Kluwer Arbitration Blog

ICCA Sydney: Building Better Arbitration Proceedings – Efficiency and the Lessons to be Learned from Other Dispute Resolution Frameworks

Nasreen Jahan (Corrs Chambers Westgarth) · Wednesday, April 18th, 2018 · Young ICCA

The 10th panel session of the ICCA Sydney Congress 2018 with *The Honourable P A Bergin*, Singapore International Commercial Court; *Dr. Shen Hongyu*, Supreme People's Court (China); *Flip Petillion*, Petillion (Belgium); and *Henri C. Alvarez*, Vancouver Arbitration Chambers (Canada) and moderated by *Stephen L. Drymer*, Woods LLP (Canada), continued this year's theme of evolution and adaptation in commercial arbitration, centring its discussion on features of other dispute resolution mechanisms that may be transposed into the realm of commercial arbitration in order to enhance the cost effectiveness and speedy resolution of arbitral disputes. Each panellist explored their own experiences with different forms of dispute resolution in order to evaluate the efficiency of commercial arbitration, highlighting, in the process, what they have seen to be problematic tendencies in the commercial arbitration sphere. While much of this comparative exercise involved weighing commercial arbitration against the Australian court system, speakers Hongyu Shen and Henri Alvarez added colour to the discussion by exploring favourable aspects of the Chinese courts and sports arbitrations, respectively.

The Hon. Patricia Bergin commenced the session by castigating "doomsayers" who claim that commercial parties now hold a level of disdain for the courts and their adversarial nature. Patricia Bergin submitted that there is no evidence of such disdain, despite the fact that commercial parties are now often seen to favour arbitration over other forms of dispute resolution. In fact, it was noted by the entire panel that present-day arbitrations have proven to be rather protracted and laborious in practise, falling well short of the promised efficiency which often attracts parties to arbitration in the first place.

Both Patricia Bergin and Hongyu Shen suggested that aspects of traditional litigation can prove useful in enhancing the efficiency of arbitral proceedings. For example, Practice Note SC Eq 11 of the Equity Division of the NSW Supreme Court (including the Commercial List but excluding the Commercial Arbitration List), now provides:

> "Disclosure
> 4 The Court will not make an order for disclosure of documents (disclosure) until the parties to the proceedings have served their evidence, unless there are exceptional circumstances necessitating disclosure.
> 5 There will be no order for disclosure in any proceedings in the Equity Division

> unless it is necessary for the resolution of the real issues in dispute in the proceedings."

Reference to "evidence" in this practice note means all evidence- claim, reply and all supporting evidence- and restricts the court to ordering discovery only after parties' reply submissions have been delivered. The audience heard that this guideline should be applied more commonly in arbitral proceedings. The discussion period offered robust agreement on this point from speakers, moderator and audience members alike, with many pointing out that until each party's reply to the other's claims is examined, the true issues of the case cannot be properly evaluated. This means that when document discovery is allowed to occur immediately after filing of the initial claims, unnecessary (and unnecessarily broad) requests are made and the discovery process can take several months to exhaust. Patricia Bergin noted that the average legal cost that parties incur during discovery alone in large commercial arbitrations averages 2 million dollars. Problematically, the IBA Rules regarding document discovery (see Article 3) permit parties to submit to the Arbitral Tribunal and the other parties a Request to Produce, within any time ordered by the Tribunal, so long as the request is "relevant to the case and material to its outcome". Arguably, this poses a much lesser threshold than the NSW Supreme Court guideline and allows tribunals to more readily order discovery immediately after the submission of initial claims and before replies.

A point was made that in the age of technology, inefficiencies such as this are all the more objectionable- the very function of advents such as e-discovery tools is to accelerate the process of discovery and yet, it is perhaps the introduction of these tools that has allowed the process to remain laborious as they enable parties to drown each other in Redfern Schedule requests and production of documents- most of which ultimately do not go to the crux of the issues in dispute. Panellists observed that rare are the cases where a "smoking gun" is discovered in an opposing party's document production. Rather, most disputes centre on presenting and defending one's own arguments. Given this tendency in arbitral disputes, it is time that discovery takes its place as a supporting, rather than central process in arbitration in order to accelerate final resolution of disputes.

This point was reiterated by Henri Alvarez, who stated that a common cause of frustration amongst arbitrators is that whilst they attempt to push parties along, parties themselves favour a luxuriously paced process. While it has been suggested that the memorial system in arbitral proceedings overcomes the prohibitive cost and time impact that is seen in traditional litigation, Patricia Bergin disagrees. Members of the panel commented that memorials of claim in arbitral proceedings have not served their promised purpose of condensing the parties' claims, with memorials often extending to hundreds of pages long. Accordingly, it was suggested that page limits for memorials and witness statements should be imposed more frequently by tribunals to compel parties to distil their submission to the very nucleus of their claims, again going some way towards accelerating the proceedings and arriving more efficiently at a final award.

Henri Alvarez also delivered novel insights and comparisons from the field of sports arbitration as against commercial arbitration. Where sports arbitrations are mandated by sporting contracts between athletes and sporting institutions, they are hallmark examples of extreme efficiency of the arbitration process. As an example, tribunals acting on FIFA arbitrations are held to tight time frames for the delivery of each party's evidence and tribunals are compelled to deliver awards within 48 hours of the hearing. Another aspect that is lacking in the commercial arbitration world is that with consistency in sporting arbitral awards which stems from a reliance on authoritative

precedents.

As a counter-point to the entire discussion, it was noted that context is key to the success of any system and that no one mechanism can be transferred to another area without posing unique issues, even when certain adaptations are made. That is, there exists no universal system capable of meeting all needs in all areas. This is especially true of commercial arbitration as it is the one binding mechanism of alternative dispute resolution that often canvasses extremely complex legal issues and subject matters. The consensual nature of arbitration perhaps plays to its favour in this regard, as procedures can be tweaked to suit the particular needs of the parties to a particular dispute.

The closing remarks of the panel served as a poignant reminder to practitioners in the field; it is the parties themselves who bear the responsibility of ensuring that the unique benefits of arbitration are reaped; it is the parties themselves who are responsible for ensuring arbitration lives up to its promise of being a cost and time effective alternative dispute resolution mechanism, perhaps by borrowing from the beneficial aspects of court and sporting arbitral proceedings as presented by the panel.

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