Moving Ahead in 2017

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Ricardo Guimarães, Raquel Galvão Silva (Linklaters)

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New years are a great opportunity to take stock and to prepare for future developments, despite the obvious difficulties in predicting what the main trends will be. This is also the case for 2017.

Looking back to 2016 there are two topics that immediately stand out: gender diversity and transparency. Both topics were subject to substantial discussion last year and the developments in these areas are likely to continue (or even increase) in 2017.

For gender diversity in international arbitration, last years' highlight was without question the Equal Representation in Arbitration Pledge, which was launched in May and has been described as a turning point for gender diversity in arbitration. The Pledge follows the recognition by members of the arbitration community of the under-representation of women on international arbitral tribunals and establishes concrete and actionable steps aimed at ensuring that women are appointed as arbitrators on an equal opportunity basis.

As of the 9 January 2017, the pledge had 1620 signatories, including well-known law firms and arbitral institutions. In fact, arbitral institutions have had a valuable role in promoting greater gender diversity in arbitration panels, adopting specific policies for that effect and publishing annual statistics, thus enhancing transparency in this regard.

The ICC, for example, published in May 2016 a Note to the ICC National Committees and Groups about the selection of arbitrators, encouraging them to favor diversity, including of gender, in proposing candidates to become arbitrators. In addition, it published for the first time in 2016 statistics on gender representation in arbitral tribunals, showing that women arbitrators represented just over 10% of all appointments and confirmations in 2015. According to the same statistics, women were more frequently appointed or confirmed as co-arbitrators (43%) than they were as sole arbitrators (32%) or tribunal presidents (25%). Finally, the statistics show that parties were less likely to select women arbitrators than the ICC Court. These figures are in line with the statistics released by other arbitration centers, in particular the LCIA

It will be interesting to see the statistics for 2016, but it seems clear that the discussion on gender diversity in arbitration is far from over and we expect it to continue to be a hot topic in 2017, probably with parties more directly involved in the debate which will also probably focus more intensively in other forms of diversity besides gender. The ICSID report for 2016, for example, has just been released and it evidences a greater diversity in terms of geographies from which arbitrators have been appointed. Amongst other interesting trends, the report shows that the Western European appointments for annulment committees have declined – representing 42% of all appointments compared with 50% in 2015.

As in previous years, the balance between confidentiality and transparency in international arbitration was widely discussed in 2016 and such discussion is likely to continue.

This trend for a higher degree of transparency has been mainly happening in investor-state arbitrations, led by critics who perceive ICSID as a “secret court” in which investors can challenge a country’s laws or regulations if adverse to their investments.

In an effort to ensure greater transparency, several initiatives have been emerging such as (i) the United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in investor-state arbitration, which became effective on 1 April 2014 and, unless the parties to the treaty have agreed otherwise, are applicable to all investor-state arbitrations initiated under the UNCITRAL Arbitration Rules; (ii) the UNCITRAL Transparency Registry, a repository for the publication of information and documents in treaty-based investor-State arbitration, and (iii) the Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention) which provides a mechanism by which states can express their consent to the application of the UNCITRAL Rules on Transparency, including in respect of treaties concluded before 1 April 2014.

In 2016 these initiatives were further developed. ICSID, for instance, began live-streaming hearings in investor-state cases and, in December 2016, Canada became the second country in the world to ratify the Mauritius Convention which now needs a third ratification before entering into force.

This movement for greater transparency is increasingly growing also in international commercial arbitration and arbitral institutions have been amending their rules and practice. The ICC, for example, started to publicize on its website the names of the arbitrators appointed to ICC cases, their nationality, as well as whether the appointment was made by the ICC Court or by the parties and which arbitrator is the tribunal chairperson. Although parties can, by mutual agreement, opt out of this limited disclosure, they may also request the Court to publish additional information about a particular case. In addition, in February 2016, the ICC Court adopted a guidance note for the disclosure of conflicts by arbitrators and the new ICC rules which will come into force on 1 March 2017 now state that any party can ask the ICC Court to provide reasons for its decisions (in particular on challenges of arbitrators).

Other institutions have been taking a similar path, with the LCIA for instance publishing a comprehensive analysis of cases to provide users with information on the average costs and duration of arbitrations and the SCC publishing a report detailing the size of disputes, their length and costs, and how tribunals allocate the costs of arbitration and the costs for legal representation.

The changes implemented in 2016 towards a higher degree of transparency were considerable but there seems to be room for improvement. The 2015 International Arbitration Survey organized by Queen Mary and White & Case suggested that the arbitration community would “welcome increased transparency in institutional decision-making”, especially in the appointment of, and challenges to, arbitrators”. At the same time, when asked about the three most valuable characteristics of international arbitration, 33% of the respondents said that one of the main reasons they choose arbitration is the confidentiality and privacy of the process. The challenge for 2017 will thus continue to be the need to strike the right balance between transparency, on the one hand, and confidentiality, on the other hand, avoiding to undermine the ability of parties choosing (for valid reasons) to keep the proceedings private.