THE EVOLUTION OF INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION: FROM ONE SIZE FITS ALL TO BESPOKE SUIT

By Lorraine M. Brennan, Esq.

Several years ago, I was giving a talk in Parma, Italy, on international commercial dispute resolution and the dramatic changes the field had undergone in the past century. Looking around the room, I noticed that everyone was exhibiting *la bella figura* (this was Italy, after all); thus, I decided to use a clothing metaphor for my musings.

The "One Size Fits All" Era

The first phase of the evolution I referred to as the "One Size Fits All" period. Following the end of the Great War, business leaders from the U.S., the U.K., France, Italy, and Belgium—known as the Merchants of Peace—founded the International Chamber of Commerce, headquartered in Paris, France. The aim was to provide a forum to discuss business disputes and avoid another war. Once the institution was founded, the founders realized they needed a mechanism to resolve disputes, which lead to the founding of the ICC Court of Arbitration in 1923, although with rules of arbitration and conciliation. At that time, however, international arbitration was not widespread, as there was no international enforcement mechanism in place that made it a viable option. Moreover, the conciliation rules provided an opt-out for either party, thus rendering them essentially toothless.

With the advent of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the world finally had a treaty that would allow for enforcement of foreign arbitral awards. The Convention was concise, composed of only 16 Articles, and dealt with two issues: the enforcement of the agreement to arbitrate and the enforcement of the resulting arbitral award. The United States ratified the Convention in 1970, and to date there are 150 countries that are signatories. This development was a dramatic and major step forward for international commercial dispute resolution.

Two other very significant developments were the 1965 creation of the International Centre for Settlement of Investment Disputes (ICSID) (the Washington Convention), designed to deal with Investor/State matters, and the Iran/U.S. Claims Tribunal of 1981. Both bodies have contributed greatly to a "soft body" of international arbitration jurisprudence, and the Iran/U.S. Claims Tribunal elevated the status of the UNCITRAL Arbitration Rules by employing and adopting these rules for use at the Tribunal.

The "Pret-a-Porter," or "Ready-to-Wear," Phase

With the dramatic growth of international arbitration came problems and complaints about the cost and the length of the process. In response, the institutions entered the next phase of the evolution, the "Pret-a-Porter," or "Ready-to-Wear," phase, whereby a proliferation of institutions, both domestic and international, adopted their rules to meet these complaints. Institutions such as JAMS and JAMS International, the ICDR, CIETAC, HKIAC, SIAC, etc., offered rules and procedures for commercial parties designed to fill lacunae and streamline the process. They also offered new products to give the parties more choices. For example, most institutions added expedited rules to their traditional arbitration rules. Some institutions offered pre-arbitral procedures or emergency arbitrators, and many institutions made a sole arbitrator the default choice if the parties could not decide. In addition to the administering institutions, many organization, such as the IBA, the ABA, the College of Commercial Arbitrators and other entities, offered guidelines and protocols in an effort to streamline the process and make it more user-friendly and transparent. Different products were created, such as dispute resolution boards, primarily for construction disputes but with applicability to many long-term contracts. The dispute boards allowed projects such as the Hong Kong Airport and the Big Dig in Boston to proceed without being bogged down by endless litigation. Multi-tiered clauses and med/arb clauses became more common, and institutions such as WIPO created dispute resolution mechanisms for domain names, which were conducted entirely on the papers and with only two potential remedies: The complainant was entitled to keep their domain name, or they were not. In addition, a proliferation of other online providers, such as Click and Settle, E-courthouse, etc., were created, and the enormous online auction site eBay used a company called SquareTrade to mediate all complaints.

At the same time that international arbitration was growing and adapting, mediation was gaining significant ground, particularly in the domestic sector in the U.S. Indeed, mediation has taken on such significance that there is now a working group at UNCITRAL that is considering the efficacy of a mediation convention that would mimic the New York Convention by enforcing agreements to mediate and any resulting settlement agreement.

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The Future: The Bespoke Suit

So what does the future hold for international commercial dispute resolution? I refer to this upcoming era as the Bespoke Suit, tailor-made solutions for more educated users, who become more demanding of specific procedures to streamline the procedure and cut costs. Users are becoming increasingly more sophisticated and cost-conscious and more involved in the selection process. Mediation is definitely here to stay. Sophisticated users such as Bombardier, Siemens, Nestle, GE, etc., are all strong advocates of the process. A prolonged economic crisis might make mediation even more attractive to users who would prefer a guaranteed settlement to a court award that may never be enforceable due to bankruptcy or a unfavorable court ruling a party may not have been expecting. Arbitration will also continue to evolve. Two dramatic geographic growth areas at present are Asia and Latin America. While many of the major institutions have a presence in these areas, regional institutions have taken on a more important role and will continue to do so. It is my belief that eventually arbitration will look less Western European and will incorporate the local sensibilities and legal traditions of the regions.

Conclusion

The process has come full circle to some extent. The original goal of the Merchants of Peace was to foster harmony and keep businesses doing what they do best: business. I believe the current evolution will help achieve the goal of getting businesses back to work faster. It is our job to support the process and give the parties what they want and need to make the international dispute resolution system successful and workable for clients.

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