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Does a full house tribunal trump three of a kind for cost effective arbitrations?

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Abstract

There are problems in international arbitration which unnecessarily increase the time and cost of resolving disputes. A root cause is the high dominance of tribunals comprising three lawyers, without intimate working knowledge of the industry concerned. Parties to arbitrations have an incentive to change this. They have the power to reduce the resources they need to resolve disputes and to minimise the time required to have an award if they choose to do so. Arbitral institutions and CIArb have a significant role to play in expanding the pool of competent arbitrators to include technical specialists. The current situation is that some of the key institutions as well as counsel acting for parties rarely appoint arbitrators who are not lawyers. This ultimately acts against the interests of parties in international arbitrations.

Background

My involvement with arbitration started towards the end of a 45 year engineering career in aerospace and the international oil industry. I find that engineers and lawyers have much in common. We value precision, tend to be pedantic, enjoy the intellectual challenge involved and take great satisfaction in our work. As I've learned about law by completing the CIArb arbitrator training I came to realise that I could probably have enjoyed a career in law as much as I enjoyed my engineering career.

My research and my experience as an expert witness shows that international arbitration tribunals overwhelmingly comprise three lawyers. There are several factors that contribute:

1. The 'Old Boy' network - counsel for parties usually appoint other lawyers they know, who appoint a third as chair.
2. The 'Safety Factor' or the 'Predictability' theory. Institutions appoint from lists which contain mainly lawyers, whose customs and practices are known and are regarded as a 'safe pair of hands'.
3. 'Keep it in the Club' appointments. The institutional appointment committees I've been able to identify are nearly all lawyers. If you are not in this club you shall not be appointed. Management boards and top executives of arbitral institutions are mostly or completely lawyers. I present first-hand evidence below that even when asked to appoint an arbitrator from the industry involved and when one was both available and eminently suited to the appointment, a major institution still appointed a lawyer.

The effects of this situation can be seen in the Queen Mary University annual arbitration surveys. Users find the process too similar to High Court practices in litigation. Costs are too high, the arbitration is often delayed and when it occurs is lengthy and awards are made available in the far distant future. A classic example of the problems arising in delayed awards is that of a senior QC chairing a Tribunal who had still not issued the award 14 months after final submissions. 14 months after the hearings one of the tribunal took up an appointment with one of the parties to the dispute, giving grounds to challenge

any eventual award. Contrast this with an engineer arbitrator of my acquaintance who has never failed to issue an award within six weeks of hearings. I have issued 45 awards as a sole arbitrator, none took longer than 27 days from final submissions. I'm still looking for that first tribunal appointment more than a year after being accepted as a Fellow of CIArb and having built up some reasonable award-writing experience.

I now understand that not being a lawyer acts as a huge barrier to overcome in getting tribunal appointments; there is no level playing field here.

Evolution of modern commercial arbitration

Commercial arbitration developed among trade organisations or gilds, where disputes between members were arbitrated by other members. As members of the same trade would understand the issues involved in trade disputes, a speedy and cost-effective resolution to the dispute was likely and everybody could move on and concentrate on making money.

The Liverpool Cotton Brokers' Association was established in 1841 and became the International Cotton Association (ICA). The ICA website notes: "*The Liverpool brokers also developed a hugely successful system of arbitration to settle disputes between buyers and sellers, quickly and simply, without the need of expensive and time-consuming legal redress. Buyer and seller would nominate a broker to represent them and if the two brokers could not agree, a third would be selected to arbitrate. It is a system which survives in essence today*[1]." This was possibly the first modern arbitral institution. An ICA Arbitrator requires 5 years of experience in the international cotton industry and must be an ICA individual member. After completing the training, they are allocated a mentor and must observe at least 3 arbitrations of different complexities[2] before going solo. The ICA Bylaws 307 and 308 effectively cut lawyers out of the process[3]. Costs are low and most disputes are resolved in a reasonable time.

The Law Quarterly Review reporting on the 1891 inauguration of the new arbitration tribunal that was to become the LCIA said: "*Commercial interests were also seeking the adjudication of their disputes by their own; by a tribunal precisely familiar with the area of business in which the dispute had arisen, though this was not, of itself, a new idea.*[4]" This is not how it is now. Almost all modern LCIA cases appoint lawyers to tribunals. I was told by an LCIA insider that there are occasional appointments of a quantity surveyor or engineer but that these are rare. From starting as a dispute resolution organisation using people familiar with the business to arbitrate, LCIA is now a de-facto closed shop for lawyers to have tribunal appointments, with rare exceptions.

