The role of appointing bodies under different arbitration rules

The role of the arbitration rules

Under investment treaties, states often allow investors to bring claims under any of a series of different arbitration rules. Investment contracts, on the other hand, typically provide for claims under only one set of rules and before a designated forum.

The choice of arbitration rules, whether by states when negotiating a treaty or by investors when bringing a claim, has important consequences. Perhaps most importantly, the rules typically determine who exercises ultimate appointing authority in the arbitration.

[IIAPP comment: in effect, the choice of arbitration rules determines further aspects of the state's decision to delegate to international arbitrators its sovereign authority to adjudicate public law and public policy. Where a treaty gives a choice of rules to an investor, aspects of the state's decision to delegate its authority are in turn allocated to future claimants.]

Implications of the choice of arbitration rules

Where an investment treaty or contract is otherwise silent on these matters, the choice of arbitration rules will determine, among other things:

- the available avenues for review of awards,
- the level of openness in the arbitration process,
- the ability of a state to participate in reviews and revisions of the rules, and
- who has the ultimate authority to appoint arbitrators to a tribunal.

On this last point, the body that is given ultimate authority to appoint under the rules will have the power to select the presiding arbitrator of a tribunal where an agreement is not reached on who to appoint and to appoint an arbitrator on behalf of a party (where the party otherwise does not do so). The allocation of appointing authority under different rules is discussed below.

[*IIAPP comment: Negotiations between an investor and a state about who to appoint occur against the backdrop of expectations about who the appointing body would otherwise appoint. In some cases, the appointing authority adopts an active role in shaping the negotiations by distributing lists of candidates under consideration for appointment. For this reason, it is important to consider the political context for different arbitration rules and appointing bodies. That is, who does one trust as an appointing authority? How neutral will that authority be and who is likely to hold influence within it?*]

Commonly-used arbitration rules

At least five sets of rules are commonly-used in international investment arbitration. They are (roughly in order of prominence, based on IIAPP data on investment treaty cases):[1]

- **ICSID Rules**. Administered by the International Centre for Settlement of Investment Disputes (ICSID) in Washington, an arm of the World Bank. Used in about 54% of confirmed investment treaty cases.

Under the ICSID Rules, appointing authority rests with the President of the World Bank (a.k.a. the Chair of the ICSID Administrative Council). Alternatively, some treaties designate the ICSID Secretary General as an appointing authority. Customarily since the organization was established, the World Bank President is an appointee, in effect, of the U.S. Administration. The ICSID Secretary General is nominated by the World Bank President and then approved by a vote of the states parties to the ICSID Convention.

[*IIAPP comment: In August 2010, an ICSID arbitrator, Jan Hendrik Dalhuisen, made explosive allegations of an inappropriate attempt by ICSID staff to interfere in the decision-making of an ICSID panel of which Dalhuisen was a member. Dalhuisen also highlighted unhealthy practices of investment arbitrators in seeking re-appointments.*[2] *These allegations heighten concerns arising from the absence of institutional safeguards of judicial independence in the system. On the other hand, it is positive that such issues could be aired publicly in the context of ICSID and testament to Dalhuisen's personal integrity that he raised them. Other appointing bodies are much less open to outside scrutiny and public debate.*]

- **UNCITRAL Rules**. Adopted by the UN Commission on International Trade Law (UNCITRAL) as commercial arbitration rules in 1976. Later incorporated by reference into investment treaties. Administered by the Permanent Court of Arbitration in the Hague. Used in about 30% of confirmed treaty cases.

Under the UNCITRAL Rules, where a decision must be made by the appointing authority, the Permanent Court of Arbitration has the power to designate a person or organization to serve as that authority. In investment treaty cases to date, the PCA has selected, for example, the International Chamber of Commerce, the Stockholm Chamber of Commerce, and certain individuals as the appointing authority.

[*IIAPP comment: Historically, the Dutch government has occupied a prominent role at the PCA. The Chair of the PCA Administrative Council is the Dutch Minister of Foreign Affairs and the Secretary General of the PCA is, as of September 2011, Christiaan Kröner, a Dutch national. As in the case of other appointing bodies, appointment-related decisions at the PCA will likely be influenced by staff at the PCA secretariat.*

[1] Confidentiality provisions in the UNCITRAL Rules, ICC Rules, and SCC Rules mean that confirmed data on investment treaty cases under-estimates the role of these rules in such cases. They also preclude the reliable collection of data on arbitrations under investment contracts.
[2] *Compania de Aguas del Aconquija & Vivendi v. Argentina Republic*, ICSID Case No. ARB/97/3, Annulment Award (20 August 2010), Additional Opinion of Professor Jan Hendrik Dalhuisen.

