ICCA Congress, Sydney, 2018

Panel 4: Reforming Commercial Arbitration in Response to Legitimacy Concerns

Commercial arbitration and the development of common law

Noradèle Radjai
Commercial arbitration and the development of common law: The criticisms
The Criticisms - England

“…the diversion of more claims from the courts to arbitration […] reduces the potential for the courts to develop and explain the law […] transforming the common law from a living instrument into … ‘an ossuary’”. Lord Chief Justice, Lord Thomas, 2016

“Arbitration is retreating into its lair, dragging with it into the darkness the very cases that should be used to develop the common law as it applies to modern commerce”. Bor, 2016

“the lack of publication, the lack of transparency, the difficulty or impossibility of getting such awards into the public domain, a fortiori in the light of institutional rules which bar any challenge or appeal to the courts whatsoever, mean that our commercial law is going underground.” Sir Bernard Rix, 2016
The Criticisms - Australia

“An unintended side-effect of the increase in arbitration is the corresponding reduction in litigation […] stunting the development of the common law.” Stephenson and Andersson, 2016
Common law is akin to a living tree

“All areas of law […] are living, constantly evolving trees. Some branches sprout and grow; others crack and need trimming. Thus, the law develops and remains responsive to changes in society…”

“…the tree looks different than it used to. It may not be dead, but new branches are not appearing as often as they once did. And old branches that need pruning are often neglected.”

Rt. Hon. Beverley McLachlin, Chief Justice of Canada
The Criticisms – United States

“The arbitration movement evicts entire classes of claims from the public justice system…There can be no dispute that arbitration…fundamentally precludes the common law development” Myriam Gilles, 2016

“For the entire categories of cases that are ushered into this vault common law doctrinal development will cease. That is what I mean by the end of law” Myriam Gilles, 2016

By taking cases away from courts, international arbitration causes a dearth of precedent in certain areas of the law and is perceived as a threat to the healthy development of the law.” Ank Santens and Romain Zamour, 2015
Assessing the Criticisms

1. Does commercial arbitration hinder the development of common law?

2. If so, does this hindrance render commercial arbitration any less legitimate?

3. If so, how should commercial arbitration adapt?
Steady growth in number of arbitration disputes

![Bar chart showing growth in number of arbitration disputes from 2013 to 2016 for ICC, LCIA, CIETAC, and SIAC.]

- 2013: ICC 767, LCIA 301, CIETAC 259, SIAC 222
- 2014: ICC 791, LCIA 296, CIETAC 222, SIAC 271
- 2015: ICC 801, LCIA 326, CIETAC 271, SIAC 259
- 2016: ICC 966, LCIA 303, CIETAC 259, SIAC 259
Many arbitrations governed by common law

English and US law have been consistently the most frequent choices of law by the parties in recent years.

“End of law” equation

Increase in arbitrations + Governed by common law = Fewer cases before common law courts = Fewer opportunities to develop common law
Assessing the Criticisms

1. Does commercial arbitration hinder the development of common law?

2. If so, does this hindrance render commercial arbitration any less legitimate?

3. If so, how should commercial arbitration adapt?
Standard of legitimacy

Narrower perspective:
Party or arbitration community legitimacy

Broader perspective:
National or global legitimacy

Hindrance of common law raises potential legitimacy issues from all perspectives
Assessing the Criticisms

1. Does commercial arbitration hinder the development of common law?

2. If so, does this hindrance render commercial arbitration any less legitimate?

3. If so, how should commercial arbitration adapt?
The critics’ proposed solution
The critics’ proposed solution

Increase scope of court jurisdiction

Decrease scope of arbitration

Overrides party autonomy to choose arbitration
Critics’ proposed solution is untenable

- Overrides party autonomy in choosing arbitration
- Increases costs and delay
- Counter-productive
- “Sets the clock back almost 40 years”, Sir Bernard Rix, 2016
A solution based on greater interaction between courts and tribunals
Components for an alternative solution

✓ First input: Body of decisions produced by arbitral tribunals (or “law-making” for the bold)

✓ Second input: More systematic publication of arbitral decisions
Wider publication of awards is advisable also from other legitimacy perspectives

“As more and more international commercial cases go to arbitration rather than the courts, we are more and more losing sight of the basic feedstock of our commercial law. In such circumstances, it is in my opinion inevitable that the public interest is being and will increasingly be damaged as more and more decisions on areas of commercial law become inaccessible to the public arena.”

Sir Bernard Rix, 2015
Thank you

nradjai@lalive.ch

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