Controlling the role of experts in arbitration

When a tribunal with no industry expertise hears a dispute involving highly technical issues relating to a particular industry, the tribunal has no intimate understanding of the issues. I've written expert reports which had to be longer than they might have been. This was necessary to explain the most basic concepts involved to aid the tribunal due to this lack of industry knowledge. With experience as an author of a non-technical guide to the Drilling industry and with long experience of creating and delivering training I can do this but my time and of course my fees increase.

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[1] https://www.ica-ltd.org/about-ica/our-history/1830-1913/ for 2 April 1841. Viewed 2 December 2020.
[2] https://www.ica-ltd.org/arbitrator-training-faqs/ Viewed 23 November 2020.
[3] https://www.ica-ltd.org/media/layout/documents/rulebooks/bylaws-and-rules-november-2020.pdf page 50. Viewed 9 December 20.
[4] https://lcia.org/LCIA/history.aspx viewed 2 December 2020.

There is also the problem which arises on all-lawyer tribunals when the experts are wrong. If both experts agree on a point which is incorrect, that is the evidence upon which the case will be decided in keeping with High Court practice. Technical expertise within the tribunal may challenge such errors for the benefit of the parties.

The example of a technical oilfield dispute arising from a serious problem which could have tens of millions of dollars at stake comes to mind. Expert evidence will have a significant influence in these technical disputes. I attended a debate on experts hosted by LCIA at the London School of Economics in March 2020. This debate pitted a civil law jurisdiction lawyer, Professor Stefan Kröll against a common law jurisdiction lawyer, Wendy Miles QC. Professor Kröll argued the case that experts were mostly "hired guns" arguing the case for their appointing party. Ms Miles argued that experts were and had to be independent of the appointing party and provide an impartial expert opinion. While the "judge", Paula Hodges QC decided the debate for Ms Miles, Professor Kröll's experience indicated to him that many experts were obviously partial to their client's case. In my experience, I side more with Professor Kroll; about half of the expert reports I have read or had to deal with were partial to the case of the party appointing them. If the Tribunal included industry expertise, an expert witness would probably be more careful about being seen to be independent. It would be obvious to the industry expert arbitrators if an expert witness gave opinions which were unbalanced and partial to their appointing party.

Early in the arbitration, a conference between the parties, tribunal and experts could take place at which the expert issues could be agreed on. Having industry expertise on the tribunal would ensure that the substantive questions are asked and that irrelevant questions are excluded. This will help keep time and costs under control. This conference could define:

1) What questions the experts are required to answer, to assist the tribunal in reaching a decision. This limits the work of the experts to only answer questions that are relevant to deciding the dispute and prevents costs being incurred on answering minor, irrelevant or leading questions.

2) The body of documents and other data that the same subject matter experts for both parties need, in order to address the questions. That is, both experts on a particular subject should have access to the same data set from the parties in considering the questions from early in the arbitration. Ideally they would share an online resource of documents. This process of creating a Redfern schedule to request documents from the other party followed by document pingpong then a tribunal decision eats up a lot of time. I usually start to write an expert report based on some subset of data then have to ask for other documents. This increases the time and money spent. Tribunal expertise could start off by guiding the agreement of the parties on what documents should be made available from both sides. By example from oilwell drilling; there are some reports which are more detailed than others. The drilling contractor daily drilling report is always more detailed and accurate than the daily report written by the operator representative on the rig. Recorded data is invaluable to make a forensic analysis of events.

