ARBITRATION IN THE DEVELOPING WORLD

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Developing countries need stable and reputable commercial arbitration at least as much, if not more, as developed countries, in order to settle their international commercial disputes. These countries also might face emergence from colonialism, communism or radical theocratic kingdoms, twinned with the conundrum of lack of infrastructure, facilities, governmental structures and hungry, uneducated masses for which they are responsible. Whatever legal structure may have been in place, whatever governance there may have been, whether good, bad or oppressive, may have been destroyed or decimated in the process of gaining autonomy.

Once stabilisation has occurred, however, and a new sovereign government is emerging, the process of bringing a new country into the global economy involves international business, trade and contracts. Successful countries which have emerged from developing status to a viable developed country in the sixty plus years since World War II have first established the foundations for stability in terms of judiciary and government, as well as development of infrastructure and exploitation of natural resources. Some emerging countries struggle to provide such things as we have never had to think about, electricity, clean water, sanitation, transportation and communications systems. These amenities, which add so much comfort to our lives, are often brought to the developing world only through outside, international contracts, using outside international expertise.

Our work as legal professionals, whether as attorneys offering advice, or resolving a dispute, or later as an arbitrator presiding over a case, should begins right at the outset, at the contractual stage, where we hope a workable dispute resolution or arbitration contract clause is a primary consideration and not an afterthought. One of the most common and difficult problems arising in arbitration is the large number of badly drafted arbitration clauses, sometimes called “pathological clauses.” I have seen many examples of these. After a dispute between parties arises, it is the arbitrators, and unfortunately the courts, that have to cope with these agreements. It is vital that lawyers, advisors and drafters of contracts carefully consider this (potential) problem. When the parties are in dispute it is too late for the parties or their lawyers to sort out this problem.

Cross-border disputes result in lengthy proceedings and higher court costs than domestic disputes, with the added dimension of a clash of laws, jurisdiction, language, travel and other costs. When a dispute arises between two foreign parties, neither party would wish the dispute to be settled in the other party’s national courts, because of language difficulties, unfamiliarity with the other country’s law and court procedures, suspicion, unease, etc. Both parties may be

concerned that the other side's courts would be sympathetic to their own countrymen and, as a result, they might not receive an unbiased adjudication.

The attraction to resolve disputes through arbitration lies in its neutrality, confidentiality, cost effectiveness and speed. The flexibility, informality and freedom from rigid rules of court are among the benefits of international arbitration, which proceedings are held against a backdrop of different legal and cultural backgrounds, without pomp and ceremony, wigs or robes, judges or juries. The proceedings are generally held in a neutral country, in a neutral setting, e.g., a conference centre or room, seated around a table, without national symbols, emblems or flags or other signs of state authority.

Notwithstanding the growth in international arbitration, the logistics of an international arbitration should be, but may not be, understood by all parties to an agreement. Facing the possibility that one or more of the arbitrators may be foreign, that the arbitration may in whole or in part be conducted abroad, that the procedure may borrow from foreign judicial traditions, the language may be different, and the place to enforce the award may be abroad, are there clear benefits to a developing country to participate in an arbitration process? The answer lies in international arbitration's single greatest advantage, that an arbitral award has far greater trans-national currency than state court decisions. Even if the process does not live up to its sometimes exaggerated advantages of being quicker, cheaper, neutral, more final and more confidential than court litigation – and experiences inevitably vary – it is often only the dispute resolution mechanism that gives a successful party the chance of enforcing the decision abroad.[1]

Nevertheless, for parties attending from a developing country, the proceedings can be daunting. Aside from obvious language differences that arise, cultural differences can be an undercurrent, even if not readily apparent, and even if (in theory) the developing country's participant does not dispute the legitimacy of arbitration. Arbitration is often viewed as a "necessary evil,"[2] and, as Professor Amir Shalakany of Egypt suggests, developing nations remain wary that a developing country bias lies institutionalised within arbitration rules, even though his research into this question might tend to show that the opposite is true. Even with those underlying reservations, developing nations may regard their use and acceptance of international arbitration favourably, in the sense that by incorporating arbitration into their international contracts, it indicates a growing national stability.

