Arbitration Reform Efforts Continue Despite Pandemic

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Just like many of us have learned to work remotely these past few months, those leading the efforts to reform international arbitration have also had to endure the constraints imposed by the pandemic.

At the first-ever virtual ITA-ASIL conference, held on 24 June 2020, Professor Chiara Giorgetti from the University of Richmond School of Law and Corinne Montineri, Senior Legal Officer at UNCITRAL's Office of Legal Affairs and current secretary of Working Group III, provided those attending the conference via Zoom with an update of the work being performed by UNCITRAL Working Groups II and III. Although the pandemic has indeed forced certain meetings to be postponed, reform efforts continue largely unimpeded.

Expedited commercial arbitration

Working Group II, with a mandate covering "Arbitration and Conciliation / Dispute Settlement," managed to squeeze in a meeting in New York for its 71st session in February 2020. Working Group II has been active for over 20 years, tackling topics including the enforceability of interim measures, the revision of the UNCITRAL Arbitration Rules, transparency in treaty-based arbitration, and more. Yet as Ms. Montineri explained, Working Group II has now turned its attention to developing

expedited commercial arbitration provisions that may eventually be presented as an appendix to the UNCITRAL Arbitration Rules, or as a stand-alone text.

The challenge for Working Group II, according to Ms. Montineri, will be to strike a balance between improving efficiency and reducing cost and duration, on the one hand, and guaranteeing due process, on the other.

The draft provisions on expedited arbitration cover procedural aspects including: (i) arbitrator appointment; (ii) the case management conference and provisional timetable; (iii) written submissions; (iv) counterclaims and additional claims; (v) the taking of evidence; (vi) hearings; and (vii) the making of the award.

Participants at the 71st session—which included representatives of various State delegations, intergovernmental organizations and non-governmental organizations—had an opportunity to discuss the draft text and express their views.

Unlike the ICC's expedited procedure which establishes financial thresholds that automatically trigger the application of the expedited rules unless the parties have expressly opted out, Ms. Montineri explained that UNCITRAL Working Group II decided to make the express agreement of the parties the sole criterion to determine when the expedited provisions apply.

The next meeting for Working Group II is tentatively scheduled for 21-25 September 2020, in Vienna.

ISDS reform

By contrast, Working Group III's 39th session, originally scheduled to begin in New York on 30 March 2020, was indeed postponed due to COVID-19. Nonetheless, and until its next meeting tentatively scheduled for 5-9 October 2020 in Vienna, the Group will continue to collaborate informally, hold frequent webinars, and accept public comments to various working papers posted on its website.

Unlike Working Group II's current narrow focus, Working Group III's mission encompasses a broad array of initiatives under the label "Investor-State Dispute Settlement Reform." Since it began its work in 2017, Working Group III has studied and developed ISDS reform options suggested by Member States, covering issues

as varied as: (i) the possible creation of a stand-alone review or appellate mechanism for investment disputes; (ii) the possible creation of a standing first-instance and appeal investment court; (iii) arbitrator appointment methods and ethics such as the issue of "double hatting" (described below); (iv) control mechanisms on treaty interpretation; (v) dispute prevention and mitigation; (vi) cost management; and (vii) third-party funding.

Combining the various reform proposals, many of which are interrelated, is challenging. As Ms. Montineri pointed out, the goal is to achieve "consistency and flexibility," and avoid "fragmentation".

One noteworthy, recent development coming out of Working Group III was the publication, on 1 May 2020, of the draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. The draft Code of Conduct was prepared jointly by the ICSID and UNCITRAL Secretariats, partly in response to concern over arbitrators' independence and impartiality. Its text provides policymakers with a range of options on issues including disclosure obligations, repeat appointments, issue conflicts, and more. Professor Giorgetti, who worked on the Code of Conduct as a scholar in residence at ICSID, recently published an in-depth blog post on the subject.

Article 6, which deals with "double hatting"—the practice of simultaneously acting as counsel and arbitrator, among other roles—is already generating significant discussion. The article's draft text suggests a range of options, from a ban on double hatting, to simply requiring detailed disclosure. Yet, as Vanina Sucharitkul recently argued on this very blog, a complete ban on the practice of double hatting could hinder efforts to promote gender and regional diversity in arbitrator appointments, since it would impose significant barriers to entry for younger, less established arbitrators.

The road ahead

These various reform efforts, particularly those being led by Working Group III, seem especially relevant today. ISDS is once again in the spotlight, with some observers fearful that State measures taken in response to the pandemic may lead to an onslaught of investment claims against States, many of which already face daunting fiscal challenges.

This push and pull between those advocating for ISDS reform, and those calling for more drastic change, recalls Tom Sikora's opening remarks at the conference. Mr. Sikora, Senior Vice Chair of the ITA Advisory Board, noted that "the current reform debate seems to me to be between the advocates of remodeling to perfect the existing design, and those in favor of demolishing it completely to build a different edifice." Amidst a general distrust of the system, UNCITRAL's work to improve the efficiency and transparency of arbitration is a timely and laudable endeavor.