   Video evidence if it exists can show things not otherwise recorded and can be determinative. As a good example, I completed a forensic analysis and wrote a report on a well control incident where crude oil flowed from the well while removing two old production tubings on a dual completion. The drilling contractor shut the blowout preventer shear rams, severing the two completion strings and sealing the well. The contractor was accused of panic and unnecessarily shearing the pipe by the operator. I went offshore to gather evidence and interview those involved. Sitting with the operator's representative Drilling Supervisor I asked if there was any rig-floor video; he said not. Then he remembered that on his previous trip to the rig, a video

camera had been installed on the accommodation near the helideck. We found the recording; the camera was looking right at the rig floor and showed the whole incident. Nobody panicked; in fact the well flowed crude oil jetting up to 40 ft in the air for 13 minutes and 9 seconds before the BOP was closed, the pipe was cut and the well made secure. The video allowed a precise timeline to be built and tiny but key details were available that would otherwise never have been known. It also provided absolute proof that there was no panic and absolved the contractor from blame. This was key because it took several days to sort out the well and retrieve the cut tubing at a significant cost. The video presented in evidence would be easily understood by someone with Drilling experience but to others, it would require a blow-by-blow explanation of what was happening and what that all meant.

3) A timetable for the experts to do their work. This could include at what stage the experts should meet to agree on common expert opinions and identify where their opinions diverge, prior to submitting their draft expert reports.

Expert reports would not need to include tutorials on normal industry practices. With industry expertise on the tribunal, an early opinion could be given – without pre-judging the matter – of which claims are thought to have less merit and would therefore require particular attention to prove the case if the party decided to continue with those claims.

An appeal against an award under the Arbitration Act 1996 s68(1) written by an industry specialist acting as arbitrator failed[5]. The arbitrator heard expert evidence from both parties, was able to filter out inappropriate expert opinion and make an award. Halliwell M noted in the judgment at paragraph 31: "*I am not satisfied there is any irregularity in the Award. There is thus no room for* ***serious*** *irregularity.*" An arbitrator without industry expertise would be unlikely to make this analysis of the expert reports.

An interesting research project at the University of Michigan is relevant to comparing the likely performance of a homogenous tribunal compared to a diverse tribunal in solving the problems of judging issues and drafting an award. The report **Groups of diverse problem solvers can out-perform groups of high-ability problem solvers**[6] stated:

> *"We find that when selecting a problem-solving team from a diverse population of intelligent agents, a team of randomly selected agents outperforms a team comprised of the best-performing agents. This result relies on the intuition that, as the initial pool of problem solvers becomes large, the best-performing agents necessarily become similar in the space of problem solvers. Their relatively greater ability is more than offset by their lack of problem-solving diversity."*

By "problem-solving diversity", the report refers to "*differences in how people encode problems and attempt to solve them*". These results are identified in other studies; the Kellogg School of Management published a paper **Better Decisions Through Diversity**[7] which concluded that:

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[5] Field & Others v Network Rail & Others, [2020] EWHC3440 (Ch) https://www.bailii.org/ew/cases/EWHC/Ch/2020/3440.html viewed 28 December 2020.

[6] . See https://sites.lsa.umich.edu/scottepage/wp-content/uploads/sites/344/2015/11/pnas.pdf viewed 1 October 2020.

[7] https://insight.kellogg.northwestern.edu/article/better_decisions_through_diversity viewed 1 October 2020.

> *"In the study, diverse groups outperformed more homogeneous groups not because of an influx of new ideas, but because diversity triggered more careful information processing that is absent in homogeneous groups."*

If a panel comprises three lawyers, the ability of this panel to provide optimum judgments of disputed issues would be lower than if the panel is more functionally diverse. In the example of a dispute involving matters which are technical in nature, there is a significant benefit to the functioning of the tribunal if the arbitrators have specialist knowledge of the technical field. Within a mixed tribunal there is then a group ability to understand the issues and evidence, identify expert opinion that is impartial or not and draft a just award.

If a tribunal comprises a homogenous group of lawyers, the default process is most likely to reflect their normal professional arena – a courtroom where the issues are judged, positions are entrenched and agreed settlements are rare. I see my role as an arbitrator to facilitate an agreed settlement if that is possible, to control costs and give a rapid award if not.

For arbitration as a dispute resolution mechanism to continue to develop and grow, the pool of available arbitrators must necessarily increase and become more diverse. The only way to grow the pool of arbitrators is for parties and institutions to appoint more qualified technical arbitrators for their first few appointments. While the lack of actual tribunal experience combined with not being a lawyer is a huge barrier to overcome, every tribunal member in history was once given their first appointment. Qualifying as a lawyer should not be a pre-requisite to being appointed to a tribunal, neither should prior appointments.

What do arbitration stakeholders think?

