Kluwer Arbitration Blog

The Battle for Survival Among Arbitral Institutions

Stéphanie Papazoglou · Friday, June 19th, 2020

> "Success in life is not for those who run fast, but for those, who keep running and are always on the move."
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> *Bangambiki Habyarimana, Pearls Of Eternity*

This expression may work in both, personal and professional situations. Indeed, there seems to exist a consensus that "arbitration has become a big legal business" and a "field of intense competition".[1)] The growing use and evolution of arbitration has led to a burgeoning number of global and regional arbitral institutions. Every institution is thus competing to secure, keep or expand its own share of the arbitration world. This article reflects on implications of such competition and on predominant criteria for choosing an arbitral institution.

Choosing an institution

Given the rising competition among arbitral institutions, it is important to understand the elements that drive parties' decisions in choosing an institution for their dispute. Nassib Ziadé has stressed that efficiency and legitimacy are the two factors that will determine any future role for arbitration institutions.[2)] While the issue of efficiency has been subject of many works, legitimacy has also gained its own spot, and is now being considered as a current key factor for the success of any arbitral institution, working as a thermometer for its trust and acceptance.

Accordingly, when negotiating the so-called "midnight clause" – assuming that parties have opted for an administered arbitration – the following factors should be taken into account: (a) whether a potential case related to this transaction calls for an international or local institution; (b) the desired level of interference by the institution; and (c) other key features, such as reputation, costs, culture, expertise and level of transparency.

Firstly, it is of paramount importance that parties evaluate whether they need the seal of a globally recognised arbitral institution, or those of regional presence can satisfy their needs. Taking the example of Africa, the SOAS University of London, together with the International Council for

Commercial Arbitration, published a table consolidating the main arbitral centres in that region. Many of them enjoy a growing reputation for administering cross-border disputes and have an increasing caseload. Regional institutions are thus on the rise, attracting users from established international ones.

Secondly, when choosing a body that will administer their disputes, parties should take into account that each institution has its own level of intervention, to use the expression of Rémy Gerbay.[3)] Arbitral institutions perform both casework and non-casework activities. Examples of casework activities include decisions on seat, consolidation, constitution of the tribunal, challenges etc. Mr Gerbay observed that ICDR is regarded as a centre with "medium intervention", while HKIAC and SIAC can be described as institutions with "limited intervention". Mr Gerbay considered LCIA and ICC to be of stronger intervention.

Thirdly, several other key features are usually considered in a decision on an institution. According to a 2015 study, interviewees assigned most importance to "high level of administration", being related to the pro-activeness and responsiveness of the institution's staff. "Neutrality/internationalism" and "global presence/ability to administer arbitrations worldwide" with a proven track record of international practice were ranked second and third respectively.

These top three features are all fairly generic performance indicators rather than objectively distinguishable institutional features. Nevertheless, as stated by Guy Pendell, it is inevitable that most practitioners will "*probably have their favourites, likely to be based on prior experience, familiarity with their rules and procedures and, quite probably, geographic convenience to their office*."

The never-ending race among arbitral institutions

The rise of new institutions vs. recent revisions of existing institutional rules

As explained above, new arbitral institutions have been set up in places such as Central Asia and Africa.

In November 2018, the Tashkent International Arbitration Centre (**TIAC)** was established in Uzbekistan. TIAC aims to be a viable alternative to arbitrating at Paris or London based institutions. TIAC's paradigms of success are cost, efficiency, compliance with international best practices and top-class arbitrators. TIAC arbitration rules adopt the latest thinking in arbitration. For instance, the rules enhance transparency and legitimacy by giving additional powers to arbitrators (e.g. Articles 10 and 20 of the TIAC Rules).

In Africa, the African Court of Mediation and Arbitration (**CAMAR**) was established in April 2019. The Court, aiming to open new perspectives and a better-organized legal framework, handles disputes involving states, African companies and multinationals operating in the continent. Such disputes have thus far been resolved before institutions in the Hague, Paris or London. As rightly observed by Gregory Travaini, CAMAR *"could well be a contributing step towards the "Africanization" of arbitration"*.

The ever-expanding list of new institutions all over the globe, illustrated by examples above, has

provoked strong competition among the existing and new institutions. Internationally accredited and well-known institutions, notably in Europe and Asia, have responded with significant efforts in revising their respective arbitral rules (e.g. ICC Rules 2018 or Hong Kong International Arbitration Centre (**HKIAC**) Rules 2018).

Positive and negative implications of competition

This competition has various implications.

