Precedents in arbitration – a practical position (Part 1)

This article follows a talk Maurice Kenton, partner in Clyde & Co's Global Arbitration Group gave as part of the Oxford Symposium on Comparative International Commercial Arbitration in November 2017.

It is often stated that 'there is no precedent in commercial arbitration'. Challenging that statement, this article focusses on the practice of arbitration to see how 'precedents' are created and used in international commercial arbitration.

The meaning of 'precedent'

The Oxford Dictionary defines precedent in law as 'A previous case or legal decision that may be or (binding precedent) must be followed in subsequent similar cases'. For common-law English lawyers this is the intuitive meaning of precedent but this article takes a wider view of 'precedent' to mean 'what has gone before' or, as the dictionary puts it, 'an earlier event or action that is regarded as an example or guide to be considered in subsequent similar circumstances'.

Precedent in the context of this discussion is also not just about legal decisions – it is about the entire arbitral process encompassing the parties, the lawyers, experts and the arbitrators. A precedent is not limited to something that is binding – the existence of some form of prior decision already shapes the future.

In Part 1 of this article we look at sources of precedent.

In Part 2 we look at the way practitioners and arbitrators create and use precedent and consider whether this system of informal precedent creates consistency.

Sources of precedent

While commercial arbitration is a private consensual process wholly confidential to the parties, it can also be a rather leaky sieve. There are several sources of information about arbitrations and arbitral awards which enable information to become publicly available.

Institutional publications

The ICC publish extracts of arbitral awards giving insight into the reasoning of international arbitrators on
the interpretation and application of contractual clauses, international conventions and the law of international trade. The ICC states that the publication ‘is invaluable to both scholars and practitioners involved in the drafting and negotiation of international commercial contracts and the resolution of international commercial disputes’.

Similarly the SCC has published arbitral awards. The SCC state that ‘the extracts from the arbitral awards provide indispensable and extremely helpful insights into the attitudes of tribunals on arbitration matters and arbitral awards worldwide.’

UNCITRAL also permits the publication of awards where the parties consent to that publication (Article 34.5) and where this occurs counsel and arbitrators are able to look to past UNCITRAL awards as non-binding precedent.

In disputes heard under the LMAA Terms, publication of awards is permitted subject to preserving the anonymity of the parties and the identity of their representatives and the tribunal. In practice, the availability of these awards means that arbitrators in this sector do review previous awards and look to them to see what previous decisions have been made, even though they remain non-binding.

Appeals and enforcement

Information about the arbitral process and awards also becomes publically available when awards are challenged in the courts. See for example, decisions in cases arising out of arbitration such as that in C v D, the first time the English court had the opportunity to consider Bermuda Form arbitration and Essar v Norscot in which the court interpreted s53 of the Arbitration Act 1996.

Although details are often anonymised in the interests of the parties, such cases nonetheless provide useful sources of information about what and why decisions were made in the arbitration and perhaps also the arbitrator’s reasoning on certain points. The resulting judgment will of course then, dependent on the level of court involved, become of precedential value but beyond this, and in the wider use of the word ‘precedent’ outlined above, the judgment gives an insight into what happened in the arbitration.

Legal press

The legal press, particularly specialised arbitration publications often provide insight into ‘what has gone before’ in arbitrations across the globe. These reports may not contain the level of detail on tribunal’s reasoning that would be available from, say, the ICC, but often one can learn about tribunals, dissents and attitudes on key issues. The legal press is also a key resource for learning about previous appointments of arbitrators and decisions they have made.

The legal press, not a judicial body, not an arbitral body, not appointed or sometimes invited by any party thereby influences the arbitral process. Their sharing of ‘what has gone before’ becomes part of the legal research that goes into a case and thus influences the case – the parties are learning from the past. This may well be a leap away from the formal case law precedents formed by the English and other courts but it forms a barrier to the statement that ‘there is no precedent in commercial arbitration’.

Soft law and text books

In arbitration guidelines and practice notes (commonly known as soft law) proliferate. These guidelines can be adopted by agreement to form a part of the arbitral rules or as a means of persuading a tribunal to a point of view. The best example of the former is the International Bar Association (IBA) Guidelines on the Taking of Evidence in International Arbitration (the IBA Guidelines) which are commonly adopted as a
means of levelling the playing field for parties from different jurisdictions and setting out clearly for all
involved how the evidence in the arbitration will be handled. Other sets of guidelines and practice notes
issued by arbitral institutions and other independent bodies (such as the IBA and Chartered Institute of
Arbitrators) are relied upon by parties regardless of their official status in the arbitration to guide their
conduct or to persuade the tribunal of the legitimacy of a point of view.

These guidelines and other resources are developed based on the norms and practices of arbitration that
have developed over time. They are produced by those with experience in arbitration practice who
understand 'how things are done' and in being published and adopted come to codify that practice to some
extent. In this way, they are a creature of precedent having been created based on 'what has gone before'
and seeking to shape future practice.

Arbitration text books also shape precedent in a similar way. They often report on how tribunals have or
are likely to interpret a point of practice or, for example, how easy or difficult it is to persuade a tribunal to
make a certain order. By way of example, The Secretariat's Guide to ICC Arbitration contains indications as
to how a rule has previously been interpreted by tribunals or how the Secretariat will act in certain
circumstances. The text has no official authority but it shapes the way practitioners and tribunals behave.
The guidance given in such texts is borne of practice and experience. Of course, the tribunal is not bound to
act in a certain way as prescribed in a text book but the weight of authority of the authors of renowned
texts may weigh heavily on a tribunal.

Conclusion

Precedent in its wide sense is therefore available and applied in commercial arbitration. In Part 2 we will
look at how precedent is created and applied by practitioners and look at the impact of this informal
precedential system.

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