President's Message

A "Clarion Call" Seconded

In his keynote speech opening the Hong Kong International Arbitration Centre's conference on "*ADR in Asia*" on 27 October 2015, the IBA President David Rivkin listed many of the complaints commonly voiced about the real or perceived shortcomings of arbitrators and issued a call for a "*new contract*" between parties and arbitrators. One commentator described the speech as a "*clarion call for better behaviour*" by arbitrators. This President's Message seconds that call, putting it into perspective and ending with a few humble proposals for some concrete measures that might help to remedy the ills we all know too well.

A catalogue of sins

The list of shortcomings given by David Rivkin was, regrettably, not very novel. This does not mean that there was anything wrong with his speech. What it does mean, simply and rather sadly, is that the complaints he revisited are not being heard and addressed, in any event not sufficiently. The litany of common misdemeanours is indeed drearily familiar: arbitrators who wait too long before delving into the facts and issues of the case (before, during and after hearings) and who thus lack the confidence needed to sort the wheat from the chaff; arbitrators who work on "auto-pilot mode", thereby missing opportunities to cut costs and save time by tailoring the proceeding to the particularities and needs of each individual case; arbitrators who begin their deliberations long after a hearing has been completed; and arbitrators who take too long to issue awards.

Let us look at these sins one by one.

The first sin, namely the failure by arbitrators to become well-versed in the factual and legal issues of a case as quickly as possible, is by far the worst. Obviously, the very idea of arbitrators rendering an award without having rolled up their sleeves and getting into the details of the case is abhorrent. However, it is not enough for arbitrators to do their homework when they turn to drafting an award. Long before any award is rendered, insufficient familiarisation with the facts and issues of the case leads to a host of serious inadequacies. Take, for example, document production. How can an insufficiently informed tribunal make sensible decisions on document disclosure? The uninformed tribunal will routinely take the safest route: when

in doubt, grant, which in turn generally encourages ever-expanding follow-on requests (plus endless squabbling as to whether a party actually did produce all documents that could conceivably be deemed to be responsive). The end result is, predictably, serious waste of time and money. Another procedural issue that a tribunal cannot address adequately if it does not sufficiently master the facts of the case at an early stage are decisions as to whether to allow unplanned submissions or whether to exclude evidence-taking on the ground that it is not relevant. Again, the potential to waste of time and money is immense. David Rivkin also pointed this out in his speech.

Also, poor arbitrator preparation all too frequently pollutes hearings. First, the arbitral tribunal that takes a pro-active approach to streamlining hearings, *inter alia* by paring down lists of witnesses and experts in advance of the hearing is a rare breed.[1] At the hearing itself, arbitrators' failure to grasp the facts and issues of the case all too often results in a series of patently irrelevant questions that arbitrators would never ask if they had done their homework properly. Worse, if more than one arbitrator is insufficiently prepared, this often produces a snowball effect: not to be outdone by his or her colleagues, the unprepared arbitrator will attempt to disguise his or her own ignorance by adding another burst of meaningless questions. The alternative hearing scenario with an unprepared tribunal consists in no questions at all – which is hardly more reassuring (as also noted by David Rivkin).

The second sin – the tendency of arbitrators to put the proceedings on "auto-pilot" – is nearly as bad as the first. It could be described as the transposition to arbitration of Henry Ford's famous quote, "*Any customer can have a car painted any colour that he wants so long as it is black*."[2] One can almost close one's eyes and recite by rote the standard Procedural Order No. 1; or the inevitably detailed Procedural Timetable, complete with: two rounds of pre-hearing submissions (three if there is a counterclaim); two rounds of witness statements filed simultaneously (unless they are filed with the submissions); a discrete phase for document production; the date, time and agenda of the pre-hearing telephone conference; the one-week hearing with identical examination times for all parties irrespective of the likely number of witnesses and without any regard for the difference between the position of the claimant and the respondent; two rounds of post-hearing

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1 To be fair, this is understandable, at least to a certain extent. The consequences of depriving a party of the possibility to put forward testimonial or expert evidence can potentially be so far-reaching that tribunals are naturally reluctant to take that step. Also, tribunals need to draw a distinction between firmness and boldness. A decision not to allow evidence can lead to challenges and the like, the consequences of which can be far more disrupting than an additional day of hearing time.

