Arbitration in Asia: What does the future hold?

Peter Godwin*

International arbitration is now widely accepted in Asia as the preferred form of dispute resolution in cross border transactions. Gone (mainly) are the days when arbitration was seen as a new process of which clients should be suspicious.

These days arbitration is part of the mainstream of dispute resolution as evidenced by the number of lawyers in the region making their living from arbitration. It is easy to forget how quickly the arbitration scene has developed in Asia and consequently, in many cases, how steep the learning curve has been and here I am just talking about for the lawyers. For the clients, in many cases, the curve remains steep, as happily for them, most have less exposure.

All of this leads to a situation where at a high level Asia now looks to the outside world to be a place of sophistication in arbitration terms which is destined to be a growing arbitration market for the foreseeable future. However, is that correct? Scratch the surface and unsurprisingly, one discovers that the level of expertise, whether at client, counsel or arbitrator level varies enormously. This leads to a situation whereby:

- The common misconceptions around arbitration being quick, cheap and confidential are still commonly heard;
- The real advantages of arbitration are overlooked and/or undermined where commercial compromise is allowed to trump the law; and
- Emerging arbitration markets with small local bars can be vulnerable to the influence of one or more dominant players. Ambitious counsel seeking to develop market leading positions in relatively new arbitration markets are picking up some bad habits and sadly Asia is starting to produce its very own 'guerillas' in unlikely places.

I. DEALING FIRST WITH THE MISCONCEPTIONS

Firstly, speed – whether arbitration is quicker than litigation will depend upon what you are comparing it with but I would suggest that if you compare obtaining an arbitral award to obtaining a first instance judgment in most courts, arbitration will rarely be quicker and will often be slower. There will be exceptions and the position changes if you factor in appeals but, as a general rule, I would suggest that choosing arbitration because you believe it will be quicker than litigation is rarely correct.

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* The author is the Managing Partner and Head of Disputes, Asia at Herbert Smith Freehills LLP. This speech was delivered at a public lecture held at the Faculty of Law, University of Malaya on 9 August 2017. It was adapted from an earlier article published in the KLRCA newsletter entitled 'Arbitration in Asia – the Good, the Bad and the Ugly', Newsletter #22, April-June 2016, p.20.

Secondly, cost – similarly it is rarely the case that arbitration will be cheaper than litigation. Whilst having to pay your arbitrators and your hearing room (compared with a judge and the court room) adds to the cost, the bulk of the costs are those of the lawyers and any expert witnesses they may retain. Whilst much has been written in recent years on controlling these costs, the fact remains that they are substantial and at least on par with the equivalent fees incurred in litigation.

Thirdly, confidentiality – certainly amongst clients, and among some lawyers, there is a belief that the arbitration process is confidential. Of course, it often is but that is a function either of the law of the seat of arbitration, the rules of arbitration or a separate confidentiality agreement. Absent confidentiality being provided in one of these ways, arbitration is not a confidential process, merely a private one.

II. BENEFITS OF ARBITRATION

Having cleared up the misconceptions, it is worth briefly reminding ourselves what are the real benefits of arbitration:

Firstly, enforceability – the New York Convention is arguably the most successful multi-lateral treaty ever conceived allowing for the enforcement of arbitral awards in 150 countries worldwide. This is at the heart of arbitration's popularity as the equivalent processes for enforcement of court judgments across borders are far more cumbersome, if indeed they exist at all.

Secondly, neutrality – human nature is such that where parties come from different jurisdictions, they are reluctant to provide their counterparty with 'home court advantage' for dispute resolution. The ability to pick a neutral third country is therefore attractive. The same is also often true of the governing law.

Thirdly, procedural flexibility – in a national court one is bound by the local civil procedural rules; are bound to litigate in the local language; and are required to use counsel qualified in that jurisdiction. By comparison, in arbitration, one can design the procedure to best suit the case at hand and, importantly, in all major arbitration centres, can choose to arbitrate in the language of your choice using the counsel of your choice.

Fourthly, experienced tribunal – when in court, the judge is assigned. He or she may or may not have specific experience in the type of dispute that you face. In arbitration, the parties have control, or at least a significant degree of influence, over who is appointed to their tribunal so allowing for the tribunal to be made up of people with directly relevant experience for the matter in issue.

Fifthly, final and binding – in most jurisdictions there are very limited grounds on which to set aside an arbitral award (compared with, the position with a court judgment where one (often two) appeals are permitted as of right). This is an advantage of arbitration so long as you win!

All of the above sounds straightforward and the misconceptions are easily corrected so you may ask 'what can go wrong?' Quite a lot is the answer!

III. CHALLENGES

Firstly, poor drafting of the arbitration agreement - A good arbitration agreement does not usually need to be long. Every major arbitration institution has a model clause it recommends, often in multiple languages. These clauses are tried and tested; they work. Your starting point should be such a model clause not a blank sheet of paper. I call the latter having your own recipe for disaster. Having started in the right place, remember to 'KISS' – Keep It Short and Simple. As a rule of thumb, if an arbitration clause in a contract exceeds half a page, there is a good chance it is too complicated and contains an error.

Also add a sentence clearly stating the language (one only please!) of the arbitration. The model clauses do not contain this but, in my view, it is essential so as to (i) avoid lengthy arguments about language when a dispute arises; and (ii) avoid very significant bills for translation, etc.

Secondly, over–complication. Sometimes, a short and simple arbitration agreement will not suffice and something more complex is required, for example, an umbrella agreement where there are multiple parties and contracts in play or preferred, for example, a tiered agreement (that is one with multiple stages from negotiation through mediation and ultimately to arbitration). Having asked yourself 'is this really necessary?', if you find yourselves needing more complex agreements such as these, seek expert advice. The fees involved in getting that advice will pale into insignificance compared to the fees you will pay if the drafting goes wrong and you find yourself with the efficacy of your arbitration agreement being challenged.

