Luncheon Address to the International Arbitration Club

14 September 2023

Midstream CMC – a Blessing or a Curse?

Professor Doug Jones
AO, RFD, IJ, BA, LLM, CCIArb, FRI Arb 1

Atkin Chambers, 1 Atkin Building, Gray's Inn, London, WC1R 5AT, United Kingdom

www.dougjones.info

Sydney Chambers: Sydney Arbitration Chambers, 139 Macquarie St, Sydney, 2000, NSW, Australia

Canadian Chambers: Arbitration Place, Bay Adelaide Centre, 900-333 Bay Street, Toronto, Canada M5H 2T4

Midstream CMC – a Blessing or a Curse?

Professor Doug Jones AO[1]

Engagement between tribunals and parties in international arbitration, post PO1, and prior to the evidentiary hearing, particularly in the common law tradition, has in the past been largely limited to dealing with procedural differences between the parties, issues of disclosure, and preparing for the main evidentiary hearing.

Two suggestions seeking to encourage pre-hearing engagement by tribunals with the merits have been the Reed Retreat and the Kaplan Opening.[2] Both can be generally categorised as attempts to educate the tribunal on the issues likely to be dealt with at the main evidentiary hearing, and arise, at least in part, from a concern by parties that informed tribunals are not always encountered at evidentiary hearings.

Engagement between the tribunal and the parties on the issues in dispute well before the evidentiary hearing is not a common feature of international arbitration except insofar as there might be applications for bifurcation of issues, or attempts to 'strike out' some or all aspects of a claim or defence.[3]

There can be seen in domestic civil law court proceedings an ongoing merits engagement between the parties and their counsel, and the judge, leading, it is said, to evidentiary hearings quite different in character to those encountered in domestic common law court systems.

It is suggested that significant value can be added to the process of international arbitration by "merits" engagement between the tribunal and the parties during the arbitral process and well before any evidentiary hearing, by means of one or more 'midstream' case management conferences (**CMC's**).

After the first exchange of parties' cases, most usefully when they are in a memorial form, the tribunal has an opportunity to itself distil the issues in contention between the parties revealed from those cases. This does, of course, require the tribunal to read and analyse the parties' cases and to summarise for the parties what it understands to be the issues and the parties' contentions in respect of them.

There are some arbitrators who might be disinclined to make the investment of time and effort necessary to do this. Indeed, the Kaplan Opening concept is one where the parties summarise for the tribunal what the issues are. Indeed, it has sometimes been said that Kaplan Openings are a way of relieving arbitrators of the responsibility of actually reading the parties' cases!

However, for those arbitrators prepared to undertake the work of summarising the contentions and producing a tribunal's analysis of what they are thought to be, great value can be achieved, at least in the following respects:

a. The tribunal is educated by undertaking this process;

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[1] International commercial and investor-state arbitrator and International Judge of the Singapore International Commercial Court: www.dougjones.info. The author thanks Caroline Xu, Legal Assistant, Sydney Arbitration Chambers, for her assistance in the preparation of this paper.

[2] See Neil Kaplan, 'If it Ain't Broke, Don't Change It' (2014) 80(2) *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 172; Lucy Reed, 'The 2013 Hong Kong International Arbitration Centre Kaplan Lecture – Arbitral Decision-Making: Art, Science or Sport?' (2013) 30(2) *Journal of International Arbitration* 85.

[3] Provision is made for the early disposition of issues in certain arbitral rules. See, eg, International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules 2022, Art 41; London Court of International Arbitration (LCIA) Arbitration Rules 2020, Art 22.1; Singapore International Arbitration Centre (SIAC) Arbitration Rules 2016, Art 29; Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules 2023, Art 39; Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, Art 43; International Centre for Dispute Resolution (ICDR) International Arbitration Rules 2021, Art 23. See also International Chamber of Commerce (ICC), 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration' (1 January 2021) 16–17.

b. The parties can clarify whether or not the tribunal has properly understood the issues;
c. The issues can be presented, often in a tabular format, to which can be connected as the case subsequently proceeds, the factual and expert evidence relied upon in respect of each of the competing contentions, all available at a glance on an issue-by-issue basis;
d. The tribunal is certain to be better informed as to the relevance or materiality of documents sought to be disclosed for the purpose of a 'Redfern' or equivalent process;
e. There can be helpful engagement between the parties and tribunal on what further evidence is needed by way of reply submissions, perhaps avoiding the removal of all the ‘trees’ in order to ensure the 'wood' is dealt with; and
f. Often at the stage at which a midstream CMC is held, there are other case management issues that can be dealt with, including document disclosure and engagement with experts.

By way of clarity, what is not done is the expression of tribunal views on the merits, a process quite different to the subject of this paper.

So, is a midstream CMC of the sort described above a blessing or a curse?

Properly implemented, it is hard to describe it as anything other than an effective contribution to proactive case management, likely to have the effect of increasing the efficiency and economy of the arbitral process, and reducing the 'all or nothing' character of the evidentiary hearing.

On the curse side of the equation, however, a midstream CMC represents a substantial investment of time and cost for the tribunal and for the parties, and thus needs to be engaged in in a manner consistent with the needs of the particular dispute rather than undertaken merely for the sake of doing it.

There is also the possibility that some arbitrators simply would have neither the time nor inclination to invest in the process at the stage when a midstream CMC might be called for. Sadly, a ‘just in time’ approach to preparation by tribunals is common.

My personal experience is that in both complex, and relatively simple cases, it adds real value, and is often productive of the narrowing of issues, sometimes encouraging the settlement of the matter.