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Precision and Legitimacy in International Arbitration: Empirical Insights from ICCA

Susan D. Franck (Washington and Lee University School of Law) · Wednesday, September 10th, 2014 · Institute for Transnational Arbitration (ITA), Academic Council

This past April, the International Council for Commercial Arbitration (ICCA) held its prestigious biennial conference in Miami, with more than 1,000 people in attendance. Our research team received unprecedented access to collect demographic information and administer a survey. The results offer an unprecedented window into the "invisible college" of the international commercial and investment arbitration community. As data about the world of international commercial arbitration is notoriously difficult to obtain given doctrinal obligations of confidentiality, the data offers a particularly critical baseline for assessment and comparison.

Our research sought to use empirical methods to explore the international arbitration community. At ICCA, we were able to collect detailed information about the counsel, experts, judges and arbitrators. We obtained responses from more than 500 attendees, 413 of whom had served as counsel in at least one international arbitration and 262 of whom had served as an arbitrator in at least one case. We also note than 67 respondents had served as an arbitrator in at least one investment treaty arbitration.

Aspects of the research, including aspects related both to conference themes of precision and justice, will be published as a chapter in the next ICCA Congress Proceedings. One of the core insights from the research relates to burden of proof. The data revealed that individuals who had served as arbitration counsel and/or arbitrator considered issues burden of proof to frequently be outcome determinative in arbitration cases. Nevertheless, those same respondents indicated that international arbitral tribunals only occasionally articulated those standards in advance. This poses a quandary for the international arbitration community. On the one hand, both counsel and arbitrators acknowledged the importance of the burden of proof in a proceeding, yet on the other hand, tribunals did not appear to be doing a thorough job of informing counsel about the particular standards for each case in a timely manner. The gap between the responses raises an issue as to whether there are opportunities to create targeted improvements in international arbitral procedure to generate enhanced precision.

Yet, issues of procedure are nuanced and may require tailored solutions. For both questions involving burden of proof—namely whether proof issues were outcome determinative and articulated in advance—we identified a statistically meaningful divide among lawyers with common and civil law training. Specifically, common law lawyers were less likely to identify that arbitrators provided the burden of proof in advance, whereas civil law lawyers were more likely to

conclude arbitrators frequently articulated the burden of proof in advance. Likewise, common law trained lawyers were less like to identify that burden of proof was outcome determinative, whereas civil law lawyers believed proof was more likely to be outcome determinative in international arbitration.

We also surveyed respondents about their views on important topics in international arbitration related to fraud, document withholding, costs, arbitral reappointments, and diversity. This first of its kind survey research sheds light on the "invisible college" of international arbitration; and we hope that the results provide a historical moment for the arbitration community that serves as a constructive launching point for an informed discussion about how the larger international law community should evolve.

In addition to myself, the research team also comprised Dr. Anne van Aaken, Professor of Law and Economics, Legal Theory, Public International Law and European Law, University of St Gallen; Chris Guthrie, Dean and John Wade-Kent Syverud Professor of Law, Vanderbilt University School of Law; Jeff Rachlinski, Professor of Law, Cornell University School of Law; James Freda of Freshfields Bruckhaus Deringer US LLP's international arbitration group; Tobias Lehmann, a Ph.D. candidate at the University of St. Gallen; Kellen Lavin, a recent graduate of Washington & Lee University School of Law; and a talented team of current Washington & Lee students.

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