UNCITRAL's 2016 Notes on Organizing Arbitral Proceedings: Evolutions and Fragmentations in International Arbitration

Kluwer Arbitration Blog
September 7, 2016

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Please refer to this post as: Esme Shirlow (Assistant Editor for Australia, New Zealand and Pacific Islands), 'UNCITRAL's 2016 Notes on Organizing Arbitral Proceedings: Evolutions and Fragmentations in International Arbitration', Kluwer Arbitration Blog, September 7 2016, http://arbitrationblog.kluwerarbitration.com/2016/09/07/uncitrals-2016-notes-on-organizing-arbitral-proceedings-evolutions-and-fragmentations-in-international-arbitration/

On 7 July 2016, the UNCITRAL Commission adopted a revised and updated version of the UNCITRAL Notes on Organizing Arbitral Proceedings. The 2016 Notes replace a 1996 edition, and aim to flag procedural issues typically associated with arbitral proceedings. They include guidance on matters such as the language(s) of the proceedings, confidentiality and transparency, and documentary evidence and site inspections. The Notes are intended to maintain the flexibility inherent in arbitral proceedings, and are therefore not binding. They were updated with input from the UNCITRAL Commission, the UNCITRAL Working Group II on Arbitration and Conciliation ("WG"), and the Secretariat. The discussions of the WG and Commission – as well as the text of the Notes – provide valuable insights into perceptions within UNCITRAL as to best practice on key procedural issues that may arise in arbitral proceedings. This post will briefly outline some of the key differences between the 1996 and 2016 versions of the Notes and then consider their significance to international arbitration more generally.

Reflecting 20 Years of Evolution in Arbitral Practice

The overarching aim in updating the Notes was to ensure that they "conform[ed] to current arbitral practices". A number of topics previously addressed in the 1996 Notes have been updated and expanded in the 2016 edition. The 2016 Notes adopt a more favourable attitude towards arbitrator-initiated settlements; highlight new factors relevant to selecting a place of arbitration; and address in more detail the possibility for tribunals to use administrative or legal secretaries. The shifts in treatment of these matters demonstrate important shifts in arbitral practice and party expectations over the past 20 years.

On the topic of settlement, for example, the 1996 Notes recommended that tribunals "only suggest settlement negotiations with caution" (para. 47). In revising the Notes, the WG considered it important to "reflect more positively the possibility of amicable settlements during arbitral proceedings". It considered that approaches to this matter had evolved to such an extent that – in some circumstances – it may even be appropriate for arbitrators to be involved in mediating such settlements themselves (para. 72).

The treatment of arbitral secretaries in the 2016 Notes is equally revealing of a shift in attitudes. The

1996 Notes flagged the existence of "[d]ifferences in view" as to the tasks arbitral secretaries could appropriately perform. In particular, they emphasised that it would be inappropriate for secretaries to perform tasks similar to the "professional functions of the arbitrators" (para. 27). In updating the Notes, the WG noted that this was a "fraught issue", but ultimately opted for a more neutral approach. The 2016 Notes observe that "[s]ome arbitral tribunals wish to have secretaries carry out more substantive functions including legal research….and preparing draft procedural decisions". The WG ruled out involvement of secretaries in arbitral decision-making, but was nevertheless willing to recognise that there may be exceptions to this general rule "in certain rare, specialized types of arbitration" (para. 36). The 2016 Notes further reflect changes to party expectations, emphasising the importance of disclosures by tribunals of secretary appointments (para. 38).

A number of topics which were not addressed in the 1996 Notes are now covered in the 2016 version. These include joinder and consolidation, costs allocations, and the recoverability of in-house costs. The 2016 Notes now endorse, for example, "the general rule…that costs follow the event" (para. 48). In addition to endorsing this principle, it was agreed that the Notes should also identify other potentially relevant criteria, such as the conduct of the parties during the proceedings (para. 48). A suggestion to include further factors, such as "the complexity of the case", did not receive support. During their discussions of costs allocation, concerns were expressed by both the WG and Commission that the non-inclusion of a reference to in-house costs might be taken as "mistakenly imply[ing] that only the legal fees of external counsel would be recoverable". The WG and Commission both acknowledged that this "was a controversial matter", but formulated the view that "[t]here is no principle prohibiting the recovery of in-house costs incurred in direct connection with the arbitration". The Notes thus identify circumstances in which in-house counsel fees may be recoverable (para. 41).

