Kluwer Arbitration Blog

The Global Pound Conference Reaches Its Conclusion: User Focus Is Now Mainstream

Michael McIlwrath (MDisputes) and Phil Ray (International Dispute Resolution) · Wednesday, July 5th, 2017

Mark Twain once wrote that a person with a new idea "is a crank until the idea succeeds."[1)]

Innovations and new ideas on the verge of implementation seem to arrive almost weekly in international arbitration. They range from institutional rule changes, services that provide information about arbitrators, and various proposals from academics and arbitrators themselves. Much of this appears to be driven by a genuine attempt to listen to the voices of in-house counsel like us who have called for greater emphasis on case management, efficiency, and generally helping parties reach an early resolution of their disputes, thereby saving time and costs.[2)]

While this service model may seem common sense today, it represents a shift from the environment in-house counsel faced a decade ago. Those of us paying the bills were once largely ignored. At most we were given lip service with the occasional "users panel" at conferences, which one of us ungenerously compared with the children's tables set up at weddings. Although we continue to face the occasional reminder that not everyone agrees that arbitration should serve primarily the interests of parties,[3)] it is undeniable that we now occupy a seat at the main table.

The momentum reaches a new high this week when the Global Pound Conference (GPC) concludes on July 6. A major international initiative to shape the future of commercial dispute resolution, the GPC reaches its final destination in London's Guild Hall, the 29th GPC event since it debuted in Singapore in April 2016.

At these events, over 2,000 stakeholders in commercial dispute resolution around the world – "Adjudicative Providers" (judges, arbitrators, mediators, arbitral institutions), "Advisors" (external lawyers, consultants) "Users" (corporate counsel) "Influencers"(academics), and ministries of justice, among others – have provided their views on the same 20 "core questions" about current and future dispute resolution practices.

The core questions ask these stakeholders to provide their input on the same topics: what do disputants desire most from the dispute resolution process; what should be changed to meet their expectations; and who should drive these changes?

The answers to these questions arrive at a time in which civil justice around the world is facing a moment of transformation. And international arbitration is now experiencing changes that, in our view, would have been considered heretical or at least highly unorthodox just a decade ago.

ICC Fee Reduction for Delay in Submitting Awards

Ten years ago, an in-house counsel would have been pilloried for suggesting that arbitrators should have their fees docked for delay in delivering the award. Yet in a 2016 Rules update, the ICC did just that.

While not exactly a "money-back" guarantee, the ICC fee reduction is a vivid example of an institution treating arbitration as a service that should meet the parties' reasonable expectations.

Arbitrator Performance Data: Arbitrator Intelligence

Even before the advent of the Internet, consumers could find information about virtually any products or services before purchasing them. Despite the multiplication of such information via on-line databases and reviews, reliable information about arbitrators remains elusive. Parties must usually infer case management and soft skills through limited information generally transmitted via word of mouth.

In 2014, Professor Catherine Rogers founded a service to make appointing arbitrators a user-friendly process: Arbitrator Intelligence (AI). Notwithstanding resistance from arbitrators, the service has been well received. In fact, Wolters Kluwer, the publisher of this blog, will now include AI reports in its on-line arbitration database.

If AI is a success, it will permit parties to better select the arbitrator whose skills fit the profile they desire, and encourage arbitrators to be mindful of how their performance will appear to the parties (not just to their co-arbitrators and the institution).

Arbitrator-proposed innovations

It was commonplace a decade ago for conference panels to explain why arbitrators should not attempt to facilitate settlements. Although parties generally desire an early resolution, the thinking went, tribunals should be mindful of the due process implications of expressing early positions or appearing to encourage or meddle in settlement discussions.

Both of us found this reasoning troubling, and contradicted by our own experiences. At both Siemens and GE we had encountered cases where, at the parties' request, one of the co-arbitrators (who possessed mediation expertise) agreed to act as a mediator to facilitate settlement. Not only did the cases survive the predicted due process apocalypse, parties on both sides of the dispute expressed deep satisfaction with the performance of the tribunal (including in the case that did not settle).

Last month, Professors Klaus Peter Berger and J. Ole Jensen published an article that tackled the issue of settlement facilitation not from the perspective of preserving the judicial function of

arbitration, but in how to provide a mechanism that parties desire.

In "*The Arbitrator's Mandate To Facilitate Settlement*", the co-authors suggest methods by which proactive tribunals can easily facilitate settlement during an arbitration. These range from simply mentioning settlement to the parties, providing an early neutral evaluation, conducting a settlement conference, or even using mediation techniques, in particular caucusing.

The ICC fee reduction for delay, Arbitrator Intelligence, and the Berger/Jensen proposal for settlement facilitation all share a common feature with many other recent innovations or proposals: they seek to make arbitration a more attractive service to the parties, rather than enhancing its purely adjudicative function. This is no small thing.

Not gaining ground: ignoring the service side of the arbitration business

By contrast, consider one proposed innovation that could have generated improvement in the judicial function of arbitration, yet has not gained currency in the seven years since it was first suggested. This is Professor Jan Paulsson's proposal to eliminate the role of party-appointed arbitrators.

Both of us agree with Paulsson that permitting parties to unilaterally choose an arbitrator does indeed give rise to the risk of moral hazard and inject other dynamics that may compromise the quality of the arbitration award.

The reason that no major institution has adopted this proposal, however, is unrelated to quality of arbitral awards. It is simply deference to the fact that parties want to be able to appoint an arbitrator. If institutions are to treat arbitration as a service, then they cannot prioritize the judicial function if it is not positively received by the parties.

The GPC data: the user-focus trend will continue

The respective founders of our current and former employers – Thomas Edison (GE) and Werner von Siemens (Siemens) – knew that if they did not lead the transformation of the electrification era, someone else would do it. The great challenge facing companies like GE and Siemens today is adapting to the demands of the global and local economies in which we compete for business. Our companies are changing in this marketplace, and dispute resolution institutions will need to continue to innovate to keep pace.

Fortunately, while the final report of the GPC data will be published in the coming months, the data that has been emerging from the events so far suggests that in-house counsel like the trends that they are seeing, and they want more: they want their external lawyers to be more proactive, and emphasize collaboration; they expect institutions to provide a greater range of procedural options, and to explain the choices that are available; they want paths to reaching an early settlement.

As current and former in-house counsel, we are excited and optimistic about the changes that have already occurred and those that are bound to come.

** Philip Ray is the principal of PhilRay-IDR. In 2012, he retired after 23 years as senior in-house counsel for Siemens AG Legal in Germany, counseling the business on international transactions and disputes.*

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

References

?1 Pudd'nhead Wilson's New Calendar, in *Following the Equator* (1897). The Merriam Webster dictionary defines "crank" as "an annoyingly eccentric person."

?2 We are two long-time corporate in-house counsel (one active and one retired). One of us, Michael McIlwrath, is a current General Electric corporate counsel (and the chair of the Global Pound Conference); the other, Philip Ray, is a retired Siemens AG corporate counsel (and co-editor of JURIS *Journal of Technology in International Arbitration*).

?3 In a notorious "open letter to the international arbitration community," three international arbitrators upset about the fees assessed by the institution, wrote "[t]he role of an international arbitration institution is to protect the arbitrators that work under its aegis[.]" Catherine A. Rogers, *When Arbitrators and Institutions Clash: The Strange Case of Getma vs. Guinea*, Kluwer Arbitration Blog, 12 May 2016.

This entry was posted on Wednesday, July 5th, 2017 at 7:46 am and is filed under ADR, Arbitration, Arbitration Awards, Arbitrator Intelligence, Arbitrators, Global Pound Conference, ICC
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.