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Adding strands to our bow: two arbitration proposals

Edna Sussman*

In recent years there has been an evolving debate about the appropriate role of the arbitrator. Is the arbitrator simply appointed to manage the proceeding, receive the evidence and make a decision—thus, to act as a largely passive decision-maker—or is the arbitrator a service provider who should undertake a more active role[1] and act as the dispute manager,[2] the settlement facilitator,[3] the town elder,[4] the collaborative arbitrator,[5] the interactive, or proactive arbitrator?[6] Increasingly the answer is in favour of a more engaged and more proactive role for the arbitrator. Indeed, in responding to a recent survey when asked 'Do you think an arbitrator has a role in fostering settlement?' 78% of the global arbitration practitioner respondents said 'yes'.[7]

In response to this evolving view of the arbitrator's role and in an effort to provide ever-better service to users, institutions and ADR organizations are providing new guidance. For example, as part of its centenary celebration, the ICC is issuing the report of its *Task Force on ADR in Arbitration* with guidance for innovative approaches focusing on the equally important goals of dispute avoidance and dispute resolution. The *Mixed Mode Task Force*, a collaborative effort of several leading ADR organizations, issued white papers offering practical guidance, *inter alia*, on utilizing a process design facilitator,[8] on the arbitrator's role

* Edna Sussman is a full-time independent arbitrator and is the Distinguished ADR Practitioner in Residence at Fordham University School of Law. Formerly a litigation partner at a major international offer firm, Ms. Sussman served as the Chair of the New York International Arbitration Center, founding chair of the AAA-ICDR Foundation, and President of the College of Commercial Arbitrators. Ms. Sussman has lectured and published widely on arbitration and mediation; Email: esussman@sussmanADR.com.

[1] Klaus Peter Berger and J Ole Jensen, '*The Arbitrator's Mandate to Facilitate Settlement*' (2017) 40 Fordham Int'l L. J. 887.

[2] Paolo Marzolini, 'The Arbitrator as a Dispute Manager—The Exercise of the Arbitrator's Powers to Act as Settlement Facilitator', in *The Arbitrator's Initiative: When, Why and How Should It Be Used?* (ASA Special Series, No. 45, 2016).

[3] Gabrielle Kaufmann-Kohler, 'When Arbitrators Facilitate Settlement: Towards a Transnational Standard' (2009) 25 Arb Int'l 187.

[4] David Rivkin, 'Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited' (2008) 24 Arb Int'l 375.

[5] Catherine Kessedjian, 'International Arbitration—More Efficiency for Greater Credibility' in Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014* (Nijhoff Publishing 2015).

[6] Michael Schneider, 'The Uncertain Future of the Interactive Arbitrator: Proposals, Good Intentions and the Effect of Conflicting Views on the Role of the Arbitrator' in Brekoulakis and others (eds), *The Evolution and Future of International Arbitration* (Kluwer Law International 2016).

[7] Edna Sussman and Klaus Berger, *Arbitrator Techniques and their (Direct or Potential) Effect on Settlement*, NY Dispute Resolution Lawyer, Vol. 14 No 1, pp. 25-28, 26, available at http://bit.ly/40jcG7D.

[8] Working Group 2 White Paper, Laura Kaster and Jeremy Lack, *Neutrals Facilitating tailored Process Design*, available at https://imimediation.org/about/who-are-imi/mixed-mode-task-force/ (Accessed April 10, 2023). These White Papers are the product of the Mixed Mode Task Force which was sponsored by the International Mediation Institute, the College of Commercial Arbitrators and the Straus Institute for Dispute Resolution, Pepperdine School of Law.

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in setting the stage for settlement,[9] on Arb-Med,[10] and on the arbitrator's communications with the mediator.[11] Individual arbitrators have proposed many excellent new approaches to case management. To name a few: Neil Kaplan's 'Kaplan Opening', David Rivkin's 'Town Elder Protocol and Decision Tree Analysis', Doug Jones' 'Expert Protocol', Yves Derains's 'Preliminary Report', Toby Landau's 'Tribunal Witness Discussion'. All of these call for an arbitrator who takes an active role in raising possible procedural approaches and discussing options for process design with the parties from the commencement of the case.

