

Are We Dealing with the Trend of Specialised Arbitration?

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The development of international arbitration in recent years has led to a significant multiplication of arbitration institutions around the world. In fact, every major city related to trade or industry has at least one dispute resolution centre. In addition to having long-standing, very reputable institutions for resolving commercial disputes, i.e. the ICC in Paris or the LCIA in London, for some time there has been a trend in establishing dispute resolution centres specializing in particular sectors of the economy. This trend is particularly noticeable in disputes relating to energy and natural resources, as well as those regarding the financial sector.

Energy sector

For a long time arbitration has been the preferred method of resolving disputes related to energy and natural resources. An arbitration survey conducted in 2013 by Queen Mary University of London and PwC revealed that 56% of respondents from the energy sector preferred arbitration over other methods of dispute resolution. This is most likely due to the fact that these disputes involve very complex technical issues, have an international character, and also impact the current activities of the energy market.

Due to the increasing popularity of arbitration in this branch of the economy, in recent years a few arbitral institutions have sprung up specializing exclusively in resolving energy disputes. In 2013, on the initiative of the Scottish Arbitration Centre and the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee (CEPMLP) established an institution called the International Centre for Energy Arbitration (ICEA), aimed at both legal and technical support of energy disputes resolution. The ICEA is in the process of preparing the rules of arbitration, which as far as possible will reflect the needs of the energy industry. This task is to be met primarily through a survey conducted by the ICEA and consultation with the energy sector and the relevant regulatory institutions. Another of the institutions aimed at resolving disputes in the energy sector was formed at the end of 2014 in Australia, the Perth Centre for Energy and Resources Arbitration (PCERA). This institution offers institutional support for the settlement of energy disputes through specially modified 2010 UNCITRAL Arbitration Rules (PCERA Arbitration Principles) and maintains a list of highly specialized arbitrators in the energy sector. Its long-term goal is to develop towards becoming the leading arbitration institution administering energy disputes in the Pacific region.

Financial sector

The financial sector usually preferred litigation instead of arbitration as a method of dispute

resolution. However, in recent years there has been a significant increase in the use of arbitration by banks and other financial institutions. This may be a result of the increased complexity of disputes as a result of the excessive complication of financial products and activities of financial organizations such as the International Swaps and Derivatives Association (ISDA), which promote arbitration as a method of dispute resolution in the financial sector.¹⁾In 2013, the International Swaps and Derivatives Association (ISDA) published “Arbitration Guide”, which aims to illustrate how to use arbitration as an effective tool to resolve disputes on the market for swaps and derivatives. In response to the increased interest and demand for arbitration as a method of dispute resolution in the industry, institutions providing highly specialized services to resolve disputes relating to derivatives, swaps, trading of shares and other financial products have begun to emerge.

In 2012, in The Hague, an arbitration institution called P.R.I.M.E. Finance, or The Panel of Recognised International Market Experts in Finance was established. The key elements that the P.R.I.M.E. Finance offers is a team of highly specialized arbitrators and arbitration rules “tailored” specifically for disputes in the financial sector, based on the 2010 UNCITRAL Arbitration Rules. The arbitrators at the P.R.I.M.E. Finance include a number of eminent experts of the financial market including investment bankers, people with experience in regulatory bodies or derivatives traders. In order to increase the effectiveness of resolving disputes related to financial sector regulations, the P.R.I.M.E. Finance uses certain tools for this, i.e.: (i) the expedited proceedings (the parties may agree to shorten the time frame to resolve the dispute urgently); (ii) urgent measures (“emergency arbiter” may apply provisional measures in case when the party urgently needs them, i.e. they cannot await for the constitution of the arbitral tribunal), and finally (iii) the transparency of the proceedings (excerpts of awards or whole awards are published in anonymised form, provided that neither party objects). It should also be pointed out that one of the objectives of the P.R.I.M.E. Finance is to create a database of awards and source materials (mainly through the publication of awards delivered under the arbitration rules of the P.R.I.M.E. Finance) regarding the key issues in the field of dispute resolution in the financial sector.

Other examples

Another initiative highlighting the trend of specialization of arbitration was the founding in August 2014 of the Shanghai Aviation International Court of Arbitration (SHIACA), which is the world’s first arbitration institution specializing in disputes arising in the field of civil aviation. One of the primary tasks SHIACA is to promote arbitration as a method of resolving disputes between airlines, airports, gas companies and catering companies.

Vision of the future

Due to the increasing level of complexity, the technical issues occurring in energy disputes, or the regulatory procedures governing the use of financial instruments, invaluable for the successful resolution of disputes may be the arbitrators’ unique knowledge of specific issues, rather than their general competence to settle disputes. There is therefore no doubt that the differentiator for specialized arbitration institutions is that the arbitrators involved are specialists in the specific sectors of the economy who, through their many years of practical experience, are able to conduct complex forms of dispute resolution, taking into account the nuances and details characterizing disputes in the particular industry.

An advantage for specialized arbitration institutions is also to provide better suited – for sector-specific – rules of arbitration proceedings. It should be noted, however, that amendments in arbitration rules, which in recent years have been introduced by most recognized commercial arbitration institutions as the ICC in Paris or LCIA in London (respectively in 2012 and 2014), are aimed at increasing the speed and efficiency of proceedings, as well as lowering their costs, to a large

extent reflect the mechanisms contained in the rules of specialized arbitration institutions. However, account must be taken of the fact that in the near future the amount of disputes administered by the newly created entities will not be as substantial as those with many years of experience, which may result in facilitating the way for these institutions to introduce increasingly innovative solutions to better adapt to the changing requirements of the industry.

As the above mentioned institutions have been operating only for a few years, at the moment there is a lack of reliable and comprehensive data on the number of proceedings administered by these institutions, or on procedural rules based on which proceedings are conducted (the ICEA does not even have arbitration rules at the moment). However, if these centres actually will, in a more efficient way, be able to adapt to the needs characterized by disputes in a specific industry, over time the number of cases conducted by them should grow steadily. In the final effect, however, it will be vital for their existence and further development to gain adequate support from both lawyers and industry organizations that have a fundamental impact on the inclusion of arbitration clauses regarding a specific arbitration institution in contracts between entities in a given sector of the economy.

References

1. ↑ In 2013, the International Swaps and Derivatives Association (ISDA) published “Arbitration Guide”, which aims to illustrate how to use arbitration as an effective tool to resolve disputes on the market for swaps and derivatives