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Challenges to the Legitimacy of International Arbitration: A Report from the 29th Annual ITA Workshop

Michelle Grando (White & Case LLP) · Tuesday, September 19th, 2017 · Institute for Transnational Arbitration (ITA), Academic Council

The 29th Annual Workshop of the Institute for Transnational Arbitration ("ITA"), which took place on 14-15 June 2017 in Dallas, focused on a timely subject of much importance to the future of international arbitration, namely, the "Challenges to the Legitimacy of International Arbitration." The event was co-chaired by Caline Mouawad (King & Spalding), Jeremy K. Sharpe (Shearman & Sterling), and Jarrod Wong (McGeorge School of Law).

The tone of the workshop was positive and constructive, starting from the keynote speech delivered by Gary Born (WilmerHale). Gary Born demonstrated through historical references spanning more than two hundred years that the current criticisms of international arbitration are not new. Yet, international arbitration continues to exist and has become more widespread. Born argued that ultimately the success of international arbitration lies in the fact that it is an expression of individual rights such as the right to contract and the right to form relationships with others that are widely recognized and considered fundamental to any healthy society. He noted that States have not been able to come up with a better alternative, and concluded that it is difficult to imagine the world without international arbitration.

Following the keynote address, the speakers identified several challenges to the legitimacy of international arbitration, including issues regarding the decision-makers, the conduct of counsel, the efficiency of the proceedings, and domestic court oversight, among others. These issues are addressed in turn and are followed by concluding considerations about whether the existing criticisms indicate that international arbitration is in crisis.

Decision-makers

One of the characteristics of international arbitration is the right of the parties to choose the decision-makers. While this characteristic is often presented as one of the main advantages of international arbitration, it has also given rise to criticism. In particular, critics have raised questions about the legitimacy of an award issued by privately appointed arbitrators.

The discussion during the workshop revealed that the right to nominate arbitrators actually enhances the legitimacy of the process in many ways. In particular, party-appointed arbitrators play an important role in ensuring that the tribunal considers the evidence and arguments presented by the parties that appointed them. Apart from ensuring that the award accurately takes into

consideration the views of the parties, this enhances the likelihood that the losing party will accept the award and comply with it. It was noted that this reflects the view not only of private parties, but also of many states.

The speakers agreed, however, that it is necessary to adopt and enforce strong conflict rules; procedural controls on appointments so that the parties do not abuse the right to nominate arbitrators (e.g., by nominating arbitrators that are unfit or forcing their nominee to resign in order to delay the proceedings); and rules of ethics to ensure that arbitrators act diligently and impartially. Jan Paulsson suggested that the legitimacy of party-appointed arbitrators might also be strengthened if the parties were to agree on the President of the tribunal first and then nominate the other two arbitrators with her/his input.

Conduct of counsel

While the parties' counsel play a fundamental role in international arbitration, due to their diversity of backgrounds and legal cultures they are not always guided by the same values and ethical principles. The lack of a binding uniform code and a global authority to enforce it make the regulation of counsel conduct challenging in practice, raising questions about the legitimacy of international arbitration.

The subject of regulation of counsel conduct has been widely discussed in the last few years, and there seems to be an emerging consensus about the need to regulate and sanction counsel for unethical conduct. The speakers argued that the standards should focus on objective issues such as, for instance, the filing of futile challenges to arbitrators and arbitrator conflicts caused by the appointment of new counsel during the proceedings. This is, in fact, the approach adopted by the two most well-known guidelines, the IBA Guidelines on Party Representation in International Arbitration and the LCIA's General Guidelines for the Parties' Legal Representatives.

No general consensus, however, has been reached yet as to who should be the regulator – options include national bar associations, courts at the seat of arbitration, arbitral institutions, and a global ethics counsel. The preference of the speakers was for arbitral institutions to take the role of adopting standards. This is a reasonable approach, as it would allow for greater experimentation and refinement of the standards over time. The LCIA has pioneered this route with the adoption of its Guidelines in 2014. Under the LCIA rules, however, the application of the standards is left to international tribunals (see Article 18.6). According to the representative of the LCIA, the enforcement of the standards is better left to tribunals because counsel conduct is a due process issue.

