

International Arbitration Is Changing Shape

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With the globalization of business, more and more operations and relationships reach across borders. So too do business-related legal disputes, and arbitration has been playing an increasingly important role in resolving those issues. Now, two milestone changes are bringing fundamental change to this arena, and introducing elements of litigation to the world of international arbitration — and, perhaps, opening the door to the wider use of such proceedings.

The first of these key changes addresses what has long been a cornerstone objective of arbitration: to be fast and cost-efficient, which is largely based on the fact that arbitrators' decisions are final. But that approach doesn't satisfy everyone. At times, companies have been reluctant to agree to arbitration because unlike litigation, the process doesn't offer them an opportunity to appeal a decision they don't like. But that's no longer the case, because procedures adopted in late 2013 by the International Centre for Dispute Resolution (ICDR) — the international arm of the American Arbitration Association — now provide an appeals process for international arbitrations.

Under these ICDR rules, parties can now appeal an arbitral award based on errors of law or determinations of fact. However, the process is limited. Appeals are optional, and both parties must agree to them before arbitration begins. In addition, arguments need to be submitted in writing; there is no oral hearing. Appeals are weighed by a panel of arbitrators made up of former judges and other neutral parties who are familiar with arbitration processes. And the process is designed to be completed in just three months. Overall, this appeals option takes away some of the risk associated with being bound to a final arbitral decision right from the beginning. At the same time, it keeps the process relatively short, and supports the fundamental arbitration goal of being time- and cost-efficient.

This new appeals process has been in place for a relatively short time, and it's still too early to say how frequently parties will take advantage of it. However, this change should temper some of the hesitation that companies have had about arbitration, and make the arbitration route — with its potential cost savings — a more attractive option.



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The Trend Toward Transparency

A second key development affects the investor-state arbitration that is used to sort out disputes between individuals and nations — typically, those related to alleged violations of international treaties. For more than a decade, the use of these proceedings has been on the rise, and they now often involve very large sums of money. For example, in 2014, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) awarded the Gold Reserve mining company \$740 million in that company's dispute with the Venezuelan government over the nationalization of a gold and copper mining project. Around the same time, the Permanent Court of Arbitration in The Hague ruled that Russia had to pay \$50 billion to the Yukos Oil Co. for taking over its assets — the largest award in the history of international arbitration.

There has been much debate about whether these types of proceedings should be more open, or more private and confidential and operate more like commercial arbitration, where companies typically value secrecy in order to avoid airing any dirty laundry. Chapter 11 arbitrations became more open in the late 1990s following the introduction of NAFTA. With an eye to those developments, there has been a growing sense that having a more transparent process is important to the legitimacy of state-investor arbitration. So, as the prominence of investor-state arbitration has increased worldwide, there has been a growing movement to bring more transparency to such proceedings.

In 2014, this view led the United Nations Commission for International Trade Law (UNCITRAL) to develop new rules that call for open hearings. These rules allow the free publication of submitted documents, submissions and awards, and they let nondisputing third parties submit amicus briefs in investor-state arbitration. In essence, they are much like the rules used in U.S. courts.

Here again, the question is how widespread this kind of approach will become. This is certainly a topic of discussion at other institutions, such as the World Bank's ICSID and the Stockholm Chamber of Commerce. It seems clear that the interest in transparency is on the ascendancy, and on the general agenda for investor–state arbitrations. As that trend continues, we'll continue to see this field change — and the evolution toward openness in the investor–state arena may put more pressure on commercial arbitration to move away from privacy and confidentiality and toward a more transparent process.

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