

Arbitral Institutions under Scrutiny

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The ASA seminar on “Arbitral Institutions under Scrutiny” on 9 September in Zurich yielded some interesting insight in the practice of arbitration institutions, and views of well-known practitioners on the problems faced by modern arbitration systems.

After the general introduction from ASA President Michael E. Schneider, Lara Bander and Mehtap Tari Hirt, two post-graduate students from the Master of Advanced Studies in International Dispute Settlement (MIDS) in Geneva, presented the results of an elaborate questionnaire directed to arbitral institutions all over the world. Twenty-one institutions responded, including the ICC, Swiss Chambers Court of Arbitration and Mediation, LCIA, WIPO, ICSID and SCC. As examples of the results obtained, the speakers reported that the institutions generally check whether there is an arbitration agreement in existence or that some institutions stated that they have no power to refuse to confirm an appointment on the basis of information that they may possess. It was also reportedly very rare for arbitrators to be removed by the institutions and many institutions were said to ask arbitrators for the reasons for delay where this occurred. Some ask for information as to the availability of the arbitrator before appointment, though this is rare. There is generally no control on procedural decisions, and scrutiny is limited to formal comments if any, the ICC being the exception in that it also provides substantive comments.

In addition, there is general agreement among the arbitral institutions that the split in the costs of the arbitration is very similar to that published by the ICC recently, namely: 82% for counsels' fees and expenses, 16% for the arbitrators' fees and 2% for the institutions' fees. There is generally no offer of liability insurance by the institutions and institutions were reluctant to discuss their budget, and origin of funds.

Regarding the origin and gender of arbitrators, Bander and Hirt stated the institutions had conveyed that the first five favourite nationalities for arbitrators are Swiss, French, American, Dutch and German and less than 10% of arbitrators appointed are women.

A panel followed on the organisation of the arbitral institutions with particular reference to independence, funding, operations, and the role at the commencement of the arbitration.

Urs Weber-Stecher (Wenger & Vieli) kicked-off with a list of eight "basic principles to be respected by arbitral institutions in order to meet proper corporate governance requirements and objective standards of fairness". Independence from any other body, organization or industry group, the efficient assignment of tasks and the possibility of appeal on important decisions were cited as some of the principles. It was also stated that the body electing the members of the arbitration body supervising and administering the arbitration proceedings must have the legitimacy and acceptance of the arbitration community and the typical users of arbitration as well as being a transparent and objective process.

Anne Véronique Schlaepfer (Schellenberg Wittmer) discussed the role of the institution at the commencement of the proceedings. It was noted that the institution has a key role at this stage and if something goes astray, it may be very difficult or even impossible to bring the proceedings back on track. For instance, if the institution refuses to accept a notice of arbitration because it erroneously considers that there is manifestly no agreement to arbitrate under the Swiss Rules, it will be the end of the proceeding. This, according to Schlaepfer, is a jurisdictional and not an administrative decision.

A debate later ensued between Phillipe Pinsolle (Shearman & Sterling) and Simon Greenberg (Deputy General Counsel, International Court of Arbitration, ICC) as to whether the decision by arbitral institution to disallow a case to proceed to

arbitration on the basis of a manifest lack of an arbitration agreement was a jurisdictional decision or not. Greenberg stated that while it may technically be a jurisdictional decision, this was not the terminology used by the ICC. Greenberg recalled a case in which the ICC determined that the case should not proceed to arbitration on the basis of article 6(2) of the ICC Rules, a decision which was then challenged and overturned by the courts of New York. The ICC was thereafter required to allow the arbitration to proceed. Pinsolle stated that such recourse would not have been available in jurisdictions such as France and Switzerland. (On the other hand, the arbitral award itself could be challenged if the arbitral tribunal wrongly accepts or declines jurisdiction, irrespective of a prior decision of the ICC under article 6(2), - see Swiss Federal Supreme Court, 4A_376/2008, ASA Bulletin 2009, 745)

The following panel discussed the appointment, confirmation, removal and replacement of arbitrators.