Efficiency of the proceedings

International arbitration has come under attack for being costly and slow. In the 2015 Queen Mary/White & Case International Arbitration Survey, the survey respondents indicated that the cost (68%), lack of insight into arbitrators' efficiency (39%), and lack of speed (36%) were among the worst characteristics of international arbitration. Against this backdrop, the workshop provided an opportunity to discuss options to increase the efficiency of the proceedings.

One option that was considered was the use of bifurcation and motions for summary judgment. The speakers agreed that these procedures can increase efficiency if the issue in question is discrete and its early resolution can dispose of the case or a significant part of it. However, when the issue is connected with other aspects of the case, bifurcation and motions for summary judgment might

actually lead to inefficiencies such as repeat presentation of the same evidence and multiple appearances of the same witnesses. The most important aspect to ensure that bifurcation and motions increase efficiency is for the parties and the tribunal to discuss and establish clear ground rules at the outset of the proceedings. Rule 41(5) of the ICSID Arbitration Rules was cited as an example of a procedure for summary judgment that has worked well.

The panelists also explored ways to deal with the perceived problem that arbitral tribunals are taking too long to issue their awards. In this regard, in 2016, the ICC announced that it would reduce the fees paid to arbitral tribunals that fail to submit a draft award within three months of the last substantive hearing or the last substantive post-hearing submission. Depending on the length of the delay, the reductions can vary from 5% to 20% or higher. Other options discussed at the workshop included having institutions and parties ask more questions about how much time the arbitrators have available for the drafting of the award before appointing or confirming their appointment; and creating a reporting mechanism requiring arbitrators to report to the parties on their progress periodically after a certain amount of time has passed. As regards the latter, there was consensus among the speakers that shame might provide a strong incentive for arbitrators to render the award in a timely manner.

Domestic court oversight

It has been argued that the arbitral process is too autonomous from domestic law and domestic court oversight. In light of this, the speakers considered whether courts should exercise more oversight over the arbitral process. It was noted that States have defined the respective roles of national courts and arbitral tribunals through instruments such as the New York Convention, the ICSID Convention, and domestic laws. Therefore, it is for States to change the existing balance through legislation or treaties if a more active role for the courts is deemed appropriate. The panelists were skeptical about this because most domestic courts do not have the resources, time, and technical expertise necessary to exercise greater oversight. In fact, this is one of the reasons why many States have embraced arbitration in the first place and why it has become popular.

Ultimately, as one of the speakers noted, giving courts a more active role over the arbitration process would blur the line between arbitration and litigation. It would be contrary to the very idea of having arbitration as an alternative method of dispute resolution. It would also be contrary to the expectations of the users of international arbitration, who in the 2015 Queen Mary/White & Case International Arbitration Survey observed (64% of the respondents) that one of the most valuable characteristics of international arbitration is “avoiding specific legal systems/national courts.”

Is international arbitration in crisis?

While it is undeniable that international arbitration has been the subject of criticism from certain corners, in particular as regards the investor-state system, the opinion of the workshop participants and available data indicate that international arbitration is not in crisis and about to disappear.

Major institutions such as the ICC and ICSID continue to report solid or record numbers of arbitrations filed. 157 States are now parties to the New York Convention and 153 States are parties to the ICSID Convention. While some States such as Ecuador, Bolivia, India, South Africa, and Indonesia have terminated various BITs with investor-state arbitration provisions, the overwhelming majority of States, including States that are notorious critics of investor-state arbitration, such as Venezuela, has not withdrawn from the investor-state arbitration system.

Moreover, States increasingly provide for arbitration in contracts with private parties or in investment legislation. This includes States that have been notoriously skeptical of investor-state arbitration, such as Brazil.

If anything, criticisms have contributed to the health of the system. Arbitral institutions have revised their rules and practices to increase the efficiency and fairness of the arbitral process. These include the LCIA in 2014, the ICC in 2015 and 2017, the ICDR in 2014, and SIAC in 2016. ICSID is currently in the process of amending its Arbitration Rules for the fifth time. Professional associations such as the International Bar Association have revised and adopted guidelines addressing relevant subjects such as conflicts of interest and counsel conduct. All this activity shows the vibrancy of international arbitration. As long as the arbitral community does not become deaf to relevant criticisms, international arbitration will not become irrelevant. It will continue to be a legitimate – and the most effective – way of resolving international disputes.

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