2 Henry Ford, *My Life and Work*, (in collaboration with Samuel Crowther), Garden City Publishing Company, Inc. 1922, Chap. IV, p. 72.

submissions; etc. – all sent with the invitation to the first (and generally only) case management conference. Does the case actually turn on the interpretation of one single contract clause? Has the respondent raised a time-bar defence that involves no fact-finding at all? Are there claims that should be dealt with as a priority? Is the counterclaim merely the flipside of the claim and thus requires no separate briefing? The standard Procedural Order No. 1 is circulated without the tribunal asking itself (or the parties) any questions of the sort. *Keep on movin', folks, it's business as usual…*

These first two sins, a robotic approach and insufficient familiarisation with the facts, are often as inseparable as Tweedledum and Tweedledee and can make for a toxic cocktail: take for example the arbitral tribunal that decides to reserve its ruling on a jurisdictional objection for the award on the merits, although (a) the jurisdictional objection is a purely legal issue based on undisputed facts having no relation at all with the merits and (b) the facts relating to the merits are complicated, highly technical and obviously involve significant testimonial and expert evidence.

The third and fourth sins, namely the failure to plan for deliberations shortly (or immediately) after the hearing, and the failure to issue timely awards, are related and require little explanation. They generally have the same root cause: the busy agendas of arbitrators. Hence the plane back to the office (or the next hearing) as soon as the court reporters have turned off the microphones; hence the trouble in finding mutually convenient dates for all members of the tribunal to deliberate; hence the long lead time to finally get the award drafted, circulated for comment and approved. Whilst one can understand the aphorism "*I wouldn't want an arbitrator who's got time on his/her hands*", busy agendas are no excuse.[3]

Some perspective

Reading this catalogue of sins, one may wonder why anyone would agree to arbitration in the first place. If the arbitrator is a decision-maker who has a heavy caseload and thus limited time to devote to each case, who does not become fully versed in the details of the matter as early as possible, who will apply standardised procedures and who, on top of all this, leaves parties pining for judgment, why pay this person fees? Why not go straight to court?

[3] At this stage the author discloses that it would be the height of hypocrisy for him to claim that he has never sinned in this respect. Perhaps we should all recall the message of John 8:7 (the exact words according to the King James Bible being "*He that is without sin among you, let him first cast a stone at her.*"). Saint Augustine's "*Cum dilectione hominum et odio vitiorum*" (Letter 211, c. 424; translated as "*With love for mankind and hate for sins*"; updated in Mohandas Gandhi's 1929 autobiography as "*Hate the sin and not the sinner*"), offers some solace.

The simple answer is that the dire picture painted above does not apply to all arbitrators and concerns only a minority of cases. In any event, whilst one may encounter some of the sins described above in a more or less mild (or virulent) form, it is an unlucky party indeed that is subjected to the full panoply.

As for the failure by arbitrators to grasp the facts of case, it can have a variety of causes. At this juncture, we should all recall our days at school, when it sometimes happened that out of a class of twenty or twenty-five pupils, only three or four actually achieved passing marks at a given test. Was this because an otherwise normal and average class had temporarily turned into an assembly of cretins? Or was it because the subject-matter of the test had been inadequately explained? Coming back to arbitration, counsel should remember that if the tribunal appears not to understand the issues, it may be because there was something wrong with the submissions. And frankly, faced with the choice at a hearing between (a) sphinx-like (if dignified) silence and (b) a series of apparently nonsensical questions from the arbitrators, the author will always take the latter. At least it shows counsel that the message has not been heard and gives a chance to remedy the problem.

Similarly, an arbitral tribunal cannot tailor proceedings to the particularities of a given case if counsel do not follow suit. It has been a source of considerable frustration when sitting as arbitrator to propose case-specific proceedings (e.g., identification of dispositive issues up front and proceedings focusing on these issues, especially if this cuts down evidence-taking; adoption of procedures for document production that limit the scope thereof and accelerate rulings; etc.), only to hear from counsel that they prefer to do things "*the traditional and time-tried way*".[4] This is a particularly high risk where counsel and/or the parties hark from jurisdictions having very different legal traditions and/or where counsel are inexperienced in international arbitration. However, the tendency for counsel to adopt an approach that is just as unimaginative and robotic as that which would justify criticism of some arbitrators can also be found in many high-profile teams of international counsel. It is not hard to understand why. It takes confidence to craft proceedings in a truly case-specific way: confidence in one's own understanding of the facts and issues; confidence in one's own capacity for creative thought; confidence in the willingness and ability of all of the other participants (not least one's own client) to play by newly crafted rules; confidence in the arbitral tribunal's willingness to hold the parties and

[4] This is a verbatim quote from a case management conference a few years ago. The author recalls it as if it had taken place yesterday, and not for reasons that do any credit to the counsel who uttered this deplorable phrase.

counsel to those rules. To put it differently, truly tailor-made proceedings are, to a certain extent, a voyage into the unknown, and this is deeply counter-intuitive for the legal profession.