Juliet Blanch (Weil, Gotshal & Manges) raised a series of very interesting questions on the topic of appointment and confirmation. On pre-appointment disclosure, for example, Blanch noted that WIPO, ACICA and the Cairo Regional Centre for International Commercial Arbitration all allege in the responses to the questionnaire prepared by the MIDS students that they verify the information disclosed by the arbitrator. Blanch noted that this raises the question as to whether these institutions would become liable if they were negligent in such verification.

Blanch referred to the issue of having a barrister on the tribunal who was from the same chambers as a barrister acting as counsel. In Blanch's opinion this raises real concerns given that a chamber now markets its barristers under its banner and a clerk will market the Chambers to potential clients on behalf of all the barristers in them.

In the ensuing debate, Peter Leaver QC (Chairman of Board, LCIA) suggested a solution in order to avoid last-minute potential conflicts of interest where barristers who were in the same chambers as an arbitrator were requested to act as counsel late on in the proceedings. Leaver would write into a procedural order that the parties must within 48 hours of any change in their legal representation advise the tribunal of the same.

Nathalie Voser (Schellenberg Wittmer) gave a presentation on the removal and replacement of arbitrators. First, Voser discussed the decision of the Swiss Supreme Court of 29 October 2010 (DSC 136 III 605) where the Supreme Court found that the same standard of independence and impartiality applied to a party appointed arbitrator and to a chairperson.

The decision of the Supreme Court of 10 June 2010 (4A_458/2009) was also referred to. This CAS case involved football player, Adrian Mutu, and Chelsea Football Club where a first arbitration decision favoured Chelsea confirming a breach of the employment contract by Adrian Mutu. Chelsea then claimed compensation for breach of employment contract in a second arbitration. The chairman of the first arbitration was appointed by Chelsea as an arbitrator in the second arbitration. Substantial damages were awarded to Chelsea. Mutu requested the Swiss Supreme Court to set the decision aside. Mutu argued that the arbitrators appointed by Chelsea in the second arbitration was partial as he had presided over the first arbitration. Voser explained that the Supreme Court, in dismissing the request for annulment did not address the right issues as it limited its analysis to the issue of pre-judgment by the appointed arbitrator. In particular, Voser asked whether the issue to be looked at was not in fact whether arbitrators were in a position of "equality of information", a position adopted by the ICC Court when confirming arbitrators and/or deciding on challenges. The Supreme Court, Voser said, went very far in confirming the arbitral award and in her opinion it does appear questionable that Chelsea could appoint the former chair of a panel who rendered a decision favorable to Chelsea in the very same dispute.

The third panel of the day looked into supervision and quality control of the arbitration by the arbitral institutions.

Daniel Hochstrasser (Bär & Karrer) addressed the control of the efficient conduct and quality of the proceedings. He touched upon a range of issues.

For example, as to the question of whether institution should refuse to confirm an arbitrator simply because he or she is known to be subject to a heavy workload, Hochstrasser stated that party appointed arbitrators are rarely the reason for delay and even high-profile arbitrators are usually responsive and provide efficient input.

Time limits imposed on the rendering of an award were remarked to be of little effect. Although institutions insist on the establishment of the schedule at the

outset of the arbitration, there is no input from the institutions in the procedure chosen by the tribunal/parties. Hochstrasser suggested that it might make sense for institutions to influence the number of written submissions, the bifurcation of proceedings and document production requests, particularly in small cases. Hochstrasser regretted that institutions are rarely involved in discussions with the tribunal on the procedure chosen. It was suggested that should the institution find that extremely long deadlines are being set, it could intervene.

