Kluwer Arbitration Blog

Anti-Arbitration: The Train Has Left the Station

Michael McIlwrath (MDisputes) · Tuesday, June 14th, 2011

I write this post on a train on the way home from a seminar held by the Milan Chamber of Arbitration (CAM) to introduce a new rule and guidelines that could be seen as a necessary next step in the trend towards greater efficiency in arbitration. Before commenting on where these new developments might take us, however, it is worth observing that not everyone is completely on board with this trend.

One good example is *A Few Words on the Tension Between Efficiency and Justice*, posted here on June 2, 2011 by José Astigarraga. While accepting in principle that "the arbitral process generally has become too much like litigation, and needs to be more efficient and less costly," he argues that lengthy evidentiary hearings, at which the testimonial skills and character of witnesses are tested, are often needed to counter the cognitive biases of arbitrators. He is concerned that in the "zeitgeist focusing on the need for efficiency and speed in arbitration," there is a risk of over-correction that will result in reduced hearing time.

The post is philosophically in the same vein as a broad defense of the status quo offered by William (Rusty) Park, in *Arbitrators and Accuracy*, 1(1) Journal of International Dispute Settlement 25 (2010). The article makes the case that parties and tribunals should ultimately place a greater premium on the truth-seeking function of the arbitral process than on the amount of time taken to arrive at a decision. Each of these authors reaches the same conclusion, which José aptly sums up with a metaphor. "Good justice is like fine wine," he writes, "it takes time."

From Oenology to Rapid Transit

The defenses of the status quo make useful points about the delivery of justice. To contrast the vinification of arbitration with a metaphor taken from my current trip, however, I would say they have nonetheless missed the train with respect to what the efficiency trend has been about and where it is heading next.

First, I am not aware of any proposals to eliminate hearings or witness examinations, nor suggestions to take efficiency to the point of denying parties a fair opportunity to make their case or establish their defense. Granted, those of us in-house counsel wanting reform may not be rocket scientists (actually, I know an in-house lawyer who was a nuclear engineer in a previous career, so I should speak for myself), but we're certainly not going to advocate change that goes against our interests. Tossing a coin would be a speedy and efficient form of resolving commercial conflicts, but we would not last long in our jobs if we included it in contractual dispute clauses.

Indeed, there has been much more nuance and sophistication in the efficiency trend than simply

"arbitrators being encouraged to move things along," as José referred to it. Most calls for change, and the results they have produced so far, would do nothing of the sort. One notable reform, for example, would be for tribunals to dispose of key issues early in a case, when doing so would be appropriate before an evidentiary hearing. An example is an important legal issue that requires no factual evidence to be decided, such as the validity of a contractual limitation of liability. Resolving early whether the maximum recoverable damages are $500,000 or $20 million would have significant consequences for how – and whether – the parties continue to litigate the remainder of a case.

Other calls for reform have included placing restrictions on the time it takes a tribunal to issue an award after the close of hearings, limiting the amount of documentary disclosure, streamlining the number of written submissions, and focusing hearing time on issues that are actually material to the resolution of the case.

The responses have been initiatives such as the ICC's revised Arbitrator Statement of Acceptance, Availability and Independence; the International Center for Dispute Resolution (ICDR) Guidelines for Arbitrators Concerning Exchanges of Information; Rules for the Facilitation of Settlement in International Arbitration issued by the Centre for Effective Dispute Resolution (CEDR); and Protocols for Expeditious, and Cost-Effective Commercial Arbitration from the College of Commercial Arbitrators (CCA). In addition, the International Institute for Conflict Prevention and Resolution (CPR) is currently finalizing its Guidelines on Early Disposition of Issues in Arbitration.

True, there are also some notable new fast track rules, but the possibility of expedited procedure has always been available to parties and so is nothing new. Significantly, none of the other above-mentioned reforms, *if implemented by tribunals*, would require arbitrators to "move things along" by shortening of hearings or total case time. Instead of getting in-house counsel sacked for recommending them, they should have the opposite effect of making it more commercially palatable for us to recommend arbitration.

Second, the key phrase here is "if implemented by tribunals". The emerging issue is not whether arbitration should be more efficient, but *who* is making it so, and *how* they are doing it. And this brings me to my current trip from Milan.

The Efficiency Trend's Next Destination

The Milan Chamber of Arbitration has issued a new arbitration rule, CAM Rule 8, providing for the publication of arbitration awards together with guidelines for doing so in an anonymous format, in both domestic and international proceedings.

What would be disclosed under CAM's guidelines? Except for what would render the dispute or the parties "recognizable" (in most cases just their names), pretty much everything: the identity of the arbitrators and their method of appointment, the seat of arbitration, the applicable law, the arbitration agreement, the administering institution, the substantive dates of the proceeding (start, close, issuance of an award), and, of course, the nature and type of controversy and the legal reasoning supporting the tribunal's decision. I should note that Rule 8 allows a party to object to publication, and the guidelines provide a safety mechanism whereby details would be withheld if they were deemed to be "identifying information".

With access to awards published under these guidelines, parties would be able to assess both the

quality of an arbitrator's legal reasoning and the degree of efficiency he or she applied in the conduct of past proceedings. Simply by observing the key dates leading up to the issuance of awards, parties could decide for themselves whether to appoint an arbitrator who had acted promptly to issue their award after the close of proceedings or one who let the evidence ferment for months or years before doing so.

It would also make it easier for those who share José Astigarraga's concerns about cognitive biases to identify and nominate suitable arbitrators. Indeed, José's argument is, at bottom, an updated version of the long-running debate about whether common law or civil law procedures produce better justice, and there are plenty of advocates for each side.

Those biased towards the common law argue, as does José, for the primacy of witness evidence in providing a "fuller appreciation of what really happened." Those with a preference for civil law procedures, where documentary evidence is given greater weight, might cite recent research on the human brain suggesting that people, when acting as witnesses, are particularly inept at recalling past events accurately, or, as decision-makers, can be easily influenced by factors that have nothing to do with a witness's propensity to speak the truth. And there are many others who accept that there are advantages and disadvantages to each of the common law and civil law approaches, and position themselves somewhere in the center.

The point is that the publication of awards would be an ideal tool for parties to identify where an arbitrator sits on this spectrum. Whether he or she has strong or weak views about using one procedural approach or the other is exactly the sort of information that would surface.

In short, efficiency is about a lot more than just speed for the sake of speed. If the new CAM rule and guidelines are an indication of the direction the trend will next take, it is towards disclosure of information that will make it easier for parties to distinguish which arbitrators are likely to conform to their own notions of justice.

It remains to be seen how practitioners will respond to this initiative now that the efficiency trend has left the station.

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