Thus we find a potpourri of ideas percolating in our arbitration community. This article proposes two additional ideas for international arbitration. The first proposes that arbitrators, where appropriate, suggest at the first meeting with the parties that consideration be given to employing the more streamlined US domestic arbitration pre-hearing process. The second proposes that those drafting dispute resolution clauses consider the benefits of borrowing some features of dispute boards for commercial arbitrations outside the context of construction contracts. Experience has proven both of these dispute resolution processes to be effective in achieving their goals: the first to significantly reduce time and cost of the arbitration and the second to assist the parties in avoiding arbitration altogether. Since a picture—or an example—is worth a thousand words, an example from an actual arbitration is offered for each proposal.

STREAMLINING THE PRE-HEARING PROCESS

Time and cost has been a constant subject of complaint in international arbitration circles for many years. Whenever the subject comes up Professor Park's anecdote in his excellent article on Arbitrators and Accuracy comes to my mind:

> On a small street in downtown Boston stands a shoe repair shop with a proactive approach to customer complaints. In the window, an equilateral triangle links three options: fast service, low price, high quality. 'Pick any two,' patrons are advised.[12]

But can we have all three: fast service, low price, and high quality? Are there ways of conducting an arbitration that might serve to accomplish all three objectives? In appropriate international arbitrations exploring the possibility of moving away from the standard international arbitration pre-hearing process to a more streamlined and equally effective process, similar to that often employed in domestic US arbitrations, could serve to accomplish all three.

The standard international arbitration follows a familiar pattern. A demand for arbitration and an answer are filed. A standard draft first procedural order is issued by the tribunal. Most often there is little or no discussion with the parties to consider what process might be best suited to the particular case. The initial filing is followed by a statement of claim and a statement of defense accompanied by witness statements, expert reports, documents, and legal authorities. Following these merits submissions there is a period of time set aside for the exchange of documents. Following the completion of the document exchange, the claimant files a reply and the respondent files a rejoinder, again accompanied by witness statements, expert reports, documents, and legal authorities. If there is a counterclaim, there is one more submission providing

[9] Ibid. Working Group 4 White Paper, Edna Sussman and Klaus Peter Berger, *Arbitrator Techniques and their (Direct or Potential) Effect on Settlement*.

[10] Ibid. Working Group 5 White Paper, Tom Stipanowich and Moti Mironi, *Switching Hats: Developing International Practice Guidance for Single-Neutral Med-Arb, Arb-Med, and Arb-Med-Arb.*

[11] Ibid. Working Group 7 White Paper, Deborah Masucci and Dilyara Nigmatullina, *Future Directions, Interactions Between Mediators and Arbitrators.*

[12] William W Park, 'Arbitrators and Accuracy', 1 (2010) J Int'l Dispute Settlement 25.

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the opportunity for the claimant to file its rejoinder. Post-hearing memorials are typical. The number of pages submitted to the Tribunal in these multiple submissions can be and often is staggering—far more than what, in the words of Lucy Reed, can 'fit in the arbitrator's head'.[13]

Most US domestic arbitrations and some international arbitrations seated in the USA adopt a quite different process design. Following the filing of the demand for arbitration and the answer there is a period of time for exchanges of documents. In some cases there are a very limited number, typically no more than one or two, of depositions. A timeframe is set for the exchange of expert reports sufficiently in advance of the hearing to allow for preparation. In some cases parties choose to employ witness statements, especially when there are no depositions. Approximately two weeks before the hearing both parties simultaneously submit their pre-hearing briefs setting forth their view of the facts and the law. The hearing follows. Following the hearing, post-hearing briefs are often submitted.