In its appointment decisions, it is questionable for the PCA to designate private business organizations, such as the ICC, as the appointing authority in treaty arbitrations against states. Likewise, it can be problematic for an individual to be given appointing authority. For example, in one case, the PCA designated as the appointing authority a law professor who in turn appointed, as the presiding arbitrator in the case, a colleague in the same university law department. Although this does not necessarily raise any actual conflict of interest, the appointments process itself was problematic for appearances of strict neutrality and independence in UNCITRAL investment arbitration.]

- **ICC Rules**. Established by the International Chamber of Commerce in Paris and administered by its International Court of Arbitration. Used in 1% of confirmed treaty cases but also widely under investment contracts.

The ICC reported, during 2005-2009, an average of 69 arbitrations per year involving a state or state entity. Further information on the great majority of these arbitrations is not publicly-available.

[*IIAPP comment: Use of the ICC Rules is not recommended for investment arbitrations involving states. Unlike ICSID or the PCA, the ICC is a business organization that is accountable to its private membership rather than publicly-accountable decision-makers. In its wider activities, the ICC advocates for investors and promotes the use of investment arbitration, while also delivering investment arbitration services. This raises concerns about the independence and accountability of investment arbitration under the ICC Rules.*

For example, members of the ICC's private Court of International Arbitration are not protected by conventional markers of judicial independence, such as security of tenure and prohibitions on outside remunerative activities. They are also not subject to principles of openness that enable public scrutiny of judicial decision-making. Due to the confidentiality of ICC arbitration, it is not possible to verify but likely that investors have brought claims under the ICC Rules while members of the ICC or an ICC affiliate. In 2008, the chair of the ICC Court, Pierre Tercier, resigned, reportedly because of concerns that the body was not sufficiently independent of the ICC Secretariat.[3]]

- **ICSID Additional Facility Rules**. Available as an alternative to the ICSID Rules where a claim falls outside of ICSID's jurisdiction because the host state or the home state is not a party to the *ICSID Convention*. Used in 10% of confirmed treaty cases, mostly under NAFTA.

As in the case of the ICSID Rules, under the ICSID Additional Facility Rules appointing authority rests with the President of the World Bank (a.k.a. Chair of the ICSID Administrative Council).

- **Stockholm Chamber of Commerce Rules**. Administered by the SCC Arbitration Institute. Developed historically to resolve East-West trade disputes. Used in 5% of confirmed treaty cases. Like the ICC, arbitrations are usually not public although some SCC awards, especially under the *Energy Charter Treaty*, have been released.

[3] N. Goswami, "ICC left reeling as arbitration court chairman Tercier resigns" *The Lawyer* (31 March 2008).

The SCC Institute has reported that it administered hundreds of arbitrations during 2001-2009, including 30 treaty arbitrations. Further information on many of these arbitrations is not publicly-available.

[*IIAPP comment: The Board of the SCC Institute is dominated by practising lawyers and arbitrators. Like the ICC, the SCC is a business organization that is accountable to its private membership rather than to states.*]

Suggestions for respondent states

[*IIAPP comment: The following suggestions follow from the above editorial comments. They reflect assumptions that most states will prefer an appointing authority that is (1) reasonably neutral, politically balanced, and accountable to states; and (2) insulated where possible from the commercialized arbitration industry. They should not be taken as legal or other professional advice.*

- *Governments should consider developing an in-house team that can provide trusted, independent legal advice to senior decision-makers on investment treaties and contracts, the arbitration rules, and actual arbitrations.*

- *States may wish to limit the choice of arbitration rules given to investors under its investment treaties. Doing so allows a state to focus on a preferred forum in treaty or contract negotiations, to monitor usage of the rules over time, and to focus on a single forum if reforms are envisioned.*

- *Ideally, states should stipulate an acceptable appointing authority directly in an investment treaty or contract. If an appointing authority cannot be agreed with another party, this may raise questions about the neutrality of a proposed dispute resolution forum.*

- *Among the arbitration rules discussed above, the ICSID Rules and the ICSID Additional Facility Rules are probably the best of a limited set of options. These rules designate an appointing authority that is at least accountable to states and whose performance can be assessed based on a degree of public information. On the same criteria, the next-best choice would be the UNCITRAL Rules, whereas the ICC and SCC Rules should be avoided.*

- *Because of the ICC's close connections to investor interests and the arbitration industry, and the inability to track and scrutinize decisions of ICC arbitrators, states should consider withdrawing references to the ICC Rules from their treaties or contracts.*

- *States should consider developing alternative forums for investor-state adjudication.*]

Source: www.iiapp.org (September 2011), based partly on information in publicly-available awards and materials in known investment arbitrations. This report was produced by researchers coordinated by professor Gus Van Harten (gvanharten@osgoode.yorku.ca) of Osgoode Hall Law School of York University in Toronto, Canada. *You may forward or re-publish the information in this report with attribution to www.iiapp.org*.