NEWSLETTER

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International dispute resolution and enforcement – a comparative analysis of WTO, BIT, ICC and domestic dispute resolution

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On the afternoon of October 15, 2008, during the IBA Annual Conference in Buenos Aires, there was a joint session of the Litigation Committee, the Arbitration Committee and the Trade and Customs Law Committee. The program was chaired by Des Williams, Co-chair of the Litigation Committee and by Scott Anderson, Chair of the Trade and Customs Law Committee. The session provided a comparison of procedures which are available in various forms of private and public dispute resolution relating to international trade.

The first part of the session focused on procedural comparisons while the second part of the session dealt with strategic issues.

Procedural comparisons

Daniel Moulis (Moulis Legal, Australia) outlined the processes available at the World Trade Organization (WTO). Approximately 150 member states have subscribed to the Dispute Settlement Understanding which governs the process for resolving disputes under other WTO agreements on trade. For example, the Technical Barriers to Trade Agreement sets certain standards with respect to national practices which may be viewed as barriers to fair trade. Issues that may arise relate to such matters as conditions imposed on foreign investment, unfair treatment of imported goods and state subsidies with respect to exported goods. Only governments have standing with respect to WTO dispute resolution measures. The first step is the initiation of consultations with respect to the trade practice in dispute. The initial focus is on mediation, the use of good offices and conciliation techniques. Either party may request the establishment of a dispute resolution panel after 60 days of attempted conciliation. The document initiating the request for a panel must set out the specific measures which are the subject of the complaint in a brief summary of the legal basis of the claim. The request is submitted to the Dispute Resolution Body which consists of all the member states. A negative consensus will lead to the establishment of a panel, ie, in the absence of a positive consensus that no panel should be established a three member panel is appointed. In theory, the panel must report its conclusions within six months, but there are usually requests for extensions. The panel reports to the Dispute Resolution Body. If it finds that the measure which is the subject of complaint is inconsistent with WTO standards and agreements, the panel recommends that the offending member bring its measure into conformity. There is no appeal from such a recommendation. No coercive measures are available through the WTO. Arbitrations can subsequently be undertaken between the disputing states to determine whether retaliatory trade measures are appropriate or proportionate.

The next speaker was Jason Fry, Secretary General of the ICC. The ICC is a world business organisation which is involved in a wide range of issues affecting international business. Part of its objective in the promotion of international business is to provide a dispute resolution facility through its International Court of Arbitration. The ICC has presided over the resolution of over 15,000 cases involving many different languages, laws and places of arbitration. Over 700 individuals sit on ICC arbitrations at the present time. The ICC covers business disputes of an international character involving an incredibly wide scope of potential matters including both private disputes and disputes under bilateral investment treaties. In all cases the parties to the dispute must have agreed upon the ICC as the institution which will administer their arbitration. The ICC itself makes a preliminary determination on jurisdiction when an arbitration is initiated by any party to such an agreement. However the ultimate question of jurisdiction is decided by the tribunal itself.

The International Court of Arbitration of the ICC is not a court in an adjudicative sense. Its role is to administer the arbitrations that are referred to the ICC, to deal with such matters as challenges to arbitrators

and provide a scrutiny of the award, primarily to ensure that the award is in a form which is enforceable. The rules by which ICC arbitrations are conducted are highly adaptable and flexible to the particular arbitration.

Ignacio J Minorini Lima (M & M Bomchil, Argentina) then spoke on the topic of BIT arbitrations. Bilateral investment treaties provide foreign investors with protection by allowing them to file direct claims (ie, not through their state) against a foreign country in which they have made an investment. The basis of such a claim is that the protections offered by the treaty have been breached by the state which is host to the investment. For example, the foreign investor may claim that its investment has been subject to arbitrary measures or measures which unfairly discriminate against foreign investors in favour of national businesses of the host state. The provisions of BIT's are variable. Some BIT's may give a foreign investor the option of going to the national court or to international arbitration for adjudication. Other BIT's may require that recourse to the national courts must be exhausted before arbitration is initiated. Some BIT's specify that arbitrations will be conducted under the auspices of an established international arbitral institution such the ICC or the Stockholm Chamber of Commerce. The ICSID Convention provides an additional basis for redress where it is in effect as well as an institutional setting for investor/state disputes.

The discussion then turned to issues of discovery. Mr Moulis observed that there are no provisions for discovery under the WTO dispute resolution processes and any requests for information are subject to voluntary compliance, although adverse inferences can be drawn in the event that information is not provided. This is not usually an impediment to the process as most of the measures which are subject to complaints are in the public domain.

Mr Lima commented that there is no discovery, as such, in ICSID proceedings. Rule 33 provides that a party can request specific information but must state why it is important. Mr Fry commented that there is no rule with respect to discovery under the ICC Rules. A tribunal must do what it considers necessary to establish the facts. Often, where the parties to the dispute are from different cultures, eg, common law and civil law, a hybrid approach has been developed. The IBA Rules of Evidence are frequently resorted to as a procedure for dealing with discovery issues.

