The "Internationalisation" of International Commercial Arbitration

The increasing use of arbitration for the resolution of international disputes has led to the development of more standardised international arbitration procedures, which will make international arbitral proceedings more predictable and more accessible – particularly to new users. By **GARY BORN** and **RACHAEL KENT**

The past decades have seen international arbitration confirm its position as the preferred means of resolving cross-border commercial and investment disputes. Arbitration has been widely regarded as providing significant advantages over national court litigation, including neutral, expert decision-makers, internationally enforceable awards, confidentiality, and procedural flexibility. Arbitration clauses are now routinely included in most international commercial contracts.

As the arbitration of cross-border transactions has increased in popularity in recent years, arbitration has also become more "international." New markets have opened to dramatically-increased foreign trade and investment over the past decade, including the former Soviet Union, Asia (particularly China and India), the Middle East and Latin America. Many countries in these regions have abandoned long-standing hostility to international arbitration. This in turn has introduced numerous important new participants to international arbitration. Likewise, financial institutions, including international institutions such as the European Bank for Reconstruction and Development, the World Bank, and the Overseas Private Investment Corporation have increasingly begun to include international arbitration clauses in their financial documentation. At the same time, bilateral investment treaties and free trade agreements have introduced international arbitration to a wide range of new investment disputes involving developing and other states.

The international arbitration proceedings which have resulted from these developments inevitably involve parties, lawyers and arbitrators from diverse legal, commercial and cultural traditions. Arbitral tribunals in international matters will often include arbitrators from multiple jurisdictions, and, in particular, from legal traditions different from those of the parties and their counsel. Tribunals will often seek to adopt procedures that treat parties from different legal traditions equally, by providing a neutral, "international" procedural framework for dispute resolution. In particular, tribunals will ordinarily resist suggestions that they merely apply the local rules of civil procedure that would be applicable in national court proceedings.

Over time, arbitrators (and practitioners) have developed – through trial and error or otherwise – customary practices for the conduct of international arbitrations. These practices draw on a variety of legal traditions and are designed to permit the fair, efficient and neutral resolution of quintessentially international disputes. In many cases, these procedural mechanisms are derived from "international" instruments, such as UNCITRAL or International Bar Association ("IBA") guidelines, institutional rules (e.g., ICC or LCIA), or persuasive international arbitral awards.

These international arbitral practices include the use of early procedural conferences (such as those contemplated by the UNCITRAL Notes on Organising Arbitral Proceedings and the ICC Arbitration Rules), the use of written witness statements and limited document discovery controlled by the arbitrators (as contemplated by the IBA Rules on the Taking of Evidence in International Commercial Arbitration), and the handling of written submissions and oral hear-

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ings (including such matters as the scope of cross-examination, the use of "witness-conferencing," and the like). In each of these examples, a combination of publicly-available guidelines and customary practice provides the basis for procedures which are designed to ensure a fair, efficient process for resolving international disputes.

To be sure, every arbitration involves different procedures and arbitrators frequently depart – sometimes materially – from sources such as the IBA Rules. Indeed, party autonomy and procedural flexibility have long been heralded as two of the primary advantages of international arbitration over national court litigation, and the procedural course of any arbitration should be determined by the needs of the participants and the requirements of the dispute. Increasingly, however, arbitrators and experienced arbitration advocates look to existing sets of procedures, as modified by customary practices, in considering how to structure a particular arbitral process.

Similarly, the IBA Guidelines on Conflicts of Interest in International Arbitration were recently adopted with the aim of introducing greater uniformity to questions regarding the independence and impartiality of arbitrators in international disputes. The Guidelines were drafted by a working group made up of highly-experienced arbitration practitioners from a wide range of jurisdictions and were meant to "reflect the Working Group's understanding of the best current international practice." Although the Guidelines are not mandatory, they represent a step towards collecting the prevailing views of the international arbitration community towards issues of substantial importance to the arbitral process. The subject of conflicts of interest is a delicate one, sometimes prone to abuse by litigious parties, and it is to be hoped that the Guidelines will over time reduce, rather than aggravate, difficulties in the area.

The harmonisation and increasing standardisation of international arbitration procedures is a welcome advance. The development of widely-accepted standard procedures that can be used as a starting point when establishing the detailed procedures that will apply in any particular arbitration makes international arbitral proceedings more predictable, uniform in application and accessible to new users, particularly those from jurisdictions in which arbitration has only recently been embraced as a form of dispute resolution. Standards such as the IBA Rules or UNCITRAL Notes can be read by any practitioner, and are not limited to some select circle of highly-experienced counsel and arbitrators. Such standards also offer enhanced assurances of predictability and equal treatment, as compared to procedural rulings based purely on a particular arbitrator's unwritten experience and preference.

The "internationalisation" of arbitration is also reflected in the "internationalisation" of leading arbitration institutions. A growing number of arbitration institutions have adopted rules for international arbitrations and have taken deliberate steps to broaden their ability to administer international disputes. The ICC has led the way, with a deliberately multi-national staff, boasting personal and institutional experience in administering arbitrations in a wide variety of jurisdictions and legal regimes. The LCIA and the AAA have also sought to dispel perceptions that they are unduly domestic, including by widening the membership of their governing bodies and administrative staffs. At the same time, arbitration institutions in Asia (China, in particular) and elsewhere have made efforts to address concerns about perceived parochialism.

While the development of an accepted set of standardised procedures is generally a positive development for international arbitration, it also presents challenges. In particular, the procedures generally used in complex international arbitrations are a harmonisation of practices drawn from the Anglo-American common law system and the civil law system found in many Continental European jurisdictions. These procedures do not necessarily reflect the full range of legal traditions represented by contemporary international arbitration users, and may be perceived as favoring parties from developed jurisdictions (particularly Western Europe and North America). If arbitration is to realise its goal of providing truly neutral, flexible international dispute resolution, the process of distilling a set of truly international procedures should draw on the legal traditions of all users of international arbitration. This will facilitate the increasing acceptance of arbitration for the resolution of international disputes, particularly in regions of the world where it has not historically found favor, and can also be expected to provide new ideas, insights and procedural approaches.

In addition, while the evolution of a truly international set of arbitral procedures will result in greater transparency and accessibility for users of arbitration, there is also a risk that the development of a set of standard practices could limit the procedural flexibility that has so long been a hallmark of international arbitration. As arbitrators and practitioners refine their experience and settle on certain standard practices, they must also continue to be open to new innovations and must continue to look for creative and flexible approaches to resolving particular disputes. The influx of new users in international arbitration proceedings should present new ideas and new practices that will allow arbitrators and advocates to continue to blend and borrow from an expanding range of legal traditions.

The growing ranks of international arbitrators and specialist international arbitration advocates must continue to distill from their varied experiences and backgrounds the best practices that are available, as modified for the arbitral process. They must also find more effective ways to communicate those standards to less experienced users of international arbitration and to make them more transparent. It is equally important, however, that they are open to innovation and look for ways to utilise the procedural flexibility that is inherent to the arbitral process. In doing so, today's arbitrators and practitioners will guarantee that international arbitration continues to be the preferred method of resolving complex commercial disputes arising from international commercial transactions. ■

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