Investor State Dispute Settlement

An Overview of Institutional International Arbitration

1. Introduction

Foreign investors are keen to invest in jurisdictions that give them the choice of international arbitration for resolving investment disputes with Host States. Keen to increase foreign direct inflow ("FDI"), many developing countries have entered into Bilateral Investment Treaties ("BITs") with developed countries. BITs set out substantive principles for investment protection as well as the procedures for Investor State arbitration. Developing countries have additionally entrenched recourse to international arbitration for dispute settlement in their domestic legislation and investment agreements.

In this article, we give an overview of institutional international arbitration. Though there are many arbitral institutions, our discussion herein is limited to 5 namely the International Center for the Settlement of Investment Disputes ("ICSID"), the International Chamber Of Commerce ("ICC"), the London Court of International Arbitration ("LCIA"), the Stockholm Chamber of Commerce (SCC), the Permanent Court of Arbitration ("PCA"). We also highlight briefly the features of ad-hoc arbitration and the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.

2. Institutional versus Ad-hoc Arbitration

Institutional arbitration involves the parties agreeing to submit their disputes for determination by established institutions that administer the arbitration process. Each of these institutions have their own rules of procedure providing a framework for the arbitration, and form of administration to assist in the process. On the other hand and as the name suggests, ad-hoc arbitration is not administered by established arbitration institutions. The parties can choose designation of the procedural rules, applicable law, procedures and administrative support.

Save for the significant administration costs involved, institutional arbitration is preferred by most parties because of the existence of established tested procedural rules and the administrative support that enables arbitration proceedings to commence as soon as initiated. Arbitral institutions also have a pool of qualified arbitrators to choose from. The administration fees payable however may sometimes be more than the amount in dispute and the attendant bureaucracy too can delay proceedings leading to additional costs.

Ad-hoc arbitration is more cost effective since there are

no fees paid to arbitral institutions with the fees payable to the arbitrators negotiated directly between the parties and arbitrators. The effectiveness of ad-hoc arbitration is however dependent on the willingness of the parties to agree on a complete set of rules in an arbitration clause which approach can require considerable time. Additionally, if the parties have not agreed on arbitration terms before any dispute arises, they are unlikely to fully cooperate in doing so once a dispute has arisen.

3. UNCITRAL

The United Nations Commission on International Trade Law ("UNCITRAL or Commission") was established by the United Nations General Assembly in 1966. In 1976, the Commission promulgated a set of arbitration rules to govern international arbitration proceedings outside the framework of any established administering body.

The UNCITRAL arbitration rules, last revised in 2010, are widely used for ad-hoc arbitrations. These rules are not attached to any specific arbitral institution. Disputes under these rules can be conducted on an ad-hoc basis or administered by established arbitral institutions such the PCA, ICSID, LCIA or the SCC. UNCITRAL arbitration rules may be used in an institutional arbitration where the parties desire an institutional arbitration in a particular venue, but do not wish to use the rules of the institution.

UNCITRAL arbitration rules are famed for being comprehensive and universally accepted. Comprising 43 articles, these rules address all matters that may arise in international proceedings from the notice of arbitration, to the appointment of arbitrators, interim measures, proceedings, and the form and effect of an award including the decision on costs.

4. ICSID

ICSID is an international, multilateral and intergovernmental arbitral institution established by the Convention on the Settlement of Investment Disputes ("Washington Convention or ICSID Convention") The ICSID convention which was fronted by the World Bank entered into force on October 14, 1966, after it had been ratified by 20 countries. There are currently 159 signatory states to the ICSID Convention including Uganda and an amended version of the arbitration rules came into force in 2006.

ICSID provides facilities for conciliation and arbitration of investment disputes between contracting states and nationals in accordance with the provisions of this convention. It plays a key role in encouraging the inflow of FDI from developed to developing countries by providing a depoliticised and neutral system for the resolution of disputes between investors and Host States. In the case of *Amco vs. Indonesia*,[1] the Tribunal explained that ICSID arbitration is not only in the interest of investors, but also of the Host States. It concluded that the convention is aimed at protecting both the investor and the Host State, to the same extent and with the same vigor.

ICSID is the most prevalent arbitral institution. Proceedings under ICSID are independent from intervention by external bodies like domestic courts whose role is limited to recognition and enforcement of the given awards. Article 53(I) of the ICSID convention provides that awards rendered under the ICSID are binding on all parties and not subject to any appeal, or any other remedy save as provided therein. This principle of finality embodied in the convention is what attracts many state parties to sign up to it.

