LOOKING FORWARD IN INTERNATIONAL ARBITRATION

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1. INTRODUCTION

Despite arbitration's ancient origins, the 20th century witnessed its rebirth, its cultivation in various domestic settings and its ascendancy to a position of supremacy as the preferred method of resolving international commercial disputes. Pausing momentarily to survey the road now travelled, one observes a great many landmarks: early attempts at systematisation through dedicated organisations such as the Chartered Institute of Arbitrators in the United Kingdom, the cultivation of a new body of knowledge and its eventual recognition as a distinct legal discipline, the development of global professional networks, the proliferation of arbitral institutions, the creation of an effective international enforceability framework with the passage of the New York Convention of 1958 and prominently, the harmonisation of arbitration laws which followed the passage of the UNCITRAL Model Law on International Commercial Arbitration in 1985. In light also of its judicial endorsement and its commercial success, the evolution of arbitration as a dispute resolution process might on first glance appear to be largely complete.

Yet the environment in which arbitration operates continues to evolve, and in the face of intensifying competition, the process of arbitration cannot afford to stand still. There is a need to remain on the lookout for its shortcomings, and to devise and apply solutions accordingly. To this end, it is intended in this paper to identify some of the challenges which confront commercial and investor-state arbitration, respectively.

This paper commences with a discussion of two new competitors in the world of international dispute resolution – mediation and specialised commercial courts – and how arbitration might respond to these challenges. It is suggested that the practice of innovative case management techniques is an appropriate point from which to start, to secure time and cost advantages. This paper then addresses some of the long-standing criticisms of investor-state dispute settlement and the diversity of approaches to reform that might usefully be adopted, including consideration of the ISDS provisions in two recent investment partnerships, the Trans-Pacific Partnership ("TPP") and the Transatlantic Trade and Investment Partnership ("TTIP").

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2. MEDIATION: AN AMIABLE ALTERNATIVE

Mediation continues to increase in popularity and use as an independent process and in conjunction with litigation and arbitration. The rise of mediation is due in no small part to the increasing demands placed on the limited resources of courts and tribunals. This rings true in common law jurisdictions, where a flood of court filings has led, in many countries, to mandatory court-referred mediation. This process was approached by counsel with scepticism in its early years, but its effectiveness in resolving disputes and the high levels of party satisfaction associated with the outcomes has led to a willingness amongst counsel to respect the integrity of the process and to consider mediated outcomes wherever possible. Court-referred mediation has been adopted in the US,[2] Canada,[3] and Australia[4] amongst other countries. The implementation of mediation in these countries has had a positive impact on their domestic jurisprudence, and driven a departure from the stark adversarial mindsets of the past in favour of the collaborative legal thinking of the present and future. The increase in the number of voluntary mediations since the scheme's introduction in Australia serves to illustrate this point.

One important characteristic of mediation is its capacity to resolve disputes whilst maintaining positive business relationships between the parties. The adverse impact of protracted litigation or arbitration is no mystery. Where disputes arise between commercial partners, a collaborative as opposed to an adversarial approach to resolving them is more conducive to the maintenance of strong commercial relations. Mediation is also conducive to reaching innovative solutions and remedies, which encompass an infinitely broader array of options than the legal remedies available to parties in arbitration or litigation.

One must be careful, however, not to paint a wholly idealistic picture of mediation. Its non-adjudicative character and the reliance on good faith and trust between the parties can lead to justifiable limitations on, and criticism of the process.

The differences between mediation and arbitration are fundamental. One has a consensual outcome, the other an imposed one. The skill sets deployed by third party neutrals in the two processes are distinct. Many neutrals practice as one or the other and not both. The combination of the processes, at least by the same neutrals, is controversial but one which deserves exploration when looking ahead.

Mediation in conjunction with arbitration known as med-arb or arb-med is widely used in China. These processes raise conflict of interest issues, which have long been debated by international commentators.

[2] California Code of Civil Procedure, section 1775.
[3] Ontario Rules of Civil Procedure (RRO 1990, Reg 194), section 24.1.
[4] Civil Procedure Act 2005 (NSW), section 26.

These innovative hybrid dispute resolution models are deserving of recognition and have proven successful in many cases. The view that an arbitrator who was present in mediation proceedings is best placed to determine arbitration proceedings between the parties is worthy of further exploration.

