Kluwer Arbitration Blog

Anti-Arbitration: A New Year's Resolution to Leave Worst Practices Behind

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One way of looking at best practices is to think of them as the opposite of doing everything on an ad hoc basis. While international arbitration's touted flexibility can give parties and arbitrators the ability to craft the proceedings to the particular circumstances and needs of the case, extreme customization can make an arbitration appear entirely unpredictable until proceedings are well underway.

But there are certain practices that are as unwholesome as they are repeated with hard-headed stubbornness that they merit the denomination "worst practice". A good New Year's resolution for those engaging in international arbitration would be to pledge to stop engaging in them.

While arbitrators, institutions, and even country legal systems, may all have their own list of worst practices that merit serious attention, I'll limit myself here to throwing stones at my own glass house: the worst practices committed by in-house counsel like myself and the lawyers we appoint. My home-brewed definition of worst practice is simple: to qualify as "worst," it has to be bad for the person or party practicing it, a self-inflicted injury of sorts, and to be a "practice", it should be something that I've experienced more than once, having either committed the sin myself or observed it being committed by opposing parties.

Party Worst Practices

1. **Deferring assessment of probable outcomes until the arbitration is underway**. One way by which some parties try to make arbitrations more predictable is by performing an "early case assessment" (ECA) even before proceedings may have been initiated. A well-done ECA will estimate the probable outcomes and costs associated with resolving the dispute through arbitration, as well as identify key strategic issues or facts that, if developed, may materially affect the outcome. By making the dispute appear more predictable, an ECA will also provide the party with reasonable settlement objectives, save time and cost, and likely assist in identifying ideal arbitrators for the dispute.

An ECA is such a best practice that its opposite – the failure to do one at the onset of a dispute – can only qualify as a worst practice. Either because we refuse to ask – or because we retain and keep counsel who refuse to advise – parties may lack any sense of reality until the very late stages of an arbitration. The justification for not doing an early assessment is often one of cost, yet any savings will be illusory if, by remaining in the dark, the party shamefully wastes its own resources.

Many arbitrations are founded on unrealistic expectations, an unwillingness to confront bad facts, unrecognized weaknesses of certain claims or defenses, or just a failure to appreciate the various obstacles between initiating a proceeding and arriving at the desired outcome.

A party that chooses to remain in the dark is only setting themselves up for a shock that will only be more brutal if light is turned on after it is too late to correct any bad decisions. Jurriaan Braat, a partner with Omni Bridgeway, a Dutch company specializing in the enforcement of international arbitration awards, is someone whose job is, in a way, to take a hard look at the difficulties of enforcing awards once rendered. In a recent interview for an upcoming IDN podcast, Jurriaan said that he commonly finds that claimants will have failed to assess the likely problems they will encounter in the enforcement stage until they have their award in hand. Only then might they discover that the award debtor's assets are inaccessible because they are in a jurisdiction where the time and cost of judicial action (or the taxes imposed on the enforcement process) render the award a pyrrhic victory.

2. **Reactive appointments of arbitrators and counsel**. International arbitration gives parties the freedom to appoint arbitrators or counsel from varied backgrounds and the resulting freedom of tribunals to tailor proceedings to the parties' preferences. It is a world, therefore, where considerable strategic thinking ought to be applied to appointing counsel and arbitrators who will be most aligned with the party's strategy as to how the proceedings should be conducted. So it is surprising how often this opportunity to reflect on key points of strategy is ignored, and instead parties appoint counsel and/or co-arbitrators as a reaction to a single circumstance, for example because they share the same law of the disputed contract or the place of arbitration, are the same as the counsel and/or arbitrator appointed by the claimant, or, in the case of appointing counsel, are the same law firm that assisted the party in drafting the contested contract (the "lawyer down the hallway" method of appointment).

An example of an unintended (but predictable) consequence that can follow from reactive appointments is the purely domestic arbitration that can occur in the place of an international one when all counsel and arbitrators hail from the same jurisdiction. A good example is the "London arbitration" that happens even when neither party is from the UK but both parties appoint English counsel, claimant's counsel advises it to appoint an esteemed Queens Counsel as co-arbitrator, and the respondent respondents in kind. The two QCs, in turn, express a strong preference for one of their QC peers as chair. In one case in which I saw this occur, the London law firms advising each side convinced the parties to supplement their advocacy by appointing yet another QC to present arguments to the tribunal, essentially engaging in a QC-arms race. Rather than experiencing the vaunted flexibility of international arbitration, parties in such cases are likely to find themselves immersed in the idiosyncrasies of local pleading practice.

