

WORSHIPFUL COMPANY OF ARBITRATORS – ANNUAL MASTER’S LECTURE 18 May 2015

CHALLENGES AND RESPONSIBILITIES: THE ROLE OF THE INSTITUTION

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I. INTRODUCTION

- Current position of the LCIA in the world of international arbitration and plans for the future
- Arbitration is becoming increasingly complex
- Multiple players, stakeholders (parties, counsel, arbitrators, non-government organisation, governments)
 - Different interests and perspectives
 - Sometimes they are reasonably aligned (efficient and effective dispute resolution)
 - Sometimes they come into conflict (for example, transparency / confidentiality)
- What are the issues? Real and perceived
 - Internal, which involve the process (arbitrator appointments, duration, counsel conduct)
 - External (sanctions, misconceptions triggered by TTIP debate)
 - Some arguably mixed (diversity, use of legal secretaries)
- Balancing party autonomy and due process
- Institutions play a central in addressing these issues. But the responsibility is shared between all stakeholders.
- Responsible institutions should engage in all challenges (including perceived).
- Goal today is to review a number of these challenges, explore possible solutions and identify the roles to be played by different stakeholders.
- Discussion of “internal” challenges will focus four aspects:
 - Arbitrators
 - Costs and duration
 - Tribunal secretaries
 - Counsel
- Discussion of “external” challenges will focus on two issues:
 - TTIP debate
 - Sanctions
- All of this is of course related to the underlying theme and challenge – what does the LCIA want to do in the coming years – more cases? Bigger cases? More diverse case load? Greater specialisation? Focus on a particular region?

II. INTERNAL CHALLENGES

2.1 Arbitrators and their selection: Arbitrators should be good, independent and impartial, available and affordable

2.1.1 Appointment

- General: parties or institution? How do we find these people?
 - ICSID – rosters, fixed number of people
 - Party nominations
- Different institutional solutions
- The LCIA appoints all arbitrators
- Education is vital
 - Surprising how badly people are informed
 - Even users still need to be reminded what distinguishes the procedures.
- Development of soft law
 - IBA Guidelines define when someone can be seen to be impartial and independent.
 - Rules are constantly revised
 - Good and bad. Can be difficult to pin what the applicable norms are.
- What can the institutions do?
 - Provide a good procedure.
 - Provide transparency in the process.
 - LCIA challenge procedure – reasoned decisions which can be lengthy and do justice to the issues brought before the division.
 - The LCIA is seeing fewer challenges over the last few years – there is a lot to be said for a strong challenge process
 - External transparency gives legitimacy to the process – anonymised digest of challenges.
- Appointment process
 - What do we do as an institution?
 - How does it work when it comes to an actual case?
- Only in situations where institutions get to select the whole team can you mix and match.
 - The LCIA selects in about 50% of cases.

2.1.2 Diversity

- Goal itself (external challenge)

- Diversity is a diverse concept
 - Gender – at least reflect makeup of law firms. LCIA stands at 12%, this is not high enough.
 - Age/experience – first time appointees – tends to be a correlation between first time appointees and age.
 - Cultural (legal; language; nationality) – institutions should look at these constructively to make sure we get the right fit.
- Diversity improves the quality and sustainable pool of arbitrators (institutional interest)
- The Pledge
 - We should look at what the LCIA as an institution can do: transparency; steer composition; conferences
 - Parties and counsel; each list to contain women
 - Arbitrators when selecting a chair can take diversity into account
- Not a quota system, but should give more attention to the matter of diversity

2.1.3 Availability

- Conflicting demands of users (quick appointment / thorough review)
- Conflicting interests of different players
 - Arbitrators want to have enough work
 - Parties want arbitrators with enough experience but also enough time
 - Institutions want to make everybody happy:
 - arbitrators should have time; but also capable and experienced
 - parties should be satisfied in the actual case but also with the overall experience (we want Mr X but we also want you to tell him that he needs to write his awards within 6 weeks)
 - institutions: continuity and spread
- New LCIA Rules refer to availability in the rules
 - Implement this requirement of availability through a form
 - It is only when we get detailed information can we make a sound judgment
 - We now ask how many awards individuals have outstanding – this is more helpful than just case numbers
 - Also ask for the commitments people have in terms of hearings.
 - Only when people trust us can we make that information work.

