Kluwer Mediation Blog

Part 2 – Empowering the Growth of International ADR: Cries for change

Michael Leathes (Corporate counsel & author) · Sunday, June 30th, 2013

Part 1 of this post touched on rumblings for more transparency in arbitration. But there is more than the distant sound of thunder, and it's coming closer.

As arbitration and mediation are both highly competitive and fragmented fields, it is hard for providers to act collectively. Yet they must. The only forums where arbitration organizations come together at an international level conferences of the ABA Section of Dispute Resolution, the Institute for Transnational Arbitration (ITA) and the International Council for Commercial Arbitration (ICCA). Mediation providers have the annual UIA World Forum of Mediation Centers. Industry change to address user demand rarely gets discussed at these events.

One recent exception was the ICCA Annual Conference in Singapore in June 2012, the theme of which was "International Arbitration – the coming of a new age?" The keynote speech was given by the then Attorney General of Singapore (now Chief Justice) Sundaresh Menon, a man with a distinguished career in international arbitration.

Mr Menon suggested that the "new age" of arbitration is, in fact, its golden age, implying that the field stood on the brink of decline, and urged arbitrators to "embark on a course of collective self-reflection…on what we as a community have done right, but more importantly, on what we could do better, and perhaps plant the seeds of change so that our industry will…continue to play a critical role in the global administration of commercial justice."

Mr Menon highlighted how arbitration has suffered from growing complexity and "judicialisation" becoming more time consuming and costly, leading to a "growing frustration for users" and asked whether "these telltale signs of trouble signify the beginning of the end". He saw an increasing disconnect between the satisfaction of the arbitration community with the revenues they earned compared to the "growing dissatisfaction with [the] unregulated industry" by users. He urged the field to head off declining credibility and confidence by "charting a new course" and design and subscribe to an international self-regulatory regime involving greater efficiency, transparency and accountability.

Mr Menon proposed that the self-regulatory framework governing arbitrators should cover initial entry requirements, a competency certification system and practice standards for the conduct of arbitrators and also of international arbitration counsel, including a uniform global set of ethical standards and rules of professional conduct backed up by a disciplinary process. He envisaged

arbitral institutions being the functional equivalent of Bar Associations in this system, with a role in implementing the self-regulatory standards. He drew a distinction between injecting greater transparency in arbitrator conduct, and the substantive issues in dispute (which are confidential). He advanced the idea of an open-access database of information about arbitrators and their decisions under the auspices of a respected international body. He concluded that this would aid "…parties in their selection of, or even their approach towards, arbitrators in future cases, moving away from glorified and often self-promoting curriculum vitae, to serve as a repository of useful and independently audited information on an arbitrator's past cases, reasoned decisions (if necessary redacted to protect… confidentiality), the instances where the arbitrator ruled or dissented in favor of his appointing party, as well as complaints and feedback from parties."

A few months later, Professor Rogers proposed an International Arbitrator Information Project (IAIP) to help correct the "gumshoe clue-hunting approach currently employed to select international arbitrators" which is "severely outdated and unduly expensive in an era of information and technological efficiency". Professor Rogers suggested that the IAIP would be a non-profit resource providing reliable, objective information about arbitrators, with each arbitrator having a dedicated space that in addition to biographical information would include links to publicly available arbitral awards and other data, including peer reviews. It would also include objective appraisals of arbitrators' case management skills, and behavior as an arbitrator based on feedback from users and users' counsel. She identified various legal and practical obstacles including confidentiality, how feedback would be edited responsibly and fairly, but said that these issues can be addressed.

A few additional relevant considerations:

IMI is the only body in the international ADR field in which several of the leading arbitration institutions (AAA, BCDR, ICC, JAMS, SIAC) are collaborating with the express intent of helping to raise professional standards and deliver greater transparency.

A collaboration arrangement was announced in March 2013 between IMI and the Corporate Counsel International Arbitration Group (CCIAG). This collaboration will enable the user share of voice in international ADR to be more heard more loudly and clearly.

A 2011 survey was recently published of the in-house dispute resolution counsel in 368 Fortune 1,000 US companies conducted by Cornell and Pepperdine Universities with CPR Institute as a follow-up to a 1997 survey conducted by Cornell. This survey looked for trends among corporate users since 1997, emerging ADR policies and practices, and u the drivers of those trends, policies and practices. There is much useful data in this survey for both arbitration and mediation. One of the most startling statistics is that there has been a significant decline in the use of arbitration in 8 out the 10 categories of dispute surveyed between 1997 and 2011.
An International Corporate Users ADR Survey was conducted by IMI between mid-January and mid-March 2013 among 76 corporate in-house dispute resolution counsel. The Survey raised a number of issues that earlier research by different organizations had not asked of corporate in-house dispute resolution counsel. The results are revealing. In summary:

1. Users want more information about both arbitrators and mediators including evidence that their competency has been independently assessed, they want them to belong to professional ADR organizations that are not service providers, and to subscribe to rigorous Codes of Practice in ADR that render them subject to disciplinary processes, as any other mainstream professionals.

2. Past experience with arbitrators and mediators is seen as vital to selection decisions – whether that experience is the user's own, or that of their counsel, or of previous users of the neutrals under consideration in independently-prepared feedback summaries. A high proportion (76%) say they want access to the feedback of previous users of both arbitrators and mediators.
3. Arbitration providers are now expected by three quarters of in-house dispute resolution counsel to be proactively encouraging parties to mediate their disputes, and almost half go so far as to want Courts and Tribunals to make mediation a compulsory step in both litigation and arbitration.

The third and final post in this three-part series will suggest a few easy action steps that can steer ADR out of the oncoming storm.

To make sure you do not miss out on regular updates from the Kluwer Mediation Blog, please subscribe here.

This entry was posted on Sunday, June 30th, 2013 at 8:41 pm and is filed under Accreditation, ADR, Appointment of Mediators, Arbitration, Commercial Mediation, Confidentiality and Transparency, Corporate Counsel's View, Developing the Field, Dispute Resolution, Growth of the Field (Challenges, New Sectors, etc.), International Mediation

You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.