London is hardly the only city where arbitrations are "domesticated" through this worst practice. In one of my first experiences as in-house litigation counsel, I appointed Indian outside counsel in a dispute over the construction of a refinery in difficult-to-reach location in an Indian mountain region. I then followed our counsel's suggestion to appoint a retired Indian court justice as a co-arbitrator, ultimately leading to a tribunal of three retired Indian justices. The straightforward dispute, whether certain force majeure events excused a late delivery of equipment, lasted nearly 10 years. When I meekly protested at hearing that took place in year five or six, the tribunal informed me that the alternative of Indian court litigation would have been considerably longer. (They obviously did not mention the alternative of international arbitration.) When the two co-arbitrators resigned from the pending proceedings on their doctors' recommendations to reduce

their workload, I tried to rectify my previous mistake by appointing a well-known arbitrator from outside of India. The arbitration was then concluded within 18 months.

The point is that international arbitration has wonderful flexibility to meet the parties' expectations, but only if parties take the right steps to ensure they find themselves in an international arbitration. In fact, my own theory about the complaints about "international arbitration" that one hears from North America constituencies is that these are often the result of domesticated international proceedings, with the lawyers and arbitrators giving domestic treatment to a dispute between one or more international parties rather than treating it as a truly international arbitration.

3. **Three arbitrators for all contracts, all disputes**. It is accepted wisdom (or should be) that a sole arbitrator is the better option for many, or even most, commercial disputes, and that three arbitrators often unnecessarily handicaps proceedings. (See Jennifer Kirby, *With Arbitrators Less Can Be More: Why The Conventional Wisdom of Having Three Arbitrators May Be Over-Rated*, Journal of International Arbitration 26(3): 337-355 (2009, and related podcast interview, "One or Three – How Many Arbitrators Do You Need?", IDN 88, available at www.cpradr.org.) Yet a significant number of commercial contracts, I'd say the overwhelming majority, contain an express requirement of three arbitrators regardless of the size of the contract or the potential complexity of the differences that may arise one day between the parties.

This worst practice, a result of neglect or just laziness in failing to assess whether three is really justified, is a leading contributor to the time and cost of arbitration. And then we parties, having put ourselves in this position, complain that proceedings take too long to accommodate three arbitrators and their schedules, to say nothing of the risk of "rogue co-arbitrators" who intentionally slow or undermine proceedings or the solomonic decision-making process that can result from the "collegiality" of three. Potential alternatives to this worst practice can be (a) adopting a preference for a sole arbitrator for most contracts, except where the complexity of potential disputes may benefit from a tribunal of three, or (b) leaving the number of arbitrators to be determined at the time the dispute arises (which most institutional rules contemplate).

4. **Rejecting or refusing even to consider mediation**. This worst practice is as common as it is damaging to a party's own interests. Given the considerable lament of us in-house counsel over the past several years about escalating time and costs of international arbitration (I mercifully omit here the usual string citation to various writings, including my own….), one would think that parties would be embracing mediation in virtually every arbitration. And yet the data published by institutions that offer both arbitration and mediation show that the uptake of mediation services as ancillary tools to arbitration is still relatively sparse. While use of mediation may be growing, it is at best just a fraction of the total number of international arbitrations conducted. The ICC reported statistics, for example, show requests for mediation running at an annual rate of about 5% of the requests for arbitration. This is despite the ICC's considerable efforts to beef up its mediation staff and promote its mediation practice in recent years. So shame on us in-house folk who harp at time and cost, and then ignore an obvious solution that is sitting under our noses.

5. **Focusing on establishing liability while ignoring the need to prove quantum of damages**. My retired GE colleague, Ugo Draetta, laments in a recent book about his experiences both as in-house counsel and arbitrator, La Rovescia dell'Arbitrato, how parties often make the mistake of focusing on establishing liability while virtually ignoring – until it is too late – the evidence they will need to demonstrate damages. Instead, parties and their counsel may simply "take for granted that it may be difficult to determine quantum, leaving the arbitrators without sufficient information

to make any such determination even when they are convinced of the party's right to damages in the abstract." He notes that it is not always neglect of damages that is the cause, but a tendency to adopt an "all or nothing" approach, out of a concern that any suggestion that damages might be less than the full amount requested, even in the alternative, will be taken as a sign of weakness of one's case. The risk to parties, he notes, is that failing to request damages that can be supported by the evidence may leave the tribunal with no choice but to deny all damages. This another worst practice that could be cured by doing more of the hard work at the outset, in what will be needed should liability be established. Parties appearing as claimants or counter-claimants should know before they begin to incur significant costs whether a victory on liability will actually lead to a result that justifies a hard-fought battle.

The above is a non-exhaustive list of some of the worst practices of parties, and I am sure a similar one could be compiled for each of the other constituencies in international arbitration. But as the ones who pay for the process, we parties should be the first to leave behind what can be shown to us to be counterproductive and wasteful. Instead, we should follow the lead of our business colleagues, who adore the notion of best practices. Because nothing is so good that it cannot be improved, commercial managers are constantly searching for new ones to implement that will make them more effective and competitive.

So when faced with an international arbitration in 2011, may all worst practices be forgot, and never brought to mind.

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