As regards the more specific issue of deliberations immediately after the hearing, it also calls for a note of caution. Not infrequently, hearings address only a part of a case (that part which is evidenced by witnesses or experts). The impression left immediately after a hearing can thus be incomplete at best, misleading at worst. Not infrequently, it is prudent to take the time to re-read the documentary record very, very carefully, obviously with the benefit of the hearing, before reaching even tentative conclusions. Of course, this is not to criticise the proposal that arbitrators should meet immediately or very shortly after the hearing while their memories are fresh. However, this deliberation will, in the majority of cases[5], be provisional and arbitrators should ideally schedule a second deliberation to take place after the dust of the hearing has settled.

Finally, regarding delays, the human mind can only process so much data in a given amount of time: parties and their counsel sometimes lose sight of this by filing massive submissions and volume upon volume of evidence, and then being surprised by the time it takes to absorb all of this information. In addition, when one adds up extensions of time requested by parties and/or their counsel, tribunal-caused delays do not always end up looking worse in comparison.

A few humble proposals

Even having put the criticism often directed at arbitrators into perspective, the fact remains that much can be improved. So what can be done concretely?

1. To begin, the author is a very vocal proponent of hands-on case management by arbitrators. This translates into a number of concrete measures (the list that follows being a non-exhaustive selection).
    a. Instead of simply sending an off-the-shelf Procedural Order No. 1, tribunals should ask the parties and their counsel whether they wish to have any such instrument at all. Granted, in the majority of cases it *is* helpful to have an agreed set of rules at the outset. This should however not be assumed blindly. Moreover, by asking the question, the tribunal generally triggers a much more open and creative discussion on procedure than what occurs when

[5] This caveat is important. Where the proceedings are structured in such a way that the bulk of the evidence is put forward at the hearing itself, deliberations immediately after the hearing are a *must*.

the parties and their counsel use a tribunal-created document as a starting point.

b. Tribunals would be wise not to send any proposition for a procedural timetable prior to an initial discussion with the parties. Again, if a pre-established standard proposal from the tribunal serves as a starting point, this creates the risk that the parties, counsel and the tribunal will lose sight of the particular needs of the case. Instead, arbitral tribunals should foster an open discussion on the various steps of the proceedings and the timing of these steps, which in turn pre-supposes a thorough degree of preparation in advance of the first case management conference.

c. At this juncture, the author will indulge in a ride on his favourite hobby-horse: the arbitral tribunal should schedule not one, but *several* case management conferences at key milestones in the proceedings, with the possibility to forego one or more of these conferences if they are not needed. At these case management conferences, the arbitral tribunal should provide the parties with its understanding of their respective cases (without giving any opinion on the merits of the parties' respective positions – this is something completely different[6]). Ideally, the tribunal should provide a written summary of its understanding in essentially the same format as the summaries of the parties' positions that one finds in arbitral awards. The tribunal should also give notice to the parties if it has not understood something or is unsure whether it has understood, and discuss with the parties the scope and content of the next steps of the proceedings.

   One especially important milestone is after the first exchange of written submissions: the author believes that there should *always* be a case management conference at this point of the proceedings.

   These periodic case management conferences serve many important purposes and go a long way towards addressing many of the sins listed above:

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[6] For some reason, some practitioners conflate the proposal for periodic case management conferences at which the arbitral tribunal summarises its understanding of the parties' cases with settlement meetings at which the tribunal gives tentative views on what might be the outcome of the case. The author fails to understand why this confusion is so pervasive, since case management and settlement facilitation are two totally different things. And it cannot be improper for an arbitral tribunal to summarise its understanding of the parties' positions well before the rendering of the award: in ICC arbitration arbitrators are supposed to summarise the parties' positions at the very outset of the proceedings in the Terms of Reference (and it is best if the tribunal does this itself instead of asking the parties for their own summaries).

