Report on Panel 2: Procedural efficiency in investment arbitration

Moderator: Adrian Winstanley, OBE, former Director-General, London Court of International Arbitration, and independent arbitrator

Speakers: Karim Hafez, Senior Partner, Hafez, Cairo, and independent arbitrator

Ginta Ahrel, Partner, Lindahl, Stockholm

Anne K. Hoffmann, independent arbitrator, Dubai

Johan Sidklev, Partner, Roschier, Stockholm

Rapporteur: Nawazish Choudhury, Advisor, Bahrain Chamber for Dispute Resolution (BCDR-AAA), Manama

Introducing the panel, **Adrian Winstanley** said that parties to commercial arbitration had become increasingly insistent on the need to keep time and costs in check, and that measures aimed at maximum procedural efficiency (provided they did not jeopardize due process) had the benefit of moderating both the duration and the cost of the proceedings.

Mr. Winstanley observed that many arbitral institutions, including BCDR-AAA and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), had responded to the demand and expectation that delay and cost be reduced, by introducing new rules aimed specifically at procedural efficiency, including the joinder of parties and the consolidation of arbitrations, emergency arbitrator proceedings, and the summary determination of issues.

The question Mr. Winstanley posed was whether investment arbitration, which can be equally beset by delay and escalating costs, was keeping pace with innovations in procedural efficiency in

the commercial field, and whether such innovations, however effective they may be in commercial disputes, were suited at all to investment arbitration.

Karim Hafez gave an overview of the consolidation of proceedings, which, he explained, essentially involved the joining of two or more sets of proceedings into one case, to be determined by a single arbitral tribunal, in a single set of pleadings, and ultimately yielding a single determination of fact and law. There could, he said, be full consolidation with all issues and facts joined into one arbitration, or partial consolidation with only a limited set of facts consolidated with the original arbitration.

Dr. Hafez observed that consolidation could avoid inconsistent outcomes where differently constituted arbitral tribunals reached different determinations on the same or similar facts. The primary advantage of consolidation, therefore, was that it could lead to better decision making overall, because the tribunal had all the facts enabling it to deliver a reasoned decision.

However, Dr. Hafez also noted that there were potential disadvantages in consolidation. For example, counsel for a claimant might have legitimate concerns that the principal claim would be diluted by other "weaker" claims. Also, potential time and cost savings "cut both ways" since consolidated proceedings inevitably took longer than single-issue arbitration, albeit not as long as related proceedings run in parallel or consecutively.

Ultimately, he said, the question was whether consolidation was in the interests of the fair and efficient resolution of claims.

He observed that consolidation may be either mandatory or voluntary. Mandatory powers for consolidation were to be found at Article 10 of the ICC rules and Article 8 of SIAC rules. By contrast, Article 38 of ICSID's draft amendments to its arbitration rules proposed only voluntary

consolidation, and Dr. Hafez queried whether states might wish to consider opting for a more complex set of mandatory rules for consolidation in appropriate investment arbitration disputes.

Ginta Ahrel spoke on the issue of emergency proceedings. The concept of the emergency arbitrator, she suggested, was analogous to a "911 emergency call" in which a decision had to be taken on whether or not the injured party needed immediate assistance.

Emergency proceedings in commercial arbitration first appeared in the 2006 ICDR rules, followed by the SCC and SIAC rules in 2010, the ICC rules in 2012, the HKIAC rules in 2013, the LCIA rules in 2014, and the BCDR-AAA rules in 2017. Investment arbitration proceedings conducted under the ICSID arbitration rules and the UNCITRAL rules did not, she said, allow for emergency proceedings.

Although ICSID offered interim relief in the form of provisional measures, under Article 47 of the ICSID Convention and ICSID Arbitration Rule 39, the main difference between these and emergency proceedings was that the latter took place before the tribunal proper was appointed, whereas non-emergency interim and provisional measures arose only after the tribunal had been constituted.

Ms. Ahrel then considered the applicability and effectiveness of emergency proceedings under the SCC rules, which, she said, were subject to an "opt out" provision. An application for emergency measures could be made at any time until the case had been referred to the tribunal proper. Emergency proceedings were not an *ex parte* procedure under the SCC rules; the application for emergency arbitrator would be sent to the respondent(s). The SCC rules, she pointed out, were currently the only arbitration rules expressly providing for emergency proceedings in investment arbitration.

SCC statistics revealed a quick turn-around in appointment and determinations, with the emergency arbitrator generally appointed within 24 hours of receipt of an application and decisions typically rendered between 5 and 12 days thereafter.

To date, there had been only 7 applications under the SCC rules for emergency proceedings in investment disputes, with 5 of these granted in full or partially. The relief most often requested was for an order for the preservation of the status quo.

Ms. Ahrel noted that there were many similarities between commercial and investment arbitration disputes as far as the prerequisites for a successful application were concerned – namely, that there was a prima facie case for jurisdiction and for success on the merits; that there was an urgent risk of irreparable harm; and that the relief should be proportionate. In investment arbitration, however, issues related to the emergency arbitrator's jurisdiction were much more common than in commercial arbitration; one such issue being whether or not requests for specific performance were appropriate given the principle of state sovereignty.

In conclusion, Ms. Ahrel remarked that emergency decisions were enforceable in only a few jurisdictions, such as Hong Kong and Belgium. It was unclear whether emergency decisions were enforceable under the New York Convention since they were not "final." Furthermore, no state that had been the subject of an emergency arbitrator's order in an investment dispute appeared to have complied with such an order.

