Courts of International Arbitration: The Arbitrationization of Litigation?

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As leading jurisdictions around the world continue to establish national courts dedicated to the oversight of international arbitration issues, one wonders whether this is an idea whose time has come. This issue was previously discussed on this blog in September 2010. Much progress has been made in the intervening years.

The most recent jurisdiction to adopt this reform is one that will continue to be in the spotlight during 2014 as the host of the upcoming ICCA Congress: Miami. Joining New York City as only the second jurisdiction in the United States to do so, the Miami-based Eleventh Judicial Circuit of Florida adopted this reform on December 3, 2013.

New York formally created its court of international arbitration in September 2013. Courts in jurisdictions as diverse Switzerland, Australia, India, the United Kingdom, France, and Singapore have either established specialized courts of arbitration or effectively direct international arbitration matters to a single court.

While little research exists regarding the actual benefits of establishing dedicated courts of international arbitration, four appear likely.

First, greater uniformity of decision is arguably the most significant anticipated benefit. Though some jurisdictions may retain wrongheaded positions on international arbitration, one wonders whether consistent error is preferable to persistent uncertainty. Surely the latter makes it nearly impossible to measure the benefit of the bargain and is therefore more troubling from a commercial standpoint.

Although the increased prevalence of international arbitration is often touted, most judges serving on generalized commercial courts are likely to be confronted with few if any matters involving international arbitration in a given year. The consequent lack of experience presents serious challenges both to advocacy and judicial decision-making.

In the United States, some commentators have pointed to discrepancies between state and federal practice concerning the enforceability of arbitration clauses. Increased awareness of prevailing standards, both state and federal, among members of the judiciary may reasonably be expected to have a harmonizing effect, with knowledgeable courts looking beyond parochialism and converging around generally accepted principles.

While the practical effects in the United States of the adoption of dedicated state courts are likely to

be mitigated by the United States' two-tiered legal system, which largely vests authority over international arbitration matters in the federal courts, the reforms adopted by Miami and New York are more than mere window dressing. Even a cursory review of recent matters decided by Florida state courts involving international arbitration reveals that they most often arise at the initial stage of proceedings, including motions to compel or stay arbitration or litigation proceedings. Although not numerous, one can foresee the possibility of fewer parties in the future opting to remove international arbitration matters to U.S. federal courts where the likelihood of success for a motion to compel in the state court is high, thus saving the additional step of removal.

Despite its advantages, however, uniformity itself is not always a virtue. Improved policy is also a desired consequence of the concentration of judicial decision-making, particularly to the extent that those judges selected to serve on dedicated courts of international arbitration develop expertise in arbitration practice and theory. While it is true, as one prominent commentator noted, that there is no single "true" philosophy of international arbitration, it is also clear that certain practices and principles have acquired widespread acceptance.

Notably, both the New York and Miami courts of international arbitration require assigned judges to be experienced and even take courses. While not to be overstated, an unmistakable tension arising from differing policy expectations and desires exists between the judiciary and international arbitration practitioners. Whether one of the actual effects of establishing dedicated courts of international arbitration will be to align the general policy approaches of judiciaries and international arbitration practitioners is far from certain. Indeed, the vastly different constituencies of each, not to mention the more expansive policy purview of courts, renders this outcome even less likely.

Increased efficiency can also be expected as judges serving on dedicated courts of international arbitration become more familiar with recurring problems. This is particularly true as courts adopt "pro-arbitration" policies towards enforcement of arbitration clauses and arbitration awards.

Finally, driven by the increasingly keen competition among jurisdictions seeking to be selected as the "go-to" arbitral seat, the creation of a dedicated and well-trained court of international arbitration undoubtedly serves as a powerful signal to arbitration practitioners and parties negotiating international arbitration agreements. It is not surprising, as a result, that members of the international arbitration community have been among the most forceful advocates of reform in their respective communities.

The establishment of dedicated courts of international arbitration in jurisdictions throughout the world is likely one of the most significant developments of the last half-decade. Although differences will remain, how far the creation of dedicated courts of international arbitration and similar reforms will go in aligning the expectations of international practitioners and domestic courts – making them more like us – is an experiment currently being undertaken.