# Kluwer Arbitration Blog

## Anti-Arbitration: An International Pledge to Arbitrate Commercial Disputes?

Michael McIlwrath (MDisputes) · Tuesday, March 29th, 2011

The Arab Spring transforming the societies of the Middle East has raised more than a few questions among us in-house folk about what this will mean for dispute resolution in the region. Will civil institutions, in particular the courts, be a reliable mechanism in the coming years for upholding contractual rights, including agreements to arbitrate disputes? What about regional arbitration institutions?

While there is reason to be optimistic, it is too soon to place certain bets, especially if one is a risk-mitigating in-house counsel.

One option for addressing the current state of uncertainty may be an idea that surfaced during an informal discussion with co-blogger (and Kluwer author) Gary Born, who stopped by my office while visiting Florence recently. Gary posed the question, "why not a corporate arbitration pledge, similar to the CPR mediation pledge?" It seemed an interesting idea, so much so that we recorded our conversation about it, which can be downloaded in the podcasts IDN 98 and IDN 99, available for free at the CPR website or in the iTunes music store. https://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/705/IDN-98–An-Arbitration-Pledge-with-Gary-Born-Part-I-March-22.aspx

But before presenting Gary's idea, which is aimed broadly at uncertainties of dispute resolution in international commercial contracts, a bit of background first about the CPR pledge. For over a decade now, the International Institute for Conflict Prevention and Resolution (CPR) has sponsorded industry-specific mediation pledges. By signing, hundreds of corporations have commited to attempt to use mediation to resolve disputes between them, before proceeding to other forms of litigation. The pledge works in more ways than one. In theory, the existence of a global company commitment may resolve any concern of individual employees involved in a particular dispute about proposing or accepting an offer of mediation. In practice, signatories really do use the pledge to resolve pending conflicts (at my own company we've taken disputes to mediation after receiving a referral from other signatories). Moreover, the pledge is also a good marketing tool for mediation. The message it conveys is, "mediation must be a good tool if so many large multinationals have committed to use it for disputes between them".

The idea of an arbitration pledge would be analogous to the CPR pledge, with the difference that it would have the effect of a binding agreement to arbitrate. Users or potential users of international arbitration – parties active in transnational commerce – would commit to use arbitration as a means

of binding dispute resolution in commercial transactions between them, and only in the absence of other contractually-specified means of resolving disputes. The pledge would also need to provide sufficient information to assure the signatories that the arbitration would be conducted in a manner acceptable to them. Essentially, the pledge would shift the default rule of today – litigation in the courts of somewhere to be determined at the time of dispute – to arbitration at a place to be identified through an identified process.

The basic elements of an agreement to arbitrate – place of arbitration, rules, and appointing authority – could be provided for in different ways. For example, the pledge could provide that the arbitrators themselves would have the authority to decide place of arbitration, possibly from a roster of a handful of cities with a reputation for being friendly to the practice of international arbitration. Rules could be UNCITRAL in the absence of expressed preferences, i.e., "where both parties have expressly stated at the time of signing the pledge a preference for arbitration under the rules of the ____ Centre, the arbitration shall be conducted under such rules. Where the parties' preferences do not match, the rules shall be UNCITRAL." A similar mechanism might be used to identify the appointing authority. Or there may be other, better ways.

The scope of an arbitration pledge might extend to all participants within specific industries, such as Energy, Oil & Gas, or Pharmaceutical, with pledges tailored to the perceptions and needs of users in the different sectors. Parties might also be given the right to assert reservations as to types of disputes or parties they would not agree to arbitrate with. For example, my business could, if we wanted, decline to arbitrate any disputes involving questions of intellectual propriety rights, or by or against certain named competitors.

The advantages of such a pledge? One would be predictability in those commercial transactions that fall through the net by failing to have a binding dispute resolution clause. No longer would there be a race to a court-house in one or another country. Similarly, since the default would be arbitration under the pledge, it would reduce the time and stress of negotiating an effective dispute resolution clause. When negotiating DR clauses, parties would have a common benchmark as reference. And parties would have a mechanism to resolve disputes by a predictable means even when radical change might occur between the time of signing a commercial transaction and when a dispute under it arises.

Which brings us back to the Arab Spring, and what it might mean for international dispute resolution in the region. Maybe instead of betting on what civil institutions and courts may look like in two to five years in the region – or in any region for that matter – parties could instead place their bets on an institution with proven reliability and that could survive independently of any particular court system: international arbitration.

I invite Gary to comment, correct, or supplement the above outline of the idea.

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