Such processes are not unknown in common law jurisdictions. In the state of New South Wales, Australia, the hybrid "med-arb" process has been used successfully under a statutory scheme for workers' compensation.[5]

Developments in mediation and conciliation have also taken place at the international level, with the UNCITRAL Model Law on International Commercial Conciliation being promulgated in 2002. One of the main obstacles for international mediation remains the enforceability of mediated settlements, in contrast with the enforceability of arbitral awards under the New York Convention. The Convention's ratification worldwide has been critical to the success of international arbitration. Mediation's success and advancement as a complement to international arbitration will depend upon initiatives to develop a sturdy and far-reaching international framework for the conduct of mediation in international disputes and for cross-border enforcement of the settlements reached therein.

In 2016, the UNCITRAL Working Group on Arbitration and Conciliation continues its endeavours to develop a convention on the international enforcement of commercial settlements.[6] This project has been under development for some time, but has made considerable headway in recent years. At its meeting in New York in February 2015, the Working Group considered the legal and practical issues associated with developing such an instrument.[7] The Group considered that the New York Convention could provide a useful basis for doing so, although there were recognised distinct issues raised by the enforcement of settlements (as distinct from arbitral awards) which will need to be addressed. The Group identified a number of issues including chiefly, the lack, and inconsistency, of domestic legislative frameworks for the enforcement of settlement agreements in countries around the globe.[8]

Significant further progress was made by the Group at its subsequent meeting in Vienna from 7–11 September 2015. The report on that session states that broad support was expressed for limiting the scope of the instrument to settlement agreements resulting from formal conciliation

[5] Workplace Injury Management and Workers Compensation Act 1998 (NSW).

[6] The last session of the Working Group was held from 1–5 February 2016 in New York, the session report for which had not been released as at the date this article was written.

[7] A/CN.9/832 Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2–6 February 2015).

[8] A/CN.9/832 Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-second session (New York, 2–6 February 2015), paragraphs 45 to 56.

in order to bring certainty to the enforcement procedure.[9] The Group considered in significant detail various aspects of the proposed instrument including the definition of "conciliation", the content of "commercial" settlement agreements and their form, the mechanisms and procedures for enforcement and finally, the grounds that ought to be available to resist enforcement of commercial settlement agreements. Generally agreed defences to enforcement included fraud, duress, public policy and that the subject matter is not capable of being conciliated. The defence of a lack of due process in conciliation was, however, more controversial. Ultimately, the report from the September session concluded as to the form of the instrument that "progress could be made based on draft provisions without prejudging the final outcome". To this end, it was requested that the Secretariat "prepare a document outlining the issues considered at the session and setting out possible draft provisions, including those that would be relevant if the instrument were to be a convention".[10] The report of the subsequent meeting scheduled to take place in New York from 1–5 February should therefore be anticipated with interest.

It can be predicted with confidence that mediation will play an important part in international commercial dispute resolution in the years to come. Its effective combination with both arbitration and other forms of international dispute resolution such as dispute boards, will be one of the significant challenges for the future. No doubt the work of UNCITRAL Working Group II (Arbitration and Conciliation) will have a pivotal role to play in its development.

3. SPECIALISED COMMERCIAL COURTS

Another trend which has made great headway in recent decades has been the birth of national courts specialising in commercial, construction and technological matters, around the world, such as the English Technology and Construction Court, the Singapore International Commercial Court and the Dubai International Financial Centre Courts. Specialised courts are increasingly demonstrating their capacity to resolve complex disputes expeditiously, so as to rival the efficiency that arbitration has long claimed to offer. Judges in specialised courts have developed the technical expertise in specialty areas of the law that is necessary to deal with complex and highly technical factual disputes. They rival the once distinct industry expertise that was the province of arbitrators alone.

[9] A/CN.9/861 – Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7–11 September 2015).

[10] A/CN.9/861 – Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session (Vienna, 7–11 September 2015), paragraph 109.

Not only are specialised courts able to compete with the benefits that arbitration has long claimed to distinguish it, but they carry the advantages of the sovereign powers they wield, and the freedom from many of the constraints for arbitral tribunals as creatures of contract. Among the foremost of these is the difficulties faced by arbitral tribunals in conducting multi-party arbitration. Difficulties of this sort arise frequently in string contracts, which often feature arbitration clauses in some and not all of the contracts. The limited ability to consolidate proceedings and to join additional parties has long been a hurdle for arbitration, but not for courts with their compulsive powers of joinder and consolidation. The challenges of string contracts are particularly prominent in the construction industry; and the English Technology and Construction Court is an example of a specialised court easily able to overcome these challenges in contrast with arbitral tribunals, which are confined to the ambit of the arbitration agreements under which they are constituted.

