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The state of arbitration

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Charles Adams, a partner at Akin Gump in Geneva, considers whether international arbitration lives up to its historical roots and traditional image.

Would Winston Churchill view arbitration in the same terms as democracy?

The historical record is sparse as to the origins of commercial arbitration. It seems likely, however, that the practice has been with us in Europe since Greek and Roman antiquity.

Certainly, in Medieval Europe, arbitration had become widespread to settle disputes within merchant and trade guilds, whose members were often required to resort to intra-guild arbitral mechanisms rather than seeking the intervention of the state's judicial apparatus.

In the earliest forms of structured dispute resolution within the Medieval guilds, the disputing parties were assisted by fellow merchants or tradesmen acting as "friends" in reaching a settlement, in what resembled modern-day mediation. By the fifteenth century, in England and in continental Western Europe, it had become common practice for the parties jointly to select neutral arbitrators, still from among the guild membership.

Alternatively, each party would select an arbitrator, who was authorised to join with his counterpart in the designation of a third, neutral "umpire", with the decision of the panel thus constituted to have binding effect.

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A century or so later, with commercial trade usage having become increasingly codified, parties would resort to appointing as arbitrators figures who were external to the guild but still possessed special knowledge and experience of the particular trade or industry at issue in the dispute. By the Whig era in England, beginning in around 1640, arbitration in this form had become widely prevalent to resolve commercial disputes, with the first arbitration statute enacted in the country in 1697.

Because of the relative simplicity, reliability, expedition and fairness of the process, arbitration was thought to be preferable to litigation in the courts of law. The English novelist Daniel Defoe wrote in his Compleat English Tradesmen in 1726, in words that would be music to the ears of today's international arbitration practitioners:

> *[T]he honest peaceable Trades-man, will, as far as in him lies, prevent a Decision at Law; if it be possible, he will bring all Differences to a friendly Accommodation, by Expostulation, by Application, by Arbitration… When two tradesman of this Pacific Temper meet, A Reference never fails to put an End to all Disputes between them: A Man that means Honestly, is never afraid or asham'd to refer all his Differences to the next unbias'd and indifferent Man he meets.*

Since the days of Defoe, however, the process of arbitration, and of international arbitration in particular, has considerably evolved – and not necessarily for the better.

It has been international arbitration's promotional mantra that it is quicker, cheaper, less complicated and more likely to be fair and equitable in result than conventional litigation in domestic courts. I am not convinced that this is any longer the case, at least in the perception of the end-user community of CEOs, general counsel of transnational corporations and attorneys general of sovereign governments.

To the contrary, the impression is taking hold these days that international arbitration has become painfully protracted, prohibitively expensive, unnecessarily cumbersome, and, from time to time, arbitrary and capricious in result. Needless to say, this is undesirable both for the system and for those of us who earn a living from it.

Here are some thoughts – empirical and anecdotal, not scholarly or researched – as to the reasons for the development of these perceptions of international arbitration, and what might be done to correct them.

Glorification of arbitral form over substance

Nowadays the businessmen who are the end-users of the "product" of international arbitration – the final award putting an end to the dispute – are passive bystanders to the process whereby the product is manufactured. The principal actors in arbitration, the arbitrators, advocates, and staff of the supervising arbitral institution, are almost invariably not tradespeople, but lawyers and lack any particular knowledge or experience of the trade or industry out of which the dispute arises.

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The entire arbitral process, from the drafting of the arbitration clause to the enforcement of the award, and at every stage in between, is driven by lawyers, and increasingly by lawyers whose practice is specialised in this field. It is unsurprising that this has led to the glorification of arbitral form over substance, with a great deal of sound and fury, and an enormous amount of expense, being devoted to skirmishing over matters of procedure that have little to do with the resolution of the underlying contractual dispute.

Examples include arguments about jurisdiction, challenges to arbitrators, objections to the form of powers of attorney, gamesmanship over the payment of advances on costs, endless discussion of discovery and document disclosure, disqualification of experts for conflicts of interest and tempests-in-teapots over filing deadlines, translations, court reporters or hearing venues.

Opportunities are rife for delay, disruption and obstructionism on the part of recalcitrant parties, substantially contributing to the excessive duration of proceedings, which is now, on average, more than two years from the filing of the demand for arbitration to the issuance of the final award. Rather than cutting quickly to the chase on substantive adjudication, international arbitration has come to be infected with some of the worst dilatory features of conventional litigation.

Some observers are inclined to think that this freighting of international arbitration with procedural wrangles is attributable to the preponderance of Anglo-Saxon lawyers participating in international arbitration, who import into the process the hyper-adversarial style and sometimes vexatious abuse of procedural rules that are the hallmark of litigation in common-law courts.

It is true – as evidenced by the GAR 100 ranking – that British and US lawyers tend to dominate, more as counsel than as arbitrators, in the market for legal services in international arbitration. This is owing partly to the fact that English remains the lingua franca of international arbitration, and partly to the greater attraction of arbitration to the adversarial principles of common-law dispute resolution than to the inquisitional dynamic of litigation at civil law.

