

Table Talk

Lunchtime addresses

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WHY IS THERE STILL RESISTANCE TO ARBITRATION IN ASIA? *

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This paper addresses a question which is based on the unproved assumption that there is still resistance to arbitration in Asia. Nevertheless, I have been witness to sufficient personal and anecdotal evidence to assert that assumption as a proposition of fact. I therefore consider it a worthwhile exercise to attempt an analysis of the kinds of resistance that arbitrators in Asia are likely to encounter, disclaiming any intention to declare this anything more than a subjective, unscientific and generalized overview.

My central thesis is that there are three classes of resisters, who are for the most part Respondents:

- (a) Terrorists or Arbitration Guerillas
- (b) Conscientious Objectors or Arbitration Atheists
- (c) Skeptics or Arbitration Agnostics

Terrorists or Arbitration Guerillas

These are Respondents who are not interested in playing the game by the rules, usually because they have a bad case. They will try and exploit the procedural rules for their own advantage, seeking to delay the hearing and (if they get any opportunity) ultimately to derail the arbitration so that it becomes abortive or ineffective.

Their first strategy will be to try and find a technical objection to the Tribunal's jurisdiction so that, hopefully, they will be able the Tribunal to self-destruct by declaring that it has no jurisdiction over the dispute.

If the jurisdictional objection does not work, then they will take their case to a court (usually their own local court rather than the court of the seat) to seek to establish the jurisdiction of that court in

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place of that of the Tribunal. Such applications to court often include a prayer for injunctive relief against the Claimant from further prosecuting the arbitration. If the Claimant happens to be incorporated or carrying on business in the same country as the Respondent and therefore subject to the jurisdiction of that local court, the Claimant will be bound, under pain of contempt of court, to obey any order that local court may make even if it is not the court of the seat.¹ Even if the Claimant were not otherwise subject to the jurisdiction of the local court, it will be mindful of its need ultimately to go back to that court for enforcement of the Tribunal's award, so it will usually feel the need to appear in that local court to prevent any order being made which would pre-empt a subsequent enforcement application.

Assuming that these jurisdictional objections and applications for anti-arbitration injunctions fail, these Respondents will then adopt a campaign of guerilla warfare, trying to delay the arbitration hearing indefinitely and, if that proves unsuccessful, adopting provocative measures designed to produce over-reaction by the Tribunal, hoping that the Tribunal will take one or more mis-steps, so that the subsequent award becomes capable of challenge, either in setting aside or enforcement proceedings.

These Arbitration Guerillas will rely on the provisions that are applicable to most international arbitrations:

- the rule that each party must be treated fairly;
- the rule that each party must be given a full or reasonable opportunity of presenting its case; and
- the rule that each party is entitled to a hearing if it so requests.

Exploiting these rules, they will (among other things):

- fail to comply with the Tribunal's procedural orders in a timely fashion or at all;
- fail to pay deposits, leaving the other party to make advances on their behalf²;

¹ A new variation I recently came across has combined an attack on the jurisdiction of the Tribunal with an implied attack on the members of the Tribunal personally. An Respondent not only filed a challenge in its local court to the jurisdiction of the Tribunal, it also filed an action against the Claimant for the tort of "wrongful arbitration" claiming enormous damages and a conservatory order seizing the assets of the Claimant. I was a member of this Tribunal, and had some difficulty in persuading the other members (who were both from the jurisdiction of the local court) to make any orders while these court proceedings were pending, as they were fearful that any action taken by the Tribunal to advance the hearing would result in similar court proceedings being taken against the members of the Tribunal.

² Under the Rules of the Indonesian Board of Arbitration (BANI) the party who appoints an arbitrator is solely responsible for that arbitrator's expenses. I was once a member of a BANI tribunal where the party appointing me refused to pay for my expenses, and BANI

- discharge their lawyers and then apply for a postponement of the hearing because they need time to brief new lawyers³;
- ask for adjournments of hearing dates at the last minute on a variety of grounds (missing witnesses, local festivals, political events) when they know that the Tribunal's and Counsel's commitments will prevent an early re-fixing of the hearing;
- make a series of unmeritorious applications to the Tribunal, which are dismissed, and then mount a challenge to the Tribunal on the grounds of bias (in extreme cases they will even dismantle the Tribunal by revoking the appointment of their own party appointed arbitrator⁴).

