Interviews with Our Editors: In Conversation with Hafez Virjee, President of Delos Dispute Resolution

Mary Mitsi (Assistant Editor) (University of West London)/October 4, 2019 /Leave a comment

Thank you for joining us on the Kluwer Arbitration Blog, Mr Hafez Virjee. We are honoured to have the opportunity to gain insight on Delos, the independent arbitration institution that you co-founded and which provides an innovative approach to commercial dispute resolution.

1. ***Delos provides a solution starting from the contract-making stage through to the issuing of the final award in case of arbitration. Why and how does Delos distinguish itself from existing options? How is the need for accessible and effective arbitration for disputes, in the EUR 0-10 million range particularly, addressed by Delos?***

Thank you for your warm welcome to the Kluwer Arbitration Blog. Regarding your question, it points to why there was a need to create a new arbitral institution. The founders of Delos were all getting similar feedback from their respective clients and networks: whether it be listed companies or start-ups, and everything in between, users wanted a quality arbitration procedure that was significantly more time and cost-effective than what they had been using so far. We first considered existing arbitration offerings, but none of them sufficiently met the needs expressed by users. At the same time, we had many ideas as to what a useful solution

could look like, and so set to work to design what came to be known as "Delos".

Delos distinguishes itself from existing arbitration offerings in three key respects:

- Delos considers efficiency for all disputes, rather than by way of exception through expedited rules for lower-value disputes only;
- Delos considers arbitration as a dispute resolution mechanism as a whole rather than focus only on discrete stages / procedural matters, typically limited to the conduct of arbitration proceedings once a tribunal has been constituted. Put differently, Delos took a holistic view of arbitration by ensuring that the incentives and disincentives of all stakeholders at every stage of the process were adequately aligned: contract formation stage; pre-arbitration phase; initial claim documents; constitution of the tribunal; conduct of the proceedings; costs of the arbitration; and encouraging settlement; and
- Delos makes international arbitration genuinely accessible for Small and Medium-sized Enterprises (SMEs) and for start-ups. Delos's positioning is not limited to smaller-value disputes and extends to medium-value disputes (EUR 10m-40m) as well.

As you had a particular interest in this last point, I will add this: discussions around smaller claims tend to jump-start to how to make the procedure more efficient. We looked at the preceding question: from the perspective of users, what is proportionate in terms of time and cost for arbitration to be an effective dispute resolution mechanism for EUR 0-10 million disputes? By framing it that way, we realised that the answer was not just about the efficiency of the procedure but had to be a lot more comprehensive. As such, not only are our costs schedules proportionate to the amounts in dispute (and lower than at the major arbitral institutions), we also have responsive time limits for various stages of the proceeding,

template claim forms, additional model clauses to those typically made available, practical guidance, and a procedure for the registration of contracts.

2. ***As the president and co-founder of Delos, was there any personal experience that constituted your inspiration for creating such a tool?***

In April 2012, a friend in the Middle East reached out a little panicked about a start-up dispute. Advising that friend and his company over the following months on this and other disputes was eye-opening about the issues that arise in the start-up economy. This became the start of many conversations with start-ups, founders, investors and lawyers in different parts of the world.

As it turned out, I was also acting at the time on a small administered arbitration for a European listed company which gave me similar feedback about the inefficiencies of arbitration and how change was needed.

When I compared notes with the other founders of Delos, we realised we had all been receiving similar feedback from our clients and networks around the world, which we further confirmed with our contacts before taking matters forward.

3. ***Which are the Delos principles to achieve fair and efficient international arbitration?***

The Delos Rules can be articulated around **four core principles**.

Delos Principle 1 focuses on the active engagement of the arbitral tribunal (as opposed to a purely adversarial model). More specifically, Delos sets

tribunals a time-limit for submitting their award, be it a final award, or a partial or interim award to be followed by further award/s within a further time-limit (with the possibility of having concurrent phases). Within this flexible framework, arbitrators must tailor the procedure and timetable so as to ensure that the issues in dispute are adequately pleaded to allow them to come to a timely decision. There are multiple tools and techniques available to arbitrators to achieve this, as discussed in relation to your next question.

Actively managing an arbitration may require arbitrators to exert a firm control on the procedure while respecting due process. To reduce the risk of 'due process paranoia', Delos Principle 2 promotes the use of 'safe seats', rather than any seats. A 'safe seat' is one where the legal framework and practice of the courts support recourse to arbitration as a fair, just and cost-effective binding dispute resolution mechanism, as opposed to one that materially increases the cost of arbitrating disputes in that place. This cost can be borne by the parties directly or indirectly because of the need for arbitrators to temper their efficiency with due process conservatism and inefficient adjustments, hence Delos's focus on 'safe seats'. To facilitate the identification of a safe seat for users, Delos has included in its model clauses a list of recommended seats, which is based on its Guide to Arbitration Places ("GAP").