The 2018 Queen Mary University survey on international arbitration[8] had some findings relevant to this article. The survey asked questions about diversity on the tribunal but this referred to gender, age, cultural and geographical origin rather than having a panel with diverse capabilities. Several parts of the survey point to the need for a wide and diverse pool of arbitrators. If non-lawyers have a high bar to entry, that effectively excludes a great many people with technical capabilities and sufficient legal knowledge from joining that pool. The survey concluded that the biggest influence on getting diversity in appointments was the arbitral institutions (45% of respondents), with the parties and their in-house counsel coming in second at 27%. The Report also noted that "… *actual appointments still fail to reflect the larger pool of available arbitrators and rather continue to perpetuate the nomination of repeat players*".

In the Energy sector, respondents primarily think that "*publicly available rosters of arbitrators with specialist industry/sector experience*" and "*more industry/sector-specialised arbitral institutions*" would make international arbitration more appropriate for energy disputes. These findings underscore the ever-increasing complexity of energy disputes. For a satisfactory dispute resolution process, users feel the need to have ease of access to databases with arbitrators boasting significant experience in this field. Equally, they wish the administering institutions to be well versed in dealing with energy disputes and their corresponding particularities (e.g., the possibility of having arbitrators travel to certain locations for on-site inspections).

[8] http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF viewed 6 November 2020.

A growing concern in international arbitration is a perceived reluctance by tribunals to act decisively in certain situations for fear of the award being challenged on the basis of a party not having had the chance to present its case fully ("due process paranoia"). Page 3 of the report stated: *"Due process paranoia" continues to be one of the main issues that users believe is preventing arbitral proceedings from being more efficient. "* This was evident in earlier QMU surveys and so is seen as a persistent issue. This ("due process paranoia") is why lengthy High Court practices prevail. As one eminent arbitrator recently said to me, "*the problem with retired High Court judges becoming arbitrators is that they bring too much baggage of both the law and practices of the High Court*". This is especially a problem in international arbitration where references to the Civil Procedures Rules, the Brown book[9] or the White book[10] should have no place.

Having 3 eminent lawyers, all experienced arbitrators with 2 QC's on a tribunal does not guarantee that the award is not successfully contested: see *Herculito Maritime Ltd and others v Gunvor International BV and others* [2020] EWHC 3318 (Comm)[11].

UK All Party Parliamentary Group for Alternative Dispute Resolution report[12]

The APPG recognises the UK's status as the world's leading international disputes hub but also understands that to keep that status, it's necessary to continue to develop ADR practices. Section 7 of the report entitled "***Beyond lawyers: a holistic approach to disputes***" makes a number of points about encouraging more non-lawyer industry experts to practice.

"Many high value disputes in international arbitration are becoming exceptionally large-scale, with vast numbers of participants on both sides. Additionally, as the stakes get ever higher in high-value and complex commercial arbitrations, party demand for an ever-narrowing pool of 'celebrity arbitrators' (usually with an extensive background in corporate law) creates something of an arms race when appointing a tribunal. Both dynamics create a climate in which an arbitral tribunal increasingly resembles the court room to which it was meant to provide an alternative".

The report notes that "*However, arbitration has come under increasing criticism for too closely emulating the litigation process it was meant to provide an alternative to.*" This is unsurprising if tribunals are composed of all lawyers or chaired by an eminent judge as they will naturally follow the processes they are trained to use.

The report recognises the importance of having a diverse range of backgrounds, both legal and non-legal, in continued development of dispute resolution. This leads to their 5th recommendation:

5. The UK and Singapore Governments should work with professional bodies and training providers to increase the number of non-lawyers practicing dispute avoidance and resolution.

Two more paragraphs of this section emphasise the need to change the way that tribunals are appointed;

Crucially, dispute avoidance, management and resolution mechanisms need to continue to offer genuine alternatives to court – they must not become imitators of the litigation process.

Many of the disputes the businesses we spoke to faced were highly complex and required extensive background knowledge of the industry in question. Neutrals can only be effective in this context if they

[9] https://www.lexisnexis.co.uk/store/products/civil-court-service-2020-the-brown-book-hardcopy-and-cd-skuuksku9781784734480CCS83769/details viewed 29 December 2020.
[10] https://www.sweetandmaxwell.co.uk/whitebook/index.aspx viewed 29 December 2020.
[11] https://www.bailii.org/ew/cases/EWHC/Comm/2020/3318.html viewed 22 December 2020.
[12] https://ciarb.org/media/12067/appg-report_digital.pdf viewed 2 December 2020.

are rooted in the dynamics of that industry – and in mediation the sense was that this sectoral expertise is more important than extensive legal training.