The success of specialised courts and their increasing viability for resolving international disputes raises the question of whether the monopoly that arbitration holds over international enforceability, by virtue of the New York Convention,[11] will enable it to remain the preferred international commercial dispute resolution process in the future. The enforcement of foreign judgments among common law countries is relatively straightforward and increasingly liberal among close trading partners. Elsewhere, regional arrangements are growing apace, and The Hague Conference is considering a renewed effort to establish a multilateral judgments convention, following the promulgation in 2005 of a Convention for judgments issued in business disputes in which the parties had included exclusive jurisdiction agreements in their contracts.[12] Designed as a counterpart to the New York Convention for court judgments, the Choice of Court Convention, which lay dormant for a great number of years, finally received ratification by 28 European Union member states and entered into effect on 1 October 2015, constituting a major development in the international enforcement of selected court judgments. It remains to be seen whether the instrument will be ratified more broadly, including in the United States and Singapore where the instrument has been signed but not ratified.[13]

The parallel initiatives of the DIFC Courts and the Singapore International Commercial Court to seek enforceability of their judgements aims at entering into reciprocal memoranda of understanding with courts of other jurisdictions thus creating a network of jurisdictions in which their judgements will be enforceable with relative ease.

[11] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

[12] Hague Convention on Choice of Court Agreements concluded at the Hague Conference on Private International Law, 2005.

[13] https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.

The New York Convention has given international commercial arbitration a monopoly on the resolution of cross border disputes but as the issues with the enforceability of the judgements of these commercial courts fade, arbitration will need to find ways to remain competitive.

4. COMMERCIAL ARBITRATION'S RESPONSE TO THESE CHALLENGES

The need to design a process each time that fits the parties' dispute is of paramount importance. Established frameworks for the conduct of commercial arbitration ought not to be regarded as more than a foundation on which to build. Procedural flexibility and the supremacy given to party autonomy may properly be regarded as one of commercial arbitration's greatest advantages. Conversely, reluctance to depart from rigid rules-based procedural frameworks leads to the accumulation of time and costs and thereby deprives arbitration of its competitive edge.

There are a number of case management practices that may be adopted to streamline arbitral proceedings and thereby tackle the obstacles of time and cost, including methods of managing experts in a way that is conducive to the efficient resolution of the material issues of contention. This is a subject on which valuable insights were provided by the ICC Arbitration Commission Report on "Techniques for Controlling Time and Costs in Arbitration" (2012) ("ICC Commission Report").

4.1. Case management conferences

Conferencing has become a permanent feature in most international arbitrations, both at the directive of certain institutional arbitration rules and at the initiative of counsel and arbitrators. For convenience, this will often be done by telephone or video conference, though the object remains the same – to facilitate ongoing dialogue between the parties and the tribunal and promote procedural efficiency, including the maintenance of a tight procedural timetable.

Mandatory provision is made in numerous institutional arbitration rules for the tribunal to convene a case management conference early in proceedings, including the rules of the: ICC International Court of Arbitration,[14] Australian Centre for International Commercial Arbitration ("ACICA"),[15] London Court of International Arbitration ("LCIA"),[16] Singapore International Arbitration Centre ("SIAC")[17] and Dubai

[14] ICC Arbitration Rules 2012, Article 24.
[15] ACICA Arbitration Rules 2016, section 21.3.
[16] SIAC Rules 2013, Rule 16.
[17] LCIA Arbitration Rules 2014, Article 14.

International Arbitration Centre ("DIAC").[18] The purpose of this initial meeting is to establish a procedural timetable for the future conduct of the arbitration (including dates for the exchange of cases, document disclosure and the evidentiary hearing) and also to adopt procedural measures as deemed appropriate.

There is in the author's view very significant value in adopting a practice of convening a "Second Case Management Conference", following the filing by the parties of their first round written submissions, at which the merits of the dispute are to be addressed. The objective of this meeting is to identify the issues material to the resolution of the parties' dispute and, in doing so, to limit subsequent reply submissions, reply lay witness evidence and expert evidence, insofar as possible, to these issues only. It also provides the opportunity for the parties and the Tribunal to explore and discuss key aspects of the case, and where appropriate deal with preliminary issues the resolution of which can clear the path to an early resolution of matters in dispute by the parties themselves.

This of course requires the members of the Tribunal to have reviewed the material in detail at an early stage in proceedings. The consent of counsel is essential to the success of this technique. Nevertheless, the cost and time savings that can result from early intervention and redirection of the proceedings are far-reaching.

