

JUSTICE CAN'T BE TAKEN FOR GRANTED IN ARBITRATION
KHAWAR QURESHI QC

Government moves to impose increased charges for civil court users and, in the face of a storm of condemnation, the belated withdrawal of Dickensian requirements for criminal defendants to contribute to court costs, are seen by many as destructive incursions on the right of access to justice.

While the 21st-century, bean-counter-led obsession appears to be focused on expediency, efficiency and making the court system pay for itself, anyone who believes in the fundamental need for society to be rooted in justice – and the dispensation of justice for all – may well ask: where is this all heading in terms of civil and criminal justice?

In the commercial context, parties have increasingly resorted to international arbitration to resolve disputes. The process has been perceived to possess the benefits of informality, speed and finality.

It is undoubtedly the case that there are situations in which parties will wish to avoid a specific domestic court, and seek to find a mutually acceptable alternative.

The predominant reason for this is a perception that the domestic court that might otherwise have jurisdiction (or be put forward by a party) is unlikely to possess the expertise and/or independence and impartiality necessary to deliver a fair determination in a timely manner.

Not least because of increased global commerce, the trend has been towards an increasing use of arbitration and for conferring greater powers on arbitrators. Arbitrators can now issue “preliminary measures” and “ex parte” orders – hitherto the exclusive resolve of a judge.

At one level, it is a logical progression for parties to confer greater powers on arbitrators, as well as a vote of confidence in the arbitral process: that arbitrators can be trusted to act in a judicial manner.

Indeed, one of the cornerstones of the arbitral process – and its perceived strength – is the limited role a domestic court is intended to play in terms of supervision or review of arbitration. The mantra is “support not interference”.

In that regard, trust of the user parties in the arbitral process and, ultimately, delivery of justice will ensure that arbitration continues to flourish. One of the difficulties in assessing the strength of these factors is the confidential nature of arbitration, and the limited scope for feedback.

Accordingly, neither trust nor justice can be taken for granted. There is no room for complacency.

In the context of the hitherto massive growth area of investor-state arbitration, there are signs that developing states are reacting against the use of arbitration to determine claims that may involve vital national assets. Indeed, distrust of the process is looming large.

The challenge for arbitration as a process – and, one hopes, for any domestic legal system – is never to lose sight of the end of the process: namely, the delivery of justice.

17 December 2015