JUDICIALIZATION OF THE ARBITRAL PROCESS

BRUNO ZELLER*

ABSTRACT

This paper will critically investigate the issue of judicialization of arbitration. Specific issue, such as length complexity and cost of proceeding, will be analysed. It will conclude that a balancing of party autonomy and fairness will assist in resolving the criticism. In effect, a move towards a best practice framework will minimise the trend. The issues of the seat as well as the incidence of setting aside and enforcing arbitral awards are specifically discussed with the view of finding judicial "creep".

I INTRODUCTION

Commercial arbitration has undoubtedly progressed to a point where the question needs to be asked: what next? The point of progression is arguably the strengthening of arbitral rules to keep up with changes in economic activities. One example is the change in the 'Hong Kong Rules' to be able to enforce foreign judgment in China.[1]

There is always a tension between national laws and arbitration considering that national laws attempt to preserve what might be termed "sacred cows". National laws indeed have and must establish new "and perhaps abbreviated domestic priorities for the 21st century."[2] The new "talking point" evolves around the issue of *judicialization* of the arbitral process. It is interesting to note that Carbonneau borrowed the words of David Stewart, who noted regarding this issue as: "manifest destiny, manifest disregard, or manifest error."[3]

What is uncontested is that arbitration has always been attractive due to its commercial expedience and, importantly, its functional pragmatism.[4] The point is that arbitration has offered a process which - not completely removed from the judicial system – was still faster, less costly and produced results that were "innovative." However, as Carbonneau has noted, "arbitration has passed from the state of nature to life in civilized society and, in the process, has acquired many of the trappings of the dysfunctional judicial trial."[5] This has been pointed out by a survey conducted by Queen Mary University of London in 2013, which pointed to "'judicialization of arbitration' as the single greatest concern

[1]* Dr. Bruno Zeller is a Professor of Transnational Law in the Law School at the University of Western Australia, Perth, Adjunct Professor, School of Law, Murdoch University – Perth, Fellow of the Australian Institute for Commercial Arbitration, Panel of Arbitrators – MLAANZ, Visiting Professor Stetson Law School, Florida, Humboldt University Berlin and Aalborg University Denmark.

Hong Kong International Arbitration Centre (HKIAC), *SECTION V. AWARDS, DECISIONS AND ORDERS OF THE ARBITRAL TRIBUNAL*, (Web Page, 2018) < https://www.hkiac.org/arbitration/rules-practice-notes/administered-arbitration-rules/hkiac-administered-2018-2>.

[2] Thomas Carbonneau, 'Carbonneau on International Arbitration: Collected Essays' (2011) *Juris Net* 125.

[3] Ibid.

[4] Ibid [126].

[5] Ibid at [127].

in the future of commercial arbitration and one of its most damaging obstacles. "[6] Stipanovich also urged arbitrators to not follow lawyer-made "monolithic" procedures.[7] In addition, Justice Moreno from the California Supreme Court noted that: "arbitration is intended to be an efficient, fair, and inexpensive avenue for resolving complex disputes but I've seen a trend lately where it is becoming 'judicialized', with the courts getting more and more involved." [8] In essence, it has been argued that arbitration is only a step parties must undertake before litigation.[9] Recently, several arbitrators have conducted interviews and sent out questionnaires investigating whether legalism or judicialization is infecting arbitration.[10]

Arguably, this criticism is directed where arbitration and the judicial system – due to national laws – must meet. The point is that arbitrators cannot acquire judicial functions as this is the reserve of national laws and the legal process itself. The courts will always exercise an oversight over the arbitral process and specifically in the area of setting side or enforcing awards the national law of a state will direct the process. The UNCITRAL Model Law on International Commercial Arbitration in Articles 34 and 36 and the New York Convention in Article V have regulated this issue. However, the point is that only nations where the two instruments have been adopted will potentially exhibit a harmonisation. It follows that the choice of the seat is important in order to at least have a harmonised and hence relatively predictable approach in the process of judicial oversight.

Arguably, the problem of judicialization can be grouped into an 'internal' problem and into an 'external' problem. The internal problem, in effect, is driven by arbitrators that are primarily retired judges who bring their experience of the running of a trial into the management of the arbitration. Unfortunately, this simply creates extra cost and is not timely because the arbitration is more akin to a trial. Phillips also remarked:

> "One arbitrator attributed the problem to lack of arbitrator training, citing many
>
> retired judges who have become arbitrators who simply do in arbitration what they did in court. However, many respondents said that lawyers too "fall back on methods they know" and "have difficulty getting out of the litigation paradigm."[11]

Horvath further notes that failure to abandon judicialization of arbitration may

[6] Bruno Zeller and Camilla Andersen, 'Discerning the Seat of Arbitration – An Example of Judicialisation of Arbitration, Vindobona Journal of International Commercial law and Arbitration'(2015) 192, 195.

