Kluwer Arbitration Blog

The Development of International Arbitration as a Mechanism For Determining International Business Disputes

Julian Lew (20 Essex Street and Queen Mary University of London) · Saturday, February 6th, 2021

Professor Stavros Brekoulakis has written a blog post commemorating the 60th volume of Kluwer Law International's International Arbitration Law Library Series ("Series"), of which he and I are co-editors. His blog post considered the Series' contribution to the field in light of the evolution of international arbitration's scholarship in the last 40-50 years. In particular, he reflected on the founding of the School of International Arbitration, Queen Mary University of London in 1985, which was the first academic institution dedicated to the teaching and research of international arbitration. In the intervening years, international arbitration has continued to grow and mature as a field, and so too has related research and scholarship. Reaching the 60th volume of the Series is only one such example; however, it is a significant one. To mark this moment, I wish to offer some perspectives on the background to the development of international arbitration in the 1960s-1980s, and the founding of the School of Arbitration in 1985.

When we established the School of International Arbitration we had a clear vision: to establish a centre of excellence to research, teach and participate in the development of international arbitration as a stand-alone subject. We aimed to provide our students with an understanding of the aims, structure and workings of international arbitration as an independent, flexible and appropriate mechanism to determine disputes arising from international transactions of all kinds in an efficient and effective manner.

There were three prevailing geo-political factors at that time which heralded the beginning of a new era for international arbitration.

First, following the end of WWII, was the emergence of many new and independent states, particularly in Africa and Asia, in the 1950s and 1960s. This was the end of the colonial period. The opportunities from trading internationally were apparent and the circumstances to support these opportunities became the focus of international institutions and national governments.

Second, following on the first point, was the beginning of globalisation and increasing international commercial reliance and business transactions. This was spurred on with the development of telecommunications and the need of the business world for new markets and places of business. National focuses were replaced by global visions.

Third, and perhaps the most significant for the School of International Arbitration, was the emergence and acceptance of an international and neutral infrastructure for international

arbitration. This was started in 1958, when the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded. Today this is the cornerstone of international arbitration, to which over 168 countries are party.

The 1960s saw a flurry of developments:

- The 1961 European Convention on International Commercial Arbitration (mainly between western and eastern countries). To date, the Convention has 16 Signatories and 31 parties.
- In 1965 regionally focused arbitration rules for international commercial arbitration were developed by United Nations Economic Commissions for Europe and for Asia and the Far East.
- These were the forerunners to the UNCITRAL Arbitration Rules 1976.
- In 1966 through the influence of the World Bank, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, and the establishment of ICSID, provided a system for determining disputes between investors and the States in which they had invested. To date, 163 States have signed the Convention, of which 155 have ratified it.
- In the early 1980s UNCITRAL also proposed the Model Law on International Arbitration which States could incorporate into their national laws. To date 84 States (for 117 jurisdictions) have adopted the Model Law, in whole or in part.

As we know now, these factors all have contributed to the development of international arbitration practices, with accepted basic legal principles and practices followed in arbitrations conducted under different systems and different laws.

Whilst there were many institutions offering arbitration facilities around the world, the only active international arbitration institution at that time, with a significant caseload, was the International Chamber of Commerce. The other institutions were focused on domestic arbitrations or were offering arbitrations for special circumstances, e.g., the Stockholm Chamber of Commerce, which the American Arbitration Association and the Soviet Foreign Trade Arbitration Commission had agreed should be the forum for disputes between US and USSR entities.

In many countries and legal systems there was no real concept of international arbitration. There were few truly international arbitration specialist lawyers. Many of those were professors of private international law, public international law, international commercial and comparative law. Even if law firms had lawyers with some experience of international arbitration, few such firms boasted great expertise in international arbitration. In most national jurisdictions, arbitration was seen either as a subject of procedural law, or a contractual arrangement between parties.

Even where parties were of different nationalities, and the underlying business arrangement out of which their dispute arose was in other countries, most national systems considered the arbitration to have the nationality of the country in which it had its seat. This often also indicated the law and procedure to govern the arbitration and the substantive issues in dispute and enabled national courts to claim the right and obligation to review the process followed and decision reached by arbitrators. That is why in many countries arbitral practice mirrored how proceedings were conducted in the national courts. Today, subject to mandatory laws, there is greater flexibility in the right of parties to choose the applicable substantive law or rules to govern their relations, and the procedure to be followed in the conduct of the proceedings.