4.2. Written submissions

The adherence to a standardised structure and timeline for the filing of written submissions by disputing parties is seen all too commonly in international arbitration. Considerable cost and time savings can be achieved by carefully considering the necessity for and scope of second and subsequent rounds of submissions.

After the parties have been given the opportunity to plead their case in full, subsequent rounds of written submissions and evidence can usefully be limited to that which is responsive in nature. The Second Case Management Conference discussed above can provide a useful opportunity for the tribunal and the parties to agree on the material issues on which further briefing is necessary, and limit the scope of subsequent written submissions accordingly (both as to number and content of submissions). These agreements can then be documented and given effect by the tribunal in a procedural order.

Limiting the scope and number of submissions in this way is consistent with points 44 and 48 of the ICC Commission Report. It helps avert unnecessary argument over peripheral issues, crystallises the issues that are material to the outcome of the case, and enables the parties to set out clearly their

[18] DIAC Arbitration Rules 2007, Article 22.

positions on only these relevant points, to the extent necessary. By applying this practice over the course of proceedings (i.e. from early exchanges of case all the way through to post-hearing submissions), it is possible to steer the arbitration as directly as possible to the end of its route.

4.3. Limited disclosure of documents

The issue of document disclosure in arbitration has been at the forefront of debate in recent times. This is fuelled by concerns that the practice of flooding arbitral proceedings with documents, submissions and production requests is having a negative effect on the efficiency and management of arbitral proceedings. Flowing from these concerns is a degree of scepticism toward the claim that arbitration can provide a more efficient process than litigation.

In light of the broad discretionary powers granted to arbitrators, the tribunal has a fairly substantial degree of freedom to define the manner of evidence taking, including the right to document disclosure and the extent to which this is used. In reality, arbitrators are often reluctant to restrict the submission of documents and in many cases, they appear to allow requests that are unnecessary for the resolution of the dispute. One possible explanation for this tendency is the arbitrators' fear of breaching their duty to assure the parties their right to an equal opportunity in presenting their case.

Despite this practice, it is crucial to note that allowing parties a "reasonable opportunity" to present their cases is not a licence for arbitrators to grant, nor for parties to expect or demand, excessive time-consuming and resource intensive disclosure. Courts have repeatedly opined that the parties cannot expect to receive the same judicial protections in arbitration proceedings that they have before a court. To have such expectations fulfilled would simply result in a replication of court proceedings and defeat the purpose of agreeing to arbitrate rather than litigate. Therefore, refusing a request for production or failing to order the disclosure of non-vital documents should not be considered a form of misconduct on the part of arbitrators. Instead, such conduct should be recognised as upholding the parties' original intention of choosing arbitration.

To combat excessive and unnecessary disclosure requests, sometimes used as dilatory tactics by parties, the IBA Rules on the Taking of Evidence in International Arbitration (2010) ("IBA Rules") provide that where a party requests the other to produce documents, it must justify the request through a statement explaining the relevance and materiality of the documents to the case.[19] The party of whom the documents are requested

[19] IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 3.

may then object to the request, and if necessary to resolve the objection, the tribunal will rule on the validity of the request, taking into account the materiality and relevance of the documents.[20] This provision improves the management of the arbitral process by reducing the proliferation of redundant paperwork.

Importantly, although the IBA Rules provide a process to govern requests for disclosure, requiring requests to be justified on the basis of materiality and relevance, they do not provide a time frame for this process. Imposing strict time limits on the process is necessary to curtail disclosure in arbitration. This can be achieved by the agreement on time limits between the parties and tribunal, and incorporation of those limits into the relevant procedural order.

4.4. Managing experts

The use of party appointed expert witnesses is common in international arbitration, yet lamentably the efficient use of these experts is far less common. Various rules and protocols exist to regulate this area of procedure, including the International Bar Association's Rules on the Taking of Evidence in International Arbitration ("IBA Rules") and the Chartered Institute of Arbitrator's Protocol for the Use of Party Appointed Expert Witnesses ("CIArb Protocol"). While these guidelines are useful, the proactive management of party appointed experts beyond simply adhering to these guidelines can greatly reduce the time and costs associated with arbitration.

An essential element of using party appointed expert witnesses efficiently is ensuring the independence of the experts. Only when the experts recognise that their duty is to the tribunal, and not to the party by whom they were appointed, is the expert's evidence going to be most efficiently and effectively utilised. Various procedures can be utilised by tribunals to attempt to maximise the independence of expert witnesses, and various parts of both the IBA Rules and the CIArb Protocol are relevant to ensuring the expert remain as independent as possible.

