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Making Arbitration Better

by

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Twenty years ago, when I embarked upon a career in international arbitration, it was considered by most to be a niche activity, a slightly exotic appendage to more mainstream litigation. At its core, arbitration was a compromise, albeit a very important one, which provided international businesses with an opportunity to have their cross-border disputes adjudicated in a neutral forum while remaining responsive to the fundamental expectations of each party. Globalisation, and the veritable explosion of cross-border trade of all kinds, has led to a corresponding boom in international arbitration. So much so that today, international arbitration is big business in its own right. It has even fuelled other satellite businesses – such as damages consultancy, expert witness providers, even its own very active ranking services and media outlets. International arbitration appears to have been a great success.

It is important, however, to distinguish between growth and success. International arbitration has undoubtedly grown, but has it lived up to expectations along the way? The key question, in light of this boom, is "has arbitration gotten better for the consumer?" We fear that the answer is no. Twenty years on, arbitration has become slower, more expensive and less efficient. A strong argument may also be made that arbitration has become less accommodating to the different legal cultures it was intended to serve and to the legitimate expectations of litigants around the globe. If anything, arbitrations today appear to be less culturally accommodating than in the past. This briefing note lists some of the reasons why we believe this is the case and suggests some simple remedies.

The criticisms set out here are not directed to the numerous international arbitral institutions that administer arbitrations worldwide. Almost uniformly, they have improved their rules and procedures and they have given parties the platform to conduct arbitrations efficiently. Moreover, their rules and procedures are sufficiently flexible to accommodate the suggested improvements outlined in this paper.

The objective of this paper is to stimulate debate within the international arbitration community, and among the businesses that use it. Like any successful industry, there is a risk that the arbitration world becomes inward looking and self-congratulatory. But ultimately, unless it responds to the legitimate expectations of its client base, it will defeat itself.

1. Arbitration as Frankenstein

A key facet of the "traditional" approach to arbitration was a championing of substance over form. The central idea – and one that parties could get very comfortable with – was that the formalistic requirements of domestic litigation could be eschewed, provided there was a reasonable opportunity for each side to ventilate its claims. Over time this phenomenon appears to have been reversed.

One striking feature of international arbitration today is the proliferation of pleadings that have become the accepted norm in all but the most simple of disputes. By way of example, it is not unusual for a relatively straightforward international arbitration to now include two pre-hearing memorials on the merits, followed by two substantial post-hearing memorials on the merits. Added to that is a possible briefing phase (also four memorials) on jurisdiction, and (possibly) a separate damages phase. One must ask the question if all these are truly necessary.

Clients care about this sort of thing because they know – or quickly come to realise – that putting together a submission of any kind is an extremely expensive business. Armies of lawyers working long hours, assisted by support staff working even longer hours, expensive research, staggering reproduction costs and other disbursements all lead to huge costs. Some of this cost is unavoidable; parties should put their best case forward and to do so is money well spent.

The problem appears to have arisen, however, because different legal cultures tend to deploy these resources at different stages in the litigation process. Some legal systems are front end loaded, with all the expensive briefing coming relatively early on. Other legal systems are back end loaded, with the costly briefing coming later. There is a worrying trend in international arbitration to "bolt" these two systems together, to create a Frankenstein of sorts. This is the worst of all worlds.

Again, it is worth bearing in mind that a single round of submissions can be enormously expensive; so even doing away with one unnecessary briefing phase would lead to significant cost savings. Is there any scope to achieve this? We believe that there is.

If the parties are going to pull their case together at the post-hearing memorial stage, wouldn't it be sensible to reduce the scope of the pre-hearing submissions to something more modest? Clearly, parties need to set out their cases and evidence must be produced, but surely this can be accomplished without the long, narrative, and hugely-expensive pre-hearing memorials that are likely to be disregarded once the post-hearing memorials are in. Surely there must be some more efficient way to accomplish what pre-hearing memorials need to accomplish, without over-litigating matters at that early stage? For example, it is not uncommon for parties to use these submissions to narrate their case theory exhaustively, before the witness testimony is in, and before the documentary evidence has been discovered. That suggests that to some degree the cart is being put before the horse. Perhaps "leaner" pre-hearing memorials might serve their legitimate purpose, without the attendant inefficiencies in terms of time and expense.

2. Dispositive Motion Practice Please

With some notable exceptions, such as Article 41 of the ICSID Rules, there is no dispositive motion practice in international arbitration. Surely this is an aberration? This allows a party to advance a manifestly unsustainable claim early on in the proceedings and bring it all the way through to a final

award. Sections of memorials will be devoted to it, witnesses will testify about it, experts will quantify it, Tribunals will deliberate upon it, arbitral awards will address it, and in the end it will fail. Enormous amounts of time and money are spent – client's money – prosecuting and defending bogus claims. Surely the time has come for the widespread adoption of some kind of dispositive motion practice that might cull these hopeless claims sooner rather than later?

Some countries have highly developed dispositive motion practice, and it might be going too far to adopt procedures that are similarly broad in scope. Nor is it necessary to do so in order to render the arbitral process dramatically more cost-efficient. A simple procedure for culling out claims that fail to make a case as stated would already improve matters. A rule requiring parties to plead fraud or misrepresentation with particularity might be another worthy improvement to the system. At the end of the day, however, parties should be encouraged to adopt procedures that save them money in the long run, whether they win or lose the claim in question.

3. Streamlining the Witness Hearing Process

Any uninitiated observer who stumbled into an international arbitration hearing nowadays might well be excused for thinking that they have gate-crashed a meeting of a UN weapons inspectorate. Mounds of lever arch binders are flown around the globe at great cost, most of which are never opened. Lawyers, surrounded by support staff, populate the room, rubbing shoulders with transcribers, interpreters, IT staff, administrative helpers and of course the Tribunal itself. The cost per hour – indeed, the cost per minute – of these events is staggering.

