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Safeguarding the Future of Arbitration

Daniel Waldek (Herbert Smith Freehills LLP) · Tuesday, August 4th, 2015 · Herbert Smith Freehills

At the CIARB's London centenary conference earlier this month, the Honourable Chief Justice of Singapore, Sundaresh Menon, cautioned that:

> *"we should remain mindful that there is no place for complacency or reason to assume that [the] international system of dispute resolution which so many have invested so much in, will continue on its recent trajectory unaided. Murmurs of disaffection among users of arbitration have been mounting in recent years; and it is unlikely to be a coincidence that commercial courts around the world are gaining prominence at the same time."*[1)]

This is a timely caution and all the more important coming from the head of the judiciary of a country which, for many years now, has been at the forefront of innovation and development in international arbitration. Indeed, just in the last few weeks, the European Union parliament has voted against including international arbitration as the dispute resolution mechanism for investor state disputes under the proposed Transatlantic Trade and Investment Partnership treaty. The parliament voted instead in favour of a system of that would be "subject to democratic principles and scrutiny", where cases are handled "in a transparent manner" by "publicly appointed, independent professional judges… in public hearings" and subject to an appellate mechanism.[2)] In other words, the European Parliament's clear preference is for dispute resolution to occur in a public court-centric based system, not by way of arbitration.

While these comments are specific to the future of international arbitration in the investor-state context, many of the concerns underlying those comments apply equally to international commercial arbitration. I believe that the most pressing of these is the increase in the time and costs involved in arbitrating disputes.

Much has been written and spoken on this topic, but little appears to change in practice. As Chief Justice Menon lamented, "despite many calls for reform, we are far from winning the war on rising costs in international arbitration." Although many point the finger of responsibility at counsel, rarely does only one participant in the process bear responsibility. Rather, it is a collective failure of arbitrators, counsel and end-users to work together. We can, and must, do better.

As any practitioner knows, two areas of the 21st century arbitral process which most commonly

give rise to unnecessary time and costs are expert evidence and document production. Some will have seen proceedings where two opposing experts end up like ships passing in the night by giving testimony on related but completely different issues. Many more will have been subjected to lengthy and voluminous requests for document production (even under the cover of, and when purporting to comply with, specific guidelines such as those of the IBA) which, in the final analysis, make no meaningful contribution towards helping the tribunal resolve the facts in dispute. Rather than give more examples, it is more important to get to the root of the problem.

When all is said and done, there is one underlying common factor to these issues: the failure of all involved to come together very early on in a case to define the issues and facts actually in dispute, ascertain the types and extent of evidence that the Tribunal will need to resolve them and, consequently, sculpt appropriate procedures for the conduct of the case.

Some may say this is stating the obvious, but why then do so many still fail to grasp the importance of this? It is all too common that (if and) when an early case management conference is called, one party will always inevitably suggest that 'it is too early to know what the issues are' and the tribunal will end up issuing a bland 'vanilla' first procedural order which is entirely unspecific to the nuances of the case in question. Indeed, that is my experience from one recent case where a tribunal declined to push opposing counsel to clarify and commit early on to precisely defining the issues in dispute despite it being relatively obvious to all involved what those issues were. Perhaps even worse, is the situation in ICC cases where the Terms of Reference – which clearly encourage the parties to precisely define the issues – simply include a bland provision along the lines that "the issues to be determined will be decided by the Tribunal in consultation with the parties in the course of these proceedings". On any view, these types of approach will not result in procedural flexibility and efficiency (which should be two of the hallmarks of arbitration), leading to unnecessary time and costs and, ultimately, dissatisfaction in the end-user. Instead, early and meaningful engagement is necessary.