The use of party appointed experts, and the associated challenges, is not unique to arbitration. Indeed, the use of experts has been the subject of much scrutiny in the context of domestic litigation in recent years, beginning in the UK and spreading throughout other common law countries. The lessons learned in the courtroom are worth considering, as tribunals and parties to arbitration can consider how the courts have addressed these issues, and adapt their solutions to suit arbitration.

[20] IBA Rules on the Taking of Evidence in International Arbitration (2010), Article 3.

4.4.1. Hot-tubbing and witness conferencing

Hot-tubbing is a positive trend in arbitration, and it is becoming increasingly common to dispose of traditional witness examination and cross-examination procedures. While there is no standardised definition of exactly what "witness hot-tubbing" or "witness conferencing" entails in the context of arbitration, generally they refer to degrees of the same concept, namely the process of taking evidence from witnesses in the presence of other witnesses (from both sides of the dispute) and allowing them to engage with each other as to the accuracy of their claims. Frequently, the term "hot-tubbing" is used in relation to expert witnesses and "conferencing" to refer to both lay and expert witnesses, but this distinction is not universal.

Hot-tubbing and conferencing will not always be appropriate, but are especially effective in highly technical arbitrations where there are complex factual and technical issues that need to be resolved and both parties rely on evidence from a number of expert witnesses. Traditional methods of each side calling their witnesses in a linear fashion can lead to a cognitive disconnect in the arbitrators' and counsel's understanding of the issues. This disconnect is exacerbated in situations where there are large numbers of witnesses and it could be days before the contradictory evidence of an expert witness' counterpart is heard. Further, it is possible that due to the highly technical nature of the evidence, opposing counsel will not be able to form fully informed questions until they have been advised by their own expert. Therefore, allowing experts to analyse and question directly the evidence of other experts ensures greater celerity of the hearing.

There are no standard guidelines or rules provided by any arbitral institution to facilitate conferencing or hot-tubbing, primarily due to the nature of the process being particularly dependent on the specifics of the matter. The CIArb Protocol does not provide specifically for conferencing or hot-tubbing beyond granting the tribunal the power to conduct expert testimony in such a manner as to assist the tribunal to narrow the issues between the experts, and to understand and use the expert witnesses efficiently.[21] Witness conferencing and hot-tubbing can be an efficient and effective tool when used correctly, but care must be taken to ensure the proceedings are conducted in a manner that will result in the most accurate, as well as efficient, evidence. Tribunals wishing to utilise these methods of adducing expert evidence should pay heed to court guidelines such as those discussed above in ensuring that the process is undertaken as effectively as possible.

[21] CIArb Protocol, Article 7.1.

4.4.2. Exchange of draft reports

An effective way of limiting the differences between experts is to require them to exchange drafts of their reports early in the proceedings. This allows for the early clarification of contentious issues. Further, it exposes the experts to the views of their fellows, which may prompt them to consider things differently, and potentially reach consensus on some of the issues at the outset of proceedings.

The CIArb Protocol allows for, but does not mandate, the exchanging of draft reports by expert witnesses, when so directed by the arbitral tribunal.[22] It is suggested that, as far as is practical, tribunals should utilise this discretion in order to facilitate the most efficient procedure for hearing expert evidence.

4.4.3. Weight

The weight to be attached to the evidence of experts whose independence is compromised needs to be known and understood by the parties from the outset of the process. This serves two purposes:

- It clarifies the role and duty of the expert so that unconscious bias may be minimised; and
- it makes experts and parties aware of the risk that biased evidence will be discounted prior to its being adduced. As a result, the chances of impartiality are increased, as this allows (and encourages) parties to take active steps to avoid partiality at the commencement of the process.

Since a party whose expert is found to have acted partially risks little or no weight being attached to their evidence, the knowledge of what (if any) weight will be accorded to such evidence affords the opportunity for parties to strengthen their cases by ensuring that their experts are independent.

4.4.4. Transparency

Opinion over the desirability of such a rule regarding the exposure to disclosure of communications between lawyers and their experts in litigious proceedings, and the extent to which communications should be revealed, is divided.

The 2010 IBA Rules include a provision in Article 5(2)(b) requiring the expert to provide a description of the instructions they have received from the parties. This ensures that the parties will not instruct the expert to behave in a manner that would adversely affect the expert's

[22] CIArb Protocol, Article 6.1.

impartiality. However, this requirement needs to be carefully considered given that the CIArb Protocol and IBA Rules are designed to operate in conjunction with one another. The CIArb Protocol provides that while instructions are not "privileged", they should not be ordered to be disclosed by the arbitral tribunal without good cause. As such, Article 5(2)(b) of the IBA Rules should be understood to require that the description of the instructions received by the expert must always be provided, but the instructions themselves should only be requested by the arbitral tribunal when there is good cause for doing so, for example where the expert's impartiality comes into question.

