Current Trends on International Commercial Dispute Settlement — An Overview

Professor Diego P Fernández Arroyo

Member of the Curatorium, The Hague Academy of International Law
Professor, Sciences Po Law School, Paris, France
Private Justice v Public Justice?

- Reflex: some public element/authority is always associated to the very notion of Justice
  - However, ‘Private Justice’ (i.e. the settlement of legal disputes by private adjudicators whose decisions are largely enforced by private means) becomes more and more significant

- Different expectations and assumptions exist as to their legitimacy
Settings for the settlement of international commercial disputes:

- Arbitral tribunals
- [Mediators]
- Domestic courts (including ICC)
- International courts
Private Justice’ protected and controlled by State (or supranational) courts?

- Human right to access to justice includes the right to arbitrate – See for instance ECHR case-law:
  - Mutu and Pechstein v Switzerland (2018)
  - Ali Riza et al. v Turkey (2020)

- Control of impartiality and independence of arbitrators
  - Halliburton v Chubb (2020) U.K. Supreme Court

- Recognition and enforcement / annulment of awards
  - NY Convention / UNCITRAL ML
• Private adjudicators and public courts ---

competition or collaboration?
Arbitration

- Peak of Arbitration = *de facto* quasi exclusive jurisdiction in many commercial fields
  
  ▶ The vast majority of the most economically relevant commercial disputes is now systematically submitted to arbitration
  
    - *Commercial disputes in general*
    - *Investment disputes*
    - *Inter-state disputes related to trade issues*
    - *Sports arbitration*

  ▶ Boom of arbitral institutions — opening new offices across all continents
This growing ‘arbitralisation’ is not for free --- it calls for reform to enhance core values of transparency, consistency and accountability (vectors of legitimacy)

- Reform is ongoing in ISDS for procedural and substantial issues

- ICA is still far from acknowledging the need for a comprehensive reform
  - But arbitral institutions have engaged in some reforms
Different reactions to the expansion of Arbitration

- **Arbitration users**: general preference for Arbitration but concerns about efficiency, celerity and costs

- **Civil Society**: general unease about allowing private adjudication of disputes concerning public interests

- **States**: generally a proactive attitude in favour of arbitration since the 50s
  - At national and international level
  - Promoter & Regulator = more space for arbitration in exchange of some control *(ISDS: State criticism is peculiar and normally related with its role of respondent in actual cases)*
‘Denationalisation’ of Commercial Law (which is also generally applicable to Private International Law):

- **Erosion of the exclusive role** once played by the State and **end of State monopoly on normative production** (amazing amount of substantial and procedural soft law)

- **States** nevertheless retain an important **role in the IBL game**:
  - Establishing some general IBL objectives
  - Developing a part of its content
  - Adjudicating IBL disputes
• International tools to catch up *(or try to do so)* with the New York Convention?

▶ 2005 Hague Convention on Choice of Courts Agreements

▶ 2019 Hague Convention on Recognition and Enforcement of Judgments

▶ 2018 Singapore Convention (UN) on International Settlement Agreements Resulting from Mediation
State Courts

• Emergency of international commercial courts
  
  ▶ **Arbitration copycat?** More flexible procedures and specialised (possibly foreign) judges but still within public national judicial structure
  
  ▶ **How flexible? One telling fact:** the use of English language before the new International Commercial Court of Paris (ICCP)
  
  ▶ **A competitor for arbitration?** Aggressive marketing by these international commercial courts: see *Singapore International Commercial Court (website)*
International Courts

• ICJ examines PrIL issues when deciding on PIL issues

• Human Rights courts indirectly address PrIL issues

• Regional courts dealing with commercial issues
Which Future?
Dialogues and Transformations

- Impact of ‘legitimisation trend’ in Arbitration
- Evolution of international commercial courts
- Development of international Mediation
- Use of international conventions by private institutions and State courts
Thank you and see you in 2021!