

The state of dispute resolution in today's world

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The first two speakers heard at the first Dispute Resolution Section panel to take place in Chicago did not speak directly to the packed audience. Nor, for that matter, were they even present in the room. Instead, moderator Barry Sullivan initiated the panel discussion by quoting two venerable jurists on the subject of civil litigation.

The first quote, from Lord Phillips, Lord Chief Justice of England and Wales, went like this: 'Civil litigation is still something any sensible person should look at with horror at the possibility of being involved with.'

The second quote, from one of the United States' most famous jurists, Justice Learned Hand, was even less upbeat: 'As a litigant, you should fear a lawsuit more than anything, short of sickness or death.'

Thus, the tone was set for a rather introspective, and self-critical, debate on the problems inherent in litigation today. Carrying out this debate was a panel of four speakers from both sides of the Atlantic: Katherine Gurun, former General Counsel for Bechtel Corporation who now works as a mediator and arbitrator with the JAMS alternative dispute resolution center in New York City; Jacques Buhart, corporate partner in the Paris office of Herbert Smith; Jonathan Schiller, partner in the litigation boutique of Boies Schiller & Flexner LLP, Washington DC; and Judith Gill, an arbitration specialist working in the London office of Allen & Overy LLP. Klaus Reichert, an independent barrister and chartered arbitrator from Dublin, chaired the panel and was responsible for organising an informative, lively and sometimes contentious debate.

Each of the speakers on the panel wrestled with the basic questions raised by the words of Justices Phillips and Hand: 'Should clients "fear" the process of civil litigation?' If so, what are the major problems inherent in litigation? And what, if anything, can be done to resolve these problems? While the speakers took varying positions in defence of the modern state of litigation, no one seemed to disagree with the basic premise that litigation, to quote Lord Phillips, can often be a 'horror'.

Ms Gurun led the debate by taking the most anti-litigation stance of the panel. Borrowing from her years of experience working in-house for the Bechtel Corporation, and thus her proximity to what clients

actually think of the litigation process, Ms Gurun described the litigation system in most countries today – in particular, the US litigation system – as 'Dickensian'. Careful to point out that she has no issues with the quality or intelligence of the US judiciary or of the US bar, she opined that the problems with US litigation are institutional in nature. As she explained, the system itself is prone to abuse and delay (particularly with respect to document discovery) and the courts simply lack the means or the power to accelerate the speed of the process and control the costs. She warned that if the problems with the litigation system were not fixed soon, corporations would continue their exodus to other means of dispute resolution, including arbitration and mediation, as well as informal business settlement negotiations without the use of attorneys at all. Litigators, she said, cannot expect the current system – and their monopoly on the substantial legal fees generated by the current system – to last forever.

In response, Mr Schiller took up the most pro-litigation stance of the panel. While acknowledging that there are indeed significant problems affecting litigation, Mr Schiller claimed that Ms Gurun's viewpoint was too one-sided and too heavily weighted to large commercial entities like her former employer Bechtel. Thus, Mr Schiller asked Ms Gurun to consider the viewpoint of an entity suing Bechtel. As a hypothetical, he asked what if Bechtel had been commissioned by the State of Alaska to build an oil pipeline and the project had come in two times over budget – only through the US litigation process, Mr Schiller surmised, could the State of Alaska obtain the discovery necessary to expose the cost overruns by Bechtel. Justice, in turn, depended on the State's access to the litigation system.

Mr Schiller also rejected the notion that the only choice was between litigation and an entirely different dispute resolution mechanism such as arbitration or mediation. Rather than be forced to choose between two different dispute resolution mechanisms, he maintained that there are ways to reduce the delays and costs of litigation without running to another system and that there is, in fact, ample reform currently underway in the US litigation system. For example, Mr Schiller pointed to the widespread use by US federal judges of magistrates or special masters to expeditiously

handle discovery disputes and, thus, free up the judges themselves to attend to the more important work of bringing a case to trial. He also pointed out that litigants in the US federal court system are being increasingly obligated to engage in mediation after the commencement of a lawsuit and this reform was also encouraging settlement and shortening court dockets.

Taking issue with Mr Schiller's defence of the US discovery system, Ms Gill pinpointed the greatest source of litigation's image problem on the discovery process. In particular, she bemoaned the fact that US-style discovery techniques were becoming increasingly prevalent in international arbitration. She also challenged the idea that one must have access to widespread discovery in order to obtain 'justice'. Justice, Ms Gill explained, is a relative concept and there is 'no one size fits all' dispute resolution regime that will satisfy everyone – thus, for example, the absence of extensive discovery in the arbitration process may strike a European party as fair while at the same time leaving a US party with the feeling that it has been cheated.

Mr Buhart agreed with Ms Gill that US-style discovery techniques are becoming more prevalent outside the United States, though not just in international arbitration. He explained that US-style discovery techniques are also increasingly being employed in civil litigation in France and he pointed to the recent international cartel cases as a good example of this. At the same time, Mr Buhart seemed to disagree that justice is so relative that the substantial chasm between civil law and common law attitudes towards discovery cannot be bridged. In this regard, Mr Buhart broadly credited the IBA Rules on the Taking of Evidence in International Commercial Arbitration with doing just that, ie creating a workable compromise between the minimal-discovery pole of the European civil litigation system and the hyper-discovery pole of the US civil litigation system.

