Kluwer Arbitration Blog

ICCA Sydney: Arbitration Challenged I – Reforming Commercial Arbitration in Response to Legitimacy Concerns

Geneva Sekula (Allens) · Tuesday, April 17th, 2018 · Young ICCA

What if Facebook, as a result of its recent negative publicity, had the opportunity to file a request for arbitration against Cambridge Analytica? A key principle of international commercial arbitration is its maintenance of confidentiality, but would the public interest in such an arbitration justify greater transparency?

The afternoon panel of the first day of the ICCA Sydney Congress 2018 grappled with questions such as these in its examination of how international commercial arbitration is positioned to respond to growing challenges and concerns related to its legitimacy. Various criticisms include that arbitrations take too long, that they are too costly, that they are secretive, that there is no accountability etc. But how can the arbitration community respond?

Mr Dietmar W Prager's opening remarks and Mr Andrés Jana's presentation shone a spotlight on the tension that exists between public and private interests within an arbitration. A cornerstone of the concept of international commercial arbitration is party autonomy and party freedom in dictating the terms of their own dispute resolution.

However, there are strong public interest factors which emerge in arbitration proceedings, which Mr Jana characterised as stemming from two arenas:
• The specific arena: the involvement of states and state entities necessarily brings into question issues of public interest. In 2017, 15.4% of ICC arbitrations involved a state party or state entity.
• A more general arena: the large scale social significance of arbitration continues to grow, attracting more public scrutiny and focus.

There is a natural tension which exists between the promotion of public and private interests, and Mr Jana noted that adopting a framework which considers both is a good way to start to find a solution to enhance perceptions of legitimacy. Considering both interests is more likely to produce a favourable result.

However, of particular interest were the comments made by Ms Noradèle Radjai. Her presentation focused on a specific manifestation of the tension between public and private interests, through an examination of the criticism that the growth of international arbitration is hindering the development of the common law. Her thesis grew from the position that indeed, cases that might have otherwise contributed to the development of the common law are being arbitrated, thereby not forming part of case law. English and US law are the most common choices of law for

international commercial arbitrations, and therefore these systems of law are particularly affected by this issue.

There are necessary issues of legitimacy to confront in this arena. From a global perspective, if a third of jurisdictions (i.e. common law jurisdictions) are limited in their development of precedential law then this is not a legitimate outcome. Ms Radjai noted however that this issue also impacts civil law jurisdictions, which though do not adopt binding precedent, use case law as influential precedent. Regardless of whether one takes a narrow view (i.e the interest of a party, or the arbitration community) or the wider global view, there are legitimacy issues that need to be confronted.

So what is the solution for the arbitration community? Any solution must be careful not to override the autonomy of the parties in choosing arbitration as their forum for dispute resolution. Ms Radjai suggested that one possible way to mitigate this issue is through a more systematic publication of arbitral decisions. Wider publication would enable parties to refer to more decisions, and also allow courts to allocate appropriate weight to certain decisions. Ms Radjai recommended that these awards could carry the same weight as other non-precedential material, such as academic materials and judicial decisions from other jurisdictions.

In the discussion that followed her presentation, Ms Radjai also suggested that to balance confidentiality concerns, publication bodies could anonymise the names of the parties, implement a cooling off period or 2 or 3 years before publication, and publish the reasoning with limited reference to the facts, in an effort to protect and preserve confidentiality.

Unsurprisingly, the panel were unable to resolve all the legitimacy concerns facing international commercial arbitration in their allotted 90-minute time slot, however the panellists provided insightful and engaging responses to current problems facing the arbitration community, and made some compelling suggestions for the arbitration world to consider moving forward.

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