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ICCA 2014. Have We Made Progress? What Remains To Be Done?

Brian Briz (Holland & Knight LLP) · Sunday, April 13th, 2014

And so the *twenty-second biennial Congress of the International Council for Commercial Arbitration* officially comes to an end. But what progress have we made with respect to the challenges facing international arbitration? And, where do we go from here?

Chief Justice Sundaresh Menon, the Chief Justice of Singapore, delivered his assessment of the progress made on the challenges he identified in his “Golden Age” keynote address delivered at the 2012 ICCA Congress in Singapore. He began his speech by discussing the diversity of viewpoints that exists among international arbitration practitioners who are scattered across the globe. While there is certainly divergence, Chief Justice Menon warned that it would be unrealistic and unwise to seek consensus and regulation. Arbitration, he explained, “is better suited to evolution rather than to revolution.” We must, he said, maintain diversity of ideas.

Chief Justice Menon assured that evolution will occur and that international arbitration will adapt to its challenges and evolve to what is best for its users and practitioners. This, he explained, is already evidenced by the fact that we are moving rapidly from a time where the practitioners knew one another and looked like one another, to a time where the practitioners are increasing both in number and in terms of diversity. The future of arbitration, he stressed, is in the hands of the younger practitioners whose numbers are growing by the day.

While progress have been made, it is yet too soon to declare a victory. And, while Chief Justice Menon is optimistic regarding the future of international arbitration, he identified three issues that must be dealt with that were not addressed directly at the 2014 ICCA Congress.

The first issue, he explained, is the rising cost of international arbitration. Arbitration is not always the cheaper alternative and Chief Justice Menon expressed concern that users are often forced to accept arbitration “despite its cost, and not because of it.” This, he warned, leads to the risk that wealthier parties will be able to buy justice.

The second issue Chief Justice Menon identified is third party funding, a relatively new phenomena that he explained has grown substantially since the turn of the century. The issues created by third party funding—such as conflict issues and disclosure issues—are readily apparent and thus, he warned that we would be wise to study third party funding and address the issues it creates.

And finally, the third and perhaps most difficult issue that Chief Justice Menon identified is ethical standards. We have come such a long way, he explained, that the old rules no longer apply. International arbitration is truly global and has experienced exponential growth. We must have “common” ethical standards so that the users and practitioners can understand the rules of engagement. The challenge, of course, is bridging cultural differences to reach a consensus. Yet, he stressed that it is these very differences that make finding a consensus necessary. Again, Chief Justice Menon is optimistic that this challenge can be overcome as is demonstrated by the IBA guidelines that have already become almost universally accepted.

In conclusion, despite the challenges, Chief Justice Menon, expressed optimism regarding the future of international arbitration. He is encouraged by the subtle shift in the tone of the debate from whether anything needs to be done, to what should be done and why. This shift from ignoring the problems to tackling the problems provides Chief Justice Menon with the hope that international arbitration will overcome its challenges and reach its full potential.

With those words, the 2014 ICCA Miami Congress concluded. Without a doubt, the challenges identified by Chief Justice Menon will be discussed at the twenty-third biennial ICCA Congress to be held in Mauritius in 2016. And without a doubt, the questions will again be asked as to what progress has been made and what is left to be done.

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