4.4.5. The single expert

There is increasing interest in international arbitration in the appointment of single expert, either by the parties' agreement or at the tribunal's direction. This is said to bring with it benefits in terms of efficiency as well as cost-effectiveness, but this must be considered in light of the inherent disadvantages of a single expert, including the difficulties of reaching agreement upon a single expert, and the prospect that one or both of the parties will have an inadequate opportunity to present their case.

The cost benefit of appointing a single expert is obvious when considering the need to only renumerate a single expert for his or her services, as opposed to each party paying for its own expert, thereby halving the costs of hearing expert evidence. In terms of minimising delay in the process of the evidentiary hearing, the use of a single expert can have a significant impact. This is because when each party appoints their own expert, often each expert report will cover the same ground, with only minor areas of difference.

A single expert does, however, have some disadvantages. Firstly, there is the possibility that the expert will misunderstand his or her role and make a determination on a question more suited to determination by the arbitral tribunal. Secondly, in some areas of expertise, there are genuinely held alternative views which will not be brought to a tribunal's attention with only one expert appointed.

4.4.6. Expert teaming

In his 2010 paper presented at the International Council for Commercial Arbitration (ICCC) Conference in Rio de Janeiro, Dr Klaus Sachs introduced the concept of expert teaming.[23] Briefly, expert teaming consists of parties presenting a list of desired experts to the tribunal.

[23] Dr Klaus Sachs, "Experts: Neutrals or Advocates. Protocol on Expert Teaming: A new approach to expert evidence" (paper presented to the International Council for Commercial Arbitration Conference, Rio de Janeiro, 2010).

Each party is given the opportunity to register any conflicts of interest with the opposing party's listed experts. Taking these into account, the tribunal selects an expert from each list and appoints the two experts jointly as an "expert team". Following this, the tribunal, the experts and the parties meet to establish a protocol by which the expert evidence will be adduced. The expert team will then prepare a joint report, and may be questioned by the tribunal or the parties at their discretion. The expert team will be expected to work as an independent team, and all communication with the parties or the tribunal must be disclosed to both members of the team.

This concept has many attractions. It attempts to minimise the feelings of loyalty often associated with party appointed experts who are individually instructed by the appointing party. Further, it ensures that the parties are able to have an expert of their choice utilised, as opposed to the use of a tribunal appointed expert. By having each party produce their own list of experts, each party is given significant input into the choice of experts, but without the difficulties associated with having both parties agree on the appointment of a single expert. Finally, expert teaming has cost and time benefits, in that only a single expert report is produced. This reduces the amount of work required by each expert. This also ensures that the situation does not arise whereby two conflicting reports are produced that operate from disparate assumptions as to basic facts relating to contentious issues.

4.5. Conclusion

Broader discovery, longer briefing schedules, considerably larger briefs, far greater reliance on experts and witness testimony, and increasing procedural challenges are contributing to the perception that arbitration is as drawn out and expensive as court litigation. In order to retain its position as an effective and efficient dispute resolution process in the face of new competing dispute resolutions alternatives, arbitration needs to continue to adapt to meet the continually evolving needs of its users. In doing so, it is essential that the arbitral process be effectively managed in a pro-active manner that promotes a tailor-made, streamlined and disciplined process.

While the aforementioned techniques are not exhaustive, both parties and arbitral tribunals can benefit from these practical tools to facilitate efficient procedures whereby time and cost can be better controlled and the arbitral process effectively managed. Ultimately, the appropriate procedural tools will depend on the specificities of each dispute and the needs of the parties involved. With the guiding hand of a pro-active arbitral tribunal, together with the cooperation of the parties, arbitration will meet its goal of impartially facilitating the fair and final resolution of commercial disputes without unnecessary delay or expense.

5. INVESTOR-STATE DISPUTE SETTLEMENT

Investor-state dispute settlement is another feature of the international arbitration landscape which has grown in prominence in recent decades, mainly due to the inclusion of arbitration clauses in modern bilateral and multilateral investment treaties. The rationale for investor-state arbitration is the protection of investors from the regulatory opportunism of governments, for example, in circumstances where a foreign investor is persuaded to invest with promises of a stable and favourable economic and legal framework, only to have that framework altered to its disadvantage. The primary administering institution of investor state arbitration is, of course, the International Centre for Settlement of Investment Disputes (ICSID). However, the rapid increase in its use, and the public sensitivity of the issues it addresses, has generated a range of controversies – from forum shopping, inconsistency in decisions, and a strident political backlash.

