

Kluwer Arbitration Blog

Playing Hardball in International Commercial Arbitration

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Litigation tends to attract the assertive type of lawyer. This may in part be due to hearings taking place in open court, which sometimes encourages a tendency to play to the gallery. The practice of international arbitration may seem a natural side practice for litigators given the transferable skills and similar situation, namely, the existence of a dispute. However, arbitrations tend to take place behind closed doors, thus making grand gestures less effective. More importantly, the objectives are not purely identical.

Adopting a pure litigation mind set in international arbitration proceedings can be fatal and risks backfiring. All too often, counsel treat international arbitration as 'litigation-lite', which results in an overt reliance on bullish and hard-lined behaviour. This results in some counsel seeking to hammer through a procedural point on, for instance, agreeing to dispense with a hearing on a preliminary issue, agreeing to dispense with expert reports or insisting on religiously following the allocated time given to each party during a hearing. Such counsel presuppose that the same rules and strategies apply in international arbitration when this is not always the case. This is not to say that being assertive and firm is not vital in international arbitration – in fact, it is essential against a recalcitrant adversary. However, this approach has to be deployed at effective times.

'Winning' and an 'obtaining an enforceable award' are not always the same thing. Winning in a litigation leads to a court judgment which is automatically enforceable. As all international arbitration practitioners know too well, the same cannot be said with respect to obtaining a favourable arbitral award. The path for enforcement is muddled with difficulties and, almost always, invites threats for setting-aside proceedings at the curial seat from the disgruntled party. Setting-aside proceedings or enforcement proceedings engage the court to review whether the making of the award violates any grounds under the curial law. The extent of the court's review depends on the jurisdiction and even the most minor procedural oversights risks jeopardising the entire award. As such, international arbitration is not so much about 'winning' but obtaining an enforceable award that can survive even the most interventionist courts during enforcement and setting-aside proceedings.

In this regard, it is important to pick your battles. Not every procedural point has to be contested, fought and won. Arbitration is, after all, a subset of alternative dispute resolution and, thus, parties have agreed to resolve their dispute through a less formalised means of court-like procedure. The procedure is still supposed to be cooperative and demonstrating flexibility and bipartisanship

should be the virtues counsel should strive to. These become even more vital when the arbitration proceedings involve counsel and arbitrators from different legal systems. Further, the parties might very well want to continue their business relationship and are only seeking to obtain a ruling in respect to compensation arising out of, for instance, a major infrastructure transaction. As such, in determining the appropriate strategy “*the advocate would have to consider the underlying relationship of the parties or whether the goal is to reconcile them or to dissolve a situation that has reached an irreconcilable impasse*” (David W. Rivkin, *Strategic Considerations in Developing an International Arbitration Case*, in Doak Bishop and Edward G. Kehoe, eds., *The Art of Advocacy in International Arbitration* (Juris, 2010). P. 152).

It goes without saying that, irrespective of the conduct of the counsel, whether any grounds for challenging the award exist depends largely on the conduct of the tribunal. A stellar tribunal lineup can sniff out foul play and oust hidden ploys. Even the most abrasive counsel can be subdued by a tribunal that can keep the proceedings on check. In fact, this was precisely what occurred in *Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co. Ltd. & Anor* [2009] HKCU 211 (“*Brunswick Bowling*”). In that case, there was a procedural order that called for a chess-clock method of allocating time to each party in presenting their case and conducting cross-examination at the hearing. During the course of the arbitral hearing, the tribunal, after hearing submissions from the parties, decided to extend the hearing and allocate more time to the Claimant because it required further evidence from the Respondent’s witnesses. The Respondent objected to the tribunal’s decision stating that “*this is a fundamental shift of the tectonic plates of this litigation after we have already done in effect, the sacrifices of not examining certain witnesses and it can only benefit the other side. It seems to be a very one-sided decision*” (at [78] of *Brunswick Bowling*). The tribunal, however, was not persuaded by the Respondent’s argument because, if the chess-clock method was strictly followed, it would result in a breach of Article 18 of the UNCITRAL Model Law, which prescribed that the parties must be treated with equality and be given a full opportunity of presenting their case. When the Respondent sought to challenge the award in the Hong Kong High Court, the Court agreed with the tribunal’s decision in this regard.

This case presents two lessons for arbitration practitioners. The first is that a rigid adherence to procedure is not always necessary or helpful to the overall process. Although in this case the Tribunal granted more time to the Claimant, it is also possible to imagine that another tribunal might not have. If that situation had arisen, the party prejudiced by the lack of time may well have raised a setting-aside challenge of its own and, if the overriding concern is a right to a fair hearing, such a challenge may well have succeeded.

This highlights a second lesson – the importance of a skilled tribunal in dealing with tactics from aggressive counsel.

However, relying on the tribunal to take the lead in protecting the integrity of the arbitration proceedings might not be enough. Policing ‘abusive’ conduct by counsel largely depends upon the individual arbitrator’s own legal culture. Identifying ‘abuse’ is not straightforward and most adopt a “we-know-it-when-we-see-it” policy. Professor William W. Park states:

“Like pornography and elephants, abuse in arbitration is often easy to recognize but hard to define, leaving many fuzzy edges that frustrate rigorous discussion. A ‘we-know-it-when-we-see-it’ approach has merit *faute de mieux*, as an analytic starting point that serves until something better appears. However, arbitrators and judges who

apply such subjective tests for abuse must do so humbly, recognizing their own cultural blinkers and predispositions.” (William W. Park, *Arbitration’s Discontents: Of Elephants and Pornography*, *Arbitration International*, (© LCIA; Kluwer Law International 2001, Volume 17 Issue 3). P. 263)

The problem may be compounded by tribunals or arbitrators who are less familiar with the intricacies of the arbitration process. This situation may be particularly acute where the value of the dispute is low and the client is (rightly) concerned with controlling costs. There are two potential issues that spring from this. First, in such cases, there is a tendency to prefer a sole arbitrator. This is echoed from the practices of arbitral institutions when they are asked to determine the number of arbitrators. In 2011, the ICC Court decided on a sole arbitrator in a vast majority of cases where the amounts in dispute were US\$ 10 million or less (Table 15 *The Secretariat’s Guide to ICC Arbitration*, Jason Fry, Simon Greenberg and Francesca Mazza. July 2012). This reduces the opportunities for the arbitrator to consult the different perspectives that co-arbitrators may provide.

This may not be a problem in itself but low-value claims also tend to be assigned to arbitrators who are perhaps less experienced with the arbitration process. At the same time, the fact that a claim may be low in value does not mean that it is less complex than a high-value claim and may require nuanced judgment. The sheer number of arbitrations requiring arbitrators nowadays makes it difficult to always appoint the most experienced arbitrators for every case.

This then leads us back to counsel themselves, and the responsibility that they have to their clients to conduct their arbitrations in a way that ensures that they obtain not only a successful award, but an enforceable award. One may win the battle on technical skirmishes but lose the war when it comes to enforcement.

One method to overcome abrasive counsel is to agree to a ‘common’ ethical standard of conduct in international arbitration. This was precisely one of the three challenges that international arbitration had to overcome according to Chief Justice Sundaresh Menon at the 2014 ICCA Conference in Miami, USA earlier this year. Given the diverse body of counsel practising international arbitration, there is a growing need for consensus on the proper code of conduct.

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