Kluwer Arbitration Blog

It Takes Pressure to Form Diamonds: The Changing Landscape of Dispute Resolution and its Implications for International Arbitration

Klaus Peter Berger (University of Cologne, Center for Transnational Law (CENTRAL)) and J. Ole Jensen (WilmerHale) · Monday, May 23rd, 2016

When questioned what the users of arbitration expect from the process and what its main pitfalls are, the answer is usually unequivocal: the need for time and cost-efficient proceedings leading to a well-considered decision is not consistently met. The reason for this complaint is obvious: the 'Golden Age' of arbitration has made way for a New Age of more 'judicialised', i.e. more procedurally, legally and factually complex proceedings with a greater demand on resources. (Alan Redfern, 'The Changing World of Arbitration' in David D Caron and others (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press 2015) 51) Some fear that this development will lead the users of arbitration to ultimately turn away from arbitration towards other methods to resolve their international business disputes. This fear is not unfounded. It derives from the 'triple threat' currently facing the market for international arbitration services: pressure developing from two ends of the dispute resolution spectrum – novel methods of ADR on one, state courts on the other end – and a legitimacy crisis looming above it all. The present contribution highlights from which specific areas this pressure is developing and which actions stakeholders in the arbitral process may take in order to ensure the future viability of international arbitration.

Alternatives to the alternative

History has a way of repeating itself. Much like there was a shift from state court litigation to international arbitration over the last century, today there are indications that such a shift might be happening again. Now that the 'alternative' international arbitration has become the norm for cross-border disputes, new alternatives are presenting themselves. Indeed, those who have traditionally been faithful to arbitration have begun to explore other methods of ADR. One such platform of exploration is the 2016-17 Global Pound Conference Series (GPC), whose aim it is to 'shap[e] the future of dispute resolution and improv[e] access to justice'. All conferences revolve around the core questions of whether the dispute resolution market is properly addressing the parties' 'wants, needs and expectations' and how alternative dispute resolution outside domestic courts can be improved. While the organizers of the GPC are to be applauded that these important questions are being asked in this regular conference format, it is quite obvious that their answer may not necessarily be 'arbitration'. Other developments which make alternatives to arbitration like negotiation or mediation increasingly popular is the discussion of a *New York Convention*-esque UNCITRAL Convention on the Enforcement of Mediated Settlements, which would strengthen the legal enforceability (and thus attractiveness) of a negotiated or mediated settlement.

In addition, the potential of other alternatives to arbitration, such as Dispute Resolution Boards, originally developed for construction disputes, is now also recognized in areas like large IT-projects and joint venture agreements. (Ulrike Gantenberg and Gustav Flecke-Giammarco, 'Championing the Use of Dispute Adjudication Boards as a Project Management Tool That Helps to Avoid Disputes' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration 2016* (Manz 2016) 210–1) These developments indicate the changing landscape of ADR with a greater emphasis on less formal and more efficient and flexible methods of dispute resolution. All of them are welcome additions to the arsenal of dispute resolution options available for parties to international contracts. At the same time, however, they do put pressure on the attractiveness of international arbitration.

State court competitors

The competition arbitration is facing today is not limited to 'alternative' forms of dispute resolution. Rather, national legal systems are also setting up to be more competitive by trying to eliminate the reasons for parties to choose alternative dispute resolution methods in the first place. Indeed, some jurisdictions work on re-establishing state court litigation as the favoured means of resolving international business disputes, thus trying to reverse the development away from state courts. There are four developments in particular, from which this conclusion may be drawn.

First, there is a significant trend towards modernizing national codes of civil procedure to be more appealing to the needs of litigants, especially those coming from the commercial world. This development started with the English 'Woolf Reforms' in 1996, creating efficient Civil Procedure Rules in England and Wales, and is now being discussed in other jurisdictions as well. In Germany, for example, calls are being voiced for a more effective and modern code of civil procedure, tailored specifically to the needs of the users of arbitration. The suggested improvements include the possibility for parties to opt for confidential proceedings, to conduct them in the English language or to introduce written witness statements.