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[1] Partasides, Constantine, "International Commercial Arbitrations," *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, 653

[2] Shalakany, Amr A.*, Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism,* Volume 41, No. 2, Spring 2000, pp 419 - 468

WESTERN BIAS

Recent debate has stirred up the question of Western bias in arbitral awards. A look at the history of international commercial disputes since World War II indicates the rapid growth of arbitration, which has been exponential since the oil cases of the 1970s. Complaints from developing world parties speak of the world of international commercial arbitration as one which is perceived as a "rather closed and arcane European club," where the "selection of the chairman and members of the tribunal is a key decision in winning or losing, and where the attorneys for the parties well understand that the "authority" and "expertise" of arbitrators determine their clout within the tribunal."[3] Likewise, though the Calvo Clause[4] has been in a state of suspension for many years, a number of Latin American countries (Brazil and Venezuela at the forefront) are returning to its provisions as a protection against (primarily) American contracts which contain arbitration clauses, though not exclusively. In so doing, they seek to litigate international commercial disputes in national courts. Some disputes headed towards arbitration have been precluded from doing so by injunctions while the South American parties seek to renegotiate the contracts to exclude the arbitration clause.[5] This may very well have a chilling effect on international trade with those countries, even though they are signatory to the 1958 New York Convention assuring the ability to enforce and collect on arbitral awards.

A critical question that needs to be explored is how arbitration is perceived in developing countries in respect of durability, independence and reliability, particularly in relation to whether there is a fear of, or a perception of, bias in favour of established, arguably Northern or Western, parties to the process. It has been argued that Western arbitrators have been biased particularly against countries which have legal systems which are not based in common law or civil law. Practitioners from Arab countries have raised the issue of Western bias, often citing *Sheikh of Abu Dhabi v Petroleum Development Ltd*, in which Lord Asquith said that if a national law was applicable it would be that of Abu Dhabi, "but no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."[6] The regrettable term "primitive region" may have been suggestive, not of arrogance on behalf of the arbitrator, but rather of his misunderstanding of the Arab culture and of Sharia law which is encoded within the

[3] Dezalay, Yves and Bryant Garth, *Dealing in Virtue*, University of Chicago Press, p 8-9, 1996
[4] A provision in an agreement between private individuals and a foreign state that states: "Aliens are not entitled to rights and privileges not accorded to nationals, and that, therefore, they may seek redress for grievances only before local authorities."
[5] Cremades, Bernardo, Dispute Resolution Journal, *"Disputes Arising Out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues"* May-July 2004
[6] AWARD OF LORD ASQUITH OF BISHOPSTONE, *International Comp Law Q.*1952; 1: 247-261

Koran, but at that time was not necessarily unified or codified as a set of laws that existed in legal text.

When registering perceptions of arbitral bias in Arab countries, two other cases are often cited, *Ruler of Qatar v International Marine Oil Company* (1953) as well as *Aramco v The Government of Saudi Arabia* (1958). In both, the arbitral award cited an absence of an organized, codified law, and the fact that Saudi law contained (at that time) no precise regulation or legislation for petroleum concessions. However, in a recent conference held to address this issue of pro-Western bias, one speaker pointed out that in numerous recent awards that the speaker had been able to read, "the arbitrators, of whatever origin, have scrupulously applied the Arab laws when these were designated by the parties or by the rules of the dispute."[7]

This same speaker, who has a number of years of experience in oil arbitration and other large arbitrations since the 1970s, noted problems with perceived bias in cases involving Arab parties could be caused by not being familiar with, or understanding, procedural matters. For instance, the manner in which pleadings tend to express the view of the party rather than being the critical, scrupulous and professional work of the jurist who advised the party. It was also noted that the style (and cultural demeanour) of an Arab jurist is to present persuasive argument rather than hard, provable facts, and the tendency to refuse to cross-examine witnesses because "to do so would be to question the veracity of their testimonies."

