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The future significance of international arbitration

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Distinguished guests, Justices, ladies and gentlemen.

Today I want to talk about how arbitration assists with mitigating some of the challenges that arise in international dispute resolution. That is not to say that it is a silver bullet or that it can clear the path of obstacles but it can assist in reducing risk and increasing predictability.

There are two particular characteristics of arbitration that I will focus on, namely:

- the privacy of proceedings; and
- procedural flexibility, including in particular, the ability of parties to shape the arbitral process.

Flexibility and privacy

Imagine this scenario: a joint venture with Japanese, Chinese, American and Australian parties. The JV is anticipated to run for 20 years. But, a high value contractual dispute has arisen between the participants, and the would-be claimants are advised that they have good prospects. However, the situation is complicated by a number of factors:

- The would-be respondent has a vertically integrated business model, and so is both an operational participant in the JV, and its customer.
- Each of the potential claimants has strongly held and differing views about how to navigate the competing objectives of maintaining productive commercial relationships and enforcing legal rights:
    - the majority joint venturer may initiate proceedings unilaterally, but is concerned about the potential commercial impact in both the short to medium term as well as the JV becoming unworkable;
    - one of the parties wants to sue as a matter of principle, and is beginning to use minority veto rights in protest;

- the third potential claimant is a co-venturer in other projects with the respondent off-shore, and it is opposed to bringing a claim. It is a multi-billion dollar company but has not been a party to large-scale litigation in recent memory.

Arbitration can assist with resolving this impasse. Because the proceedings are private there are greater opportunities to maintain commercial goodwill, including by reaching a negotiated outcome. In particular:

- proceedings can be commenced confidentially, but with sufficient rigor to clarify the issues in dispute;
- at the same time procedural flexibility means that there is significant scope to stay proceedings and continue commercial negotiations, if the opportunity arises; and
- the parties potentially have greater capacity to agree on procedural aspects of the arbitration compared to litigation, including, for example, the scope of discovery, the volume of evidence and submissions.

This is not to say that the process is perfect and that arbitrations do not become unduly contentious – but it offers the opportunity to resolve disputes in a manner which is better aligned with the maintenance of long term commercial relationships. This is fundamentally important within Australia. The scenario that I have described could readily arise on a mining or oil and gas project. Tweak the facts slightly, and similar patterns can be seen in major infrastructure projects. These types of arrangements are of major significance to our economy.

A further point on the benefits of privacy: imagine for a moment, that you are General Counsel for the majority joint-venture participant. You are accountable to your employer for how the arbitration will run - both the outcome as well as the resources expended, including time and disruption to usual business activities. However, because the matter will go to arbitration you are in a fundamentally different position from if you were recommending that the company initiate litigation. That is not just because you can assure stakeholders that reasonable steps will be taken to maintain productive working relationships within the JV. It is also because of the character of the arbitral process, including the hearing. In practical respects, your accountability extends to the experience your colleagues

will have in giving evidence if the matter proceeds to hearing. In the case of arbitration:

- for the majority of cases, cross examination of a single witness will not last for more than 2-3 hours; and
- because the hearing is private, the process of giving evidence will not have broader career impacts for the witnesses.

As a consequence, whatever the outcome, there can be confidence that the hearing will not quash any future appetite to participate in legal processes within an organization.

Balancing privacy against transparency

Of course, any argument in support of the privacy of proceedings raises a counter-argument in support of transparency. There are those who argue that the public interest is served by complex commercial disputes being resolved in public – this supports the development of the common law and facilitates corporate accountability. At the same time, there are others who reasonably question whether legal precedent should effectively be created by arbitrators who have been appointed by parties. There are also those who argue that behind the veils of privacy or confidentiality, the arbitral process is itself less disciplined because with transparency would come greater accountability for arbitrators and parties.