[7] Thomas Stipanowich, '*Arbitration: The "New Litigation*"' (2010) *University of Illinois Law Review*, 1, 1-60.

[8] LEGAL NEWSLINE, *Justice Moreno: Arbitration Becoming 'Judicialized',* (Web Page, 18 February 2010) *<http://legalnewsline.com/stories/510522428-justice-moreno-arbitration-becoming*-judicialized#sthash.OaAe34AH.dpuf>.

[9] Leon Trakman and Hugh Montgomery, 'The 'Judicialization' of International Commercial Arbitration: Pitfall or Virtue?' (2017) *Leiden Journal of* International Law, 30.2, 406.

[10] Remy Gerbay, 'Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration'*(*2014), *The American Review of International Arbitration*, 25.2, 223; Gerald Phillips, 'Is Creeping Legalism Infection Arbitration?*' Dispute Resolution Journal* 9, 37.

[11] Ibid [39-40].

jeopardise justice in international business disputes.[12] This issue has been somewhat solved by institutional organisation in creating expediated processes. In the end, it is up to the parties to be aware of this issue and choose arbitrators that are to their liking. This issue will not be further pursued in this paper.

The effect of the seat and the enforcement has contributed to the judicialization of the arbitral process. Undoubtedly, issues that are not within the competence of arbitrators must inevitably end in court. However, an understanding of the relevant processes is of paramount importance and, in the end, parties to an arbitral dispute must be aware of the issues in order to minimise judicialization of the process. After all the parties have the ability to choose arbitrators, they can control the "internal" process. Simply put, "the crux … is that there are other, equally important, aspects of [International Commercial Arbitration] beyond allegations of 'judicialization' that need to be improved so as to promote this method of alternative dispute resolution."[13]

II IS THERE JUDICIALIZATION?

Undoubtedly, there are elements of judicialization within arbitration. As noted above, arbitrators themselves have contributed to it by prolonged formalistic procedures of judicialization within arbitration. Additionally, large companies engage senior lawyers to prepare for hearings and they are using the same tactics used in litigation and, hence, prepare lengthy briefs while searching for legal intricacies in making or responding to claims. Flannery suggests that 85% of costs are party costs due to hiring lawyers and experts.[14] It is unsurprising that Gerbay's study reveals that arbitration has not suddenly become judicialized but, instead, only perceptions of the process draw this picture.[15] The driving factor is the observation that costs and the duration of arbitrations have made arbitration less attractive. However, the issue as Gerbay noted is that little research has been conducted and empirical data is scarce.[16] Thus, the issue of judicialization rests on anecdotal evidence. It rests mainly on the argument as advanced by Fali Nariman, who noted: "[international commercial arbitration] has become indistinguishable from litigation, which it was at one time intended to supplant."[17] Even if that was true, it can also be argued that arbitration has become more sophisticated and, accordingly, more procedurally formalized. The fact that most institutional rules are constantly updated to take note of developments in the field speaks for itself.

As arbitration is getting "older" it can also become more sophisticated; hence, a certain similarity between litigation and arbitration is inevitable. In most cases, there is only one "best practice" formula to deal with procedures. The fact that there are still

[12] Günther Horvath 'The Judicialization of International Arbitration : does the Increasing Introduction of Litigation-Style Practices, Regulations, Norms and Structures into International Arbitration Risk a Denial of Justice in International Business Disputes?*'* (2011) *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* 251, 271.

[13] Trakman (n 9) 406.

[14] Louis Flannery and Benjamin Garel, '*Arbitration Costs Compared: The Sequel'*, (2013) *Global Arbitration Review* 8.1, 4.

[15] R. Gerbay, 'Is the End Nigh Again? An Empirical Assessment of the "Judicialization" of International Arbitration' (2014) 25(2) *The American Review of International Arbitration* 223, 226-7.

[16] Ibid.

[17] Fali Nariman, 'The Spirit of Arbitration-The Tenth Annual Goff Lecture' (2011) *Arbitration International* 16, 262.