For arbitration to be a successful alternative in developing nations, an essential requirement is the education and training of competent arbitrators the world over. Speaking about the state of arbitral practice in Egypt, Hadia Mostafa says the following: "Finding top-notch corporate and commercial legal advisors (in country) has proven to be challenging for both local businesses and international investors they do business with. Only a handful of elite lawyers are currently capable of providing the services that Egyptian businesses are in dire need of as the country more fully integrates into the global economy."[8]

Some relatively well-known arbitrators[9] from developing countries have, however, cosmopolitan educations, studying abroad and incorporating foreign law and Western thinking into their personal practices. Outstanding jurists from developing countries who gain credibility within the field of arbitration tend to have Western training, and tend to be pulled into arbitration capitals,

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[7] Fadlallah, Ibrahim, Speech delivered December 6, 2007, "*Pacta sunt servanda vs. Rebus sic stantibus*," translated from the French.
[8] Mostafa, Hadia, "*Mastering Law*", Business Today Egypt, March 2007
[9] Such as Mohammed Bedjaoui, Algeria; Professor Ahmed El-Kosheri, Cairo; Judge Khaled Kadiki , Libya, Eduardo Jiminez de Arechaga, Uruguay and others.

such as London or Paris.[10] It was pointed out at the 13th Geneva Global Arbitration Forum, December 5th & 6th, 2000 that parties in Arab states often choose arbitrators from Europe and America rather than one from their own country. In that sense, one would ask if there is not a sort of reverse bias.

Since the year 2000 some 30 plus jurisdictions have modified their law to include arbitration, and have enacted the UNCITRAL Model Law on International Commercial Arbitration. There are many new international arbitration centres, many of them in Africa, Asia and former Eastern European or Soviet Union countries, which are sending a message to the international commercial community as to their "user friendly" legal environment. China and the Far East are becoming more and more comfortable with the idea of international arbitration as a means of settling business disputes, as are South American countries. A major benefit to an arbitral proceeding in these jurisdictions where a case is unfolding is the availability of a local arbitrator who will be familiar with local law. As we have seen above, the Egyptian state, having recognised this important aspect in international contracts, is currently expanding its law courses to include Western-style legal training. Compare Ireland, where since 1990 barristers had to pass arbitration law to qualify; the UNCITRAL Model Law was adopted in full in 1998.

Cultural diversity and differences in law meet in international arbitration. An arbitral tribunal may deal with the contentious negotiations of the interests, rights and responsibilities of the international community and multilateral organisations, States and non-State groups (like minorities, indigenous peoples, corporations) and individuals. This intersection of cultures and laws exposes some of the most fraught debates in contemporary international law.[11] The proprietary rights of states and individuals are increasingly being balanced against the interests and obligations of the international business community.

For arbitrators and litigators in international practice, knowing, or at least understanding, the culture in which they will be working, both by way of the local society and local business practices, will be advantageous. The present view reflects the need of international commerce, now conceptualised as "good governance" for the "global economy." It emphasises that contracts freely entered into by governments cannot be cancelled by government fiat without proper compensation.[12] The question arises, in some cases, of the relationship between treaty-based international arbitration and jurisdiction-based domestic law and specific contractual jurisdiction.

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[10] Dezalay, Yves and Bryant Garth, *Dealing in Virtue,* University of Chicago Press, p 25, 1996

[11] Francioni, Francesco and Vrdoljak, Ana Filipa, *Human Rights, Cultural Diversity and Heritage in International Law,* Class syllabus. European University Institute (Law), Italy

[12] Walde, Thomas, *The Umbrella \(or Sanctity of Contract/Pacta sunt Servanda) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, Transnational Dispute Management, Volume I, Issue 4, October 2004

The problem is not so much within the arbitration process itself as it is in realising and enforcing the award. Legal practitioners closer in background to the culture, and loyal to the state, are more apt to emphasise sovereignty over contract, while those from Western (or Northern) cultures appreciate more the role of economics, commerce and finance. In other words, they understand the nexus between prosperity and the sanctity of a contract. [13]

Arbitration is founded on consent, and the parties are therefore free to agree on the procedure to be followed. It should not be difficult to imagine that arbitrators may tend to be more convinced by cases presented in a manner with which they are familiar and comfortable.[14] Flexibility will be needed by the lawyers and arbitrators who participate in international arbitration. In international proceedings the parties' nationalities tend to be different from that of the presiding arbitrator. In the case of a three-member tribunal, the arbitrators and counsel appearing before them may very well represent five different legal systems. Therefore, anyone who insists on unbendingly applying his or her own procedural rules without regard for the litigants' expectations, and without a trace of tolerance for their respective idiosyncrasies, will fail in his/her task of crafting a procedure that is legitimate in the eyes of the participating parties.

