THE CHANGING FACE OF 21ST CENTURY DISPUTE RESOLUTION

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The future management of international trade disputes involves genuine systemic change, and new attitudes, skills and structures, says Martin Hunter

In 2000, I predicted that we would experience a proportionate decline in the engagement of third parties in resolving mature international trade disputes. I also felt that the level of expansion of work for arbitrators and mediators would decline, while there would be an increased demand for dispute management specialists. And these predictions are now becoming realities.

Arbitral advantages

The preference for arbitration in international transactions has nothing to do with speed and cost saving, which are often emphasised at arbitration conferences. In practice, these advantages apply only in domestic arbitrations before a sole arbitrator and even then only in specialised fields such as maritime or commodities.
The main reason why arbitration clauses are seen in international commercial contracts is that corporations and governmental entities engaged in international trade are simply not willing to litigate in the other party's 'home' court. This is not just because of any perceived bias on the part of national judges – there are other much more practical reasons for not playing an 'away game' unless absolutely necessary.
The other positive feature lies in the treaty obligation for enforcing arbitration awards across national boundaries. In contrast, it may be difficult to enforce a favourable judgment of a national court in another country as there are no multilateral treaties covering the reciprocal enforcement of court judgments.
For these reasons, arbitration will always be needed where a final and enforceable outcome is necessary. On a number of occasions I have seen situations where the client needed an award – a final and binding solution imposed by a third party – rather than an agreed compromise settlement or even a 'consent award'.
However, not everything is right with international arbitration. Generally, it is lengthy and costly, and the outcome will be 'rights' rather than 'interest'-based.

Mediation
Developed in the US for use in purely domestic disputes, during the 1990s, mediation and its associated ADR offshoots made a significant impact in the international arena – they proved they can work just as well, at least in cases that are susceptible to compromise solutions.
The preference for mediation comes from the commercial clientele's disenchantment with the cost and time involved in litigating in national courts and international arbitration, and a growing feeling among international traders that 'interest- based' solutions may produce better outcomes in the medium to long-term than 'rights based' solutions.
The result is that the major international arbitration institutions are developing their ADR facilities and capabilities with understandable urgency, because these things are market-driven. The AAA, the ICC, ICSID, the LCIA and WIPO all promote their own sets of conciliation or mediation rules; and there are many domestic organisations offering mediation services, particularly in the US and other common law jurisdictions. Most offer training for budding mediators, while some offer diplomas or other such opportunities.
Mediators bring many useful skills to the bargaining table – in particular, neutrality and a sense of structured informality to the proceedings. They may also receive information that neither side is willing to impart to the other, and then use this information as an element in their strategy to help guide the parties towards agreement.

The future of dispute management
Only genuine systemic change can alter the role that commercial lawyers, international or domestic, private practice or in-house, should play in dispute management. The main reason that many do not negotiate well in a dispute resolution context is because historically it has not been their job. They are litigators or advocates who sometimes attend negotiation sessions, where they are often operating outside their comfort zones.
I foresee a new breed of lawyers becoming actively involved in preventing disputes getting 'out of hand' before they mature into intractable situations. Dispute avoidance teams are likely to be set up around the world, both as independent entities and also within major law firms and as in-house teams in large corporations. The deployment of such resources at this stage of the process would be an eminently sensible investment.
It is unlikely that the current narrow focus on the third party intervention model will last very far into

the 21st Century. As international business becomes more sophisticated, so will its desire to solve problems fast and painlessly. This will require attitudes, skills and structures designed to enable commercial transactions to be supervised effectively in order to prevent disputes from arising; and, when disputes prove to be unavoidable, for the parties to have available the separate but related attitudes, skills and structures to resolve them promptly and fairly through direct negotiation.
I hope that the next generation of international trade lawyers will be able to be a part of this development. The challenge for law firms, law schools and practitioners is to participate in devising the type of structures I have described and to find ways of teaching the next generation the attitudes and skills they will need in order to operate successfully within those structures.

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