Example:

A major corporation spun out a significant portion of its operations to a newly formed company. The transaction came together very quickly with very little time for those most knowledgeable about the company's accounting to assess the transaction. After the closing, one of the parties claimed the assets and liabilities were not what had been expected and agreed. This had not been obvious prior to the closing because the operations of the company spinning out its assets were reported on a consolidated basis. An arbitration claiming $1.2 billion based on the alleged discrepancy in the assets and liabilities was filed. The parties agreed on a schedule. Dispositive motions were filed with respect to certain discrete issues and resolved promptly. The parties exchanged documents. Two weeks before the hearing both parties submitted their pre-hearing briefs. A two-week hearing took place seven months after the Tribunal's first meeting with the parties. Post-hearing briefs were submitted. The award issued shortly thereafter.

The elimination of the multiple pre-hearing rounds of briefing typical in international arbitration enabled the arbitration to proceed on a much more abbreviated schedule, just seven months from the first case management conference to the hearing. It also served to reduce dramatically the volume of material submitted to the Tribunal. Reducing the length of the proceeding and reducing the number of submissions undoubtedly also dramatically reduced costs.

Those schooled in the civil law traditions might balk at the idea of having document exchanges precede the first merits submission as the claimant should know its case before the arbitration is initiated. But the demand for arbitration in international arbitration is generally quite detailed and sufficient to convey the thrust of the claim. Such detail can be required of the parties when employing this more streamlined process. A detailed answer can also be required. In fact, in many cases the parties might find it to be an advantage to have the document exchange precede the first merits submission and thus avoid the common problem of having a reply and a rejoinder which drift quite far from the initial submissions as the parties acquire information from the documents exchanged, making the initial submissions of limited utility, albeit expensive and time consuming. And with the elimination of the initial round of merits submissions the tribunal's impossible task of trying to absorb the many thousands and thousands of pages of submissions is reduced.

Some might wonder how the Tribunal can decide document exchange disputes if there has been no full initial merits submission. Again, detailed initial pleadings provide considerable assistance in this regard. Moreover, document exchange disputes present an excellent opportunity to engage in conversation with the parties to explore the case and the bases for the requests

[13] Lucy Reed, '*The Kaplan Lecture 2012 Arbitral Decision-making: Art, Science or Sport?*' (2013) 30 Journal of International Arbitration 85–99.

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and the objections. Oral presentation of the dispute, taking it beyond the Redfern Schedules, enables the tribunal to gain a better understanding of the issues and to make accurate decisions on document exchange disputes. The decisions on document exchange are no less accurate in this streamlined process than in the typical multi-submission international arbitration.

International arbitration practitioners might view this abbreviated process as depending on the utilization of the US practice of depositions. Since, they would say, there is great resistance to depositions in international arbitrations and it is necessary that the opposing parties' fact evidence be provided in advance of the hearing, this process cannot be adopted. However, witness statements can be utilized, and often are, in lieu of depositions without diminishing the benefits of this process design.

Some might say that this kind of streamlined proceeding is only appropriate for cases of limited value. But this example of a $1.2 billion case conducted in this fashion is not unusual. High value domestic cases in the USA are typically conducted with this process structure. Experience has shown that it works. The tribunal is comfortable that it has received all of the information that it needs to make its decision and parties are comfortable that they have had a full and fair opportunity to present their case. That increasingly parties are opting into expedited arbitrations even in higher value cases is proof that a more abbreviated process is equally satisfactory, if not more satisfactory in many instances, than the more traditional international arbitration process.

BORROWING FROM DISPUTE BOARDS

The structure of dispute boards can vary depending on the contract but generally they provide real-time decisions or recommendations for disputes that arise. Depending on the contract, there may be recommendations or decisions that may be or may become binding on the parties. While most commonly utilized in construction or major infrastructure projects and rarely used in any other context, virtually every longer-term commercial relationship would benefit from being able to have facilitated conversations before a dispute ripens into a demand for arbitration or litigation.