The increasing globalisation of production and investment has stimulated the formation of a large number of Investment Treaties and as a result, investors who are seeking to pursue claims for damages often have a choice of fora. The availability of choice has encouraged parties to bring their claims in the fora considered most advantageous in the circumstances. Forum shopping increases the likelihood of the same facts being brought before parallel and multiple proceedings in different tribunals. Parallel proceedings litigated in different fora not only multiply costs and waste dispute settlement resources but also carry the risk of rendering conflicting decisions and awards, resulting in international business disputes becoming more unpredictable. The ISDS provisions of the recent Trans-Pacific Partnership attempt to redress this issue by preventing a claimant from pursuing parallel proceedings seeking an award of damages (curial proceedings for interim injunctive relief to preserve the claimant's rights/interests in the pendency of arbitration are however permitted).[24]

A single crisis can give rise to a multitude of claims by investors. An unfortunate consequence of the proliferation of separate arbitrations is that tribunals can reach starkly different conclusions on similar or even identical issues. Arbitration's roots in private commercial disputes has not readily supported a foundation for a hierarchy of tribunals or a tradition of stare decisis that would promote order in plethora of inconsistent results.

A useful illustration of this problem arises from the Argentine economic crisis between 1992 and 2002. As a result of that particular event, over 47 ICSID claims were brought against Argentina to determine whether the crisis constituted a State of necessity. The result was two different arbitrations brought against Argentina, in which the two tribunals reached

[24] Trans-Pacific Partnership, Chapter 9: Investment, Article 9.20 (Conditions and Limitations on Consent of Each Party).

opposite conclusions on the availability of the necessity defence despite almost identical facts and pleadings.[25]

This clash of decisions undermines the certainty of the outcomes in investor-state arbitration and calls into question the quality of justice rendered by arbitral tribunals. This problem is amplified in times of crisis where multiple claims on the same facts are commonplace. Without an accepted principle of stare decisis in investor-state arbitration, tribunals are not bound to follow decisions of earlier tribunals where the present facts and issues are similar or identical. And the laudable publicity of the results of these tribunals provokes public concern over the legitimacy of arbitration as a means of deciding these controversies. If the inconsistency of awards causes parties and the wider public to lose faith in the investor-state dispute settlement system, the system's utility will be significantly reduced.

One possible solution lies in creating provisions for the consolidation of multiple proceedings into a single arbitration. This would eliminate potential for inconsistent decisions and the inefficiencies inherent in holding multiple arbitrations on the same facts and issues. Neither the ICSID Convention or ICSID Arbitration Rules contain any clear guidance on the formal consolidation of parallel arbitral proceedings. Without amending the ICSID Convention, which would be extremely difficult from a political standpoint, facilities for consolidation could be achieved through provisions in individual investment treaties. This has been an emerging trend in the drafting of Bilateral Investment Treaties and Free Trade Agreements, for example, Article 1126 of the North American Free Trade Agreement (NAFTA) which provides for the consolidation of proceedings where a tribunal that has been constituted to determine the question, is satisfied that other claims that have been submitted to arbitration have common questions of law or fact. The more recent Trans-Pacific Partnership features a similar mechanism in its ISDS provisions.[26]

Alternatively, replacement of the current appeals mechanism with a more robust and formalised mechanism for annulling awards on various grounds has been suggested. Inconsistency with another decision is not currently a valid ground for annulment of an award, but such a ground could serve to promote the uniformity of investor-state arbitration decisions.

Although it is unclear what the future holds for investor-state dispute settlement, the resolution adopted on 6 April 2011 by the European Parliament based on a report by the Committee on International Trade gives a strong indication of the European position on the current model.[27] The report shows a clear inclination towards weaker investment protection

[25] *CMS Gas Transmission Company v The Argentine Republic* (2005) ICSID Case No ARB/01/8 and *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v Argentine Republic* (2007) ICSID Case No ARB/02/1.

[26] Trans-Pacific Partnership, Chapter 9: Investment, Article 9.27 (Consolidation).