At that time, there was nowhere to study international commercial arbitration as a stand-alone subject. Arbitration was considered in some jurisdictions as a subset of procedural law; in other

places, it was a contractual arrangement between the parties as to how disputes should be resolved, and was considered similar to all other contractual terms. In these jurisdictions, it was subject to control and supervision, more or less, by the national courts. International arbitration was not considered a subject in its own right.

Our vision at the School of International Arbitration was to present international arbitration, commercial and investment, as a distinct and independent subject, with its own specific character, requirements, practices and infrastructure. We wanted to provide a venue where students could learn about international arbitration, its essential characteristics, infrastructures, international regulations, soft law and other instruments, as well as the fundamentals, concepts and issues which arise in practice.

An essential criterion for international arbitration was its non-nationality. Hence the requirement that arbitrators should be independent and impartial, and that all parties should be equally viewed in the context of the arbitral process. It was increasingly accepted that national procedural and substantive laws were not necessarily appropriate for an international arbitration with parties from different and often disparate jurisdictions. Whilst recognised in principle these concepts were to be developed into fundamentals of international arbitration in light of decreasing confidence of parties receiving a fair hearing in national courts. These principles are still followed and considered fundamental to international arbitration today and, through the decisions of national courts, they have become clearer and even more entrenched.

In this light there were three key elements in the arbitration courses and other programs which were developed by the School of International Arbitration: private international law, public international law and comparative law. This was pertinently summarised by Professor Pierre Lalive at the inaugural conference of the School of International Arbitration when he expressed the view that an international arbitrator "*should have a good command of contract law, commercial law, procedure, private international law and preferably also public international law*" but should also have some experience "*of comparative law and the comparative method*".[1)]

These subjects were considered the essential tools for practitioners and arbitrators where parties are from different legal and cultural backgrounds. They remain fundamental to the work of the School of International Arbitration today and to the specialist international arbitration lawyer.

Private international law and conflict of law rules are important as they direct the determination of the applicable national or non-national governing law and the applicable relevant rules to apply. This relates not only to the law to govern the substantive issues and the arbitration agreement, but also relevant procedural issues within a non-national and independent system arbitral context. It also is frequently relevant to other incidental but important issues, such as rights and duties of legal entities, the form of documents and evidence, and the obligations and behaviour of legal counsel.

National legal systems have their conflict of law rules applicable in a domestic context. There are no default rules for choice of law in international arbitration. Most arbitral institutions now have choice of law rules to be applied by tribunals. This includes the right of arbitrators to make a direct choice of the applicable substantive law to apply based on the facts and circumstances of the case, or to choose and apply a conflict of law rule which the tribunal considers appropriate to direct it to the applicable law. Arbitrators are also able to apply non-national rules such as the *lex mercatoria* and soft laws to the substantive dispute, or decide issues ex aqua et bono where appropriate.

Public international law was important because States have always been involved, directly or indirectly, in international business, and influence transactions through their laws and policies. This has expanded enormously with the now mainstream of investment arbitrations under the ICSID Convention and other treaties, e.g., NAFTA, USMCA, ECT, CAFCA, and bilateral investment treaties.

Comparative law brings clearly the need to understand that at all levels of legal direction, there are different national ways of dealing with legal and practical situations. This includes, e.g., burden of proof and weight of evidence, discovery/document production, presentation of evidence, examination of witnesses, reports of experts, legal privilege, awarding costs. It is important to understand these concepts which apply with differences in all international arbitrations, often determined specifically for each arbitration depending on its facts, the applicable rules, the origin of the parties, the seat of the arbitration and the background of the arbitrators.

A major change since the establishment of the School of International Arbitration is that now, after 35 years, many law firms and many individual lawyers have expertise in international commercial arbitration, including international investment arbitration, with dedicated teams working in these areas. International arbitration has become almost a core subject in many university programmes. Many of our former students have joined major law firms, big corporations, arbitration institutions, and government service where they are involved with international arbitration; there are also former students now professors and lecturers on international arbitration in many countries.

This level of maturity and growth has been enabled by continued study, research and scholarship. It is therefore fitting that the Series covers a wide range of works related to international arbitration, spanning from mediation and commercial arbitration to energy, maritime and investment arbitration; from private law to public international law; from conflict of laws to contract and procedural law. Professor Brekoulakis and I view it as a venue to explore and better understand current debates and important issues in the field.

Having now reached the milestone of 60 volumes, we look forward to the scholarship that will take us to 100 volumes and beyond.

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References

?1 P Lalive, “International arbitration – teaching and research”, in Contemporary Problems in International Commercial Arbitration, ed Julian D M Lew, 1986, Centre for Commercial Law Studies, at p 16.

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