



**British Institute of
International and
Comparative Law**

Report on the seminar

**'International Arbitration and Developing Countries:
What are the Benefits and what is the Way Forward?'**

**Temple Garden Chamber Series
in International Adjudication**

11 September 2014



Report on the seminar

'International Arbitration and Developing Countries: What are the Benefits and what is the Way Forward?'

On 11 September 2014, the British Institute of International and Comparative Law hosted a seminar on the subject of 'International Arbitration and Developing Countries: What are the Benefits and What is the Way Forward'. Emmanuelle Cabrol (Herbert Smith Freehills) chaired a panel of experts that consisted of N Jansen Calamita (British Institute of International and Comparative Law), Dr Gbenga Oduntan (Kent Law School) and Fedelma Claire Smith (Permanent Court of Arbitration).

Emmanuelle Cabrol opened the seminar with a thought that proponents of arbitration claim it is important for developing countries to promote arbitration as it sends a signal that these countries are committed to providing protection to investors in line with international standards. However, as she highlighted, perceived benefits should be compared with actual outcomes. It is also necessary to explore the extent to which developing countries have access to arbitration. Additionally, normative questions regarding the active involvement of developing countries in the international arbitration system must be considered. To this end, N Jansen Calamita discussed the role of international commercial arbitration in development and the challenges of reform; Dr Gbenga Oduntan argued the case for qualitative and representative participation of African States in the international arbitration system and Fedelma Claire Smith explored the relationship between the Permanent Court of Arbitration (PCA) and developing countries.

Mr Calamita began by discussing why developing States seek to engage in international commercial arbitration. He explained that the legal infrastructure of a particular country forms part of the commercial calculus of its potential trade and investment partners. As a result, States seek to present stable, predictable, transparent and efficient legal environments in order to attract business interest. Development of the legal environment is achieved both through domestic reform of institutions and international integration.

Mr Calamita explained that while there are variations amongst growth-promoting legal infrastructures, divergence from internationally familiar commercial legal regimes may create uncertainty and risk for investors, which in turn can result in costs that developing countries cannot bear. For commercial parties in international transactions, arbitration is the preeminent means of dispute resolution. Trade and investment partners typically consider whether potential State partners have acceded to the *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards* (*New York Convention*) and adopted the *UNCITRAL Model Law on International Commercial Arbitration*.

Mr Calamita then described his ongoing work with the Government of Iraq on reform of Iraq's arbitration regime. He noted the challenges for legal reform in Iraq, including a lack of physical security, political instability, isolated legal culture, out-dated legal content and various historical liabilities. He also covered a number of successes in Iraq including reforms to Iraqi judicial institutions and an emerging shift in judicial attitudes towards international commercial arbitration. Despite these successes, Mr Calamita opined that it would only be possible for Iraq to turn the corner towards sustained economic growth and development once the various ongoing socio-political issues had been addressed.

Dr Oduntan began by providing an overview of how arbitration has historically been utilised in Africa. Drawing on the boundary delimitation issues in *Cameroon v Nigeria: Equatorial Guinea intervening* (ICJ) and *Eritrea-Ethiopia Boundary Commission* (PCA), he highlighted the various advantages and disadvantages of arbitration.

Dr Oduntan argued that African States hold deeply-rooted suspicions of international systems. These suspicions are symptomized by the systematic referral of arbitral matters outside of Africa and exacerbated by the perceived preference for non-African arbitrators. Consequently, African States resort to the familiar option of litigation of international disputes. He also noted that the complications caused by the differences in jurisdictions, legal traditions and language as well as the scepticism amongst external actors regarding the capacity of African countries to provide appropriate venues for the conduct of arbitrations, contribute to the reluctance to engage in arbitration in Africa.

He reasoned that arbitration should be more widely accepted by African States given the high levels of economic growth in African countries, the increasing prevalence of arbitration centres across the continent and the fact that arbitration more closely resembles customary legal methods of adjudication. Dr Oduntan also mounted a normative argument for the increased participation and representation of African States in international arbitration. He reasoned that it is not possible to be underrepresented without significant deleterious effect.

While acknowledging the various issues around instituting arbitration in Africa, Dr Oduntan concluded that there was a need to reform the existing system. In order for arbitration to take hold in Africa, it would have to be developed as part of an indigenous process.

Fedelma Claire Smith gave an overview of the history, structure and composition of the Permanent Court of Arbitration. She highlighted that while developing countries were underrepresented at the founding conference of the PCA, the intention behind the Court was to create a global institution. The Court presently has representatives of 115 members including 22 member States from Africa, 19 from the Asia Pacific and eight from the Middle East.

Ms Smith then covered the various ways the PCA makes arbitration accessible to developing countries. According to PCA Arbitration Rules (2012), the Secretary-General of the PCA provides for the automatic review of fees and expenses of tribunals. The PCA also has a Financial Assistance Fund for States Parties to the 1899 or 1907 *Convention for the Pacific Settlement of International Disputes* that are included on the Organization for Economic Co-operation and Development's 'DAC List of Aid Recipients'. Finally, Host Country Agreements, such as the PCA–Mauritius Host Country Agreement, make the PCA's alternative dispute resolution services more widely accessible by ensuring that participants in proceedings are accorded the same facilities, services, privileges and immunities as they would enjoy in The Hague.

Ms Smith also gave an overview of the PCA's caseload. By comparing matters that had gone to arbitration with similar matters that were resolved in litigation, she demonstrated a noticeable degree of consistency between tribunal rulings and the case law of the ICJ. She also noted cases including *Romania v Ukraine* where the ICJ made reference to arbitral jurisprudence.

Report written by Chanu Peiris.

Charles Clore House
17 Russell Square
London WC1B 5JP

T 020 7862 5151
F 020 7862 5152
E info@biicl.org

www.biicl.org

Registered Charity No. 209425
Company Registration No. 615025