Hilary Heilbron QC (Brick Court Chambers, England), provided information as to discovery in international arbitrations which are conducted in London, England. Normally, the party who brings the case has the responsibility to produce the documents on which it relies. There are then targeted requests which are exchanged between the parties. As with international arbitration everywhere, requests for fishing expeditions are not well received. Sometimes the parties prepare, in the form of a chart sometimes known as a Redfern Schedule, their requests and the positions each party has taken with respect to the requests of the other party.

Steven Davidson (Steptoe & Johnson LLP, Washington DC) commented that there is an ability in international arbitration to get what you need if you can be specific as to why you need it.

Strategic issues

The first strategic issue discussed was the subject of appeals. Mr Lima commented that there is no appeal process in ICSID or BIT arbitration, only an annulment process. Very specific and limited grounds are available for annulment which is regarded as an exceptional remedy for a badly flawed award. Ms Heilbron commented that it is controversial whether there should be a right to appeal in commercial arbitrations. Most practitioners think it is a bad idea. There is a limited right to move to set aside awards for specific reasons such as arbitrator misconduct or excess of jurisdiction. However, under the English Arbitration Act of 1996, leave of court is needed in order to appeal on a point of law. Mr Davidson observed that arbitration is a consensual process and that appeals on the merits would make arbitration less desirable. Marco Schnabl (Skadden Arps, New York) observed that, nevertheless, a lot of parties to arbitrations are worried about the finality of awards and there is a movement in the United States to expand the basis for appellate review of arbitration awards through some consensual mechanism. Mr Fry indicated that in response to some concerns within the business community in relation to high stakes arbitrations (eg, over half a billion US dollars) the ICC is reviewing its rule to see whether or not some form of appellate review might be provided. Keith Steele (Freehills, Australia) commented that parties must have confidence that they have received a 'fair shake' and know why they have lost. He suggested that the circulation by the tribunal of a draft award on which parties can comment may be helpful in increasing confidence in the arbitral process.

A discussion then ensued with respect to the role played by private investors in public sector arbitrations and what the impact is of methods of funding the dispute resolution process. Mr Moulis observed that WTO proceedings frequently have private investors in the background. However private investors rarely have full control of the proceedings and are never present when the dispute resolution process is actually taking place. There was a discussion about the opening up of WTO hearings to the public as well as the role that can be played by *amici* briefs and the interventions of non-governmental organisations in investor state disputes. In some cases there have been split hearings with respect to WTO disputes so that some portions of

the hearings can be held in public. However, this adds substantially to the costs of the proceedings.

A further topic discussed was that of parallel proceedings. Mr Lima observed that most BIT's have 'fork in the road' provisions under which the investor is obliged to choose court proceedings or arbitration. This is also true under the ICSID rules. However, it is not clear what happens if the investor chooses one option and the government of the state in which the investor resides chooses to initiate a parallel WTO proceeding. Mr Moulis observed that the WTO itself does not have any rule that requires that local avenues of redress be exhausted.

A further discussion followed about remedies and the enforcement of arbitral awards. Mr Davidson observed that in commercial arbitration the most frequent remedy is a monetary award. Tribunals are reluctant to grant other forms of relief because of their concerns regarding the enforceability of such awards. Therefore, in his experience it is better for the parties to go to the relevant courts for non monetary relief. Ms Heilbron observed that frequently in investor state disputes there are issues relating to sovereign immunity and whether or not the assets of a state party are commercial assets. Mr Moulis observed that in WTO proceedings a party cannot get an order for the payment of money. A state that obtains a favourable report can try to negotiate compensation. Professor George Berman (Columbia University, New York) observed that there is an increasing demand for declaratory relief, specific performance and contract reformation in international arbitration but that the implications for enforcement under the New York convention for the enforcement of foreign arbitral awards are not clear. Mr Fry observed that in ICC arbitrations a very significant number of cases involved tribunals which make orders of specific performance, injunctive or other forms of non monetary relief. While there are interesting issues with the respect to the characterisation of these awards and their enforcement under Article 17 of the UNCITRAL model law, 95 per cent of all orders are complied with voluntarily.

Conclusion

A number of other topics were briefly touched upon in the interesting exchange that took place following the formal presentations.

Report on private international law workshop, Buenos Aires

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The Litigation Committee sponsored a lively session on 'hot topics' in private international law on the afternoon of 14 October 2008 at the IBA Annual Conference in Buenos Aires.

The first half of the session, chaired by Committee Co-Chair Klaus Reichert, was a workshop on important developments in the fields of private international law. Marta Partegás of the Hague Conference on Private International Law began the session by discussing a project in which the conference is considering the preparation of a new instrument on choice of law in international contracts. Although most legal systems respect party autonomy over applicable law, this is not universal and there are serious limitations on party autonomy in important jurisdictions such as Brazil. One preliminary issue is what form such instrument should take, eg, a convention, a model law, a set of principles or a guide to good practice. The goal would be to encourage states to respect party autonomy and provide guidelines for addressing problematic scenarios that can arise.

The Permanent Bureau of the Hague Conference has conducted a feasibility study on the choice of law in international contracts and has obtained feedback from Member States.[1] The project is currently in the consultation phase, in which additional feedback is being gathered from various stakeholders. The IBA is an important partner in this process, and the conference would appreciate comments from IBA members. Issues to be considered include whether there should be different rules for choice of law in court litigations versus arbitrations, what type of agreements should be covered, and what a court should do in the absence of a choice of law provision.