It must be said, however, that the many highly-skilled civil law practitioners who have achieved deserved prominence as advocates in international arbitration are by no means any less inclined than their common-law counterparts to seize upon such opportunities as are offered to them to engage in procedural frolics and detours.

The result of all of this is that the end-users who are paying the often exorbitant cost of international arbitration can no longer see the wood of substantive, fair-minded dispute resolution for the trees of needless and wasteful procedural argy-bargy. Lawyers are playing at being lawyers, to the detriment of the ultimate purpose of the arbitral exercise; and in this they are being indulged, if not encouraged, by the unwillingness of tribunals to impose rigorous discipline on the process, and the failure of the sponsoring arbitral institutions to provide any meaningful oversight or quality control over tribunals' performance.

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The avoidance of in limine dispositions

Many disputes in international arbitration are susceptible of being adjudicated in limine on grounds of lack of jurisdiction, statutes of limitations, res judicata, collateral estoppel, prior accord and satisfaction, and the like – the sorts of issues which, in conventional litigation, lend themselves to motions to dismiss or for summary judgment.

Where a dispositive award can be entered early in the proceedings on such grounds, this can obviously provide both parties with substantial savings in legal fees and arbitration costs.

Tribunals in international arbitration, however, are often disinclined to enter such dispositive in limine rulings. Arbitrators regularly invoke the sanctity of a party's "right to be heard" as preventing the early dismissal of a claim or defence on a preliminary ground, preferring to allow the full development of an evidentiary record before making an award.

Rightly or wrongly, the perception among end-users, shared by an increasing number of practitioners, is that tribunals are sometimes swayed in this regard by the rather less noble consideration of material self-interest: the longer the proceeding, the higher the arbitrators' fees. All things being equal, if there is a plausible rationale for allowing the proceeding to go forward, then this is the course the tribunal is more likely to adopt.

It is for this reason that in limine dismissals, when they occur on justifiable grounds, are to be saluted by all stakeholders in the system of international arbitration. The sense that tribunals could ever be motivated by anything other than the desire to reach a fair and just result as speedily and inexpensively as possible must be actively combated. The secretariats of arbitral institutions have a responsibility of supervision in this regard, to ensure that arbitrators avail themselves, whenever the circumstances of a case permit, of opportunities to make an early dispositive adjudication.

A caste of professional arbitrators

The original conception of arbitration as involving the resolution by merchants of commercial disputes between their peers has been further eroded by the recent development of a class of professional arbitrators, who devote their practice exclusively to service as panelists in major disputes, and no longer appear as counsel in proceedings, if indeed they ever did. This phenomenon has generated intense debate within the arbitration community.

On one side are those who believe it desirable that the practitioners who appear most often as counsel serve from time to time as arbitrators, so that tribunals may enjoy the benefit of their better understanding of the rough-and-tumble of arbitral procedure and case presentation, and their greater proximity to the commercial context of the parties' dispute. Professional arbitrators, it is thought, become too cloistered, and develop approaches too academic to lend themselves to practical real-world solutions.

There is also concern that a closed universe of professional arbitrators, who repeatedly encounter one another on tribunals and at the incessant round of conferences attended

by the arbitral in-crowd, gives rise to the perceived, if not actual, risk that disputes are resolved through horse-trading and deal-making regardless of the merits of the individual case.

Finally, this school of thought holds that professional arbitrators, to make ends meet, must take on many more mandates than any one person can possibly manage, thereby doing justice to none. Too often the most essential functions of the arbitrator, up to and including the drafting of the award, are delegated to unseen associates and assistants not accountable to the parties.

The arbitrator, the argument goes, is designated intuitu personae, and it is inconsistent with the arbitral mission that any part of the arbitrator's function be handed off in this way.

On the other side of the debate are those who feel that practising advocates should never be permitted to serve as arbitrators; and that the function of the arbitrator, like that of judges in civil litigation, requires a full-time commitment to being a finder of fact and giver of law. Only in this manner, is it said, can the arbitrator be insulated from conflict of interest, from the commercial pressures of private law practice, and from rivalries with competitors in the international arbitration industry.

Professional arbitrators deny that they would ever delegate to assistants anything other than the most ministerial of tasks and reject wholly the idea that they should be required to disclose the volume of cases on their docket or other competing demands on their time.

It is difficult to say which side of the debate is right. It must be recognised that the vast majority of prominent professional arbitrators are individuals with surpassing legal minds and unquestionable integrity. No doubt the system of international arbitration is the better for their availability to devote themselves full-time to the arbitrator function, particularly as chairpersons of tribunals.

On the other hand, there is a clear benefit to leavening arbitral tribunals with lawyers who have experience as advocates in adversarial proceedings and understand the practical impact of procedural rulings.

