Nineteen Eighty-Four: arbitration Room 101?

Professor Julian DM Lew QC and Catherine Reeves

In this sixth edition of *Arbitration Classics*, **Professor Julian DM Lew QC** and **Catherine Reeves** debate arbitrator and counsel bête noire...

International arbitration is continually challenged by both academics and practitioners to develop and evolve in the interests of the participating parties. Catherine Reeves asked Professor Lew of Twenty Essex for the benefit of his experience in considering some aspects of international arbitration which cause great debate. Specifically, Professor Lew then discussed whether certain procedures in international arbitration should be consigned to 'Room 101' and if there was a danger that over-analysis could cause us to lose some of the specific practices that make arbitration a successful process.

1. **It is sometimes said that arbitration is just litigation in another (potentially more expensive) forum and that the notions of arbitration providing a bespoke, flexible and party-driven procedure are in fact nonsense. As a bold opening question then: Should arbitration itself be put in Room 101?**

'Room 101' is perhaps a little drastic. That is not to say that the current international arbitration system is perfect. It is important at the outset of this discussion not to generalise about international arbitration. We must not forget that (i) in each case the process belongs to the parties and must fit the parties' interests, not the lawyers (ii) parties have chosen arbitration to avoid national courts, procedures and systems even though in many cases they are of high quality. Remember always that in most international arbitrations parties come from different jurisdictions, legal and cultural systems and tribunals are frequently made up of arbitrators from similarly disparate backgrounds.

Your challenge that the bespoke nature of arbitration is 'nonsense' perhaps derives from the way some arbitration is practised mimicking national court procedures and practices. Many lawyers seek to fight arbitrations as they would in their own national courts ignoring the international nature of the parties and the dispute. There are international arbitrations which have been turned into 'litigation by another name' by some legal counsel involved. In this respect I think there is an onus on parties to arbitration (whether they are led by GCs or non-lawyers) to remember why they chose arbitration as the forum to determine disputes arising out of a specific transaction. This should focus their representatives' minds on resolving the dispute in front of them, not fighting on every small issue (often in language that they would not dare use in front of a national court judge) with little regard for the bigger picture and ultimate goal of resolution.

International arbitration is a system that crosses and ameliorates the divides of different laws, cultures, mentalities and experiences, but aims to meet the efficiency and justice, and fairness expected in the international arena. It is essentially an international and a comparative law mechanism and many of the leading international arbitration lawyers have an understanding and appreciation of legal systems and procedures other than their own. The arbitral process should be flexible and capable of change depending on the parties and tribunal's backgrounds – good legal representatives should be adaptable to this.

2. **Document production is often time-consuming and costly. Do Redfern Schedules and the 'standard' document production exercise in arbitration really merit the time and costs spent on them? Is it time to move to a more limited disclosure process as standard?**

Document production can be a costly part of an arbitration both in terms of time and money. Despite this often-significant investment, a smoking gun is rarely found. Even in the current system Redfern schedules are frequently peppered with repeated boilerplate language, requesting or refusing production and attempting point-scoring. This adds little to the arbitration excepted for added costs. Redfern schedules were developed to streamline and focus the disclosure process to only necessary and relevant documents. Yet now one regularly sees

schedules with five or six columns of back and forth between the parties and the Tribunal and even pages of preamble explaining the parties' case in order to justify document requests.

Being blunt, I sometimes feel that document production has taken on a life of its own. It has become a tactical weapon used by lawyers to pressure/ embarrass counsel for the other side. I note with interest that the Prague Rules introduced in late 2018 provide more of a civil law limited-disclosure approach. I suspect this will lead to more discussions between parties and Tribunals early in the arbitration about limiting disclosure and perhaps whether the Prague Rules or the IBA Rules are more appropriate for the parties and their dispute.

One way to control the excess would be to introduce a page limit for the Redfern schedules. I accept that his may be difficult in practice as directions would have to made early in the arbitration often before the full extent of the dispute is known.

My turn to be bold and ask: is document production really necessary? On reflection, disclosure is necessary to a minimal degree but the time and money spent on the reams of documents reviewed and disclosed is disproportionate in all but the rarest of cases. I think this is an area where parties to a dispute should work with the lawyers in understanding the purpose of disclosure and, where appropriate, encouraging an agreement between the parties to limit the process.

3. **Is it time for in-person hearings in arbitration, particularly given our recent forced move into the virtual world, to go into Room 101 or is there still a place for them?**

It remains early days in the progress of 'virtual arbitration' though there have been moves in this direction for some time. We are all learning what does and doesn't work and I commend the arbitration community for its knowledge sharing during this difficult time. This shared learning will help shape these various platforms going forwards to improve the process further.

Personally, my experiences over last seven months have been very positive and I expect that this forced change will lead to a long-term change in arbitration practices. For example, it is no longer the norm for parties, their representatives and arbitrators, to fly around the world for short hearings when the case does not require it. There will always be a place for in-person hearings which will invariably have an advantage – for one party or other but we should all think twice in the future about whether we actually need to travel or if a virtual hearing or meeting would serve just as well.

4. **It is sometimes said that arbitrators are scared to use their case management powers for fear of being seen by the parties to over-step their role. Is it time for a brave new world where arbitrators actively manage cases with regular CMCs and, in doing so, guide the parties to the key issues and therefore reduce the issues in dispute saving time and money in the process (and perhaps facilitating earlier settlement)?**

I think there is a head of steam to encourage greater case management by arbitrators, but it is too early to tell if it will take off or succeed. It would involve proactive case management from arbitrators, including meeting with the parties on a regular basis (in person or virtually say every three to six months), considering the issues in dispute and the evidence in the record, the appointment and use of experts, etc., and generally seeing how the case is progressing. This could extend to a form of Med-Arb procedure as contemplated by the Prague Rules and more common in Asia than we are used to but is generally distrusted in the UK and other European courts. I appreciate that for many this is a 'giant leap' from current practice and therefore must be approached with wariness.

5. **Costs are always a hot topic in arbitration. Should costs orders go into Room 101 and each party simply bear their own costs? This would save time and money in the parties' preparing costs submissions which, some argue, the Tribunal do not consider thoroughly in any event. As an added benefit, perhaps parties would be stricter on costs if they knew they were going to have to pay them?**

This topic is not as hot as some would like it to be. Your proposal as a blanket rule goes too far. I do not think the costs of arbitration would be reduced just because each party is to pay their own legal costs and expenses whatever the outcome of the arbitration. However, I do think that all involved in international arbitration, parties, legal representatives, experts and arbitrators could and should address the costs at the outset of the arbitration, in early correspondence or at the first CMC. Parties could, subject to legal constraints of course, agree a position on costs so that they are clear from the outset. In turn, this would focus parties' minds on the potential eventual costs and induce them to engage more with what their lawyers are doing and spending on their behalf.

The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of other members of Twenty Essex.

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