

Kluwer Arbitration Blog

The ICC New York Conference: Releasing a New Report

Lisa Bench Nieuwveld (Conway & Partners) · Monday, September 17th, 2012

Last Monday I was honored with the opportunity to serve as one of the speakers for the annual ICC New York Conference. With an overflowing turnout and impressive list of panelists, it was a successful event. One interesting event of note was that the ICC took this opportunity to release the ICC Commission Report on States, State Entities and ICC Arbitration. We were privileged with the attendance of the co-Chairman of the ICC Commission on Arbitration's Task Force on Arbitration Involving States or State Entities, who addressed some of the key portions of the report, Mr. Eduardo Silva Romero.

The ICC Commission Report explains its own purpose as explaining "how ICC arbitration works in relation to disputes involving states and state entities." As I already mentioned in a previous post back in July, (and according to this report) around 10% of ICC arbitrations involve a state or state entity. This figure mostly comprises commercial arbitrations, but it also comprises investor-state arbitrations as well. For more background details, I kindly refer the readers to the ICC website where the report has been made publically available.

What I found the most useful about the report are, what I will describe as, the practitioner recommendations. Essentially, the report goes through some key areas notably of concern to states when they are parties to arbitration and either (a) explains new provisions in the ICC Arbitration Rules 2012 which now addresses these concerns, or (b) give recommendations for drafting clauses in such a way to ensure certain concerns are addressed (or with respect to treaties, it goes through suggested language as well).

Now it is time to hear from the clients – would the state entities find this information useful? Will it entice those who may be hesitant to more openly consider the ICC when drafting the arbitration clause in commercial agreements or including it as an option when drafting treaties. Although I failed to write down the exact number, it was reported during the conference that there are already a handful of BITs which provide the ICC as a dispute resolution option.

It was also intriguing to hear some of the inside scoop from government representatives. A representative from Canada's trade department spoke on how they go about negotiating investment treaties with other countries. We also heard from a former representation of the US government who had been involved in negotiations with drafting US BITs, including one with Korea. Hearing the insights made it clear that similar to contract negotiations it is not always very clear to follow the reasoning as to why certain language is accepted – when it is finally concluded late into the evening. Several parties are involved internally before the respective negotiators from each country

can even begin to work through the proposed language together. This may make gleaning the states' and state entities' reactions to the ICC's efforts in becoming more appealing to states and state entities more difficult. But it would indeed be interesting to know.

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