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**'Arbitration after lockdown'**

As governments take slow and tentative steps out of lockdown the question on everyone's lips is: what next?

The press is full of ideas on the new economy and an opportunity not to be wasted. What opportunities will there be for dispute resolution, and what will arbitration look like? While we all schedule zoom meetings and breathe a sigh of relief for technology, we need to be careful that we don't let this particular opportunity slip through our fingers.

For international commercial arbitration (as opposed to inter-state treaty based arbitration), the 2019 annual Queen Mary University of London survey reads like Groundhog Day. Each year, clients tell us they are unhappy at the cost and delay in arbitration. Yet, as one famous international arbitrator observed recently, most of those issues are driven by the clients themselves. But that is only part of the picture.

Investor-state, international trade and other treaty-based arbitrations are likely to suffer the combined blows of the pushback against globalisation and growth of economic nationalism that is sure to follow the pandemic. That is a shame, as investor-state dispute settlement has, despite some criticism, been pivotal in promoting the rule of law in international relations, and rigour in cross-border investment. International commercial arbitration, enforced under the New York Convention, has also established itself as the only effective means of determining disputes in cross-border transactions. For all the criticism of international arbitration, few will consent to the uncertain jurisdiction of a foreign court.

Domestically, arbitration has often drifted into a legal twilight zone. Its use is almost universal in some industries (construction, maritime and technology), but not so assured in others. We talk of party autonomy, the benefits of selecting the tribunal, setting the procedures best suited to the dispute; but do these benefits truly withstand close scrutiny? The reality seems to be that most clients actually do not care too much about confidentiality, and they rely on their legal advisors' recommendations on the other issues. In many cases, clients are relatively indifferent to the choice of court or arbitration, or the benefits of confidentiality or the doctrine of precedent. Provided they get a result they like and can enforce.

And here lies the problem. Like many a well-crafted commercial agreement, arbitral procedures in the hands of lawyers have tended to become more complex, more detailed, and more refined. No lawyer worth their salt is going to leave a stone unturned in looking after their clients' interests. This is, perhaps, compounded by many arbitration practitioners and tribunal members having a background in the tried and trusted, and it has to be said arcane, practises of court litigation. As many practitioners comment, the rules of evidence and procedure have been refined over the years, and they are a very sound starting point.

And yet, replicating traditional court procedures will carry with it many of the criticisms of the court process. Are we really making the most of the advantages which arbitration has to offer?

So what are the core ingredients of a system capable of providing fair and durable results? The opportunity for the parties to present their cases to a fair and impartial adjudicator, in accordance with

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the principles of *natural justice*, certainly. The parties must also perceive that they have been dealt with in a transparent fashion, with durable decisions. It does not automatically follow, however, that an oral hearing is required, or that reasons for the determination must be given, or that the adjudicator has the discretion to stray from the relief sought (as in baseball or pendulum arbitration).

Objectively speaking, the Model Law provides considerable procedural flexibility which enables parties to achieve a durable and fair result without much of the criticism levelled at traditional litigation and international commercial arbitration. Post Covid-19, that flexibility is more attractive than ever.

The compulsory requirements of the Model Law are surprisingly limited:

- Agreements to arbitrate may be oral.
- If the parties cannot agree on their tribunal, the appointment may be made for them.
- The tribunal can rule on its own jurisdiction.
- The parties may select the applicable law and language of the proceedings.
- Emergency and interim relief is available.
- The tribunal has the power to determine the rules of procedure, subject to the overriding requirement of equal treatment.
- The requirement for oral hearings – confidentiality, the means of presentation of evidence and provision of a reasoned award – are all subject to agreement by the parties.
- The courts may provide support, and the opportunities for court intervention are reasonably limited.

In cross-cultural disputes, whether international or domestic, this flexibility is of considerable value. To resolve an indigenous dispute, for example in my country Māori treaty disputes, in accordance with tribal laws (*tikanga Māori*) arbitration is of considerable value. Similarly, in the international context, to have regard to cultural values can only enhance arbitration as a disputes procedure, provided the approach is well managed.

A level of confidence and courage might be required by the participants, but that is surely what the parties are paying for. In a time of uncertainty, such as we are approaching, that flexibility will almost certainly make arbitration a more attractive procedure for resolving commercial disputes; particularly as the backlog of cases increases as courts struggle with social isolation and safe practises.

To be fair, most institutional rules have this level of flexibility built into them; emergency arbitration, expedited arbitration for low-value disputes, dismissal of unmeritorious claims, issues hearings, dispensing with strict rules of evidence in favour of the International Bar Association guidelines, dealing with costs and allowing for appeals on questions of law. However, their use, particularly domestically, is infrequent.

If arbitration is to thrive and yield its benefits, both domestically and internationally then counsel and their arbitral tribunals must focus at the outset (preferably at the first preliminary conference) on the best and most appropriate procedure for the dispute at hand. Proportionality is a relatively new concept to some common lawyers, but its time has surely come.