The Arbitral Institutions

The 2018 Queen Mary survey found the 5 most popular arbitral institutions internationally to be ICC, LCIA, SIAC, HKIAC and SCC.

International Chamber of Commerce

The ICC allows non-lawyers who are appropriately qualified to register on its database for a monthly fee. The 6 person panel who make up the appointments committee don't publish their names but all the ones I can identify are lawyers. While it is theoretically possible to get an ICC appointment without being a lawyer, the gate holders are lawyers. I was unable to get statistics from ICC about how many non-lawyers were appointed by the ICC.

London Court of International Arbitration

LCIA have a database of potential arbitrators which is separate from LCIA membership. That is, it's not necessary to be an LCIA member to be in the database. LCIA stresses that membership does not guarantee appointments – which should surprise nobody at all – and is separate from the database. The benefits of membership are supposedly the networking at conferences rather than appointments. It seems to me to be unlikely that somebody in the database who is not listed as an LCIA member would get appointed by LCIA and the main reason anyone pays to be a member is to open a route to an appointment.

The Director General of LCIA told me in an email that "*The bulk of the LCIA cases call for the appointment of lawyers.*" Of the 566 appointments made by LCIA in 2019, I asked (as a current member) how many were non-lawyers and how many were non members (ie picked from the database rather than the membership list) but received no reply.

I have first-hand evidence that LCIA do not appoint suitable non-lawyers in a technical dispute even when asked to by a party. Jim Daniels is a highly experienced Drilling expert who has also been an active arbitrator for many years, including chairing international arbitration tribunals in cases not involving drilling. He is an engineer, not a lawyer. Here is his experience.

"I was selected for an arbitration over some Dubai offshore platforms and Richard Siberry was the Chairman. Richard is an expert on banking and insurance especially as it relates to shipping. Some time later I was appointed Expert for an LCIA arbitration and realised that the three members of the panel (the panel being an LCIA selection and appointed one) were QC's with Richard Siberry as Chairman. Of course on accepting the Expert role I had to declare very early that Richard was also Chairman of the Dubai arbitration. The LCIA arbitration was purely about drilling and rig performance for a well offshore Tunisia - right up my street and I ought to have been a shoe-in for selection as arbitrator. I was a fully paid up member of LCIA.

At a conference I asked, in a social context, as to why I had been ignored for consideration as arbitrator for the Tunisian one and was told "the parties requested QC's". I later found out this was a complete lie and the rig owner had wanted an arbitrator with oilfield experience. Armed with this knowledge I asked the LCIA again as to why I had been omitted and was told "LCIA only appoint barristers - you have no chance!"

Because I was Expert on this case I could monitor how effective the panel were and how much better my contribution could have been. The panel were lost without my input and had I been on the panel the dispute could have been resolved months earlier."

If somebody who is able to act as an arbitrator but is not a lawyer pays money to join LCIA, it should be made expicitly clear that while membership has benefits and is a route to appointments, non-lawyers almost never get appointed. Accepting membership fees knowing that the payer has an expectation of a benefit which is vanishingly unlikely to occur without pointing this out is disappointing.

The 44 member of the LCIA Court are all lawyers[13] as are the 15 members of the LCIA Board[14]

Singapore International Arbitration Centre

SIAC does not require applicants to the SIAC Panel to be a lawyer[15]. They do recognise Fellowship of the Chartered Institute of Arbitrators as one of their eligibility criteria. The applicant must have written arbitration awards. There is a non-refundable fee of S$535 (about £300) to apply to join the panel.

Of 551 arbitrators on the SIAC panel, I found 13 who are not lawyers[16] by the simple but exhausting process of following the website links to review the CV's of the people on the panel. I received replies from five of the non-lawyers. One engineer decided to become a barrister so as to increase the chance of appointments as "*most disputants prefer to appoint those who are legally qualified*". I didn't pick this up because his CV on the website hadn't been updated. One did not want to answer my questions directly but agreed that lawyers dominate in all the major seats except in maritime, commodity and construction arbitrations. One had 4 SIAC appointments in 13 years. One was listed with SIAC for many years and had one appointment as a sole arbitrator on a small case.