All the more reason then, for time at hearings to be used judiciously. Sadly, however, this rule is often obeyed in the breach. It is not unusual for one side or the other to embark upon an escapade of questionable relevance with a witness for hours on end. Very often, these wasted moments involve some obscure challenge to witnesses' credibility, which is double-speak for wasting hours on issues that are wholly unrelated to the case at hand. Another variant of this problem relates to expert witnesses, where lawyers spend hour after hour sniping around the edges of an expert's area of expertise, often out of fear or inability to tackle the heart of the expert's opinion. This is all a massive waste of time and money.

Is there a way to improve this? We believe there is. While we understand that lawyers will be very reluctant to tip their hand as to the issues they want to cross-examine a witness on, we strongly advocate that each party should circulate a pre-hearing list of issues they wish to explore to the Tribunal and to the other side. An active Tribunal would then be free to express its views as to the relevance of certain issues and disregard those it deems irrelevant, with the end result being a narrower list of the most relevant issues.

4. Witness Statements: What Just Happened?

The received wisdom in international arbitration is for a party seeking to introduce a witness, to provide a written witness statement that will serve as the witnesses' direct testimony. More often than not – as everybody knows – the witness statement is a self-serving narrative prepared by or heavily influenced by the legal team. At the hearing, typically, a witness will have a brief "warm-up" with the presenting counsel and then be made available for cross-examination.

The result of all this is a paradox. Frequently the witness statement is taken lightly (or disregarded), or at the very least doesn't feature in the witness hearing. Instead, the Tribunal mostly gets to see a witness being cross-examined. Parties often get a sense that "their" witnesses didn't get to say all that they could have said, and this feeling is only offset by the knowledge that the other side's witnesses get the same treatment.

Surely this is wrong? Huge amounts of money are spent crafting witness statements that are barely looked at, or worse still disregarded. In spite of all the cost, witnesses feel unheard or that they didn't quite get to say what mattered. To compound matters, ineffective cross-examination can often focus on tangential issues (with lawyers looking for a "gotcha" moment) instead of getting to the heart of the matter.

We believe that this too can be made better. Why not simply dispense with elaborate witness statements, in favour of something much more telegraphic that lists the issues a witness will speak about? Then at the hearing, give the parties the right to put on examination in chief. True, there will be an aspect of gaining at the swings and losing at the roundabouts to this, but it might – in fact should – lead to greater efficiency and a better, more instructive, process.

5. What Happened to Cultural Sensitivity?

As stated above, a core tenet of international arbitration is that it allows parties to litigate cross border disputes in an environment that is, in essence, a compromise. Thus, a company from a country with a civil law tradition can go toe-to-toe with a company from a common law country, with each party feeling equally accommodated. That was certainly the arbitration of old, and the genius of the golden generation of international arbitrators lay in their ability to respond to the legitimate expectations of parties with differing cultural reference points.

Given the fact that we are more global and more interconnected today than two decades ago, one might expect that international arbitration would be even better at this now. Sadly, it is not. If anything, arbitrations today are less culturally accommodating than in the past.

There appears to be some degree of received "dogma" as to how arbitrations are to be conducted – largely influenced by common law, or at least the large international firms that dominate the space – that can leave parties from different cultures feeling alienated or disenfranchised.

How can we remedy this? There is no easy answer. The beginnings of a solution may lie in the recognition that, at its core, international arbitration was designed to accommodate different cultures and their attendant expectations, not the reverse. Arbitrators can be authoritative while remaining humble and open to new ways of tackling problems. Put another way, just because a roomful of arbitration experts agree that a particular approach is to be preferred, does not mean that it is the right approach for all cases. We must give great deference to the fact that arbitration is a creature of party consent. Surely a corollary must be – within reason – to have regard to the legitimate expectations of the parties who gave that consent, and who ultimately fund the procedure.

6. Hello Technology!

Another criticism of international arbitration is that it has not fully embraced technology to enhance efficiency. In our lifetime, mankind's ability to communicate information around the globe at the push of a button (or the touch of a screen) has increased exponentially. Given that this is the case it is troubling that the international arbitral process has gotten slower, rather than quicker. Much of the arbitral process involves the communication and analysis of information. Yet we seem to remain firmly rooted in the 1980s in terms of how this is done. For example, the documents required for most arbitrations could be stored on a flash drive costing less than $10, and communicated to all concerned for even less. Yet hard copies are habitually flown all around the world, to arbitral institutions, arbitrators, parties, opposing counsel, administrators, hearing rooms etc. Much of those costs could be saved by employing basic technology.

Similarly, with the advent of voice-over-internet protocol, the ability to video-conference, using services such as Skype, has been brought to the masses. It is effective and cost efficient. The entire financial community uses it. Yet hearing witnesses by video-link is relatively rare, and perceived to be a second best option. While we accept that nothing compares to a live hearing, surely *some* greater use can be made of this technology? For example, perhaps instead of flying witnesses of lesser importance all around the world for hearings, they could be heard by video-conference instead? If even one day of a hearing could be saved in this way, the overall cost implications would be very significant.

More broadly, serious thought must be given to the myriad ways in which technological advances can be employed to make the arbitral process faster, cheaper and thus better.

7. Conclusion

The international arbitration community should take the time to examine how the practice has evolved over the past two decades and be willing to address some of the excesses that threaten to turn clients away. The past twenty years has also witnessed a dramatic improvement in domestic litigation in many jurisdictions. In many instances it has become quicker, cheaper, less formalistic and user friendly. It would be a great paradox if – in the era where international arbitration reaches its zenith – parties were to turn back to court litigation.