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The Protection of the Public Interest in Public Private Arbitrations

Stavros Brekoulakis (General Editor International Journal of Arbitration, Mediation and Dispute Management; Queen Mary University of London) · Monday, May 8th, 2017

In international arbitration, as in other fields of law, the divide between private and public—commercial arbitration and public international (including investment) arbitration—traditionally has been the generally, if uncritically, accepted belief. When public bodies are involved in commercial contracts, the traditional point of distinction has been whether the state operated *jure imperii* or *jure gestionis*. Apart from the fluid and often difficult to ascertain meaning of the these grandiose Latin terms, the distinction has been unsatisfactory, mainly because it fails to capture an increasingly growing middle ground upon which the arbitration literature has only recently started to focus, including in an article I recently co-authored with Margaret Devaney for the Modern Law Review[1)]. It is the ground occupied by contracts between public bodies and private parties, and disputes arising out of such contracts that may have public interest implications. Examples of such contracts (and related disputes) include public procurement contracts, big infrastructure and concession contracts, contracts for the provision of an essential public service (provision of energy and water) or contracts for the implementation of important governmental policies in sectors that are sensitive for the public, such as health, education, social welfare and immigration.

The last forty years has witnessed a remarkable growth in the rise of public-private contracts and related disputes. The growth owes to two concurrent developments. One the one hand, with the collapse of the non-arbitrability doctrine, the scope of arbitration has greatly expanded to include not only claims pertaining to the formation, interpretation and performance of commercial contracts, but crucially statutory claims that may have crucial social implications. Today, international arbitral tribunals routinely review disputes associated with public policy, including (in investment law) disputes arising out of the exercise of regulatory sovereignty of host states.

On the other hand, a combination of economic and ideological factors has led to increased interaction between public and private sectors and increased reliance on private actors to perform public functions in virtually every industrialized state.

The connection between these two developments—the expansion of arbitration's domain and the rise of the 'contracting state'—is the fact that many public-private contracts favour arbitration and other private forms of dispute resolution over resolution of disputes in the national courts. For example, the Model Terms and Conditions of Contracts for Goods issued by the UK Office of Government Commerce provide for a multi-tiered dispute resolution process ending in arbitration

in the event that informal negotiation and mediation are unsuccessful. Similar dispute resolution provisions are common in the standard forms of international construction contracts typically utilized for procurement of public works.

This type of public-private arbitration can have important implications for the public interest. The *e-Borders* case provides an example from the UK. The case concerned a dispute between the UK Secretary of State for the Home Department and the US defence company, Raytheon Systems Limited, in respect of a 2007 contract for the design, development and delivery of a multimillion pound technology system (e-Borders) which would reform UK border controls by establishing an electronic system to vet travellers entering and leaving the UK. When the Home Office terminated the contract in 2010 for significant delays in progress of the works, Raytheon commenced arbitration proceedings claiming substantial damages for unlawful termination. The arbitration proceedings were conducted confidentially, under the rules of the London Court of International Arbitration. The arbitrators were English and American, with a Canadian chairman. The arbitrators decided, apparently within an exclusively private law setting, that the Home Office had unlawfully terminated the contract. It awarded damages of approximately £190 million to Raytheon, plus £38 million in interest and claimant's costs. While the award was challenged by the Home Office and subsequently set aside by the High Court for serious irregularity, the Home Office announced in March 2015 that it had reached a negotiated resolution, agreeing to pay £150 million to Raytheon in full and final settlement of the dispute. The *e-Borders* award raised serious concerns in the British government and attracted intensive media and public interest, with the focus on the impact of the award on public finances and on UK border security. Some observed that the e-Borders dispute cost the British taxpayer millions of pounds, with no disclosure of information about what went wrong with the Raytheon contract.

As the *e-Borders* case demonstrates, the potential problem with public-private arbitration is that, while their outcomes may have far-reaching implications for the public interest, the resolution of these disputes may be conducted within an exclusively private law framework. This raises important questions, notably whether the public interest is accounted for, and indeed protected, in public-private arbitrations.

The answer to this question depends on the national applicable law. French law, for example, recognizes the distinctive nature of public-private arbitrations, and a number of French courts decisions have held that awards arising out of public-private arbitrations must be reviewed by administrative courts to ensure that the award is not contrary to French mandatory rules of public law.[2)] Similarly, Brazil's recently-enacted arbitration law provides that public-private arbitration is subject to the 'principle of publicity' and all other laws governing transparency in public affairs.[3)]

By contrast, and partially because of the lack of a developed administrative law sphere or a separate body of administrate courts, English arbitration law has been exclusively developed around a private law paradigm, which treats all arbitrations (including those with public interest implications) as commercial. In addition, the English concept of public policy generally has been narrowly construed, and does not necessary capture public law norms.

Resolution of public-private disputes within this private law framework gives rise to a number of potential threats to the public interest. One threat is the likely non-application of public law norms, such as the administrative law doctrines of ultra vires and the rule against fettering, which allow public bodies to disrupt public-private contracts to pursue a competing public interest goal. A

second potential threat is the non-application of public law principles of openness and accountability. As public bodies are given their powers on the understanding that they are to be exercised in the public interest, the public has an interest in ensuring such powers are not abused. However, this objective cannot be achieved in public-private arbitrations, which are typically private and confidential. As in the e-Borders case, if the public is denied access to important information in relation to these arbitrations, the public is deprived of the opportunity to consider 'what went wrong' and to attribute accountability either to the public body (in which case political accountability should ensue) or to the private party (in which case civil liability should follow).

International arbitration, as a private means of dispute resolution, has been under public scrutiny and (often unfair) criticism, especially in relation to investor-state dispute settlement. However, as the number of public-private contracts increases, public attention is likely to be drawn to public-private arbitrations as well. Unless arbitration responds by dealing with important public interest concerns, state regulation (possibly unwelcome) may soon ensue.

References

?1 See for example, S. Schill, project on ‘Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica’.

?2 See, for example, the decision of Tribunal des conflits in *INSERN v Fondation Letten F. Saugstad* (2010) and the more recent decision of the Conseil d’Etat in its 9 November 2016 decision.

?3 Law No 13,129 of 26 May 2015.

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