) increase in the number of arbitration cases; one the other hand there is a rather systematic criticism expressed by certain voices, predominately in the corporate world.Most well established institutions have recorded a 10% increase in their number of case with the exception of LCIA that recorded an increase of cases of 60%. Several arbitration organisations, which operate regionally, in Latin America and in Central Asia also report very good numbers. Indications so far are clear that 2009 will be another very good year. In addition and, despite the recession, which hit many global law firms, more and more firms set up specialist arbitration groups or enhance their arbitration capabilities in respect of two regions, namely Latin America and Asia. We can also observe an unmanageable wealth of information and publications, yet with fairly few empirical studies that occupy the space between black letter analyses and anecdotal evidence. There is also a proliferation of arbitration courses for students and/or practitioners.

The corporate world, more than ever, voices its concerns about efficiency of the arbitration services, value for money and quality of services rendered by arbitrators, arbitration lawyers and arbitration institutions. The lion share of criticism is directed at arbitrators, their availability and the quality (and length) of their awards. Indeed some of the modern “great and good” who will feature in the top ten list of arbitrators will have more than a dozen cases at the time, often two dozen cases at the time and that sometimes in addition to their main job as partners of law firms, full time academics. The second major concern relates to enforceability of awards. Finally there is occasional whingeing about the fees arbitration institutions and law firms charge.

After all arbitration is a services industry. For the major part of the second half of the 20th century the industry was dominated by few cosmopolitan lawyers (practitioners or academics), which in the 1950 through the 1990s meant that they spoke French or have lived abroad for a significant amount of time. That was also the period for mega-stars in arbitration. Many of these names are very well recognisable and have been in everyone’s top ten or top twenty lists for the last twenty odd years. In the 1990s and the first years of the 21st century, arbitration has been “democratised” or “popularised”. Many lawyers, who feature as main arbitration players, still possess the international pedigree (speaking French alone is not sufficient these days – lawyers who feature well here are of Austrian, Belgian, Canadian, Dutch, Egyptian, French, German, Greek, Italian, Lebanese, Swiss, Swedish, as well as a new group emerging from Latin America); these cosmopolitan lawyers are now joined by litigators (predominately from the Anglo-American tradition, but also from the common law Asian world and Australia and New Zealand) with an

interest in international work.

Most certainly there are more persons involved in arbitration work now than twenty years ago. It will be, however, very difficult, if not impossible to substantiate a claim, that arbitration work now is not conducted as well as in the past. If this is the case, then why are there complaints about arbitration?

Let us have a closer look at some of the complaints. Two are the main concerns of the corporate world that the service providers, arbitrators, counsel and institutions can address. These are cost of arbitration and delays in the process. There is a third concern (enforcement), which is not yet empirically substantiated. Enforcement is ultimately the test of the success of arbitration and hence is the Damocles sword over each and every arbitration proceedings. The good news is that as it was been shown in the 2008 School of International and PwC Arbitration Survey overall the vast majority (92%) of arbitration awards is complied with voluntarily and in the remainder 8% of arbitration awards enforcement is effected via involvement of courts.

Cost is and should be a concern. At times of global recession, pursuing a claim in arbitration should not cost disproportionately much. Arbitration institutions, starting from ICC, have looked into that and how proceedings can be managed to reduce costs. Such initiatives are indeed very welcome. Working groups amongst counsel are also looking into such issues. It appears that law firms have started looking into fee structure departing from age-old traditions. In-house counsel are managing arbitrations very closely and contribute their part in cost saving. Institutions, both with ad valorem fees and hourly rates negotiate with arbitrators how to best remunerate efficiency. Ad hoc proceedings are also selected when use of an institution is not considered advantageous.

As far as delays are concerned, in most cases arbitration proceedings can be as fast as the parties want them to be. In certain very high profile or high volume cases parties often consider that they best manage their risk by appointing the biggest names in arbitration. Coordinating diaries of busy lawyers and busy arbitrators can only equal slow down or even delays. On a more positive note, of course, it seems that more newish arbitrators are being appointed by arbitration institutions and parties. This is not only expected but also mandated by the increase in the number of cases and geographical expansion of arbitration proceedings and arbitral seats.

The improvement of efficiency of arbitrators is not dependent on a single group of actors but rather a collective effort. The advantages of arbitration remain in tact. Let us all do our bit to keep arbitration blossoming.

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