Greenberg then talked about the specific experience of the ICC in the scrutiny of awards. Greenberg explained that the first level of scrutiny is by the ICC counsel assigned to the case, though it can be carried out by ICC deputy counsel if counsel is away. The next level of scrutiny is carried out by management, normally the deputy secretary general or the secretary general. The award thereafter goes to the ICC Court for a further review. At the ICC Court, the discussion centres on the substantive comments rather than the procedural or formal comments by the Secretariat. It is however not always clear whether the comments are formal or substantial. In any event, three things can occur in relation to the substantive comments when these are communicated to the tribunal: i) the tribunal accepts them; ii) the tribunal informs the ICC that it has made a mistake and the ICC then withdraws the comment; iii) the tribunal does not accept the comment. The second and third possibilities rarely occur.

Greenberg expressed his conviction that the scrutiny process improves awards, though there are two main drawbacks: i) there is delay; the scrutiny process at the ICC should take no more than 2-3 weeks, though it has been the case in the past that it has taken up to 4-5 months; and ii) interference with the tribunals' liberty of decision. Greenberg stated that in order to improve the scrutiny process there could be more training, further feedback from arbitrators and a continual search for ways to improve our efficiency.

The fourth and last panel related to costs and liability.

Wolfgang Peter (Python Peter) spoke on cost control and the striking the balance between cost efficiency for the parties and fair remuneration of the arbitrators.

As a measure of the disproportion between the arbitrator's fees and the other arbitration costs, Peter mentioned that it is often the case that experts charge higher fees than arbitrators. Peter also mentioned that in a recent ICSID case

counsel had charged more than \$40 million for the jurisdictional phase and that in recent case in which he was involved where \$140 million was in dispute, the parties had charged \$21 million in fees.

Remuneration of arbitrators on an ad valorem basis was said to have to particular problems. The first is that Peter believes that arbitrators have a lot more work on each case than in the past because of the way international arbitration has evolved; yet the system has not taken account of this. The second is that there are issues of allocation of fees between arbitrators where one arbitrator may carry out very little of the work yet still be awarded a substantial portion of the overall fees.

However, a time based system was also said to be problematic. In particular, should there also be a cap on the hourly rate charged by an arbitrator? This would disadvantage younger practitioners in Peter's view.

Currency fluctuation was said to be a particular issue. From 2005 to today, Peter remarked, the US dollar has dropped in value against the value of all the major currencies in the world. For example against the Swiss franc it has dropped 60% and against the Australian dollar it has dropped 50%.

Michael Moser, in the ensuing debate, referred to the situation of arbitrator remuneration at CIETAC, where arbitrator remuneration is extremely slight. As an example, in a claim for \$10 million, \$100,000 would go to CIETAC out of which \$25,000 would remunerate the arbitrators. Moser stated that as a result, the following words from the Bible were apt to describe potential arbitrator's willingness to act in CIETAC arbitrations: "Many are called, but few are chosen".

Professor Hans Van Houtte (Iran-United States Claims Tribunal) spoke of the liability of arbitrators and institutions. He started off by pointing out that the threats of liability are part of the charged atmosphere that exists in international arbitration. Indeed, it is the case that annulment of a decision is no longer felt to be a sufficient remedy.

The liability of an arbitrator will depend on the seat of the arbitration, Van Houtte said. In common law systems it is considered that arbitrators have the same liability as judges which is normally on the basis of wilful misconduct or gross negligence.

In civil law systems, the basis of any liability is based on the contract said to exist

between arbitrators and the parties and can derive from a failure to abide by the three tasks entrusted to arbitrators namely: to render a decision; to render a good decision; to behave diligently.

Van Houtte referred to the liability of arbitral institutions. Possible areas in which an arbitral institution could be found liable include where the institution has wrongly refused a case on the basis that the claim lacks a valid arbitration clause or where it accepts the case only for the award to be later annulled because the arbitration clause was invalid.

Richard W. Naimark (Senior Vice President, AAA) remarked that in the United States there has been a long history of attempts at holding institutions and arbitrators liable. A doctrine of quasi-judicial immunity which derives from judicial immunity exists.

The articles by the speakers in this conference will be published by ASA in an upcoming Special Series volume.

By Matthias Scherer and Jaime Gallego