The reasons that they will give for their actions or inactions will include (just as a sampling, since there is no limit to the ingenuity of Respondents):

- they cannot file their witness statements on time because their witnesses (who are expatriates) have gone back to their home countries owing to the danger of working in Muslim countries after 9/11, and their Muslim lawyers cannot travel to see the witnesses because of immigration restrictions imposed on Muslim visitors to Western countries (in shipping cases, the story is usually that a key witness is on a voyage somewhere and not expected to return anytime soon);
- they cannot comply with their discovery/disclosure obligations because their documents are kept at the Plant which is very far from the Head Office, and there are logistical difficulties in transporting so many documents from the Plant to the Head Office (and in any event they are short of human and financial resources to comply with extensive discovery/disclosure orders);
- they have no counsel on record (when it is clear that correspondence in their name has been drafted by external counsel); alternatively, they have just engaged new counsel, who needs

had no power to order the other party to advance my travel expenses, with the result that no physical hearing between the arbitrators could be held in Jakarta, the seat of the arbitration.

³ I was once counsel for a party who discharged me a month before the hearing because he felt that he needed an adjournment of the hearing as he did not want an award against him at that point in time. He therefore needed a reason to apply to the tribunal for an adjournment, and the engagement of new counsel seemed the best course in the circumstances. Interestingly, the Tribunal (composed of 3 experienced Singapore lawyers) refused the adjournment.

⁴ I was Chair of a Tribunal where the Respondent walked out on the grounds of alleged bias (which were subsequently dismissed by the ICC when a subsequent challenge was made). The twist in this case was that the Respondent not only left, but took its party appointed arbitrator with it, leaving me with a truncated tribunal.

more time to get up to speed (and he is a sole practitioner with little experience in international arbitration and with little back-up assistance);

- they need more time for compliance with procedural orders because of long religious holidays over the period specified for compliance (one month each for Ramadan and Aidilfitri for their Muslim staff, two weeks for Chinese New Year for their Chinese staff, two weeks for Christmas for their Christian staff, plus, for good measure, a week for Thanksgiving for their American counsel).

Arbitration Guerillas know that Tribunals will be anxious to be seen to be fair and properly appreciative of cultural differences, and they will therefore try and test this accommodating attitude to the utmost by asking for all kinds of indulgences, particularly in requests for more time. In local litigation, Counsel for the other party can often comment on the validity or otherwise of the reasons given in support of the applications for various procedural indulgences, and the local court itself can also judge the validity of these reasons from their own knowledge. It is much more difficult for non-Asian counsel and arbitrators to decide on the truth or otherwise of the reasons advanced by Asian parties for their applications. Even if they have suspicions about the validity of these reasons, if they cannot substantiate those suspicions in a manner that can speak for itself in their Award, they would still be fearful of a challenge or defence based on a breach of Article 18 of the UNCITRAL Model Law or Article V(1)(b) of the New York Convention.

Arbitration Guerillas also know that Tribunals do not usually have the power to make "Unless" orders, i.e. orders taking away the right of defending the claim from Respondents who do not comply with procedural orders, even if they default on timelines for filing documents and do not pay their deposits. They can usually be prevented from proceeding with their counterclaim, but that would not stop them from relying on their counterclaim as a set-off and hence as a defence.

Finally, as mentioned above, the true Guerilla will stalk the Tribunal, looking for ways to give the Respondent an opportunity to challenge the propriety of the arbitration in setting aside or enforcement proceedings on the grounds of lack of fairness or lack of opportunity to present its defence, and actively provoking the Tribunal into making orders that will give the Respondent an excuse to walk out of the proceedings on one or other of these grounds.⁴

How does a Tribunal deal with Arbitration Guerillas?

There is no easy answer to this. The Tribunal has to be aware from an early date that the Respondent is a Guerilla, i.e. a party who is not really interested in the ultimate verdict of the Tribunal on a dispassionate basis, but one who needs to deny the Claimant an award by any means.

The Tribunal will need to be on constant guard. It cannot presume on the goodwill of Counsel and the Parties, and will need to be aware that every decision taken by it will need to be justified on the face of the record. Where the Tribunal is about to deny an application (or overrule an objection) by an Arbitration Guerilla, it should take care to record its reasons for so doing somewhere in the record, either by reading it into the Transcript or by a separate letter to the Parties.

The Tribunal will have to mind its language, taking care that nothing in the Transcript can be used by the Respondent to make a case that the Tribunal demonstrated bias against it. Arbitrators who are used to making jokes at the expense of Counsel will have to rein in their levity and arbitrators who practise the art of Socratic dialogue with Counsel or witness questioning by the Tribunal will have to take care that such intervention does not appear to demonstrate any prejudice against the case of the Respondent.⁵

In short, the Tribunal needs to practice "defensive arbitration". It must take extreme care at all times not to give any excuse to the Arbitration Guerilla to make a challenge or an application to a court for an anti-suit injunction against the tribunal or similar relief.