[27] EU Resolution 2010/2203(INI).

in future European investment treaties. Instead, the resolution emphasises the need to strengthen host States' power to regulate and implement their policy choices in sensitive areas without the hindrance of treaty-based standards of investor protection. In particular, the EU Parliament has called for a clearer definition of the protected investments and investors, with the view that "speculative" forms of investment shall not be protected and that "abusive practices" should be abolished. The resolution seeks to frame National Treatment and Most-Favoured Nation clauses more precisely so as to focus on circumstances in which foreign and national investors must operate. It also aims to reduce Fair and Equitable Treatment to the minimum customary international law standard and to modify the provisions protecting against direct and indirect expropriation in order to establish "a clear and fair balance between public welfare objectives and private interests".

More recently the European Commission publicised the full text of its proposed "Investment Court System", which establishes a permanent court replete with its own set of procedural rules and an independent judiciary. The proposed model represents a radical departure from the traditional ISDS model and in doing so purports to confer a number of distinct advantages including public proceedings to increase transparency, the time limiting of proceedings to two years to ensure cost-effective and quicker dispute resolution and alternative dispute resolution options to make the system accessible to small and mid-size investors. Importantly, the TTIP proposes to establish an appeal mechanism to enhance consistency between decisions and address the issue which was discussed earlier. This innovative proposal has the potential to address a number of the challenges facing present day ISDS, however, it remains to be seen if the proposed model will be implemented effectively.

By contrast, the ISDS provisions in the recently concluded Trans-Pacific Partnership seek to achieve a balancing of interests that affords additional protection to signatory states, while largely keeping with the traditional ISDS model. One notable aspect of the agreement is its implementation of innovative new measures aiming to prevent abuse of the ISDS system by opportunistic investors. Among these measures are: a "Denial of Benefits" clause; a three and a half year limitation period to prevent ISDS proceedings from dragging on indefinitely; and provisions enabling states to bring counter-claims against investors and to seek an award of their legal costs, to deter investors from pursuing spurious claims.[28] Also of note are stringent provisions requiring states to "promptly" publish a broad range of written arbitration materials including the Parties' pleadings and submissions, hearing transcripts and all orders, awards and decisions of the Tribunal.

[28] Trans-Pacific Partnership, Chapter 9: Investment, Article 9.14 (Denial of Benefits).

These will no doubt be of significant value in the critique and study of Investor-State Arbitration in the years ahead.[29]

Indeed there is a wide range of proposed modifications to the current investor-state arbitration model and potential solutions to the challenges at hand. Although the future is uncertain, it is clear that innovation will be critical to develop and implement effective solutions to these challenges.

In the midst of the debate there is in the author's view a very real risk that the fundamental distinction between investor-state Arbitration and commercial arbitration will be lost and commercial arbitration will suffer as a consequence. This would be most undesirable.

6. CONCLUSION

In making a statement of some conclusory value, it seems apt to quote the following passage taken from the preface to the ICC Commission Report, written by the then Chair of the Commission, Peter M Wolrich:

> "One of the salient characteristics of arbitration as a dispute resolution mechanism is that the rules of arbitration themselves present a framework for arbitral proceedings but rarely set out detailed procedures for the conduct of the arbitration. For example, rules of arbitration do not generally specify whether there should be one, two or more exchanges of briefs. They do not contain any detailed provisions concerning document production. They do not specify how hearings should be conducted and how witnesses, if any, should be heard.
>
> This important characteristic entails that the specific procedures can be tailor-made as appropriate for each dispute and adapted to the legal cultures of the parties and the arbitrators. In order to establish the appropriate procedures for a given arbitration, it is useful and efficient for the parties and the tribunal to make conscious decisions as early as possible on the procedures best suited to the dispute at hand. In making those decisions, it is possible to shape the arbitral proceedings so that the duration and cost of the arbitration are commensurate with what is at stake in the case and appropriate in light of the claims and issues presented."[30]

This statement encapsulates the need for proactive case management and the value of designing the process to fit the dispute. It rings particularly true if arbitration is to retain the competitive advantages that it enjoys over litigation and other competing dispute resolution processes. This task is not the province of arbitrators alone, but also of counsel, experts and the range of other participants in the arbitral process. Although there can be no assured future for arbitration resting upon past success, the opportunities for growth are abundant and one can therefore look forward with optimism, justifiably so.

[29] Trans-Pacific Partnership, Chapter 9: Investment, Article 9.18 (Submission of a Claim to Arbitration); Article 9.23 (Transparency of Arbitral Proceedings); and Article 9.28 (Awards).

[30] ICC Arbitration Commission Report, "Techniques for Controlling Time and Costs in Arbitration" (2012), 5.