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INTERNATIONAL ARBITRATION: REFORM AND ITS CHALLENGES

This panel was convened on Thursday, March 30, 2023 at 3:30 p.m. by its moderator Amanda Tuninetti of Covington Burling LLP, who introduced the panelists: Arif Ali of Dechert LLP; Horacio Grigera Naon of the American University Washington College of Law; Hélène Ruiz Fabri of the Max Plank Institute Luxembourg for Procedural Law; and Isabel San Martin of LALIVE.

Introductory Remarks by Amanda Tuninetti*

Hi, everyone. Welcome, and thank you for joining us for this panel. My name is Amanda Tuninetti, and I am a senior associate here in Washington, D.C., at Covington & Burling in the International Disputes Practice Group. I am very fortunate to be joined today by this panel of elite academics and practitioners to discuss the topic of reform in international arbitration.

Professor Hélène Ruiz Fabri joins us from Luxembourg, where she is the director of the Max Planck Institute for International, European, and Regulatory Procedural Law. She was previously a professor at the Sorbonne Law School and has also taught at the Joint Institute of Comparative Law of Paris, the Academy of European Law in Florence, and the Academy of International Law in The Hague. Her scholarship focuses on matters of international dispute resolution, World Trade Organization law, and constitutional law. She also sits as an arbitrator and has advised the Council of Europe, the French government, and other international institutions on a wide range of international law issues. And she is an associate member of the Institut de Droit International.

Next, we have Professor Horacio Grigera Naon, who is a Distinguished Practitioner in Residence and the Director of the Center on International Commercial Arbitration at the Washington College of Law here in D.C. at American University. In addition to his teaching and extensive scholarship in the field of international arbitration, Professor Grigera Naon has an active practice as an arbitrator, drawing on more than his thirty years of experience as a practitioner. He previously served as the Secretary-General of the International Court of Arbitration of the International Chamber of Commerce (ICC) and is a member of the American Law Institute.

In addition, we have Isabel San Martin, who is here from London, where she is a senior associate at LALIVE, specializing in international arbitration and public international law. Isabel works on commercial and investment treaty arbitrations across a range of sectors with a focus on Latin America and Europe, and she represents investors and states. She has practice experience in Paris, Madrid, Washington, and New York, including work at the LCIA and for the Permanent Mission of Spain to the United Nations. She is a member of the Young Practitioners Subcommittee of the Equal Representation in Arbitration Pledge, where she currently leads one of its task forces.

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Finally, and certainly not least, we have Mr. Arif Ali, who is based in Washington and London, and he is a partner at Dechert, where he co-chairs the International Arbitration and Public International Law Practice Group. Mr. Ali has over thirty years of experience practicing in international dispute settlement, including in investor state and commercial arbitration, state-to-state disputes, and cross-border litigation. In addition to his work as counsel, for which he is consistently recognized as one of the world's top practitioners, he sits as arbitrator, and he has worked on disputes covering a wide range of industry sectors, applicable laws, and arbitral regimes. He has also taught at Georgetown and the University of Dundee in Scotland.

Thank you to the panelists for being here and sharing your expertise. Before we move into the substance of today's panel discussion, I also want to encourage all of you to consider yourselves as participants. We want this to be a thoughtful and engaging conversation that will stimulate discussion and debate. We will be taking a lot of audience questions, we hope, in the second half of the panel, and I really encourage everyone to speak freely and share your questions and viewpoints. On that note, I will also add that all of our panelists are speaking in their personal capacity. We have asked them to speak freely from their experience, and their comments may not fully reflect their complete views.

Without further ado, let us turn to the topic at hand, which is reform in international arbitration and its challenges. The way we will proceed is we will hear first from each of the panelists on a particular topic of reform in international arbitration, after which we will open up the discussion.

First, I would like to turn the floor over to Professor Ruiz Fabri, who will share some views on the challenges of overlapping or conflicting matters in investor state and commercial arbitration.