significant differences between arbitration and litigation, such as confidentiality, indicates that the two systems are not identical. It follows that the issue of cost and increased time is not to be confused with judicialization. Cost and delays are a consequence of complex commercial issues. This is confirmed by Gerbay and others. They have found that there is no evidence to support that international arbitration has become more judicialized but that commercial disputes are increasingly larger and more complex. Thus, such disputes are procedurally complicated, which increases costs and time.[18] A good example is the recent Yukos dispute dealing with an award of 38 billion Euros.[19] Simply put, it was a claim of indirect expropriation that was brought by three shareholders against the Russian Federation. It follows that courts are increasingly asked to assist in matters that are beyond the scope of the agreement or not within the competence of the arbitrators. It must always be remembered that, whether we deal in litigation or arbitration, an adjudicator cannot gloss over material facts, wrongly apply the relevant law, or exclude expert witnesses. This is exactly the reason why the model law and the New York Convention allow a review if justice has not been served. It is simply not possible to exclude courts from the arbitral process. This is not a recent phenomenon. Indeed, the Model Law and the New York Convention have recognised this issue long time ago. Arguably, courts intervene in relation to the seat and enforcement; setting aside awards has long been recognised and enshrined in the relevant rules. What can be said is that there is select judicialization within arbitration; however, whether it is detrimental to the progress and continued success of arbitration is yet to be seen. Gerbay offers a good definition, namely:

> the term 'judicialization' is used to refer to the phenomenon by which international arbitration procedure increasingly resembles domestic litigation, as a result of an increase in procedural formality/sophistication and litigiousness.[20]

Each of these reasons, namely increased formality and litigiousness, need to be examined. Gerbay, in his sample study, isolated the issue of challenges to arbitrators. The unsuccessful challenges and inter-party agreement on the number of arbitrators reflected the litigiousness of the arbitral process.[21] His conclusion was that "the empirical evidence examined does not offer clear proof, as it might have been expected, of an increase in the litigiousness of international arbitration proceedings."[22]

The issue of increasing formality and sophistication is more difficult to determine. "[T]he "inflation" of the procedural rules published by arbitral institutions, in the sense of an incremental expansion of institutional rules in both length and detail"[23], is often taken as an indicator of judicialization. Just because rules are expanded does not in itself constitute a good indicator. A better view is that "judicialization depends on the actual substance of such rules."[24] Again, the evidence is not convincing. Some rules, such as Article 22(1) of the ICC Rules (2012), which states: "the arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute", fosters simplicity.

[18] Trakman (n 9) 408.
[19] *Yukos Universal Limited (Isle of Man) v The Russian Federation* (2005) PCA 4.
[20] Ibid (n 10) [230].
[21] Ibid [233].
[22] Ibid [235].
[23] Ibid [236].
[24] Ibid.

Additionally, there is a drop in the awarding of partial awards that also speaks against procedural formalism and judicial heaviness. Yet, the only indicator "that does support the idea that arbitration has become judicialized is the frequency of three-member tribunals as opposed to sole arbitrators.[25]

The debate in relation to judicialization arguably looks at "the way we did business" ten or twenty years ago and proceeds to compare it with today's global trade. Indeed, disputes that are more complicated involve more money and are the result of disputes between international corporations that have grown in complexity and size. The world - as the saying goes - does not stand still for anybody; this includes arbitration. It is only natural that arbitrations are more sophisticated and more complex. Gerbay observed that:

> "In this respect, comparing the statistical information about the types of cases referred to ICC arbitrations 20 years ago and today is fascinating. It illustrates how globalization has reshaped the arbitration industry. The categories of disputes that featured prominently in the early 1990s have become much less important than some of the new categories (which often did not feature in the early statistical reports). … trading disputes represent a fraction of the ICC's arbitrations. In 2012, the proportion of trading disputes had fallen to a mere 6% of the ICC's caseload. In the same period, M&A disputes have become significantly more frequent at the ICC".[26]

The conclusion that can be drawn is that arbitration has become more sophisticated and complex. Arguably, therefore, the question of judicialization needs to be distinguished from the effects of the maturing of a system that is keeping pace with the issues of globalisation.

Put simply, what matters is not that arbitration proceedings be quick and simple, but that they be appropriate considering the particular needs of the case-- needs which may include, as the case may be, sophistication and lentor.[27] It appears that a degree of cross purpose has entered the debate. If the ability to resolve complex and difficult disputes, which do take longer than just a quick fix, is an expression of judicialization then arbitration has seen a degree of judicialization. However, the better view is that arbitration has risen to the challenge of twenty-first century disputes where major international corporations expect arbitral solutions. This is because the benefit of finality and the limited reasons to either set aside an award or refuse recognition is an important feature. It is interesting that a survey of arbitrators suggested that "the cure is in [the arbitrators] hands, and that they must control and better manage the process" and "that the arbitrator set a business-like tone in the beginning. "Counsel then will readily fall in line."[28]

The problem, as highlighted above, is that imbedded under the current heading of 'judicialization' is a rhetorical simplification of the state of arbitration today. If any judicialization has taken place – which is debatable - it would be in areas where court interference is most prevalent when dealing with the seat of arbitration and the enforcement process.

[25] Ibid [237].
[26] Ibid [240].
[27] Ibid [246].
[28] Phillips (n 10) [40].