Delos Principle 3 encourages pragmatism in the formation of arbitral tribunals, including shortened time-limits for constituting tribunals. This phase of a proceeding can at times be quite lengthy – and disproportionately so for smaller value cases – and does not receive as much attention in discussions about efficiency or in statistics on the duration of arbitrations. It seemed to us important to tackle it head on.

Finally, Delos Principle 4 can be summarised with the mantra: "Preparation, preparation, preparation". Delos has taken a long, hard look at the dynamics and incentives at play in and around an arbitration, and

anticipating issues and advance case preparation can go a long way in improving the efficiency of arbitration, hence Delos's emphasis on this.

4. ***Based on these principles, how would you profile the proactive arbitrator?***

A proactive arbitrator (in a Delos arbitration) can be profiled by reference to some of what s/he will be doing: the arbitrator will be making early efforts at identifying the key issues in dispute and anticipating the post-hearing phase of the case. S/he will tailor the procedure accordingly and actively engage with the parties and the dispute from the outset of the arbitration through to its conclusion. The arbitrator will also be making use, where appropriate, of interim decisions on the allocation of costs.

In doing so, Delos arbitrators must take account of the value of the dispute, the complexity of the issues, the importance of the dispute to any ongoing relationship between the parties, and the time-limit set by Delos for submitting a draft of their award (be it interim, partial or final), known under the Delos Rules as a Time Notice.

5. ***Where parties are not sufficiently prepared prior to the start of arbitration, such may result in compounding time and cost inefficiencies once proceedings have begun. Do you believe that anticipating the risks at every stage of the arbitral proceedings, will help to achieve greater efficiency in international arbitration?***

Most certainly (as long as it is without excess)! It is said that 'a stitch in time saves nine', and Delos has sought to facilitate advance preparation, including by making the reasonable costs incurred in the advance

assessment of the dispute and related negotiations recoverable in case of arbitration.

6. ***The Delos Guide to Arbitration Places (known as the 'GAP') has received a lot of attention. What is the GAP and why and how was it designed?***

To quote the GAP Chair, Professor Maxi Scherer, from her **Foreword to the GAP**, "[it] is a comprehensive, comparative study on arbitration places around the globe: developed as a user-friendly guide providing in-house counsel, corporate lawyers, and arbitration practitioners with practical and effective insight into selecting arbitral seats and conducting arbitral proceedings".

Over 50 jurisdictions are covered by the GAP, each in a separate chapter authored by as many law firms. The law firms prepared their chapters on the basis of a detailed analytical framework developed by the GAP Chairs Professors Maxi Scherer and David Caron, my co-Editor Thomas Granier and me.

We gave law firms the flexibility to present their chapters in the manner most suited to their jurisdictions. Some jurisdictions are thus discussed in the form of a detailed Q&A, others with a more outline version of the framework; others still follow a different structure inspired from the framework, such as for Albania or the US. Each chapter is introduced by two summaries, one for in-house and corporate counsel, the other for arbitration practitioners.

Once drafted, the chapters were reviewed by experienced young IA practitioners ("EYPs") from other jurisdictions, to ensure that, as far as possible, they were accessible to readers from different legal cultures and experience in arbitration.

Finally, the authors from the law firms and the reviewing EYPs assessed the jurisdiction on ten distinct criteria and assigned traffic lights for each one, which are presented on the cover page for each chapter. This allows readers of the GAP to get a rapid, visual overview of the jurisdiction, and indeed to compare all of the jurisdictions side-by-side at a glance (see **here** for the consolidated traffic light table).

7. ***What are the future plans of Delos? In particular, does the team plan plan to create a similar innovative tool that will respond to the needs of investment arbitration practitioners?***

There is so much we would like to do! We may indeed consider issues specific to investment arbitration in due course. For now, our priority is to help in-house counsel and lawyers generally to become more familiar with Delos, and to spread the insertion of Delos arbitration clauses into contracts. We are also in the process of setting up a new modern, accessible, hearing centre in London, to be known as the LONDAP ('London Delos ADR Places'). Finally, we are also following with great interest tech-related developments in our field, and may shortly start a **curated newsletter** to facilitate access to information.