Remarks by Hélène Ruiz Fabri*

Thank you very much for having invited me to speak in this panel. It is a real pleasure, and I have to tackle this topic of overlapping or conflicting matters between commercial and investment arbitration. I am not fully sure that I have something completely new to say on this topic. There is already a lot of literature on similarities and differences between commercial and investment arbitration, but this is not the topic I am going to tackle. I will really focus on the overlapping and conflicting matters.

However, before going into the topic, I would like to recall that one aspect colors, in my view, the issue of overlapping and conflicting matters. It is the fact that investment arbitration is about engaging the international responsibility of the state for wrongful conduct, and I think I am not reasoning in terms of superiority of investment arbitration. This is, as you will see, absolutely not my point, but it is that you are in another order somehow.

The issue of conflicting or overlapping matters is not completely new, and there are two issues that I would like to mention in relation to this topic. The most important issue, the one about which I will speak more, is the issue of parallel or concurrent proceedings concerning cases involving the same set of facts or the same subject matter. This is what UNCITRAL defined as same or related matters and same or related issues in dispute, and the risks are well known—contradictory decisions in parallel proceedings, and double recovery of costs, which increase.

The second issue that I would like at least to mention, even if I do not tackle it, is the case where investment arbitration functions as a kind of appeal or review mechanism of a commercial arbitral award in the situation where the commercial arbitral award is treated as an investment for the sake of enforcement, especially. But I will focus mostly on the issue of parallel proceedings.

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Around the year 2010 and after this period, there has been what has been called a "boom of parallel claims," and this boom of parallel claims was attributed, among other factors, to a lack of restraint by investment arbitral tribunals. That is an interesting feature. It was as if there was a competition over a market, and by interpreting in a certain way, a certain number of legal concepts, investment arbitral tribunals, took over some claims that, at this time, would have been thought to be for commercial arbitration. The triggering factor in many views was the decision by the annulment committee in the *Vivendi Universal v. Argentina* case, and the means that were used are well known. I will recapitulate very briefly the formal distinction between causes of action in which legal grounds were included, and so therefore it relied on the distinction between contract claims and treaty claims and this distinction gained prominence. Then claimants could proceed with treaty claims, even in cases where there was an exclusive jurisdiction clause in the contract, based on, for example, what the central tribunal called the interpretation of the threshold and the idea of purely commercial claims to apply this exclusivity clause and the formal distinction between claimants, that claimants were not exactly the same, although they would belong to the same economic unit was one factor, one formal factor to distinguish treaty claims and contract claims.

What could be the option in reaction to such a situation if it is found illegitimate? Just one is related to simply the behavior of arbitrators and the way they interpret a certain number of legal concepts. It depends mostly on investment tribunals, by the way, to engage more in restraint or recognition. This is what an author like Salas speaks of comity as a major principle that could inform practices. Comity could lead tribunals to discretionarily stay proceedings, for example, in case of parallel claims, or to accept determinations of fact and law by other bodies or to incorporate the reasoning of another tribunal. These are the propositions I have found, which have been written in the literature.

Relating this with what you say, the value that is at stake in terms of reform, there what is at stake is a harmony in decision making, a harmony among adjudicators, if it is found advisable. If there are no formal rules of coordination, at least these means could be used, and another value that is at stake here is consistency. We know that one repeated idea in the reform of arbitration is this idea of consistency of the case law.

However, we also have to be aware that some redundancy may also have some benefits, and the benefits that come from competition. Competition is not always bad. It could also lead to increased quality because people are stimulated to be more thorough in their legal reasoning. We cannot take for granted that competition is bad as a matter of principle. We have to balance advantages and downsides.

In such a context, the issue becomes what are the main means to discipline this competition? The value there is legitimacy, because we know that if this competition turns badly, what is at stake is the legitimacy of arbitration. One has to consider the costs of adding investment arbitration to commercial arbitration. Even if there is no double recovery, the proceedings themselves are costly.

You also have to show that it is not only for a community or a profession to make some benefits over this, to make a market function, that it has an added value beyond that, and probably what would be expected is more respect for exclusive jurisdiction rules, and that that tribunal may consider this is a repeated solution, a less formal approach of the distinction between contract claims and treaty claims.