5. ICC

The International Chamber of Commerce is a leading arbitral institution with its seat in Paris. ICC Rules of Arbitration were last revised in 2012.A distinctive feature of the ICC is the administrative assistance and guidance provided by its International Court of Arbitration ("ICA") which has been in existence since 1923. The ICA is not a court in the judicial sense and does not have any jurisdictional power. Its mandate is to supervise international dispute resolution by applying the ICC rules of arbitration.

When parties agree upon an arbitration clause referring to the ICC rules of arbitration, they also assign certain decision-making powers to the ICA. These powers include, for example: the power of the ICA to make decisions regarding arbitrators (appointing and replacing arbitrators, deciding on challenges made against them); monitoring the arbitral process to ensure that it is performed properly and with the required speed and efficiency; scrutiny and approval of all arbitral awards, in order to ensure their quality and enforceability; setting, managing and, if necessary, adjusting the fees and advance on costs; and overseeing emergency proceedings before commencement of the arbitration.

The ICC rules require arbitrators to draw up the terms of reference once they receive the files of the case from the ICC secretariat. These terms provide for a short characterization of the case, including the summary of the claims and a list of the issues to be decided. Once the tribunal has agreed on a draft of the terms of reference, this document is forwarded to the ICA and the court will check the formalities, ensuring that all the relevant matters are covered and that there are no obvious mathematical

1 *ICSID Case No. ARB Decision o ARB/81/1; Jurisdiction; September 23, 1983, 1 ICSID Reports 400.*

errors or misprints in the draft. However, the responsibility for the giving arbitral awards remains with the tribunal and not with the court.

The official and working languages of the ICA are English and French.

6. LCIA

The London Court of International Arbitration is a leading international institution for commercial dispute resolution and is based in London. It is a private body and was set up in 1986, as a successor to the London chamber of Arbitration. It was established by the City of London Corporation, and the London Chamber of Commerce to deal with commercial disputes.

The LCIA is designed to deal with disputes arising out of commercial transactions regardless of the nationalities of the parties including investor-state disputes. The current rules governing the LCIA were adopted in 1998. However, if requested, LCIA can also apply the UNCITRAL rules or act as an appointing authority for arbitrators.

The LCIA has access to the most eminent and experienced arbitrators, mediators and experts from many jurisdictions, and with the widest range of expertise. The LCIA's dispute resolution services are available to all contracting parties, without any membership requirements.

7. SCC

The Stockholm Chamber of Commerce established an independent, private body in 1917 dubbed the Arbitration Institute to administer commercial arbitrations.

The SCC Arbitration Institute oversees arbitral proceedings conducted under SCC arbitration rules that were last amended in 2010. It can also co-opt the application of other arbitration rules such the UNICTRAL among others. The SCC arbitration rules requires the tribunal to give an award within six months of the date the matter is referred to the same although this period can be extended.

Unlike other major arbitration institutions whose standard rules can be modified to accommodate requests for expedited decisions, the SCC has a separate set of rules specifically catering for expedited arbitrations, which can be modified by the parties. The use of the SCC expedited rules is recommended to resolve relatively minor disputes in a speedy and cost-effective manner.

8. PCA

The Permanent Court of Arbitration has its seat in the Hague, Netherlands. It was initially established in 1899 by the Hague Peace conference which adopted the Convention on the Pacific Settlement of International Dispute. In 1907, the second peace conference decided to retain the Court to facilitate arbitration and other forms of dispute resolution between States.

Today, the PCA has 122 member states, including Uganda which joined under the 1907 Convention in 1966. PCA arbitral rules were last amended in 2012 and apply to disputes that involve states, state-controlled entities and international organizations.

The PCA, is not, strictly speaking, a judicial court but only administers or facilitates arbitration and conciliation between parties in a dispute usually pertaining to foreign investment. The PCA's secretariat known as the International Bureau may register a case, provide legal support to tribunals, process documents, and conduct communications between parties, as well as provide legal research and organise meetings and hearings.

The Bureau also maintains a list of arbitrators who may be chosen by the parties to a dispute. The current procedural rules of the PCA are based on the 1976 UNCITRAL rules. The Secretary General of the Bureau may serve as appointing authority in UNCITRAL arbitrations or may be requested to designate an appointing authority, and may rule on the challenge of an arbitrator.

9. Conclusion

Considering the scale of capital involved in foreign direct investment, investors are keen to have in place robust mechanisms for dispute resolution with Host States. International arbitration depoliticises disputes but also ensures adjudicative neutrality. Arbitral awards are also enforceable just like decisions of domestic courts.Most countries, especially in the developed world, are signatories of the New York Convention. Consequently, judgements can be enforced across the world.

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