As Chief Justice Menon noted, the international arbitral community is not short on ideas as to how best to engage: the numerous suggestions contained in the reports of the ICC Task Force on reducing time and cost, the Reed Retreat, the early case management conference, the Sachs Protocol and the Kaplan Opening are all good tools which should be considered by tribunals, counsel and end-users and deployed where appropriate. However, it is questionable whether these efforts go far enough. These are all procedural mechanisms and tools to encourage early and open dialog *within* the confines of arbitration proceedings. They are therefore intrinsically and systemically limited. However, if parties in dispute are orientated towards open dialog and the frank assessment of their respective positions before or immediately after arbitration has commenced, then a settlement of the dispute may well be more likely or, at least, the parties' positions may be narrowed. In many cases, this can and should be achieved through mediation, or at least a hybrid process involving the use of mediation, at an early stage of the proceedings.

In practice, mediation is often dismissed by some counsel and clients as a mere formality (when required by contractual dispute resolution mechanisms) or as being ill-suited to a dispute as 'the parties' positions are too far apart'. Such assumptions misunderstand the impact that an experienced and skilled mediator can have. He or she can challenge the parties about the strengths and weaknesses of their cases (thus clarifying and narrowing issues), impress upon them the risks, time and costs involved in formal proceedings and challenge the parties to consider settlement options outside the narrow confines of, for examples, monetary sums in dispute. All of this can be achieved in a way which is often more culturally attuned and more capable of preserving business

relationships than in adversarial proceedings.

Fortunately, the benefits of mediation are not going unmissed – particularly in Singapore. At a recent lecture at the Regional Arbitral Institutes Forum Conference, the Attorney General of Singapore, V K Rajah, observed that the rise of 'non-adversarial dispute resolution' can already be seen and is most marked in Asia.[3)] Indeed, as Singapore has consciously developed itself into a leading centre of international arbitration, it is now also setting its sights on developing itself as a hub for international mediation. The past year has seen the launch of the Singapore International Mediation Institute to set world-class mediation standards in Singapore, as well as the Singapore International Mediation Centre to administer international mediations. The Singapore Courts are also playing their part, by holding parties to their agreements to negotiate and mediate.[4)] This is a position recently followed in the English High Court.[5)] These developments are extremely positive and practitioners and end-users alike can welcome them, but they are only one step towards growing international mediation in Asia.

The challenge for practitioners and end-users is to agree to actually use international mediation early on in the development of a dispute. Again, it is Singapore which has risen to that challenge with the launch of the Arb-Med-Arb protocol jointly administered by the Singapore International Arbitration Centre and the Singapore International Mediation Centre.[6)] This combined arbitration-mediation procedure has the benefits of early mediation, coupled with the fall back option and enforceability aspects of arbitration. Adoption of this procedure by parties in their dispute resolution clauses would be a further positive step towards helping reducing the time and cost burdens involved.

In conclusion, the issues faced by international arbitration must be tackled head on. This poses a challenge to arbitrators, counsel and end-users to do more to bring parties together early on to avoid unnecessary time and costs. An important tool which can and should be used to achieve this is international mediation. This sentiment was perfectly captured by Albert Einstein who once said, "In the middle of every difficulty lies opportunity." Let us all seize the opportunity.

The views expressed are those of the author.

References

?1 A full copy of the Chief Justice's speech can be found at: https://www.singaporelawwatch.sg/slw/attachments/66366/150702%20CIArb%20Centenary%20Conference.pdf

?2 https://www.europarl.europa.eu/news/en/news-room/content/20150702IPR73645/html/TTIP-ease-access-to-US-market-protect-EU-standards-reform-dispute-settlement and https://hsfnotes.com/publicinternationallaw/2015/07/13/the-future-of-isds-in-the-ttip-european-parliament-recommends-a-new-system-of-judicial-decision-making/

?3 https://globalarbitrationreview.com/news/article/33917/singapore-ag-shares-vision-less-adversarial-future/

?4 *HSBC Institutional Trust Services (Singapore) v Toshin Development Singapore* (2012) 4 SLR 378 and (2012) SGCA 48

?5 *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* (2014) EWHC 2104 (Comm)

?6 See https://simc.com.sg/arb-med-arb/

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