Anne Hoffmann then discussed the summary disposition of claims, which is a mechanism for the early dismissal of claims, in whole or in part, without having to go through the proceedings from beginning to end. Summary disposition thus offered potential savings of cost and time, allowing the tribunal and the parties to press on with the rest of the case.

Ms. Hoffmann referred to Rule 41(5) of the ICSID arbitration rules, introduced in 2006, which was the first rule specifically and expressly to allow for the summary dismissal of claims, providing that the claim, or part of the claim, was "manifestly without legal merit."

Although it had taken some time for other institutions to follow suit, many leading arbitral institutions had now amended their rules to provide expressly for summary disposition (*see* BCDR-AAA, Art. 18; SCC Art. 39(2); SIAC Rule 29(1); and HKIAC Art. 43). The ICC, in its Practice Note of 30 October 2017, also stated that tribunals were empowered under the ICC rules to order summary disposition.

There was, she said, relative consistency as to the standard to be applied in granting an application, with most rules generally requiring a manifest lack of legal merit and/or jurisdiction and in, certain cases, of admissibility.

Ms. Hoffmann then reviewed some of the key decisions which shaped the standard applied by ICSID tribunals deciding upon applications pursuant to Rule 41(5).

In *Trans-Global Petroleum v. Jordan*, the first case that pronounced on the applicability of Rule 41(5) of the ICSID rules, the tribunal had found that the word "manifestly" required that the respondent "establish its objection clearly and obviously, with relative ease and despatch," continuing that "the standard is thus set high" and that, while the tribunal's "exercise may thus be complicated, it should never be difficult."

In *MOL v. Croatia*, the tribunal held that "[t]here is no dispute between the Parties that the standard is a high one" and that Rule 41(5) "plainly envisages a claim that is so obviously defective from a legal point of view that it can properly be dismissed outright."

In *PNG v. Papua New Guinea*, the tribunal endorsed the previous articulation of the standard in *Trans-Global v. Jordan* and found that Rule 41(5) was "intended to capture cases which are clearly and unequivocally unmeritorious" and that the "standard that a respondent must meet is very demanding and rigorous."

Finally, Ms. Hoffmann invited discussion on whether summary proceedings were an effective tool in both commercial and investment arbitration, in particular if one considered that of 26 applications based on Rule 41(5), only 3 were completely successful. Whilst enabling tribunals to dispose of evidently unmeritorious claims, summary proceedings might also lead to an unwelcome additional procedural layer, causing delay and additional costs.

Johan Sidklev focused on the intervention of third parties in investment arbitration proceedings, assessing its impact on procedural efficiency. He noted that the role of *amici curiae* was to offer some information or insight unavailable to the parties in dispute, so as to assist the tribunal, typically by means of written submissions.

Mr. Sidklev noted that, in the wake of the NAFTA cases of *Methanex*, *UPS* and *Glamis*, a practice had started to emerge on third-party intervention. In a landmark decision in the ICSID case of *Aguas Argentinas v. Argentina* in 2005, it was found that, before deciding whether to permit *amicus* briefs, the tribunal should consider (i) the appropriateness of the subject matter of the third-party intervention; (ii) the suitability of the third party intending to act as *amicus curiae*; and (iii) the procedure by which *amicus* submissions were to be made and considered. Moreover, tribunals had to consider the overall fairness, effectiveness and promptness of an *amicus* application and the importance of balancing the rights and interests of third parties with the substantive and procedural rights of the disputing parties. Rule 37(2) of the 2006 amendment to the ICSID rules gave tribunals the express power to permit or decline third-party intervention.

Mr. Sidklev then considered third-party intervention under the 2017 SCC rules. Appendix III to those rules constituted special rules for investor-state arbitration, with two Articles (3 and 4) specifically dealing with third-party intervention. Under Article 3, a non-exhaustive list of considerations was set out, as follows: (i) the interest of the third party in the arbitration; (ii) whether the intervention would assist the tribunal in determining a legal or factual issue; (iii) other relevant circumstances; and (iv) the requirement that the intervention should not disrupt or unduly burden the proceedings or unduly prejudice any disputing party. Article 3(7) of the SCC rules provided the tribunal with the express power to request further details from *amici* regarding their written submissions and authorized *amici* to attend the hearing and to be cross-examined on their submissions.

Mr. Sidklev noted that the European Commission had regularly sought to intervene in investment disputes where EU law could apply, with the objective of ensuring that EU law was respected and enforced.

Third-party intervention, he argued, could improve the transparency and legitimacy of the process, thereby benefitting the system as a whole. Furthermore, *amici*, particularly with NGO expertise, could bring valuable perspectives, improving the substantive quality of the award.

Mr. Sidklev pointed out, however, the potential disadvantages of third-party intervention in relation to procedural efficiency. For example, it was an extra burden on parties, resulting in increased duration and cost, not least because parties would almost invariably respond, by way of additional written memorials and in detail, to *amicus* briefs. Furthermore, there was a potential loss of confidentiality and privacy, given that *amicus* briefs could be made public, along with documents germane to the dispute. There was also a risk of international disputes becoming "re-politicized" and investment tribunals turning into "international courts of public opinion." These

combined drawbacks were likely to undermine confidence in the process as third-party interventions typically tended to support the state party.