A *The Seat of Arbitration – an Example of Judicialization of Arbitration?*

As noted above, arbitration cannot function properly in a legal vacuum. Kerr LJ in *Bank Mellat v Helliniki Techniki SA* already noted in 1985:

> Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.[29]

This is true whether we operate in litigation or arbitration, but the difference is that the plaintiff has the option to choose a legal system if there is a connecting factor under ligation. In effect, he can choose several, as long as there is a connecting factor. This is not the case in arbitration. The only determinate factor to a seat is a contractual clause in the contract to that effect or, at least, the nomination of an institutional rule. If there is no choice in this regard, current case law suggests that a court will determine a seat taking account of all the surrounding circumstances. The key question here is: is that necessary?

A valid argument can be made. First, there is no legal block to nominate and appoint arbitrators even if no seat has been nominated. Accordingly, arbitrators "need to have the confidence to make sound business judgements about issues like an applicable law and how their decisions are guided which do not need to conform to rigid procedural rules."[30] Institutional rules have already made this change, hence recourse to a court is not necessary. As an example, the Singapore Arbitration Rules (2016) note in Article 21:

> The parties may agree on the seat of the arbitration. Failing such an agreement, the seat of the arbitration shall be determined by the Tribunal, having regard to all the circumstances of the case.[31]

However, not all arbitrations rely on procedural rules that allow the arbitrators to nominate the seat. Therefore, recourse to courts will still be an unfortunate feature where no judicial inference is realistically necessary. The New York Convention supports this view because there is nothing in the Convention requiring the seat to be found, nor is the lack of it any obstacle to enforcement that can take place anywhere. It is also not bound to a seat. The problem is that:

> Arbitrators fear non-enforcement, and Courts fear non-transparent regulations. So – at the danger of oversimplifying a complex process: if Courts embrace that enforcement of commercial arbitral awards arbitration enforcement is not pre-requisite on formalities and procedures and transparency of regulation, but embraces the promise of flexible commercial justice (as they ideally should) then arbitrators can let go of their fear of non-enforcement and everyone can focus on the outcome of the dispute. [32]

Once the issue moves to setting aside or enforcing the award court, interference

[29] [1984] QB 291.

[30] Bruno Zeller and Camilla Andersen (n 6) 210.

[31] SIAC: Singapore International Arbitration Centre, SIAC Rules 2016, (Web Page, 1 August 2016) <http://www.siac.org.sg/our-rules/rules/siac-rules-2016#siac_rule21>.

[32] Bruno Zeller and Camilla Andersen (n 6) at 212.

is necessary because arbitrators are not judicial officers. Therefore, the question of judicialization of the process at the enforcement stage needs to be investigated.

B *Setting Aside and the Enforcement Process*

In these circumstances, the argument changes as " courts enforcing arbitral decisions need not insist on the transparency of regulations and procedure found in litigation."[33] The enforcement process is not a rehearing of the case; it is entirely out of the arbitral process. The only connection is that the actual decision was reached by arbitrators, not judges, and that reason for not enforcing an award is only found in "arbitration law." Accordingly, judicialization is not a feature in this process which in effect is only needed if parties to an arbitration have not honoured the award.

III CONCLUSION

This paper has demonstrated that judicialization is not an issue; rather, it is a misconception. Since "arbitration is a consensual process crafted by the parties, generally through their attorneys, they are in the driver's seat when it comes to the process that they get."[34] However, in focusing on the need for increasingly cheap and efficient arbitral awards, commentators and arbitration practitioners risk the danger of searching for the 'El Dorado' of arbitration. In this instance, every arbitral award is quick, efficient, and streamlined. Trakman *et all* argued correctly:

> Rather than support overbroad and general contentions that [International Commercial Arbitration] ICA is inherently flawed for being 'judicialized' or arguing that ICA arbitrators consistently fail to focus sufficiently clearly on material issues, commentators and practitioners alike need to realize that the quality of an ICA award relies on many factors.[35]

This paper has demonstrated that such qualities are desirable only in some cases. Such qualities should not portray simplicity in arbitral decision-making as an end in itself, in disregard of the potentially diminished quality of those decisions.[36] It appears that it is not the arbitral 'system' that gives rise to excessive formalism but, rather, the participants in the process; namely, clients, arbitrators and lawyers. In the end, it is the arbitrator who must "take charge and not live in fear of an appeal to overrule their award."[37] What is needed is a critical and contextual analysis of the normative attributes of arbitration globally, beyond the narrow critique of undue legal formalism.[38]

[33] Zeller and Andersen (n 6) 211.
[34] Phillips (n 10) [38].
[35] Trakman (n 9) 432.
[36] Ibid [406].
[37] Philips, (n 9) [42].
[38] Trakman (n 9) [407].