Avenues that provide pre-arbitration opportunities to achieve amicable resolutions are typically addressed in commercial contracts with a tiered clause calling first for negotiation, then for mediation, and then ultimately, if unresolved, for either arbitration or litigation. Utilizing a dispute resolution mechanism akin to a dispute board instead in many long-term commercial contexts would provide several benefits that tiered causes cannot offer.

The pre-arbitration steps provided in tiered clauses are typically only utilized when there are already disputes of some moment between the parties. But having a neutral individual in place from the start of the relationship, and thus in a position to deflect disputes before they even rise to the level of being identified as a 'dispute' as opposed to an 'issue,' can in many instances avoid the escalation of the issue.

Example:

The parties were entering into a contract for a supply of pandemic-related goods for quantities to be requested and supplied over a period of two years. Written into the contract was a variety of a dispute board. Three arbitrators were to be appointed in the usual manner, with each party appointing one arbitrator and the two arbitrators to select the presiding arbitrator. The contract provided that the three arbitrators would meet with the parties by teleconference weekly for the first month, then bi-weekly for the second month in order to get to know the business, to get to know the individuals, and to review with the parties whether there were any issues or disputes that were beginning to emerge. After those initial sessions the parties would check in with the arbitrators every two months and as needed upon request by any party. If amicable resolution could not be achieved the arbitrators, who had been serving in a facilitative capacity, would serve as arbitrators to render a decision on the dispute.

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At the start of the relationship there were, as a result of the pandemic, serious issues with the ability of the seller to supply goods due to personnel shortages and supply chain disruptions. As provided in the contract, the arbitrators met with the parties weekly and then bi-weekly. No caucus sessions were held. The arbitrators facilitated a conversation among the participants and assisted them in establishing avenues of communication that enabled the parties to resolve issues as they arose and move forward together to accomplish their common business objectives. The process achieved its goal and maintained a relationship that was fraught with tension at the start by providing a forum for communication and guidance on avenues for avoiding escalations of conflict. The process was so successful that no disputes ever ripened into an arbitration. But if one had, the arbitrators were in place and prepared to serve.

The standing neutral facilitator identified and involved from the start of the relationship can be an individual separate from the arbitrator. In many cases that might be the best choice and would deliver many of the same benefits. In the example here, it was the tribunal itself that served in the neutral role from the commencement of the relationship. Having the arbitrators themselves perform the neutral function from the start of the relationship enables the arbitrators not only to facilitate resolution of issues as they arise, but to get to know the business, to know the individuals, and to generate trust. Being in place from the start enables the arbitrators to proceed with an expeditious arbitration if an adjudicative process is required, with no need to spend months on the selection of the arbitrators, no need to educate the arbitrators about the business, and with the potential to significantly reduce the need for the presentation of factual evidence, as the arbitrators will already be familiar with that evidence. Since all of the arbitrators participate in the facilitated conversations and no caucus sessions are conducted, no due process issues are raised in the arbitration. A much more expeditious and well-informed arbitral decision is made possible.

This process design is similar to a dispute board process used in construction projects in which the standing neutrals are empowered to both facilitate resolutions and render binding decisions if there are disputes that cannot be amicably resolved. This kind of 'mixed mode process' can serve to assist parties to avoid and resolve disputes in essentially all longer-term relationships, including commercial purchase and sale transactions, joint ventures, partnerships, distribution relationships, joint research projects, and many more.

As is often repeated, while taking care not to draft a pathological clause, attention should be paid to drafting an arbitration clause that is suited to the parties and their likely disputes. It should not be the standard clause if fine tuning the clause can provide procedures more useful to the parties. Introducing a dispute board-like process for many longer-term relationships could deliver significant benefits to the parties and should be considered in such relationships.

CONCLUSION

There are no cookie cutters in dispute resolution. Each dispute is unique. The dispute resolution process selected must be the one tailored to the parties' specific needs. The process structures proposed in this article are not for every case. But they are worthy of consideration in many cases and provide more strands to our ever-growing collection of strands for the strings of our dispute resolution bow.

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