The General Significance of the Notes to Arbitration: Two Trends

In addition to providing a snapshot of contemporary attitudes towards key procedural issues arising in international arbitration, the Notes also signify – and contribute to – two broader trends.

The Trend towards Institutionalisation and/or Judicialisation

First, whilst the Notes do not distinguish between *ad hoc* and institutional arbitrations, they indicate that UNCITRAL's practice may be shifting towards favouring more institutionalised or at least formalised approaches to arbitration. The WG emphasised, for example, that the option between *ad hoc* and institutional arbitration "was not binary" and that *ad hoc* rules like the UNCITRAL Rules "could be successfully administered by institutions". The Notes also highlight a number of advantages associated with institutionalised proceedings (see, for example, para. 142). Where the 1996 Notes were criticised for signifying an attempt to judicialise arbitral proceedings, the 2016 Notes appear to go further down this path. The Notes are also likely to prompt convergences in arbitral approaches to procedural issues. It is interesting to note, however, where the WG opted for less prescriptive approaches in the Notes. The WG decided against, for example, including a list of issues in the Notes to be discussed at the first procedural meeting and also rejected the suggestion that the Notes should "include a provision on the usefulness of including a section on procedural history in the award".

The Trend towards Fragmentation

Second, the Notes indicate a growing perception that 'international arbitration', and even 'investment arbitration', as fields may be fragmenting.

The WG and Commission's discussions illustrate that it may soon no longer be appropriate to address the procedural issues implicated in international *investment* arbitration alongside other forms of

international arbitration. The Notes are designed to apply to international arbitration generally and (on the whole) do not distinguish between its different types. In 2014, however, members of the WG "queried whether specific reference or guidance in relation to any type of arbitration…and in particular investment arbitration, ought to be included". These distinctions between investment and other forms of arbitration were highlighted, for example, in the Commission's discussions of in-house costs and of joinder and consolidation. A range of options were considered to address these issues, including the possibility of providing that the Notes would apply only to international commercial arbitration or including an introductory paragraph highlighting the differences between the various types of arbitration. Ultimately, the WG resolved that the Notes "should retain their general applicability", but accepted that certain sections of the Notes might need to distinguish the approaches taken in investment as compared to other types of arbitration. It also expressed a desire to "benefit public knowledge about the difference between those types of arbitration". Doubts around the appropriateness of this "generic approach" persisted, however, up to the Commission's approval of the Notes at its 2016 session.

One procedural issue that the WG considered to be specific to investment arbitration was that of transparency. The 1996 Notes endorsed the then-dominant view that confidentiality was an inherent (and desirable) feature of international arbitration (para. 31). The WG ultimately opted to retain this approach in respect of commercial arbitration, but noted that it was no longer appropriate for investment *treaty* arbitration. The 2016 Notes thus include a new subsection noting the "specific characteristics of investor-State arbitration arising under an investment treaty" support different approaches to transparency in that field. This focus on the characteristics of investment *treaty* arbitration was a theme first developed by the WG during its drafting of the UNCITRAL Transparency Rules, and the Convention. It signifies a further fragmentation of *investment arbitration* between treaty-based and other types of investment arbitration (for example, based on a contract or domestic investment law). This is a trend I consider in more detail in a forthcoming article in the ICSID Review. For present purposes, it is interesting to observe that the Notes carry forward this trend: the WG specifically noted its consensus that "the issue of transparency in treaty-based investor-State arbitration…deserved a different treatment and did not necessarily imply that it should be expanded to deal with arbitration involving States in a general manner" (para 53).

The differences between the various types of both international arbitration and international investment arbitration are empirical issues which the WG has not sought to identify or address in any detail. It is therefore unclear from the WG's records why *treaty-based* investor-State arbitrations have been singled out as a class distinct from other forms of arbitration and, in particular, other forms of investor-State arbitration. Whereas the distinction is perhaps at least arguable in respect of issues like transparency, it is interesting to see that it is being carried forward in UNCITRAL's discussions of other procedural issues. In particular, it will be of interest to see whether it persists and what role it plays in UNCITRAL's proposed future development of a code of ethics/conduct or in its exploration of the possibilities of developing and/or hosting an appellate or judicial body for investment disputes.