

Petillion

Bifurcation of disputes at transaction level

by Flip Petillion

Traditionally, authors have addressed the choice between court litigation and arbitration proceedings either at the moment that a conflict arises or when drafting a jurisdiction clause in a contract. They also tend to only analyse the pros and cons of both alternatives.

However, there is another way to look at this. Twenty years ago, we adopted an approach that may have been unconventional at the time. Now, many years later, we can easily conclude that this way of handling possible disputes has been very successful, especially with a view to avoiding disputes all together. We named it the escalation approach. The approach aims at avoiding further escalation of a conflict. This article will consider this approach and give further insight.

In brief, we support the idea that different issues call for different solutions. Some tend to require a full throttle arbitration proceeding, others may be resolved through negotiations, mediation, audits, expert determination, etc.

Whereas in many jurisdictions the judiciary has moved from a central to a decentralized approach, we have noticed another trend: The judicial authority has become distributive. Private initiatives for more efficient dispute resolution tailored to sector-specific needs have resulted in the administration of justice becoming more fragmented, but also more specialised. Illustrating this evolution are specialists in their field who jointly develop new standards in multi-disciplinary teams and who become increasingly involved in enforcing those standards through self-regulation. This is especially apparent in fields of new technologies and cyberspace.

In an article that we have prepared for the ICCA conference taking place in Sydney on April 15-18, we have demonstrated that some processes and developments in the dispute resolution rules and practices of international alternative dispute resolution institutions such as ICDR, ICC and WIPO can prove useful in international commercial arbitration generally. We have also identified a specialisation in dispute resolution approaches: Specific procedures are developed to address specific issues, creating efficiencies that may have gone astray in

modern-day arbitrations. We concluded that international commerce requires increased efficiencies. For international commerce to succeed in its quest for more efficient dispute resolution, it should embrace other forms of processes by getting a deep understanding of new methods of dispute resolution and by allowing these methods to narrow down the dispute before it is brought to arbitration.

More international business lawyers and in-house counsel should familiarise themselves with self-regulatory initiatives and introduce these into dispute resolution formats.

Why not do so when negotiating deals?

More attention should go to identifying possible conflicts and understanding the mechanics of a dispute and the means of tackling these conflicts early on in the dispute. Specific problems may call for different solutions. Do parties really need to submit their dispute to arbitration or can they resolve their dispute by submitting a targeted question to an agreed-upon expert? If the source of the dispute can be identified early on in the process and narrowed down to its core, a more tailored approach is feasible.

Financial, accounting, legal, commercial, administrative, technical or other issues can be evaluated in function of sector-specific practices by calling upon appropriately qualified experts or targeted dispute resolution policies before escalating issues to a more litigious setting. The disputes that cannot be resolved accordingly may funnel through to arbitration. By reserving arbitration for complex and multi-layered disputes, arbitration is capable of building bridges between the different dispute resolution practices.

Compartmentalising the dispute before escalating it to a more litigious setting can also be referred to as bifurcation at transaction level. English dictionaries define bifurcation as 'the division of something into branches or parts.' In the jargon of international arbitration, bifurcation refers to splitting arbitral proceedings in distinct phases, where subsequent phases are dependent upon the outcome of the

previous phase. Situations where bifurcation in arbitral proceedings may be appropriate include, for instance, (i) the separation between a first phase in which the tribunal is asked to rule on jurisdiction and a subsequent phase dealing with the merits of the case, or (ii) deciding on liability before parties enter into the phase of quantifying damages.

In arbitrations, bifurcation may create efficiencies when issues reserved for a subsequent phase become moot because of a finding in the first phase. A dispute can sometimes be settled during the first phase or the splitting of issues may help identify the scope of the dispute.

The bifurcation of issues in a pre-arbitration or transactional context may also contribute to the efficient resolution of disputes.

Bifurcation will not always be more efficient. If a dispute cannot be resolved during an early phase of the proceedings, bifurcation might extend the overall duration of proceedings and/or increase costs. The problem is that, quite often, these adverse effects will be apparent only afterwards. In individual cases, these adverse effects may be avoided by making a *prima facie* assessment as to whether bifurcation is likely to result in an accelerated resolution of the dispute (through settlement or otherwise).

On a more general level, understanding the types of disputes that may arise and identifying appropriate dispute resolution mechanisms at the time of concluding the transaction will likely create more efficiencies. When negotiating an agreement, parties should try to ensure that the dispute resolution mechanisms are in line with their internal decision-making processes. Understanding the internal decision-making processes and knowing when to escalate issues internally within the organisation can help identify problems at an early stage and tackle them before the conflict risks outgrowing itself.

More sophisticated companies will constantly monitor their internal policies and processes to make sure that they are aligned to the dispute resolution mechanisms

available to them. Where necessary, they will adapt their policies and processes. This focus on dispute resolution, already during the transaction phase, not only helps streamlining conflicts when they arise but also prevents conflicts from happening as issues are addressed early on in the process.