Thirdly, horrible compromise. Whilst we all understand that compromise is the key to any successful negotiation, I would respectfully suggest there are some compromises that should be avoided. An example of one to avoid is what is known as 'finger pointing clauses'. A finger-pointing clause is one which says something like 'if Party A (from Malaysia) claims against Party B (from the U.S) the arbitration will be in New York; if Party B claims against Party A, the arbitration will be in Kuala Lumpur. Commonly the arbitral institution may also change depending upon the venue too.

Whilst it is easy to understand how such compromises are reached, and I know, for example, that many Japanese companies used to use them routinely as they always expected to be the defendant in any claim and they felt that the claimant being forced to arbitrate in Tokyo would act as an additional deterrent. However, I strongly recommend they be avoided as they can easily go wrong in the drafting leading to jurisdictional challenges and/or parallel arbitrations in different jurisdictions which, in turn, will lead to challenges upon enforcement. It is easy to pick one place of arbitration and one set of arbitration rules. I would suggest that is always a better option than finger-pointing.

Fourthly, more horrible compromise. Not satisfied with finger-pointing arbitration clauses, I have also encountered finger-pointing governing law clauses. If the former should be avoided, finger-pointing governing law clauses must be avoided. Effectively not knowing what law governs your contract until one party commences a dispute is as mad as it sounds. Whilst it is true that the vast majority of contractual disputes depend far more on the contractual language than the governing law, it is by no means the case that the language of every contract means the same thing regardless of the governing law.

Fifthly, even more horrible compromise. The favourite governing law clause that I have stumbled across in my career read something like this:

> *'This contract shall be governed by principles of law common to England and Azerbaijan and, if no such common principles exist, by the laws of Alberta, Canada'.*

I trust no commentary from me is required!

Sixthly, dabblers as counsel. As Asia sees an increase in arbitration more and more lawyers are seeing an opportunity to make a career as arbitration counsel. Most started life as litigators as indeed I did myself more years ago than I now care to remember!

Whilst arbitration is on one level no more than another form of dispute resolution, in style and practice it has developed quite differently from litigation so there are 'rules of the game' to be learned. This leads to the classic Catch-22 as you can only learn by being involved. Where possible, I would simply encourage counsel looking to learn to seek opportunities to co-counsel with others who have already learned. When such opportunities arise, learn what the experienced counsel do well; try not to learn their bad habits too!

As the arbitration community in Asia learns together, as we have in other parts of the world where the arbitration community is at different stages of development, we inevitably see inexperienced counsel defaulting to what they know best, which is usually their domestic litigation system. This can undermine the advantages of arbitration. By way of example, as US counsel learned the international arbitration way, one would regularly get requests for (amongst others) depositions, procedural motions, none of which, I would suggest, have any place in a genuine international arbitration process. Whilst thankfully depositions have never been part of the vernacular in Asian litigation systems, the same principles apply that we should all seek to avoid importing too much of our litigation backgrounds into arbitration.

Seventhly, procedural game playing. Perhaps a function of the learning experience the arbitration community in Asia is going through, or perhaps just a function of the competitive nature of many lawyers, or perhaps (in a very few cases) a function of some over-zealous clients, we are seeing, in my opinion, too many counsels focus on time consuming procedural point scoring or what have become known as guerrilla tactics rather than focussing on the speedy and efficient determination of the substance of the dispute. Some counsel seem to think such tactics illustrate how clever and experienced they must be but seemingly ignore the negative impact it has on the tribunal who will ultimately decide their client's fate.

The other consequence of this is that it is increasing costs. Much has been written in recent years about the costs of arbitration. I firmly believe that, in many cases, it is the arbitration counsels that are most to blame and a key element of this is that there are very few tools available to tribunals to control counsel misbehaviour. This is a separate subject for another day but one that we will doubtless continue to hear much about.

Eighthly, inexperienced arbitrators. Another Catch-22. Everyone has to start somewhere and the temptation is to ask new young arbitrators to learn as sole arbitrators on small cases. This is understandable but in the same way as I encourage counsels to

learn by co-counselling initially with experienced practitioners, so ideally would a young arbitrator learn by working alongside an experienced arbitrator on a panel of three, or if that is impractical, by working as the tribunal secretary before taking appointments of their own.

Ninthly, dissenting opinions. Whilst I have not seen empirical evidence, there is a sense that we see more dissenting opinions in Asia than elsewhere. If this is indeed correct, is it because some party appointed arbitrators consider it their duty to find in favour of the party appointing them. Indeed, I have attended conferences in Asia where arbitrators have stated that expressly from the floor!

The dissenting opinions are then being used to mount challenges to awards. This is an unhealthy trend that has the potential to undermine arbitration in Asia.

Finally, approach to memorials. This is by no means confined to arbitration practice in Asia but the traditional approach that memorials are designed to narrow the issues in dispute seems to be getting lost in the mists of time with memorials getting longer; reply memorials often being longer than initial memorials and so forth. We all need to remember that the tribunal will only remember so much of what they read. A long document is not the same as a strong document.

Within these ever longer documents, there appears a growing belief that using hyperbole alongside plenty of bold underlining somehow strengthens one's case. More likely it risks insulting the tribunal.

IV. THE FUTURE

Despite these challenges, there should be no doubt that the future of arbitration in Asia is a bright one. The sooner some of these lessons are learned and applied in practice, the brighter it will be.