Second, the desirability of arbitration as a private dispute resolution mechanism is being questioned altogether, as some fear that arbitral tribunals 'steal away' the cases needed for courts to develop coherent jurisprudence. The Lord Chief Justice of England and Wales, Lord Thomas of Cwmgiedd, has addressed this issue in the Bailii Lecture 2016. In this lecture he stated that the consequence of having cases heard by arbitrators instead of courts creates 'a danger […] to the development of the common law as the framework to underpin the international markets, trade and commerce'. This fear has also been voiced in other jurisdictions. In Germany, for example, the Presidents of the Higher Regional Courts and Supreme Court have issued a joint declaration on the occasion of their 67th annual symposium, in which they state that 'private forms of dispute resolution, such as arbitration […], endanger the proper functioning of the judicial system, in particular in regard to the transparency, development and uniformity of the interpretation and application of the law' (authors' translation). While such concerns have surfaced from time to time in the past, there has recently been a noticeable increase in these complaints, voiced by high-ranking members of the judiciary and the bar. Thus, while international arbitration has traditionally been regarded as a welcome relief valve for overburdened state courts, some judiciaries now appear to regard arbitration's case load with an increasing degree of envy.

Third, some jurisdictions have established specialized international courts, whose goal it is not only to complement, but also to compete with international arbitration. These include the Singapore International Commercial Court (SICC), the courts of the Dubai International Financial

Centre (DIFC), and the English Financial List. The SICC is a separate division of the Singapore High Court, established to hear international commercial cases which arbitration might not be fully equipped to handle. In particular, the SICC seeks to address the following shortcomings perceived in arbitration:

a. over-formalisation of, delay in, and rising costs of arbitration;
b. concerns about the legitimacy of and ethical issues in arbitration;
c. the lack of consistency of decisions and absence of developed jurisprudence;
d. the absence of appeals; and
e. the inability to join third parties to the arbitration

The DIFC is a free trade zone in Dubai. It has its own courts which are not part of the UAE's court structure and whose judgments can subsequently be converted into arbitral awards in order to ensure their global enforceability. The DIFC courts attract a growing number of international commercial cases, including from non-UAE parties. The English Financial List addresses the concern of a lacking specialization of state court justices in specific sectors. It was established in order to meet the financial market's need for adjudicators with a thorough understanding of the market. It identifies a number of judges who are continuously educated about current developments in the financial sector. Once a case is on the List, it will be allocated to one of these judges. Even though England has always been one of the key venues for the resolution of international financial disputes before domestic courts, the English judiciary has taken this step to meet the increased pressure from the market. It is intended to offer the same kind of quality justice in the area of financial services, which would otherwise more likely to be found in specialized arbitrators acting under the rules of specialized arbitral institutions.

Fourth and finally, the 2005 Hague Convention on Choice of Court Agreements has entered into force on 1 October 2015 and is being ratified by a growing number of states. Its *raison d'être* is to improve the global enforcement of court judgments originating from choice of court agreements. As the travaux préparatoires to this Convention state,

> [t]he hope is that the Convention will do for choice of court agreements what the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 has done for arbitration agreements.

In addition, the 2016 Hague Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments aims at expanding this enforcement regime beyond judgments based on choice of court agreements to all judgments in civil and commercial matters. Should one of the distinguishing features of international arbitration, i.e. the virtually global enforceability of awards, at some point also apply to national court judgments, there would be another potential threat to the attractiveness of international arbitration. Thus, the pressure on arbitration not only develops from alternative methods of dispute resolution but also from state courts.