2.1.4 Affordability: cost (and duration)

- Arbitration needs to be time and cost effective (while not compromising quality)
- Different systems of remunerating arbitrators
 - Hourly
 - Ad valorem
- Connects to duration
 - If you control the process, efficient way of reducing costs
- Increasingly competitive landscape – cost is used by all stakeholders as a reason to use certain institutions / ignore institutions / comment on other institutions
- Hourly rate is transparent
 - You can plot all of our numbers in a system and see what the costs have been in arbitrations under the LCIA Rules
 - There is no typical LCIA case
 - You have to look at actual cases. But you can look at averages.
- Be transparent – publicise/debunk the myth

2.2 Legal secretaries

- Who are they and what tasks are they performing?
- Distinguish myth and reality (arbitrator whose English is limited and produces perfect awards)
 - You need to know what the process you're getting yourself into is.
- Regulation?
 - Conflicts – need to abide by the same standards of independence / impartiality
 - Cost
 - The issue is not fully developed yet
- LCIA's procedure
 - Both parties must agree. But what happens if the parties don't agree and the Tribunal still wants the Tribunal secretary?
- Education and discussions: LCIA/CI Arb conference
- Concrete steps:
 - Lists?
 - PCA treatment?
 - Develop good practice guidelines
 - Transparency
- Significant role for institution (but parties and arbitrators should be frank and transparent)
- Not about passing judgment, but facilitating a discussion and enhancing good practice.

2.3 Counsel

- Freedom to select
- Replacement
 - Barristers
 - But not exclusively
- Conduct: core standards
- Sanctions:
 - Who? Tribunal
 - How far do you go?
- Role of the institution:
 - to provide the regulatory framework
 - not to make the actual decision: it is about regulating a procedure not to regulate a profession
- Guidelines in LCIA Rules:
 - One of the developments decided before I arrived.
 - General guidelines
 - wholeheartedly embrace, genuinely happy to spread the gospel
 - area where the LCIA is taking a leading role in developing law

III. EXTERNAL CHALLENGES

3.1 Intro: myths and realities

- Two external challenges
 - TTIP debate – characterised by misconceptions and confusion.
 - Sanctions – misconceptions as to the effect and reach.
- These misconceptions and perceptions are having a knock-on effect in the context of commercial arbitration.
- Larger public is misinformed as to what arbitration is all about.
- Institutions should join forces to protect the system and counteract misleading perceptions.

3.2 TTIP debate

- System of international arbitration as we know it under threat
- LCIA: the knock on effect

3.3 Sanctions

- Sanctions potentially affect
 - The substance of the contract
 - The system itself – counsel, the tribunal and the institution.
 - “New players” (eg SIAC) capitalising on sanctions as a marketing tool
 - What is the problem? Are they resolving a non-problem?
 - EU and US sanctions
 - Different scope
 - Different implementation
 - Focus EU sanctions:
 - Sectoral
 - A few, big, companies
 - Limited scope (issuing loans)
 - Asset freeze
 - Broader scope, but not unlimited; if funds need to be paid, get license
 - But equally limited number of entities
 - What is the effect for institutions?
 - Administrative: check and recheck
 - To avoid US sanctions: avoid US nationals

- The practical concerns are actually the (indirect) effect of Iranian sanctions (banks)
- Emotion – need to go out there and not be afraid to talk about the issues.
- Are (Russian) parties avoiding arbitration altogether?
- Anecdotal evidence both ways
- RAA ballot: no change

IV. CONCLUSION

- These are some of the challenges that face institutions in general and the LCIA
- All have a role to play
- All stakeholders have an interest – this interest comes with a responsibility – institutions should lead the way?
- But work with not against the institution
- Shared responsibility.

My plans

- Bottom line: institutions can do a lot, but only where parties allow that
 - The case for institutional appointment
 - Impartial and independent arbitrators
 - Quality
 - Availability
 - Diversity: the Pledge
 - Costs: The case for hourly remuneration: transparency
- Secretaries
- Go out and speak (both on TTIP and esp sanctions: RAA example: you need to be there, don't duck the issue; go to see the users, US Russia)
- The overall direction at the LCIA
 - My role obviously limited, Board and the Court
 - Realities: increasingly competitive
 - Not for profit – stay true to our own values
 - Seek realistic opportunities
 - Recognise where our strengths lie – international institution based in London, with expert arbitrators – that is a great asset, Russia/CIS.
 - Involvement
 - Involve users and supporters
 - Conferences
 - Moots
 - Twitter
 - Website