Conscientious Objectors or Arbitration Atheists

These are commonly local lawyers who do not wish to fight foreign lawyers before a foreign Tribunal. They are not out to sabotage the arbitration because their clients have no defence, but they sincerely believe that their clients will get a better deal before a local court for the following reasons:

- they are inexperienced in international arbitration and do not know how the game is played;
- they feel that their clients may be at greater risk of liability because they are less capable of predicting the outcome; and

⁵ In such cases it will be the responsibility of the Chair of the Tribunal to exercise control over the other arbitrators who might be in danger of over-exuberance in their discourses with Counsel or the witnesses.

- they believe that their clients' witnesses may be better believed by a local court rather than a Tribunal composed of at least a majority of foreigners.

So they will try and fight the arbitration before, during and after the Tribunal has commenced its work:

- they will apply to their local courts for an anti-arbitration injunction regardless of the seat of the arbitration;
- they will challenge the Tribunal halfway through the hearing if they think there are grounds for removal; and
- ultimately, if there is an Award against the Respondent, they will resist enforcement in the court of the Respondent's home country.

How does a Tribunal deal with Arbitration Atheists?

Tribunals should realize that they are not dealing with arbitration saboteurs, but conscientious objectors to arbitration, who are sincere in their opposition, but none the less dangerous for that.

This is a long term problem. When a nation accedes to the New York Convention, it sometimes does not follow up by appropriate legislation to implement the enforcement procedure⁶ or by educating its judges as to how they should approach enforcement cases. The record of Asian courts (other than in Singapore and Hong Kong) in relation to international arbitration cases is spotty, to say the least⁷. This may not always be the local judges' fault if they have not received special training in principles of international arbitration. Tribunals cannot control what happens in the local courts, but they can try and do their best to ensure that the record of their arbitration indicates clearly the reasons for every significant step taken by them in the proceedings, so that, hopefully, their exemplary conduct of the arbitration will persuade a local court in a Respondent's home country that the foreign Tribunal is giving the Respondent a fair and unbiased hearing.

Hong Kong has got it right by appointing a dedicated arbitration judge who hears all cases dealing with arbitration. Singapore has recently followed suit. The body of arbitration jurisprudence from these two jurisdictions will undoubtedly contribute to the growth of understanding and acceptance

⁶ Countries where there has been a significant gap between accession to the Convention and the enactment of implementing legislation include Indonesia, the Philippines and Bangladesh.

⁷ See *The Good, the Bad and the Ugly* by Neil Kaplan *Arbitration* [2004] Vol 70 No 3 p 183 at 188 to 190 for some examples of questionable decisions by Asian courts in the field of arbitration.

of arbitration in Asia. Ultimately, judges (and hopefully lawyers) in Asia will understand that they should not intervene in any arbitration unless they are the court of the seat of the arbitration; otherwise they should simply refrain from intervention even if their own nationals are a party to the arbitration unless and until it comes before them as the enforcing court. Judges must further be educated that they must pay regard to Article II(3) of the New York Convention⁸ and grant stays of court proceedings as a matter of course where there is an operative arbitration agreement between the parties. Finally, they need to be educated not to deny enforcement of an award under the New York Convention save in truly exceptional circumstances.

The task of educating judges is a slow one. The International Council of Commercial Arbitration ("ICCA") has taken on itself this task in conjunction with its biennial Conferences and Congresses. In 2000 a Judicial Colloquium was organized in India for Indian judges in conjunction with the ICCA Conference in New Delhi, and a further Judicial Colloquium was organized in China in 2004 for Chinese judges in conjunction with the ICCA Conference in Beijing. But much more needs to be done on a continuing basis in the other Asian countries if more dramatic progress in judicial attitudes is to be made.

Skeptics or Arbitration Agnostics

These are persons who are not instinctively anti-arbitration, but whose experience of international arbitration has not left a good taste in their mouths. They will not automatically derail or attack an arbitration, but they will give the process an evaluation of 3 out of 10, and will dissuade clients and other Respondents from agreeing to arbitration as the preferred method of dispute resolution in their contracts.

Neophytes or Arbitration Wannabes

These are persons who are new to international arbitration and are prepared to be open minded about their reactions but who need guidance and persuasion, not unreasoned decisions based on the assumed wisdom of the tribunal. These are also likely to be people facing experienced arbitrators and opposing counsel, who may proceed with the proceedings in what experienced arbitration practitioners would consider to be an efficient and business-like manner, which may yet seem an unexplained mystery to the uninitiated

⁸ "The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article [i.e. an arbitration agreement in writing] shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement, is null an void, inoperative or incapable of being performed."