Hong Kong International Arbitration Centre

HKIAC have a Panel of Arbitrators and a separate List of Arbitrators[17]. The panel requires substantial experience as an arbitrator and the list requires substantial experience in arbitration but this can include work as an expert or counsel. Both the Panel and List require two redacted arbitral awards to be submitted. The List is used for those with less experience as an arbitrator to be considered for appointments in lower value disputes.

Upon enquiring about the criteria used for selecting an arbitrator, HKIAC sent me a list of 15 items, none of which required legal qualification.

The HKIAC Council of 24 members has some diversity with 83% lawyers[18]. Of the 11 members of the Appointments Committee, 10 are lawyers[19].

Stockholm Chamber of Commerce

The SCC website does not give any information about how appointments are made or how to be considered. The 15 members of the board of SCC are all qualified as lawyers. I sent an email enquiry to the secretariat asking if they would consider me (as a technical non-lawyer arbitrator) for their list of possible appointees. This was answered by the Deputy Secretary General who said that SCC does not keep a list of arbitrators or offer membership but I was invited to send my CV which would be kept for future reference.

[13] https://lcia.org/LCIA/the-lcia-court.aspx viewed 7 December 2020.
[14] https://lcia.org/LCIA/the-lcia-board.aspx viewed 7 December 2020.
[15] https://www.siac.org.sg/our-arbitrators/standards-for-admission-to-siac-panel viewed 4 December 2020.
[16] https://www.siac.org.sg/our-arbitrators/siac-panel viewed 9 December 2020.
[17] https://www.hkiac.org/arbitration/arbitrators/criteria-application viewed 4 December 2020.
[18] https://www.hkiac.org/about-us/council-members-and-committees/hkiac-council viewed 7 December 2020.
[19] https://www.hkiac.org/about-us/council-members-and-committees/appointments-committee viewed 7 December 2020.

London Chamber of Arbitration and Mediation

A recent addition to the London arbitration scene, LCAM lists 23 arbitrators on their panel[20]. These are all lawyers and include 5 Barristers and 7 QC's. My requests for consideration to join the arbitrator and mediator panels was unsuccessful as they were "*currently focused on marketing our services*". It's not clear to me why marketing and considering applications to join the panel are mutually exclusive activities.

GAR News reported on 25 February 2021 that Peru may pass a law restricting arbitrators in domestic cases to people who have legal qualifications certified by a state regulator. This appears to bar foreign lawyers and all non-lawyers from acting as arbitrators. The Peruvian Arbitration Act is based on the UNCITRAL Model Law and governs both domestic and international arbitrations. It remains to be seen whether this law is passed and if it does, if it is later applied to international arbitrations seated in Peru. The Model Law article 11 (2) says that "*The parties are free to agree on a procedure of appointing the arbitrator or arbitrators …*", setting out the principle that parties are free to choose their own arbitrators. Mandating legal qualifications negates that right.

Arbitrators

I consider that the duty of an arbitrator is to give the parties an enforceable award at the lowest cost and within a reasonable time. There are two routes to the award; an agreed settlement between the parties or an award that represents the final judgment of the tribunal. It follows that a duty to provide an award at the lowest cost needs the tribunal to encourage the parties to bring an agreed award to the tribunal, even if mediation had tried and failed. Settlement facilitation, reducing costs and time involved, gives the best service to the parties while of course reducing the fees of the tribunal, counsel, experts and others.

Each tribunal member should have sufficient time to dedicate to the arbitration and to issue a timely award. I heard one lawyer-arbitrator comment that they were on 18 tribunals, some as Chair. If a few arbitrators get large numbers of simultaneous appointments, this might make issuing timely awards difficult. It also reduces tribunal diversity and opportunities for new arbitrators to get a start.

Ideal tribunal

The five pillars of international commercial arbitration which parties find important are enforceability, avoiding specific legal systems, flexibility, ability to choose arbitrators and confidentiality. Opposing this are high costs, lack of willingness by tribunals to use effective sanctions against timewasting, time to obtain an award and "due process paranoia" (QMU 2018 annual survey).

