Empowering the Growth of International ADR
The supply side and the demand side can do it together

Michael Leathes[1]

In recent years, corporate users of ADR services have demanded greater transparency into the skills, experience and suitability of ADR providers and the adoption of stronger professional ethical standards and disciplinary processes. These calls are turning into dissatisfaction. The markets serving corporate client needs can, without great effort or cost, address the user demand quickly, effectively and economically worldwide. This opinion piece suggest how that can be done and invites views via an online comment page for a follow-up piece.

In May 2007, Michael McIlwrath of GE Oil & Gas published an article[2] in Arbitration, the journal of the Chartered Institute of Arbitrators, entitled *Grading the Arbitrator*. He proposed that, using a questionnaire, parties should give feedback to arbitrators on how they managed and handled the process. He suggested that, in an appropriate way, that feedback should be publicly available as an aid to the notoriously difficult but critical task of selecting competent, suitable arbitrators. Arbitrators claimed the quality of the feedback could be influenced by outcome bias, but Mr McIlwrath suggested that this could be overcome by a system of quality control[3]. In articles[4] in 2005 and 2006, Professor Catherine Rogers at Penn State Law had floated similar ideas, including a fee-based service to which parties could subscribe. The arguments in favor of a feedback scheme extended beyond facilitating arbitrator selection and extended to improving the predictability, and therefore the reputation, of arbitration.

In 2008, the International Mediation Institute (IMI)[5] launched its mediator certification scheme, at the core of which is an independently-prepared Feedback Digest based on a Feedback Request Form and an identification of the Code of Conduct and Disciplinary Process to which mediators publicly subscribe. About 400 mediators are now IMI Certified and there are 26 Qualifying Assessment Programs in 16 countries that enable ADR institutions and trainers to qualify mediators for IMI Certification, with more in the pipeline.

The past two years have seen further calls in international arbitration circles for greater transparency of key indicia of provider performance. The Milan Chamber of Commerce, for example, has proposed "*anonymized*" arbitral awards to give users greater insight into the decisions taken in arbitrations conducted under the auspices of that institution. The fact is that users need greater transparency and higher standards in the delivery of all ADR services.

The international mediation field provides useful pointers. The IMI Certification Scheme, launched in 2008 by users in collaboration with international ADR providers, initially met with skepticism from the market[6]. However, the prominent presence on the IMI Board of international corporate users caused skeptics to think again. About 400 mediators now fully IMI Certified with user Feedback Digests embedded in their profiles and a declaration of the Code of Professional Conduct and disciplinary process to which they subscribe.

As arbitration and mediation are both highly competitive and fragmented fields, it is hard for providers to act collectively. Yet they must. The only forums where arbitration organizations come together at an international level conferences of the ABA Section of Dispute Resolution, the Institute for Transnational Arbitration (ITA) and the International Council for Commercial Arbitration (ICCA). Mediation providers have the annual UIA World Forum of Mediation Centers. Industry structural change to address user demand rarely gets discussed at these events.

One recent exception was the ICCA Annual Conference in Singapore in June 2012, the theme of which was "*International Arbitration – the coming of a new age?*" The keynote speech[7] was given by the then Attorney General of Singapore (now Chief Justice) Sundaresh Menon, a man with a distinguished career in international arbitration[8]. Mr Menon suggested that the "*new age*" of arbitration is, in fact, its golden age, implying that the field stood on the brink of decline, and urged arbitrators to "*embark on a course of collective self-reflection…on what we as a community have done right, but more importantly, on what we could do better, and perhaps plant the seeds of change so that our industry will…continue to play a critical role in the global administration of commercial justice.*" Mr Menon highlighted how arbitration had suffered from growing complexity and "*judicialisation*" becoming more time consuming and costly, leading to a "*growing frustration for users*" and asked whether "*these telltale signs of trouble signify the beginning of the end*". He identified an increasing disconnect between the satisfaction of the arbitration community with the revenues they earned compared to the "*growing dissatisfaction with [the] unregulated industry*" by users. Mr Menon urged the field to head off declining credibility and confidence by "*charting a new course*" and design and subscribe to an international self-regulatory regime involving greater efficiency, transparency and accountability.