Why do Arbitration Agnostics and Wannabes not support arbitration? Their objections can be broadly divided into:

- matters of style
- matters of substance

Matters of style

They are put off by what they perceive as aggressive or arrogant behaviour of Western parties' counsel, particularly in cross-examination. If such behaviour is tolerated by the Tribunal, then they will believe that the Tribunal is sympathetic to such aggression and arrogance and is biased against their Asian clients. This feeling may be accentuated by the out-of-hearing conduct of the Tribunal, e.g. if its Western arbitrator only chats with the Western counsel during coffee breaks.

Asian counsel not from a common law jurisdiction may also not be used to the Socratic dialogue, so beloved of common law judges, which may be perceived as so interrogative in nature and manner as to indicate a prejudiced mind

Some Asian counsel and witnesses may not be as fluent in English as their Western counterparts and may feel disadvantaged as a result.

How should Tribunals address this problem?

Tribunals dealing with disputes between Western and Asian parties should take extra care to make parties and witnesses feel at ease and to believe that there is a level playing field regardless of differences of language and culture.

For those Counsel and witnesses unused to "robust" cross-examination, the Tribunal should make it clear that the silence of the Tribunal during such cross-examination does not necessarily mean that the Tribunal is supporting Counsel in his cross-examination and that the Tribunal will be keeping an open mind and neutral position throughout the proceedings.

Allowance must be made for witnesses and counsel who are not native speakers of English. Extra care should be taken to make sure that witnesses and counsel are given full opportunity to express themselves in a manner that can be understood by the Tribunal and the Tribunal itself must ensure

that it does understand what such witnesses and counsel are trying to say, however imperfect their English.⁹¹⁰

In short, tribunals should practice "ambassadorial arbitration" by taking pro-active steps to make the agnostics and the wannabes feel at home, or at least comfortable, in what (for them) would be a strange environment. A tribunal should aim, not only to do justice according to the merits of the case, but to make both parties (or at least their counsel) feel that they have had a fair deal and that there has been relative transparency in the process that has led to the ultimate verdict, even if unfavourable to one of the parties.

Matters of substance

Ultimately, arbitration agnostics and skeptics will say that their client was unhappy with the result, not just because they lost the arbitration, but because of the way in which they lost.

Here the problem goes beyond process into substance.

Asian contractual relationships depend on factors other than the letter of the law. Law and contracts as written are insufficient to maintain a commercial relationship. So when disputes arise, an Asian may not be satisfied with any solution that looks to the literal words of the contract to resolve that dispute.

In Asia, a contract is not the conclusion of the deal, but rather the beginning of a commercial relationship. As such, matters such as personal goodwill and the need to look at changed circumstances matter more than the words of a contract. Asians expect the subordination of law and contracts to evolving circumstances and relational values.

Most Chinese and Japanese contracts have a clause requiring parties to sit down and negotiate in good faith if any dispute arises. This would clearly be unenforceable under common law¹¹ and

⁹ I was co-arbitrator in an arbitration where the English Chair allowed American counsel to cross-examine European witnesses "robustly" for more than a day without comment. While the witness' English was perfectly competent for normal conversation, he was obviously at a disadvantage in trying to cope with a skilled cross-examiner who was a native English speaker constantly on the attack, and was unable to do justice to himself by his answers. When I interjected during one exchange to seek clarification of one answer from the witness, he was so relieved to hear a question from a friendly (or at least neutral) voice that he openly expressed his gratitude at finally hearing someone who did not question the good faith of his every answer. If a bi-lingual European felt difficulty linguistically in being able to cope with cross-examination, one can imagine how an Asian would feel.

¹⁰ On another occasion, I was sole arbitrator where Counsel appearing before me were Singapore counsel for the Claimant and Portuguese counsel for the Respondent. My whole instincts were to attune myself to the Singapore counsel's arguments simply because I had no problem in understanding his common law approach and his linguistic presentation. I had much more difficulty in understanding the Portuguese counsel's civil law approach and linguistic presentation. Yet I persevered, and bent over backwards to try and understand what the Portuguese counsel was trying to say. While I started off the case almost ready to give Singapore counsel everything he asked for, after I had finally understood what the Portuguese counsel's case really was, I allowed the Portuguese defence and counterclaim to a substantial extent so as to reduce the Claimant's claim.