An ideal tribunal would fulfil the 5 pillars while addressing the negatives by offering the following characteristics among the panel;

1) Intimate familiarity with the matters in dispute; technical expertise. Specific industry experience. Understand which documents requested are material to the dispute.
2) Willingness to use available sanctions and act decisively in managing costs and time.
3) A positive attitude towards encouraging the parties to settle early in the dispute.
4) Ability to draft an enforceable award within a reasonable time. Fellows of CIArb have been trained and examined on this, whether or not they are a lawyer.

[20] https://lcam.org.uk/the-panel/# viewed 30 December 2020.

I conclude that an effective arbitral tribunal would not comprise 3 people of similar backgrounds to increase problem-solving diversity. For a dispute involving highly specialist issues, a tribunal will be more likely to issue an award that is a fair, speedy and cost effective resolution if the tribunal has relevant specialist expertise. One lawyer on the tribunal should be enough to address any legal issues to be considered, unless the whole dispute hinges on contract interpretation so that all the issues are legal.

Solutions

This is a problem that should be solved because the current situation is disadvantageous for the parties who use and pay for arbitration. It increases costs, takes too long, does not do enough to facilitate settlement, mirrors courtroom procedures. It mitigates against future development of international arbitration. Solving this problem requires actions from the various stakeholders. Ultimately, parties fund the whole system and this gives them the power to force change.

Parties

1) Arbitration clauses can mandate against all-lawyer panels or require at least the chairperson to be an industry expert, to provide expertise and to prevent a default to courtroom procedures.

2) Counsel can be instructed to find suitable industry experienced arbitrators.

3) Make a condition of appointment that an arbitrator does not have too many simultaneous appointments. This would ensure they have the time to dedicate to the dispute and would also encourage timely awards as their ability to accept more appointments would be constrained by this limit. It would also spread out the work and lead to more arbitrators becoming available.

CIArb

The Chartered Institute of Arbitrators offers excellent training in international arbitration with their training pathway. This takes at least two years to work through the legal subjects syllabus and culminates in a final exam requiring an enforceable award to be drafted. After completing the pathway, a candidate can request a peer interview to become a Fellow. There are many people without a legal background who complete the course and become a Fellow but from that point, the Institute provides no help at all in getting that first tribunal appointment. The Presidential Appointments are made from a panel of "*senior and experienced practitioners*" who are Chartered Arbitrators[21]. But how to become Chartered without being able to get appointments?

At the time of writing, there are over 4000 Fellows of CIArb, of which around 500 are chartered. That is a powerful network to help those just qualified. While some people become Fellows without actually wanting to become practicing arbitrators, for most that is probably not the case. The Institute should have an interest in widening the pool of available arbitrators and in helping those trained by the Institute to progress to being chartered. It would not take much effort or resources to:

4) Offer any Fellows with no previous appointments a mentor who are active in the particular type of dispute that the Fellow has the experience to arbitrate. The mentor would try to arrange for the Fellow to attend arbitrations as an observer and would try to arrange for the Fellow to be considered for a suitable appointment. The big problem is that without experience or legal qualifications, you're unlikely to even be considered. Being considered and not being appointed is fair enough.

[21] http://ciarb.org/disputes/presidential-appointments/ viewed 2 December 2020.

5) LCIA have a searchable online directory of members which is populated and updated by the members themselves. CIArb could set up a similar directory of Fellows which could be searched by various criteria by those needing to make an appointment.

6) Fellows who are counsel making appointments could use the directory to identify suitable candidates for consideration or for mentoring.

Arbitral institutions

7) Encourage non-lawyers with industry experience to become listed as possible arbitrators. Set it up so that the list can be easily searched to find arbitrators with relevant industry experience, availability and other required attributes such as language.

8) Waive application or membership fees for those who have had less than four tribunal appointments.

9) Facilitate training, for instance by referring a candidate to CIArb.

10) Have a mix of people on appointments committees to include non-lawyer practicing arbitrators.

11) Arrange for arbitrators with no experience on a tribunal to observe arbitrations, perhaps as a free assistant tribunal secretary.

12) Limit the number of simultaneous appointments that an arbitrator can accept.

13) Provide annual statistics on appointments, allowing analysis of the extent to which non-lawyer arbitrators are appointed and how many first appointments are made.