Celebrating a Vision: Queen Mary School of International Arbitration Turns 30 and Looks Ahead to the Next 30 Years

Kluwer Arbitration Blog
May 1, 2015

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Please refer to this post as: Joanne Greenaway, 'Celebrating a Vision: Queen Mary School of International Arbitration Turns 30 and Looks Ahead to the Next 30 Years', Kluwer Arbitration Blog, May 1 2015, http://arbitrationblog.kluwerarbitration.com/2015/05/01/celebrating-a-vision-queen-mary-school-of-international-arbitration-turns-30-and-looks-ahead-to-the-next-30-years/

As a fitting tribute to the vision of the first dedicated arbitration education institution, the School of International Arbitration (SIA) marked its 30th anniversary with a two day conference looking back and looking forwards. Entitled "The Evolution and Future of International Arbitration: The Next 30 years", it brought together over 200 graduates, academics and practitioners to reflect on the achievements in the field and the challenges ahead. Highlights included some blue-sky thinking as to the dramatic impact technology will have on the landscape of arbitration and some critical introspection as to the ongoing relevance of many of the key practices that the arbitral community holds dear.

Introducing the conference, Professor Julian Lew QC, founder of SIA, remarked on the huge geopolitical shifts in the last 30 years that have rebalanced the world's power and resources and unravelled "colonialism's umbilical cord", all contributing to the increasing relevance of international arbitration. He described 4 major developments:

• A recognition of the differences in international arbitration (IA) from its domestic counterpart which have led to a reduction in restrictions on arbitrability and enforcement and a reduced tendency to over-review;
• The creation of IA legislation has facilitated the development of practice and influenced national legislation;
• The explosion of IA publications and notably of the teaching of IA with the establishment of academies and institutions worldwide; and
• A distinct preference for IA from international business.

Of the 8 panel sessions, one was dedicated to the evolution of the IA process and another to its future.

Delivering the first keynote address, Professor Filip de Ly (Erasmus School of Law) reviewed the sources of IA law and practice, noting the Anglo Americanisation of procedure. Assessing the future landscape he surmised that we are moving towards a hybrid between diversity and uniformity of arbitral practice. Globalised rules and guidelines can never go as far as to override the differences in legal and cultural attitudes and traditions. Cutting across this dichotomy are several clashes of principles: namely of party versus arbitrator autonomy, autonomy and a fair hearing, autonomy and efficiency and a fair hearing and efficiency.

Professor Sebastien Besson (Python & Peter Atorneys at Law) went on to consider the role of case law in the evolution of IA, its centrality but also its limits as regards the development of actual arbitral practice. Analysing trends, Professor Luke Nottage (University of Sydney), noted the success of efficiencies in IA but the comparative lack of success in containing rising costs, even in the Asia Pacific region where costs structures are lower, perhaps because arbitration remains “the only game in town for resolving international commercial disputes”.

Finally, Dr Laurence Shore (Herbert Smith Freehills) provided some critical perspective on the evolution of practice from the time when electric typewriters were used to draft briefs. His comments focussed on the “holy grail” of document production, witness statements and cross-examination. Redfern Schedules, he argued, initially intended to organise and discipline parties to produce only certain types of documents, have become “a trial within a trial”. The complexity of the system of matching documents to categories and the determination of counsel to procure what they say they need has “made the system simply unworkable”. In the age where tablet devices will replace bundles, cases should be led by “what

the arbitrator needs to decide rather than what counsel thinks they need". Challenging our over-reliance on witness statements, Dr Shore noted that tribunals rarely rely on witness statements in their award. Fact statements are key since documents rarely speak for themselves but the fallibility and flawed recollection of witnesses points to the need for thinking around the development of a new system that is more conducive to reaching the truth, such as video evidence-in-chief or a Q&A system. As regards cross-examination, Anglo-Americanisation is often criticised, sometimes justifiably and often because is the cross-examination is poorly executed and used simply to get documents into the evidence. Ultimately, Shore argued, whilst recognising the lawyers need to put their case, the process should be structured to put the arbitrators in a position to make a sound decision.

