Kluwer Arbitration Blog

The Urgent Need for Data: Are the Needs of Users and the Dispute Resolution Market Misaligned?

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Seismic tremors emanating from London's Guildhall on October 29th 2014 are set to send change-inducing shockwaves, around the international dispute resolution community. It is widely known that dispute resolution's customers, the disputants, have different needs and interests from the supply side of the market such as external counsel, ADR providers, and educators. The shock comes from the initial data generated at this Convention, suggesting just how far out of alignment the supply side may be with the views and needs of the users. Additional data is needed on an international scale.

A high tech Convention on Shaping the Future of International Dispute Resolution hosted by the Corporation of the City of London, enabled over 150 delegates from over 20 countries in North America, Europe, Asia, Australasia, the Middle East and Africa to vote, using electronic handsets, in real time, on more than 20 core issues that have a direct influence on how mediation and arbitration should develop in the future. The technology enabled responses from users, advisors, providers/mediators/arbitrators and educators to be instantly segmented and compared, accompanied by anonymous chats from delegates using iPads under the Chatham House Rule. Almost half of the 30 panellists at the Convention, and almost 20% of all delegates, were corporate users, many of whom represented the needs and interests of leading multinationals as well as some small and medium-sized enterprises. Leaders of most of the largest international ADR service provider organizations also participated as panellists.

The initial data harvested at this major Convention may encourage ADR's stakeholders to re-think some of their strategies. It suggests that international dispute resolution (IDR) services need to change in significant ways if they are to meet the needs of their users.

The voting data and voting chats are available for review and download on the web portal of the International Mediation Institute, a co-host of the Convention. Here are some highlights:

1. Two thirds of users rank risk reduction and cost reduction equally as the two most important factors in IDR, and few rank focusing on the key issues of the dispute highly. However, advisors rank focusing on the key issues higher than risk reduction while only 13% of users thought this to be a key factor. Providers ranked cost reduction low (15%).

2. Over three quarters of users think mediation should be used as early as possible in a dispute's life cycle, but only 44% of advisors and, surprisingly, 42% of providers agree. Users strongly favoured mandatory mediation (66%), but advisors ranked it low (16%).

3. Two thirds of users and providers value contractual dispute resolution clauses that require mediation to precede litigation and arbitration. Only 16% of advisors agree. Advisors were unique in selecting litigation as the preferred method of resolving disputes.

4. Almost 80% of users desire arbitration institutions and tribunals to explore, in a first meeting, what other forms of dispute resolution may be appropriate to resolve a given case. But only half the advisors and less than half of the providers think the same.

5. Over half of the users, but only a quarter of advisors, think that in cases over a certain value, courts and tribunals should automatically initiate a mediation process from which the parties can opt out. Providers seemed evenly split on this issue, with a slight preference favouring opt-outs as well. Three quarters of educators favour this.

6. Almost all users (92%) wish that mediators, conciliators and arbitrators should be certified and held accountable to transparent standards of conduct set and applied by professional bodies. However, only a third of advisors felt the same way. Half of all advisors actually voted against certification, in direct contradiction to the views of users.

7. 85% of users, but only 47% of advisors see the need for an UNCITRAL convention on the recognition and enforcement of mediated settlements (i.e. a mediation equivalent of the New York Convention on the recognition and enforcement of arbitral awards). No users, but over a quarter of advisors, voted against such a convention.

8. Over two thirds of users, but less than a third of their advisors, desire cooling-off periods in arbitration proceedings to make a good faith attempt to settle using a mediator.

9. Most users, but only half of advisors, think an international platform should be created that enables users to express their international dispute resolution needs clearly.

10. Almost three quarters of users, but only 38% of advisors and 54% of providers, believe that mediators should be used in deal-making – i.e. the negotiation of international contracts even where no dispute has arisen.

These stark differences need to be validated by further empirical studies, but the data does raise many fundamental questions. Providers, users and advisors all faulted in-house counsel for not taking a more central role and stronger interest in getting together to express their needs to providers and responders. Surprisingly, 56% of voters attributed the ineffective use of ADR as being due to in-house lawyers and senior management not communicating their needs, and only 19% of voters attributed this to external lawyers. Even more surprisingly, 60% of users attributed this reluctance to apparent lack of skills and interest in ADR by in-house lawyers. Providers also confirmed that when changing their rules or offering new products or services, they tend to be influenced by feedback from advisors, rather than users. This data clearly suggests that users need to express themselves, and take a greater interest in ADR. When there is commitment to ADR within a corporation, sophisticated in-house counsel partner with the businesses to determine the "appropriate" dispute resolution tool to use, and the timing for its use that is invariably earlier rather than later. Managing risk as well as costs is an important goal. The focus is placed on

retaining, growing, and strengthening business relationships. Examples from some multinationals suggested that ADR requires strong commitment and leadership not only from in-house lawyers but from senior business executives as well.

But it was not all opinion divergence. Gratifyingly, the various stakeholders were very much in alignment on at least some important issues:

1. The main challenge to the use of mediation was widely perceived to be that one of the parties is unfamiliar with mediation.

2. About half of all stakeholder groups agreed that arbitral tribunals should be empowered to award cost sanctions where a party unreasonably refuses to mediate, even if it should be the winning party.

3. About three quarters of the stakeholder groups (though only half the providers) believed that ADR providers should always collect feedback on mediators and arbitrators, and provide users with appropriate summaries based on that feedback.

4. Three quarters of all delegates, with broad agreement in all stakeholder groups, believed that there should be an Investor-State dispute resolution clause in all international investment treaties, which provides for mediation. The draft Transatlantic Trade and Investment Partnership (TTIP) treaty currently being negotiated, was voted on as a specific example, with 76% of all delegates favouring a dispute resolution clause with a mediation provision in the TTIP treaty. 14% abstained, leaving only 10% opposed to this, all of them being providers and advisors, and none being users, educators or others.

5. Almost all delegates felt that mediation should be tried first in international disputes involving issues of national heritage, such as works of art.

6. Almost everyone agreed that the dispute resolution community should set up a series of international “Pound Conferences” (named after the 1976 conference in the United States that many regard as the start of modern mediation) based on the London Convention, but adapted to local and regional circumstances.

Although sceptics may claim that any conference on mediation is likely to attract delegates who are in favour of mediation, it became quickly apparent to all delegates that no accurate or empirical data has ever been generated before that allowed the needs of users to be compared to the beliefs of providers, advisors, educators and legislators. The data generated by this interactive Convention provides much food for thought. If this initial data should be supported by further similar research, it would signify a dramatic need for a fundamental sea change by users to become far more actively engaged in the handling of their disputes and learning more about process design, such as ADR hybrids and how to achieve faster, cheaper and better outcomes that do not destroy value or put a strain on future business or personal relationships.

Similar events should be held elsewhere in the world to verify the accuracy of this initial data, from which real decisions and actions can be taken that will not merely tinker with international dispute resolution, but reform it, putting users back in the centre of dispute resolution proceedings and better catering to their needs. With that thought in mind, 79% of all delegates voted in favour of setting up a series of Global Pound Conferences around the world based on the London Convention but adapted to local and regional circumstances. Watch this space! Expect aftershocks.

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