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To Specialize or Not: How Should National Courts Handle International Commercial Arbitration Cases?

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So far in 2010, at least two jurisdictions have established specialized courts to handle international arbitration matters – Australia (in the state of Victoria) and India (in Bombay).

Australia: Within Australia's federal structure, international arbitration matters are in the jurisdiction of state supreme courts. In 2009, Australia's Parliament gave the Federal Court concurrent jurisdiction over international arbitration. In addition, a practice note recommended the appointment of an "Arbitration Coordinating Judge" for each registry. In January 2010, the Supreme Court of Victoria made such an appointment, creating an arbitration list ("List G") that centralizes arbitration matters. The list is managed by a judge with international arbitration experience who, along with several other commercial judges, will hear all arbitration-specific cases.

India: At the beginning of August 2010, Bombay's High Court announced the creation of a court dedicated to arbitration-related applications and petitions. The decision was taken when the new Chief Justice realized that there is an immense backlog of applications to appoint arbitrators because a judge hears these applications only one day a week.

These two recent developments highlight the issue of how a national court system should handle proceedings relating to international arbitration, and specifically, the debate whether there should be specialized courts to determine issues arising in international arbitration that go to the courts.

While international arbitration may be an international system of justice not tied to any state's legal system, there can be no question about the importance that national court decisions have on arbitration proceedings and the development of a jurisdiction's international arbitration law. Court decisions are critical to whether a jurisdiction develops and maintains an independent and effective arbitration regime.

It is worth remembering the number of pivotal issues that ultimately are in the hands of national courts – from what is arbitrable as a matter of policy, to what words must be used to define the scope of issues submitted to arbitration, to the availability of interim relief and orders in support of an arbitration, to the treatment of non-

signatories, to challenges to awards, and to the recognition and enforcement of awards.

In the words of McGill University Professor Frédéric Bachand in 2008, international arbitration "is very much a hybrid process, an international system of justice in which private adjudicators and the courts are partners rather than competitors" [in his paper presented to the ADR Institute of Canada's 2008 annual conference and published in Canadian Arbitration and Mediation Journal].

Indeed, a major problem can arise for international arbitration in a given jurisdiction if the judicial partner in that jurisdiction is not up to the task.

A lack of arbitration knowledge and expertise among generalist judges or judges specialized in other areas can produce decisions that are wholly inconsistent with global arbitration jurisprudence. Even in jurisdictions in which appellate courts are supportive of arbitration, aberrant lower court decisions can create international uncertainty and may disproportionately damage the jurisdiction's reputation in the field of international arbitration.

Some countries have thus created specialized courts, or specialized procedures, to deal with international arbitration issues in a centralized manner, enabling a limited number of judges to maintain expertise and creating consistency.

Specialization is not new. Well-known jurisdictions for international arbitration have implemented some specialization in their courts in one way or another, particularly concerning attacks on and enforcement of awards:

France: All applications in France to set aside arbitral awards go directly to the court of appeal at the seat of the arbitration. Given that most international arbitrations in France are seated in Paris, the Cour d'appel de Paris hears most of these applications. Other arbitration-related matters, however, go to courts of first instance.

England: Court applications concerning arbitration-related matters may only be brought within a limited range of courts in England (as provided in the Practice Direction to Part 62 of the Civil Procedure Rules (CPR)). These are, generally speaking: the Commercial Court (general), the Technology and Construction Court (TCC – only for construction/engineering-related disputes), and the Business List of regional mercantile courts (such as in Manchester, Leeds, Bristol and Birmingham) including the Central London County Court business list (which is the only county court that can accept arbitration applications). In practice, the focus is even narrower, as the two main funnels for arbitration-related matters in England are the Commercial Court in London and the TCC in London, which between them probably handle the vast majority of applications.

Switzerland: All applications to set aside arbitral awards made in Switzerland must be brought before the Swiss Federal Tribunal, the country's highest court. No further appeal or recourse is available. The Swiss legislature established this legal framework to minimize the time and cost for the resolution of these applications and so that a coherent jurisprudence would develop. As a matter of practice, all setting aside applications are assigned to the First Civil Court of the Swiss Federal Tribunal. While

this is a generalist civil court, this group of judges has developed considerable experience and expertise in deciding arbitration-related cases.

Other court applications relating arbitration, however, are generally heard by the Cantonal court of first instance at the place of arbitration in Switzerland. The practice on the assignment of arbitration matters within the Cantonal courts of first instance varies considerably from one canton to another.

Sweden: The Svea Court of Appeal has exclusive first instance jurisdiction to hear summary procedures relating to the enforcement of foreign arbitral awards. The parties can appeal to the Supreme Court.

China: China has brought increased uniformity to applications to enforce foreign arbitral awards by instituting a specialized procedure. A lower court decision not to enforce is automatically submitted to a higher court for review, and in turn its decision not to enforce must be reviewed by the Supreme People's Court.

Whether by placing arbitration issues solely in the hands of higher level courts, or placing them initially in the hands of specific judges in lower courts, these jurisdictions have centralized arbitration-related matters in the hands of specialized judges who it is expected can deal with arbitration issues consistently, competently and in a manner supportive of international arbitration.

In advocating for Canadian jurisdictions, particularly Québec, to implement in their courts greater centralization of international arbitration cases in the hands of a relatively small number of judges who would acquire experience and develop expertise, Prof. Bachand recalled that the drafters of the Model Law contemplated such centralization.

The drafters noted in the Analytical Commentary regarding Article 6 that "[t]o concentrate these arbitration-related functions [appointment; challenges; termination; setting aside of awards] in a specific Court" would have two benefits: "Even more beneficial [than enabling parties to locate the correct court] would be the expected specialization of that Court." While the drafters considered that full centralization would be best, they noted that it need not be one individual court in each State, and that particularly in larger countries, a type or category of courts might be designated such as a commercial court or chambers, and that it need not necessarily be a full court or chamber but it might well be the president or presiding judge of a chamber.

While centralizing the handling of one type of matter may not fit the legal culture and traditions of all jurisdictions, jurisdictions without specialized courts should assess whether they should be established in one form or another. In assessing the desirability of centralization and specialized courts, a jurisdiction must ask what alternatives are available to achieve consistently international arbitration decisions in its courts that meet or exceed globally accepted norms. As well, jurisdictions should consider what judicial education regarding arbitration should be provided to the judges hearing arbitration matters.

As well, there are roles for international arbitration institutions and organizations. Those roles include judicial education and the development of norms and model

approaches to assist international arbitration's judicial partners in all jurisdictions to perform their roles in this partnership consistently and effectively. This will serve well the interests of a well-functioning global international arbitration regime.

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