As Prof. Catherine Rogers has correctly observed, such competition between institutions could be a paradigm of "*a race to the top* or *a race to the bottom*". Global competition could be considered as a healthy way to, first, ensure that these institutions provide a higher level of service quality and, second, to stay abreast with the international community's developing dispute resolution needs. Similarly, while arguing that diversity is generally a good thing, Mr. Pendell notes that increasing the number of institutions should increase "*innovation and a general advancement of standards*". The use of technology could be an innovative service, by striving towards efficiency and low cost.

However, the surplus of arbitral institutions has some negative effects. Among others, the perceived efforts to attract users by offering an increased number of services and tailor it to their own needs may have a direct impact on the efficiency of the proceedings, which is one of the key features of arbitration, by leading thus to unnecessary or even unwelcome delays and costs. A risk of greater concern is that "sham" institutions or even institutions that have no expertise or resources to administer arbitrations properly will, in a spill over effect, also harm the profile of established institutions and international arbitration in general. A recent example is the 18 billion Egyptian pound award administered by the Cairo-based International Arbitration Centre (**IAC**), where the Egyptian criminal court sentenced to prison both, the executive director of the IAC, under whose auspices the award was rendered, and the administrative secretary to the IAC of the arbitral institution in Cairo, for aiding and abetting the fraud. The question, yet to be answered, is whether this recent case will have any impact on the caseload of the IAC in the future.

From Competition to Cooperation?

On 19 December 2017, the Singapore International Arbitration Centre (**SIAC**) launched its Proposal on Cross-Institution Cooperation for Consolidation of International Arbitral Proceedings (**Proposal**). By way of inspiration, AFSA and the Shanghai International Arbitration Center have created the China-Africa Joint Arbitration Centre (**CAJAC**) in Johannesburg and Shanghai. Other innovative efforts for cooperation include the Memorandum of Understanding ("MoU's") signed by the ICC aiming to facilitate knowledge sharing and best-in-class services on this field. More recently, Saudi Arabia's Center for Commercial Arbitration (SCCA) and Dubai International Financial Center (DIFC) Courts have also signed a MoU. These "mutual assistance" agreements mark a milestone in the cooperation and operation of arbitral institutions all over the globe, as they strive towards harmonization and consistency among arbitral rules. Therefore, as rightly stressed by Mr. Travaini, it seems that "*cooperation would be more fruitful than dry competition*".

This need for cooperation has become more than ever a matter at stake. Recent events arising from the COVID-19 crisis have reinforced the demand for effective and seamless cross-border

conferencing facilities to ensure that critical services, including dispute resolution services, are able to continue without prolonged disruptions, as stated by J. Hong and JH Hwang. The importance of inter-institution cooperation providing for distance video-conferencing for virtual hearings have thus, come to the forefront.

Some of the innovative solutions have already been in place or being implemented by arbitral institutions. Indeed, the ICC conducts virtual hearings and meetings with the assistance of the Secretariat and the tribunal (Article 24.4 and Appendix IV of the ICC Arbitration Rules). The HKIAC has likewise an online platform to conduct e-hearings and online filing system for the submission of documents. In developing these new approaches, a number of existing soft law instruments assist including IBA soft law rules, which provide for audio and videoconferencing services, as well as the Chartered Institute of Arbitrators Guidelines for Witness Conferencing in International Arbitration, promulgated in 2019 or the current drafting of the Seoul Protocol on Video Conferencing in International Arbitration, which could represent an inspiration for other arbitral institutions to adopt similar international standards for video conferencing into their arbitral rules.

With their genius for innovation and flexibility, arbitral institutions must work together to further advance the technologies at their disposal and develop protocols needed to meet the challenged ahead.

Conclusion and a view to the future

Legitimacy and the aforementioned key features, shaped mostly by the users' needs, importantly contribute to the success of an arbitral institution, avoiding a race to the bottom. Nevertheless, a successful institution does not prevent others' success: many institutions (if not all) record a growth in caseload, demonstrating that recourse to institutional arbitration is being preferred. This means that one institution's gain (success) is not necessarily another's loss. A healthy competition is necessary for continuous improvement, but it could also be wise to cooperate in some circumstances. A combination of both may develop the best conditions for international institutional arbitration to excel as a legitimate means for dispute resolution.

References

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?2 Ziadé, N.B. (2009), *Reflections on the role of institutional arbitration between the present and the future*, Arbitration International, p. 427.

?3 Gerbay, '*The Functions of Arbitral Institutions*, International Arbitration Law Library', Volume 38, KLI 2016.

This entry was posted on Friday, June 19th, 2020 at 8:00 am and is filed under Arbitration institution, Consolidation, Institutional Arbitration, Virtual hearings
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