To this, Ms Gill retorted that the IBA Rules, while an admirable attempt to reach a compromise discovery system, were, in practice, subject to wide-ranging interpretation and implementation by arbitrators. Thus, Ms Gill explained that in a recent arbitration in which she had participated, a European tribunal had, invoking the IBA Rules, rejected all but three of 400 document requests made by a US party – leaving the US party and its attorneys feeling as if they had been deprived of justice. Meanwhile, in another arbitration in which she participated before an American-dominated tribunal, far more discovery had been tolerated under the IBA Rules. The IBA Rules, she reasoned, are only as compromising as the arbitrators who apply them.

Mr Sullivan then steered the speakers into opining on the reasons underlying the growth in US-style discovery. Ms Gurun responded that any litigator, caught up in the heat of battle, will naturally try to

gather as much evidence as he or she can to support his or her client's case – it is an instinctive desire to maximise the chances of victory. However, Ms Gurun cautioned, 'perfection can become the enemy of good'. In seeking mountains of discovery to better the client's chance of victory, the lawyer is also creating mountains of legal fees that will disappoint the client. Perfect justice is rarely worth the cost.

Mr Buhart, in turn, opined that the reasons underlying the different attitudes toward discovery lie in basic cultural differences. Europeans, Mr Buhart reasoned, have a deeper tradition of secrecy and privacy than Americans and thus are willing to tolerate not gaining access to an adverse party's documents. Americans, on the other hand, are more open and forthright by nature and there is a cultural expectation that the information should not be kept in the dark.

Ms Gill opined that the explanation lies in simply human level of distrust. If a litigator – no matter the nationality or cultural background – is permitted to take wide-ranging discovery, he or she will usually seize that opportunity simply because he or she does not trust the other side to produce damaging evidence. Why rely on an adverse party to select and produce the relevant documents in its files when one can simply ask the other side to produce *all* of its files?

Mr Sullivan finally asked the speakers what, if anything, could be done to resolve the problem of excessive discovery. If, as all the speakers acknowledged to varying degrees, there is too much discovery today, how is this problem to be corrected?

Ms Gurun and Ms Gill agreed that the solution, at least in the arbitration context, lies in more courageous arbitrators. Arbitrators have to be willing to stand up and more steadfastly reject the imposition of US-style discovery requests on the arbitral process. Arbitrators must be more willing to set tight deadlines for discovery and stick to the deadlines when one of the parties, inevitably, comes back begging for more discovery. Mr Schiller said the same solution lies in US litigation: US judges should not tolerate excessive discovery requests and should be more willing to cut the discovery process short. Mr Schiller went on to say that, contrary to some of the prevailing views on the panel, this was already beginning to happen in the United States.

Ms Gurun also highlighted mediation as a means to avoid (if not fix) the problems inherent in litigation. She wondered why so many attorneys, and clients, are adverse to engaging in mediation and opined that there would be substantially less litigation (and thus less need for reform) if parties engaged in informal negotiation or mediation as a matter of course prior to commencing litigation. She explained that mediation is less alien to businesspersons and thus allows them to engage constructively in the process rather than to blindly follow their lawyer's lead in the strange world of litigation. In Ms Gurun's opinion, there is going to be

an ‘explosion’ in mediation in the coming years, in part because the process is becoming more accepted, but in larger part because the costs and delays of litigation are driving clients to seek alternative modes of dispute resolution.

All in all, despite the disagreements among the speakers on the tangential issues, a consensus definitely emerged from the panel that the litigation system is in trouble and that litigators have a responsibility to fix

the system now or risk losing more business. One could not help leaving the session with a nagging sense of insecurity about the future of litigation.

Note

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Dynamic bidding, patent trolls and vulture funds – in-house counsel grapple with new modes of doing business

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Lawyers in the audience in Chicago at the Corporate Counsel Forum were startled to hear Charlie Stevenson talk about Sun Systems’ experience in the search for appropriate external counsel on a due diligence project. No long lunches, no long associations over time built on trust and experience, no detailed tender documentation – dynamic bidding was the key!

The client company was to embark upon a due diligence process involving over 4,000 contracts. The client sent representatives to India and within the United States to meet with nine candidates who had expressed interest in bidding for the job. Each candidate received two days of exposure to the process and was allowed to participate in a trial auction – in this way, each candidate came to understand the scope of the job and could see how to best position themselves and their bid for the final selection process.

Once the familiarisation process was over, the client launched the online auction and the dynamic bidding began. The bidding process took two and a half hours. The client had expected that the cost could be in the range of US\$2 million: the top bidder submitted a price of US\$400,000.

The client company regarded the project, on completion, as a complete success. There were no quality issues; monthly checks during the work phase satisfied the client that the work being produced was of a high standard.

The process of dynamic bidding saw the client’s

involvement in the selection process limited to the amount of time and effort the client was willing to expend: it was not open-ended as tender processes can be. The result was clear and the reasons for the result were clear.

Some in the audience thought the process obscene and Charlie agreed that it was not a process which lent itself easily to litigation or major transactional work. But in this case, where price and efficiency were key, dynamic bidding had proved very worthwhile. Charlie was a strong advocate for the notion that lawyers should continually look for ways to package services and pre-sell them to in-house counsel. He agreed with the proposition that not all legal services were amenable to price sensitivity being the most important issue – but where it was a key factor, lawyers needed to look for innovative ways to attract attention.

The forum was generally downbeat about the prospects for litigators in the short-term – lawyers across the world thought that litigation was on a downward curve in their jurisdictions. There was a general feeling that a great deal of strategic litigation was being handled in-house and the corporate counsel present agreed with that, pointing out that often issues raised in litigation were fundamental to business or governance practices and that, accordingly, they were appropriately handled internally. This did not mean that matters settled; often large cases were not amenable to settlement because of the internal issues they addressed.