Mr Menon proposed that the regulatory framework governing arbitrators should cover initial entry requirements, a competency certification system and practice standards for the conduct of arbitrators and also of international arbitration counsel, including a uniform global set of ethical standards and rules of professional conduct backed up by a disciplinary process. He envisaged arbitral institutions being the functional equivalent of Bar Associations in this system, with a role in implementing the self-regulatory standards. He drew a distinction between injecting greater transparency in arbitrator conduct, and the substantive issues in dispute (which are confidential). He advanced the idea of an open-access database of information about arbitrators and their decisions under the auspices of a respected international body. He concluded that this would aid "*...parties in their selection of, or even their approach towards, arbitrators in future cases, moving away from glorified and often self-promoting curriculum vitae, to serve as a repository of useful and independently audited information on an arbitrator's past cases, reasoned decisions (if necessary redacted to protect… confidentiality), the instances where the arbitrator ruled or dissented in favor of his appointing party, as well as complaints and feedback from parties.*"

A few months later, Professor Rogers, who was mentioned as an authority in Mr Menon's keynote and in Mr McIlwrath's 2007 article, proposed an *International Arbitrator Information Project* (IAIP) to help correct the "*gumshoe clue-hunting approach currently employed to select international arbitrators*" which is "*severely outdated and unduly expensive in an era of information and technological efficiency*"[9].

Professor Rogers suggested that the IAIP would be a non-profit resource providing reliable, objective information about arbitrators, with each arbitrator having a dedicated space that in addition to biographical information would include links to publicly available arbitral awards and other data, including peer reviews. It would also include objective appraisals of arbitrators' case management skills, and behavior as an arbitrator based on feedback from users and users' counsel. She identified various legal and practical obstacles including confidentiality, how feedback would be edited responsibly and fairly, but said thatthese issues can be addressed[10].

A few additional relevant considerations are:

IMI is the only body in the international ADR field in which several of the leading arbitration institutions (AAA, BCDR, ICC, JAMS, SIAC) are collaborating with the express intent of helping to raise professional standards and deliver greater transparency.

A collaboration arrangement was announced in March 2013 between IMI and the Corporate Counsel International Arbitration Group (CCIAG)[11]. This collaboration will enable the user share of voice in international ADR to be more heard more loudly and clearly.

In February 2013, the results were published of a 2011 survey of the in-house dispute resolution counsel in 368 Fortune 1,000 US companies conducted by Cornell and Pepperdine Universities together with CPR Institute as a follow-up to a 1997 survey conducted by Cornell[12]. This survey was designed to identify trends among corporate users since 1997, surface emerging ADR policies and practices, and understand the drivers of those trends, policies and practices. There is much useful data in this survey for both arbitration and mediation. One of the most startling statistics is that there has been a significant decline in the use of arbitration in 8 out the 10 categories of dispute surveyed between 1997 and 2011.

An International Corporate Users ADR Survey was conducted by IMI between mid-January and mid-March 2013 among 76 corporate in-house dispute resolution counsel, mainly in North America and Europe. Law firms and other outside advisers were not invited to participate in this Survey to enable the focused view of actual disputants to be captured. The Survey raised a number of issues that earlier research by different organizations had not asked of corporate in-house dispute resolution counsel. The results, which have recently been published[13] and are most revealing, though hardly surprising. In summary:

1. Users want more information about both arbitrators and mediators. They want evidence that their competency has been independently assessed, they want them to belong to professional ADR organizations that are not service providers, and to subscribe to rigorous Codes of Practice in ADR that render them subject to disciplinary processes, as any other mainstream professionals.

2. Past experience with arbitrators and mediators is seen as vital to selection decisions - whether that experience is the user's own, or that of their counsel, or of previous users of the neutrals under consideration in independently-prepared feedback summaries. A high proportion (76%) of in-house dispute resolution counsel completing the Survey say they want access to the feedback of previous users of both arbitrators and mediators.

3. Arbitration providers are now expected by three quarters of in-house dispute resolution counsel to be proactively encouraging parties to mediate their disputes, and almost half go so far as to want Courts and Tribunals to make mediation a compulsory step in both litigation and arbitration.

Action to Address User Needs

User demand for more information and higher professional standards in ADR is unequivocal.

An international institution is needed to address the global user demand, particularly in arbitration, conciliation and similar methods of resolving international commercial disputes. That institution should preferably not be a service provider.

Ideally it should be a new entity, without an historical footprint, established as a collaboration of the demand and supply sides of the arbitration field - similar to how IMI is set up successfully in the mediation field. It could be affiliated to IMI to share funding and overheads and secure an early momentum. Funding could be drawn from all those with an interest in greater access to information and higher quality in ADR - meaning: users, ADR provider organizations, law firms and individual ADR practitioners.

