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Axel Reeg

The Pandemic – A New Dawn for Early Dispute Resolution in International Arbitration?

Editorial

After the Millennium, international arbitration has come under heavy fire. The widely popular attacks, even among politicians who should know better, were fuelled by the criticism of investor state arbitration which was perceived as in-transparent, as governed by closed shop circles and as a sign of inappropriate surrenders of public administration of justice. While this type of attacks had been *en vogue* for some time, another, more serious line of attacks has been voiced on a more continued basis arguing that, supported by empirical data, arbitration had become too costly and too time-consuming. From the user's perspective, the arbitration industry, as some of its players started to call it, was running the risk of becoming obsolete because of its lack of efficiency.

The truth is that after arbitration had been discovered as a lucrative field of practice by many law firms, especially when their teams are acting as Counsel, it had lost much of its innocence. Originally established with the idea of facilitating the resolution of cross-border disputes, overcoming the difficulties of identifying the correct place of jurisdiction and eventually securing the enforcement of an award, arbitration has evolved into a successful model for resolving such disputes through multinational arbitral tribunals composed of highly specialised and experienced arbitrators often with a cosmopolitan mind.

As a principle, in arbitration there is no second chance to make one's case through an appeal procedure. The only means to avoid the enforcement of an arbitral award is lodging an annulment claim or a defence against an enforcement claim before a state court. Such action can only be based on alleging formal deficiencies of the arbitral procedure and infringements of the right to be heard. This is the source of what has become to be known as the *due process paranoia* (Toby Landau QC et al.). Arbitral tribunals have become more and more reluctant to turn down procedural requests filed by Counsel not seldom irrespective of their relevance for the case, but, however, sometimes even described as *best practices*.

This could be noted, inter alia, in the field of granting excessive document production requests leading to substantial delays and above all generating high costs. The alleged search for the absolute or ultimate truth helped pave the path for such exercises which rarely, if ever, led to discovering "a smoking gun" (Peter Rees QC). This, in combination with an unhealthy cultivation of the ways of the taking of evidence, too often far from the issues relevant for the decision of the case, has contributed to lengthening the proceedings far beyond the expectations of the parties. The sophisticated services of party-appointed experts together with hitherto unknown and sometimes mischievous practices of Counsel illustratively described as *Guerilla tactics in international arbitration* (Horvath and Wilske 2013) have added to this unfortunate development.

As a result, more and more arbitral institutions and members of the international arbitration community came to understand they should no longer cut the branches of the tree they are sitting on.

Arbitral institutions launched the need for holding Case Management Conferences (introduced i.a. by the ICC 2012 Rules) in order to define the issues at stake at an early stage and streamline the proceedings as well as Practice Notes with a view on cost and time efficiency in international arbitration (ICC Report on Techniques for Controlling Time and Costs in Arbitration) or by considering the time efficiency of the tribunal in how it handled the case when determining arbitrators' fees (ICC Rules of Arbitration 2021 Appendix III Article 2.2).

Other arbitral institutions thought the opening of a mediation window (vid. SIAC/SIMC Arbitration-Mediation-Arbitration Protocol of 2014 as a sophisticated example) or Emergency Arbitration (as in Art. 29 ICC Rules) and Fast Track Arbitration (like the CPR Fast Track Rules for Administered Arbitration) approaches could help – albeit with limited success only.

There has been, however, one example of a thoroughly conceived but little-noticed approach to speed up arbitral proceedings:

The CEDR Rules For The Facilitation of Settlements in International Arbitration (2009) which have, apart from aiming at the facilitation of settlements, very clearly defined the way forward for cost and time efficient arbitrations. The 2018 Prague Rules are another much more recent and also very ambitious soft law instrument aiming at similar targets.

Then came the pandemic. And then, unexpectedly, like the pandemic itself, came *the new normal* of virtual Zoom and Teams meetings and virtual Case Management Conferences. And, surprisingly: It worked – at least in most cases. And then – inconceivable before the pandemic – came the request for virtual or at least hybrid hearings with multi-angle cameras used with the idea of avoiding undesired coaching of witnesses and experts examined remotely. The arbitral institutions started to follow up with "Rules" for such virtual hearings (starting with the 2021 ICC Rules).

The pandemic is a true plague for international business and international dispute resolution. But, as always, every cloud has a silver lining: All these substitutes of formerly established practices, driven by the constraints resulting from the pandemic, have helped making arbitration more cost- and time-efficient.

Also, since the beginning of the pandemic, the recent trend of arbitration practitioners leaving multi-national law firms in order to become "independent arbitrators" or establishing "dispute resolution boutiques" has grown rapidly with the protagonists becoming younger than before. These small teams are less driven by generating fees to cover high cost quota than their previous firms and may offer additional options for cost-conscious clients.

But this is, again to our surprise, not the end of the story. The pandemic has triggered more thought on ways to increase efficiency (Baumann/Risse: Thinking Ahead: Dispute Resolution after the Corona Crisis 2021). The international arbitration community has since, almost incredibly for any long-time witness, taken heart and embraced the ideas of front-loading the proceedings and, for the tribunals, of "being on top of the case from early on" even up to suggesting articulating preliminary views on the merits (David Rivkin, ICC World Business Law Conference November 2021).

Such ideas may indeed lead to an evolution, if not a revolution of International Arbitration. They allow killing two birds with one stone: The restrictions generated by the pandemic and the imminent need for cost- and time-efficient dispute resolution in our globalised world.

What does that, however, mean?

In the first place, front-loading means for Counsel to put their cards on the table straight away in the first submission (Request for Arbitration/Statement of Claim) and for Respondent's Counsel to do the same in their Response to such submissions from the Claimant. And for the arbitral tribunal, to be on top of the case at all times, i.e. to read and digest the submissions by the parties as they come in and to consider their relevance in what was once aptly called a dynamic *tribunal working paper* (Böckstiegel 2013) such that any procedural issues may be decided upon based on their concrete relevance for the decision of the dispute.

Secondly, and equally importantly, it means allowing the arbitral tribunal to put itself in a position to articulate, in the absence of procedural objections by Counsel and subject to a waiver of challenges based on such moves by the tribunal, preliminary views on the merits or on the relevance of issues disputed among the parties.

Such preliminary views of an arbitral tribunal may instigate, help or facilitate the reaching of a settlement of the dispute between the parties (David Rivkin, 2021). There is nothing wrong or improper about this. Above all it does not, if properly done, involve any *bias* of the arbitral tribunal nor is it "arbitrators changing hats and becoming mediators" (Stipanowich 2021). It is, in essence, a service rendered to the parties searching for a resolution of their dispute.

If the legacy of the pandemic for international arbitration is acting as a catalyst for efficient and early dispute resolution, the lining of the cloud may not only be made of silver but even of gold. This makes one hope for a new dawn for early dispute resolution in international arbitration.

RA und Abogado (Madrid/Spanien) Dr. Axel Reeg