The legitimacy crisis: international arbitration in the public perception

On top of this pressure from the market comes an unprecedented media attention for international arbitration during the past three years, albeit not a very positive one. There are different unrelated developments which all contribute to the public's perception of arbitration as an obscure form of

'backroom justice'. The largest public attention was created by the backlash against investment arbitration (or ISDS) following the negotiations of the major free-trade agreements TPP, CETA and TTIP, which also entailed substantial negative spill-over effects for commercial arbitration. Main-stream media referred to these trade deals as a 'reckless destruction of democratic principles' and to ISDS as a 'backroom door for a corporate power grab'. In the midst of these accusation appeared a *New York Times* article on consumer arbitration in the US (Parts I and II), pointing out that many large corporations in the US include arbitration clauses in their terms and conditions. (See, e.g., the iTunes terms and conditions, providing for ICC arbitration seated in Cairo, Egypt, in case Apple's American customers want to bring a claim against it.) Such 'privatization of the justice system' was heavily criticized – in regard to consumers a justified criticism. Other instances concern individuals who have abused the arbitral process to further their personal and political interests, as has happened in the *Tapie*– and *Seckolec*-scandals. Add the decisions of domestic courts, regarding arbitration clauses with athletes as violating anti-trust law in the latest decision of the *Pechstein* saga or the annulment of the largest ever arbitral award and one must receive a rather sceptical view of the legitimacy of international arbitration.

Of course, the cumulative re-statement of these developments paints a more negative picture of the current state of international arbitration than what it actually is. At the same time, however, some of these developments are indeed grounds for concern. In any case, they signify that arbitration has reached main-stream media attention and must face the challenges such attention inevitably entails.

Staying competitive by meeting users' demands

The conclusion that can be drawn from these market-pressures is that the arbitration community should be careful not to 'underestimate the disenchantment of our consumers'. While some still argue that there is no viable alternative to international arbitration when it comes to commercial cross-border disputes, this might not be the case for long. Both the quality of arbitration as a feasible method of dispute resolution and the legitimacy of this process have come under considerable pressure, while viable alternatives are being put into place. There is, of course, an argument to be made that arbitration lawyers could diversify their portfolios to accommodate whatever dispute resolution mechanism their clients prefer. However, if the arbitration community plans on holding its ground and staying competitive in the market for dispute resolution, it makes sense to put all effort into complying with what the users expect from the process.

The users expect efficient proceedings at reasonable costs. There are methods to ensure such streamlined and efficient proceedings already at all stakeholders' disposal. Arbitrators may look at conducting the arbitration proactively, thus ensuring streamlined, i.e. cost- and time-efficient proceedings. Parties and their counsel may employ case management techniques such as the ones proposed by the ICC. Animated by the rising pressure in the market, many arbitral institutions, such as the ICC International Court of Arbitration, are already putting heavy emphasis on the need for efficiency, be it by promulgating revised rules intended to increase the expedience of the process, by incentivizing arbitrators to render their awards timely or by increasing the transparency of the administration of the dispute in relation to costs and duration. It is up to everybody involved in international arbitration to make use of the available procedural management tools and to strive for efficient and transparent proceedings. Only by a concerted action between arbitrators, counsel and arbitral institutions alike can the users' demands be met and their trust in the efficacy of the arbitral process preserved.

As regards the legitimacy crisis, it is key for all players to actively combat public misinformation

and misunderstandings. Not only in scholarly papers, but also in main-stream media is it crucial to explain that international arbitration offers a sustainable method of dispute resolution that is independent from the biases of national judiciaries and offers skilled and specialized adjudicators for complex cross-border disputes. Indeed, we are all aware of the profound impact international arbitration has had on the development of the rule of law across many jurisdictions. Accordingly, as Alexis Mourre, President of the ICC Court of International Arbitration, puts it: '[w]e need to make the case, over and over, that arbitration is a fair and proper means of resolving disputes'. If all stakeholders take action to (re-)convey this message to the users and critics of arbitration, the changing landscape of ADR and the pressure from the global market for dispute resolution may in fact have a positive and constructive impact on the development of international arbitration. After all, it takes some pressure to form diamonds.

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