- First, they force the arbitral tribunal to delve into the details of the case at an early stage and to keep abreast of the case as it unfolds. It is simply not possible to do this exercise without having reviewed carefully the parties' submissions and evidence and without the tribunal having had a preliminary discussion among its members on the issues of the case and the way forward.
- Second, they enable the parties and counsel to spot and rectify any misunderstandings of their case on the part of the tribunal at a relatively early stage.
- Third, periodic case management conferences enable the parties, counsel and arbitrators to monitor whether the initially agreed structure of the proceedings is in line with the case as it develops. For example, arbitrators can make proposals as to issues that they believe will require further briefing in upcoming submissions (or, by contrast, identify issues that already appear to be sufficiently briefed). Importantly, if the arbitral tribunal questions the relevance of any given issue, it should flag this and foster a discussion on how to deal with it. To take another example, if the arbitral tribunal has the impression that the parties' first submissions were ships passing in the night because they did not address the same issues or were not responsive to each other, and thus were not helpful, it should engage with the parties on this problem to ensure that it is remedied in following submissions.
- Fourth and finally, the fact that the arbitral tribunal drafts intermediate written summaries and a continuously updated history of the proceedings moves the drafting of the award forward.

Arbitral institutions have a crucial role to play when it comes to arbitrator availability. It is a good thing to ask arbitrators to complete forms in which they confirm that they have and will continue to have the requisite time to devote to a new case. Where these forms require an arbitrator to disclose the number of pending cases she or he has pending and to specify the proportion of cases in which the arbitrator is presiding arbitrator or sole arbitrator, this gives something of a picture. However, that picture is incomplete. In order to assess more accurately an arbitrator's availability and ability to conduct proceedings in a time-efficient matter, more focused information is required, namely: (a) the year

in which each of the pending cases began and perhaps most importantly of all (b) the number of cases in which the proceedings are closed and the award is being drafted (with the date of closing of the proceedings). This information is important not only to assess the arbitrator's availability for the new case, but also to enable the institution to judge whether the acceptance of the new case might cause delay in existing matters administered by that same institution.

d. Arbitral institutions can also play a role in ensuring that the drafting of awards is not unduly delayed. Institutions could demand that arbitral tribunals provide them with draft awards containing only the history of the proceedings, the summary of the parties' positions, and perhaps the main provisions of the contract at issue[7] at certain key milestones. For instance, the institution could ask for such incomplete draft awards two or three weeks after the exchange of pre-hearing submissions is completed; and/or four weeks before the merits hearing; and/or after the arbitral tribunal issues a certain number of procedural orders on major issues (for instance after three such procedural orders). Obviously, diligent arbitrators do this anyway (and these are probably the very arbitrators who are not targeted by complaints on slow issuance of awards). The idea would be to ensure that *all* arbitrators adopt this good practice.

Conclusion

It is always possible to do better and the level of service provided by arbitrators is no exception. David Rivkin's call for a "*new contract*" certainly deserves strong support to the extent that it contributes to the continuous improvement of the arbitral process. Other aspects of the call for a "*new contract*" raise difficult questions. For example, would another best practice document truly achieve this goal, on which we all agree? Also, does this call for a "*new contract*" come with a Pandora's box of knock-on issues? Whilst it is perfectly desirable to obtain commitments from arbitrators to deliver high-level service, a "contract" also means *rights* of arbitrators vis-à-vis the parties, their counsel and arbitral institutions. To take but a few examples, arbitrators could understandably demand a

[7] But not, of course, the tribunal's findings on disputed facts or on the substantive issues, at least not prior to the closing of the proceedings. Even after the closing of the proceedings, the dispatch of an incomplete draft award to the institution could trigger unintended and highly unwelcome consequences, if only in terms of confidentiality of the deliberations.

"contract" in which counsel also commit to better behaviour: the *quid* of arbitrator commitments entails the *quo* of reciprocal commitments by the parties and counsel. David Rivkin clearly identified and emphasised the importance of this point in his speech. However, there is more. For instance, arbitrators could also make demands of their own in terms of immunity from legal action save in case of fraud or gross negligence. To encapsulate all of these manifold aspects in a true "contract" would be a mammoth task, the sheer breadth of which might ultimately defeat the purpose. But all that being said, David Rivkin is right to put the issue on the table once more, and ASA would be more than happy to participate in the effort he has called for.

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