¹¹ See *Walford v Miles* [1992] AC 128.

probably under civil law as well, but such clauses are taken seriously in the civil law countries of the Far East. Asian parties, particularly those not schooled in Western business traditions, view contracts as dynamic and evolving documents rather than fixing obligations in an immutable and static manner. The contract is therefore a source of guidance rather than determinative, and subordinate to other values, such as the preservation of the relationship and the accommodation of the other parties' legitimate business concerns.

Nevertheless, there is a gap between Asian expectations and Asian laws. For example, to my knowledge, the Asian Financial Crises of 1997 to 1998 have not been found to be a legal excuse for non-performance of any contractual promise in any Asian country. This is because all major Asian systems are derived from Western models. So, where any national law is the governing law, it is likely that strict standards of frustration and *force majeure* will be applied, whatever its composition.¹²

Civil law systems also pay greater attention to the concept of good faith than common law systems, but this concept is generally limited in its application to assisting with the interpretation or implication of contract terms. It is not used as a means of modifying the contract or as a means of subordinating the contract to other values affecting the commercial relationship. So this concept falls short as a vehicle of adjusting contractual obligations in the context of an East-West commercial relationship.

An argument could of course be made that the Asian approach to contractual provisions may be outmoded thinking, and Asian businessmen need to be brought into line with contemporary Western business practices.¹³

But if it is thought that they have a point, what then is supposed to be done?

As a starting point, parties should avoid using a national law as the governing law because few national laws can accommodate the expectations of Asians described above.

¹² This paper does not address the situation of BIT arbitrations where countries are respondents. In this connection, there is an interesting ongoing debate among international scholars whether certain defences available in public international law (e.g. necessity and *rebus sic stantibus* / Article 62 of the Vienna Convention on the Law of Treaties) could be invoked in BIT arbitrations by countries which are unable to fulfill their financial obligations.

¹³ A possible exception is the 1992 Dutch Civil Code, where Article 6:248 (a) provides: "rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity". See "International Commercial Arbitration in Asia" by Philip McConaughay (Juris Publishing Inc) Chapter 12 "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" at p 12-42 to 12-43.

Parties should then consider using an international convention, such as the Convention on International Sale of Goods. However, this is Western inspired, and may be interpreted in accordance with the strict standards of any Western law.

Parties may, as an alternative, consider using a system of law that allows for adjustments of strict legal rights according to concepts of fairness and equity. The UNIDROIT Principles of International Commercial Contracts, Article 3.10 provides:

"(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and

(b) the nature and purpose of the contract

(2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing:

*(3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has acted in reliance on it. The provisions of Article 3.13(2) apply accordingly."*¹⁴

Despite it being a relatively untested provision, this would seem to have the best opportunity of being widely accepted as a means of establishing a contract adjustment mechanism.¹⁵

Parties may also consider using:

- general principles of equity
- *Aequo et bono*
- *Amiable composition*

¹⁴ Article 3.13(2) provides: "After such a declaration [of willingness to perform the contract] or performance the right to avoidance is lost and any earlier notice of avoidance is ineffective."

¹⁵ These ideas are developed further in Chapter 12 of "*International Arbitration in Asia*" op.cit. end-note 13.

- *Lex mercatoria*

What practical problems arise from such a process?

First, much more importance will now attach to the decision maker than to the criteria for the decision

Second, some institutional rules do not allow this (the ICC and the Model Law allow this, but not the LCIA Rules, Rules 13.1(a) and (b) whereof require decisions in accordance with "rules of law")

Third, parties should consider using a national law blended with one of the equitable systems of law quoted above; this would give a national law some basis for predictability, but allow for modifications of the national law by the application of general principles of fairness and due faith.

Another method is to abandon the parol evidence rule for arbitrations so as to allow evidence of what the Asian party's expectations were of the contractual relationship to be received in evidence and given due weight.

Another aspect of change that should be considered is to allow arbitrators to also act as mediators:

- This is permitted by Singapore and Hong Kong legislation ¹⁶(16)
- It is positively encouraged by China and Japan
- However, the danger is that this may go against some legal traditions in countries which are used to different ideas of arbitrator neutrality

Ultimately, parties and their counsel will have to decide whether some or all of these measures would solve their problems. But parties who complain that the Western model of arbitration does not adequately address Asian concerns should realize that the solution (whatever it may be) lies in their own hands. All arbitration is a product of contract, and ultimately the parties to the contract are responsible for determining what terms govern their relationship.

¹⁶ Section 17 of the International Arbitration Act of Singapore; Section 2B of the Arbitration Ordinance of Hong Kong.