The most important thing is that all participants in the arbitral process, especially the parties who pay the fees of both arbitrators and counsel, have confidence in its basic fairness and feel assured that arbitral decisions are not influenced by the personal affinities or antipathies of any members of the tribunal. Recent surveys of end-users suggest that their confidence in these regards is far from its zenith. To the contrary, prominent voices are crying out for reform.

Party-appointed arbitrators

It is an enduring conceit of international arbitration that party-appointed arbitrators are in all cases neutral and at arms' length from the appointing party. This is simply not the case. Any lawyer who designates a party-arbitrator with the conviction that the individual will approach the case in a Solomonic and unbiased way commits a grievous error, since it is

unlikely that the other side will make its designation on a basis so pure.

At the very least, as the conventional euphemism goes, the other side's party-arbitrator will be expected to ensure that the appointing party has a full and fair opportunity to present its case. But, even in a system where it is understood that party-appointed arbitrators will play this mildly partisan role, it is disheartening that, from time to time, there are undisguised displays of bias and favouritism on the part of party-arbitrators.

It has been known to happen, for example, that a party-arbitrator and counsel for the appointing party will exchange effusive greetings or public displays of affection at a hearing; or that the party-arbitrator will offer broad hints as to the "correct" or most helpful answer by counsel or a witness to a question being posed by the tribunal.

Such breaches of etiquette are unfortunate and mercifully rare. At the very least, lip service ought to paid to the notion of the independence of all three arbitrators from the parties, for the sake of appearances. This is because, whereas veteran practitioners of international arbitration may be cynically inured to such conduct by arbitrators, the same cannot be said of party representatives who behold it for the first time.

Prominent members of the international arbitration community have even suggested that party-appointment of arbitrators ought to be abolished altogether, on the grounds that this mechanism introduces the taint of bias into the process. Exponents of this school of thought, more often than not individuals accustomed to acting as chairpersons of tribunals, would prefer either to act as sole arbitrator, unencumbered by wingmen; or to have all three members of the arbitral panel appointed ex officio by the administering institution, or selected at random by the parties from a standing institutional roster.

This would be no worse as a means of constituting a tribunal, they say, than the party-appointment of co-arbitrators with presumptively off-setting biases, followed by unattractive manoeuvring by each of those arbitrators towards the selection of a chairperson with whom they have a cosy history of proximity and fellow feeling.

This argument for reform is rejected by other, equally prominent, arbitrators, who maintain that party-appointed arbitrators are no less capable of fair-minded objectivity than professional chairpersons; and that, to preserve faith in the process, it is desirable, if not indispensable, that parties be afforded the opportunity to populate arbitral tribunals with individuals of their choice.

I myself am inclined towards latter point of view, as more in keeping with the historical conception of arbitration involving friends and fellow guild-members of the parties assisting them in the resolution of their disputes. If the parties desired to entrust the adjudication of their commercial differences to completely neutral, unaffiliated, disinterested and uninformed arbiters at remote arms' length from the parties, then they would not have opted for arbitration at all, but rather for conventional litigation in state courts.

To prohibit party-appointment of arbitrators is to carry pious sanctimony about the process a bit too far. This does not mean, however, that overtly partisan co-arbitrators ought not

to be shunned and disregarded by chairpersons, and thus reduced to ineffectiveness on the panel. The best co-arbitrator is one who provides constructive, well-informed and seemingly objective support to the panel in the determination of the case. The chairperson, generally nobody's fool, is well-equipped to figure out whether his colleagues on the tribunal are playing by that rule.

Regional arbitration centres

A healthy development in international arbitration in the past decade has been the emergence of "regional" arbitration centres in Asia, the Middle East, Africa and Latin America, bringing increasingly serious competition to long-standing and well-established institutions such as the ICC, LCIA, Swiss Chambers and ICDR.

For too long there had been a sense, in developing countries, that international arbitration was a tool designed by and for Westerners, for the preservation of their commercial interests through the enforcement of Western systems of law. This was a false and ill-informed perception but widespread all the same, and it hindered the deployment of international arbitration as a truly global means of dispute resolution.

Regional centres now afford a welcome opportunity for the integration into the international arbitration process of counsel and arbitrators from developing countries, promoting at the same time the inclusion of arbitration clauses in contracts for commercial transactions in these regions. This is a positive development for those who believe in the future of international arbitration, and in its ultimate superiority to litigation in national courts as a means of solving commercial disputes.

The worst form of dispute resolution?

International arbitration has a long way to go before it can fulfil its promise of a system of dispute-resolution that is quicker, less expensive, less complicated and more equitable than any other. The problems described in this article are real, they are serious, and they need to be addressed.

But it nevertheless remains the case that international arbitration is the option most likely to yield a final, binding and enforceable resolution, in a neutral forum, of disputes arising from transnational commercial agreements. Arbitration has been with us for a millennium, and will likely endure for a millennium more. To paraphrase Winston Churchill's famous words on democracy, arbitration is the worst form of dispute resolution, except for all those other forms that have been tried.

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