Bias is defined as being a prejudice in a general or specific sense, having a preference to one particular point of view or ideological perspective. One is not necessarily biased, however, if one's powers of judgment cannot be influenced by the biases one holds, or to the extent that one's view could not be subjective. An arbitrator must be impartial, though the term has not been clearly defined. "The opposite term, "partiality," has been used to signify the meaning of impartiality to include bias of an arbitrator either in favour of one of the parties or in relation to the issues in dispute (Redfern). Other commentators also used terms like "bias and prejudice" (Eastwood) and went on to say that it refers to a state of mind. No definition has been attempted by the UNCITRAL Arbitration Rules, neither by the UNCITRAL Model Law.[15]"

IBA's *Ethics for International Arbitrators* state: "Partiality arises where an arbitrator favours one of the parties or where he is prejudiced in relation to the subject-matter of the dispute."[16]

An arbitrator is also required to be independent apart from being impartial. The ICC Rules of Arbitration require them to be independent only. Independence is measured in terms of the degree of the relationship between an arbitrator and one of the parties, whether financial or

[13] Ibid. The *pacta sunt servanda*, or sanctity of contract clause, was first used in the 1959 German-Pakistan bilateral investment treaty, and has since become a widespread practice in investment treaties.
[14] Partasides, Constantine, Supra, 680
[15] Alam, Naser, Transnational Dispute Management, "*Independence and Partiality in International Arbitration*,", Volume 1, Issue 2, (May 2004).
[16] Article 3

otherwise. Independence is determined by applying both objective and subjective tests, but more of subjective in nature.[17] The ICC has established a requirement that each arbitrator must declare whether there exists any past or present relationship, direct or indirect, with any of the parties or any of their counsel, whether financial, professional, social or other kind and whether the nature of such relationship is such that disclosure is called for considering the arbitrator's independence in the eyes of the parties.[18]

We see, therefore, that Independence involves the relationship between the arbitrator and the parties, whereas, impartiality has more ethical nuance,[19] although UNCITRAL Rules, ICC Rules and the LCIA Rules make no separate provisions regarding the standard of impartiality and/or the independence required of a party appointed arbitrator.[20] These problems should be and are rooted out by pre-appointment disclosure of information.

For the average businessman, regardless of his origins, his perception of bias will be based upon whether he won or lost his case. To quote Charles Molineaux's speech of December 6, 2007, "Someone wisely expressed that "When you write an award, think of it not as a congratulatory message to the winner, but rather as a sympathetic explanation to the party who lost as to why he lost."

Despite all the complexities that can arise, international arbitration is designed to be a simple, user-friendly process. If an arbitration is well-designed and competently handled, the process can indeed provide the benefits its proponents claim for it: proceedings that are simple, quick, less costly than litigation, fair, and that produces final and enforceable decisions. If the rules and procedures are not well understood, or if the arbitration is not well designed and managed, the process can be a difficult one.[21]

I have asked the question, how is arbitration perceived in developing countries. I have looked at a very small, but important, issue in international arbitration. Obviously international arbitration is on the rise, and offers much by way of solutions to complex problems in the shortest possible time, and at the least possible cost. Countries subscribing to the New York Convention indicate their willingness to abide by arbitral awards and support enforcement of the same, despite problems like Calvo in South America.

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[17] Alam, Naser, supra
[18] Article 2.7 of ICC Rules of Arbitration
[19] Alam, Naser, supra.
[20] Ibid
[21] Ball, Markham, *International Arbitration: The Fundamentals*, p 1

Problems perceived as regards pro-Western bias may be well ingrained within the culture of developing countries, and can only be resolved by education, not only of parties involved in international cases, but also the arbitrators and litigators in the international arena must be able to tune in to the cultural needs and expectations of the parties. Western/Northern lawyers and arbitrators can assist in the proper development of arbitration in developing countries. Without trying to impose our will, we must have something to offer and we should do so, whether in the form of training, education or other support.

I am sure organisations like CPE, IBA, AAA, UNCITRAL, CIArb, CILS, ABA and others will be willing to help, and I am sure their help will be welcomed as well.

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