One possible solution to these tensions, which from 1 Jan 2019 is a feature of arbitration under the auspices of the International Chamber of Commerce (ICC), is for arbitral awards to be published within two years of being issued, unless the parties object. According to the approach taken by the ICC, awards may be sanitized or redacted and so may effectively be published on an anonymized basis. It will be interesting to watch this development unfold, including how many parties see the benefit in permitting the publication of awards and whether arbitrators feel bound to follow the decisions of their colleagues.

Procedural flexibility and innovation

The examples I have given also highlight the benefits of procedural flexibility in arbitration.

Indeed, the system of international arbitration is robust because it is sufficiently flexible to reflect (although, not always perfectly) the expectations of participants – both parties and arbitrators – who come from a variety of legal backgrounds.

This creates a very particular dynamic, which can be challenging and which requires counsel to be particularly agile and strategic. However, there is no doubt that the sharing of ideas and assumptions across geographies and legal traditions promotes procedural innovation. This has distinct benefits in a commercial settings where there is typically a strong appetite for finding new ways of doing things that are more efficient or which more effectively mitigate risk.

Arbitration has long been a force for innovation in dispute resolution – there are plenty of examples of procedural techniques which evolved in the context of arbitration, some of which are now deployed more widely. These include chess clocks, Redfern schedules, Reed retreats, Kaplan openings and varied approaches to expert conferences. This process of innovation will continue and arbitration is likely to be one of the key mechanisms through which dispute resolution processes are transformed by technology in coming years.

Technology now allows huge volumes of data to be aggregated and processed rapidly with a minimal margin of error. This is likely to change the forensic process in fundamental ways:

- The accuracy of early case assessment by sophisticated parties is likely to increase markedly, as parties become able to more readily search their own documentary record. As a consequence, those matters that progress to formal proceedings are likely to raise challenging and nuanced questions about the application of the law to the facts, or of reconciling two reasonable but competing interpretations of the facts.
- Threading and network technology is likely to facilitate rapid comparison of parties' competing versions of events. The forensic skill may come not in piecing together a credible version of the facts, but in explaining the flaws and refining a version of the facts which has been generated through computer processing.
- In the specific case of arbitration, parties are likely to be able to make data-driven choices about the selection of seat, arbitral institution, and even applicable law. For example, Dispute Resolution Data is a US technology

company that collates case data from the major arbitral institutions. The information covers industry type, claim amount, location, cost, duration and whether a case settled, was withdrawn, or proceeded to final award. This data is then used to create trend analysis that may inform parties' decisions about when and where to use arbitration, as well as how to tailor the arbitral process.

- Data analytics is also being used to analyze judgments in major US jurisdictions so that parties can purchase insights into the views of a judge on a specific topic, with information on what decisions a judge has rendered, and what judgments and other judges they have cited. Significantly, in-depth analysis of this kind is not a new feature of US litigation. However, data processing and analytical technology has made such analysis more accessible and accurate.

What will this mean for arbitration? One obvious application is in arbitrator selection and nomination. However, this is more difficult in the context of international commercial arbitration compared to litigation because awards remain predominantly confidential. At least for now, any data set comprising arbitral awards will have serious shortcomings, but this may change.

An alternative approach, which is gaining traction internationally, is for parties to complete surveys and give anonymous feedback on arbitrators and arbitral institutions to organizations such Arbitrator Intelligence, which is run in affiliation with the University of Pennsylvania. These survey responses are then processed and data is made available to parties, if arbitrators consent, comparing their approach to

- ordering of interim measures;
- document production;
- interpretive methodologies in construing contracts; and
- timeliness in issuing awards.

Conclusion

There is something inherently unpredictable about the impact of technology on the forensic process and arbitration more broadly. On the one hand, greater reliance on analytics and data may increase the barriers of entry for

new comers (including arbitrators, arbitral seats, and institutions) because parties may be less likely to make choices that are not supported by data. This may have the effect of reducing the level of diversity that currently exists within international arbitration (which is often seen as inadequate). Alternatively, the emergence of data driven decision making by parties may maintain the benefits of privacy and confidentiality while also increasing transparency and predictability in international arbitration.