Looking forwards, the panel on the evolution of process considered how to regulate counsel conduct in the years to come, how institutions and arbitrators can and should manage the process and, finally, how the enormous technological advances will impact upon the conduct of international arbitration. On counsel conduct, Michael Hwang stressed the need to develop sanctions for offending counsel for behaviours such as bribery, breaches of confidentiality to a third party and copying notes of opposing counsel. He noted the concerns that sanctions introduced pre-award may lead to allegations of bias on the part of the tribunal; post-award is even more problematic given that the tribunal would be functus officio. Hwang recommended establishing independent disciplinary committees that would be responsible for sanctioning. This, he argued, would create "uniform standards of appropriate sanctions and stimulate best practice".

Turning to the issue of conflicts disclosure, Alexis Mourre (Castaldi Mourre & Partners) insisted that this was the cornerstone of trust and confidence. In his view, it is the arbitral institutions that should continue to take responsibility for sanctioning failures in this regard and should be as demanding as possible. He underlined the importance of the soft law that the IBA has developed (and recently refined) in creating the consensus around this issue. The evolution of this area may well extend to the publication by institutions of challenge decisions, despite the ICC's official reluctance to do so.

Michael Schneider (Lalive) went on to raise and critically analyse several new conceptual models that could transform the way we (and arbitrators in particular) manage arbitration in the coming years and decades: the 'Reed retreat' is an idea involving gathering arbitrators together pre-hearing to frontload their preparation

and be in a position to ask questions of the parties and invite them to focus on particular areas. Similarly, the Rifkin 'town elder model' is premised on more interaction between arbitrator and parties, allowing the arbitrator to involve him/herself in the presentation of the dispute and better advise the parties about preparing their case. Finally, 'collaborative arbitration' could involve the arbitrator as a continuous helper to the parties, involving constructive discussion as to which evidence would suffice. A clear theme emerged around the various proposed models that arbitrators should assume a more hands-on role, directing the parties to the dispute and focussing their evidence. Schneider acknowledged that this approach had already begun to find its way into the rules. The LCIA Rules, for example, give the arbitrators power to take the initiative and the IBA Evidence Rules encourage the tribunal to identify issues for preliminary determination. He also acknowledged the spectrum along which this role could be played out, from impartial referee to dispute resolver but that the ownership transfer of the case from counsel to arbitrator should no longer be deferred until the hearing and post-hearing stage.

Arguably the most thought-provoking ideas were presented by Rob Smit (Simpson, Thatcher & Bartlett LLP), outlining the advances in technology that could transform the arbitration landscape. The pace of change, with computer power doubling every 18 months, makes the future (for which we must plan) almost inconceivable. Nonetheless, given current advances, huge shifts are likely to occur in the way we conduct hearings, hear witnesses and deal with multi-lingual nature of international arbitration. As regards hearings, currently extremely costly and disruptive, the future, he argued, resides not in videoconferencing but in telepresence, a projection of 3D figures so that parties can attend "holographically", and one may not know until one tries to hand over a document to a virtual party, that they are in fact not actually there. This could indeed change the cost-benefit analysis of whether hearings are required. Linguistic differences will be managed not through human translators but through universal translation technology using electrodes that read reverberations and translate them into sound, or through computers that lip-read and synthesise, thereby cutting costs and improving accuracy and fluidity. Reliability of witness evidence will also be enhanced enormously by scanners that have a vastly superior record in detecting truth compared to human arbitrators.

These advances in technology will no doubt bring fundamental changes to the way

in which we conduct ourselves in the next 30 years. However, whether they will fundamentally change the nature of arbitration is less certain. Technology could enhance efficiency and materially impact the roles of the various players but ultimately advocates will still have to present a story and arbitrators to decide cases.

Balancing the counsel's imperative to present the case with the arbitrators need to deal with it fairly and efficiently was perhaps the key concern of all those who presented over the course of the conference. There was clear consensus that to achieve the appropriate balance, there should be a never-ending process of trying to improve the way we conduct international arbitration in light of changing needs. The next 30 years may no longer hold a place for complacency and reflexive behaviours. The SIA has certainly produced an enormous cadre of graduates, thinkers and institutions worldwide built on a similar model, all of whom will be well placed to address these challenges.