Some may feel that this could be achieved by an existing entity established at global level that does not provide ADR services. ICCA, a highly-regarded organization with a truly global reach and representation that does not administer arbitrations or act as an appointing authority, and has UN NGO Consultative Status on behalf of the arbitration field, seems to be the only realistic possibility. However, ICCA's Statement of Purposes focuses its role on conferences, publications and thought leadership, not acting as the field's professional institution and self-regulatory authority. Moreover, although ICCA's 40+ strong Governing Board comprises distinguished arbitrators and conciliators, counsel and educators, it does not include any corporate users.

Easier and better, perhaps, to set up a brand new entity, with close ties to established and valuable existing institutions like ICCA and the world's great ADR providers. That entity would need to focus its core mission on: (1) setting and achieving the highest standards in arbitration and conciliation; (2) establishing a globally-applicable Code of Professional Practice linked to a disciplinary procedure credible to users; (3) improving the quality and depth of information available about arbitration and conciliation, and in particular about arbitrators and conciliators; and (4) promoting what users will regard as more practical, efficient use of ADR processes.

It is not a difficult thing to achieve. The supply side and the demand side should do it together.

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In the hope that this article will encourage ideas and debate, the author has prepared a simple online comment page where views can be posted in response to four short questions. The comment page is at: http://fluidsurveys.com/s/imi-professionalizing-international-adr-through-transparency-survey/

Footnotes

[1] Michael Leathes spent 35 years as an in-house counsel with Gillette, Pfizer, International Distillers & Vintners and BAT, managing international disputes. He is a director of the International Mediation Institute.

[2] http://imimediation.org/grading-the-arbitrator

[3] These ideas and others are captured in the 2010 Fordham Papers in an article by Mr McIlwrath and his GE colleague, Roland Schroeder Transparency in *International Arbitration: What Are Arbitrators and Institutions Afraid Of?* a summary of which is at: http://kluwerarbitrationblog.com/blog/2010/10/18/anti-arbitration-a-modest-proposal-for-standardized-performance-metrics/

[4] C.A. Rogers, "*The Vocation of International Arbitrators*" (2005) 20 American University Journal of International Law 959 at pp.1009–1010; and "*Transparency in International Commercial Arbitration*" (2006) 59 Kansas Law Review 1301

[5] www.IMImediation.org

[6] http://www.cpradr.org/Resources/ADRTools/CPRADRBlog/tabid/116/articleType/ArticleView/articleId/422/Novembers-Alternatives-More-Arguing-Over-Credentialing-Nov-11.aspx

[7] http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf

[8] CJ Menon is a former Deputy Chairman of the Singapore International Arbitration Centre (SIAC), former Head of International Arbitration for Asia at Jones Day; and a former panel member of SIAC, the Beijing Arbitration Commission and the Korean Commercial Arbitration Board. He was awarded the Global Arbitration Review's Best Speech Award 2012 for his keynote at the 2012 ICCA conference.

[9] http://kluwerarbitrationblog.com/blog/2012/12/10/the-international-arbitrator-information-project-from-an-ideation-to-operation/. Professor Rogers presented the IAIP to the Winter Forum of the Institute for Transnational Arbitration on January 25, 2013. See also Professor Rogers' article *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct* (2005) 41 Stan. J. Int'l L. 53.

[10] An earlier attempt to create a standardized form for feedback on arbitrator performance was carried out in 2007 by members of the OGEMID (Oil Gas Energy Mineral Investment Dispute) listserv operated by the thought-leader Thomas Walde. See Elika Eftekhari, *The Development of a Template Form for Providing Party Feedback to Arbitrators*, TDM 1 (2009) ("*During the first half of 2007, an informal Working Group consisting of international arbitration practitioners developed an evaluation form for parties to provide feedback to arbitrators regarding their perceptions of the conduct of the proceedings. The members of the informal Working Group included parties, academics, arbitrators, counsel, and institutions.*") The article and feedback form may be downloaded at http://www.transnational-dispute-management.com/article.asp?key=1322

[11] http://www.cciag.com

[12] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221471

[13] A summary of the results of the IMI ADR Users Survey is downloadable at: http://imimediation.org/imi-international-corporate-users-adr-survey-summary-download