Maybe another option could be the enunciation of clear bifurcation rules to remedy the difficulty of *lis pendens* in two regards. *Lis pendens* is one means that could be used, but one issue that would have to be overcome for *lis pendens* to be a usable means would be to relax the triple test that you all know, also to consider that for now *lis pendens* mostly plays as a preclusion, and it could lead to a denial of justice in case the first tribunal would decline jurisdiction.

Tribunals have to think about that. A solution would be to use more temporary conditional stays of proceedings until the first tribunal has issued its decision.

There are some procedural means that are available, and another means that could be used is *res judicata* as a preclusion principle. This could raise again the issue of the triple test, but one option is that this triple test becomes more flexible. There are propositions in this sense, and it should trigger a reflection on the very notion of cause of action, which is very familiar in commercial arbitration, and which also exists in investment arbitration. You have two types of arbitrators, the ones who are trained to this notion, the ones who are not really trained, and probably we need to adapt to this notion.

A last thing I would like to mention, which is not much used but appears in some decisions, is collateral estoppel. In more recent years, we have seen a bit more restraint by some investment tribunals at least.

I do not know whether a reform is necessary or a bit more education on these issues and these notions, and I would say comity is at least, in my view, a good start. Thank you.

Amanda Tuninetti

Thank you so much. I would like to open the floor to the other panelists. Any reactions to Professor Ruiz Fabri's comments on comity or anything else that she raised?

Remarks by Arif Ali*

If I may, Hélène. I could not agree with you more that the there are pressure points insofar as commercial arbitration and investor-state arbitration are concerned, and I completely agree with you that on the very particular points that you laid out, where evolution could take place, I would simply challenge the proposition that all we need is an evolution and leave it in the hands of the arbitrators. I think that it needs to go far beyond that, and as far as I am concerned, we really need to look at the system of investment arbitration procedurally, if not substantively, anew. Substantively, the decisions will arise out of the specifics of particular disputes, but where we are lacking is in terms of the procedural framework for investor-state arbitration versus commercial arbitration.

What has happened over the last thirty years is that investor-state arbitration has borrowed from the procedures of commercial arbitration, and I think it has done so incorrectly. I think it is incorrect because of a point that you made right at the very outset, that in investor-state arbitration, we are looking to assess state responsibility; whereas in commercial arbitration, we are looking to assess the commercial risk allocation with respect to a bilateral relationship that was negotiated.

There are two separate objectives. Investor-state arbitration, at least from its procedural standpoint, has not yet completely reflected in detail what it is that arbitrators, who come mostly from the commercial arbitration world, should be doing to give effect to that goal of the assessment of state responsibility. We are getting there bit by bit with the introduction of amicus rules or the introduction of transparency rules, but I think that the entire procedural system needs to be re-examined rather than tinkering to try and accommodate the specifics of investor-state arbitration and not abandon the presumptions of commercial arbitration. They are two completely different worlds.

Amanda Tuninetti

Thank you. Taking us briefly back to the world of commercial arbitration, Professor Grigera Naon will offer some thoughts on reform in the context of court proceedings related to arbitration.

* Dechert LLP.

Remarks by Horacio Grigera Naon*

Thank you very much. Reform means making changes to improve something, and from that perspective, I will say just a few words about commercial arbitration, because what happens within the four corners of the arbitral proceedings is not the same as what is happening when the arbitration gets in touch with the external world, which is essentially courts of law.

From the perspective of what happens in the four corners of the arbitration procedure, I think that the perspective is positive. It is true that it is not perfect. It is true that there are issues regarding, for example, privilege or production of documents or disclosure, but the truth of the matter is that within the four corners of the arbitral procedure, evolution has been very positive. I think it has been very helpful, the creation of some sort of soft law, thanks to the works of the International Bar Association, including its rules on the production of evidence, which have been very positive.

With commercial arbitration, there is no *stare decisis*. The decisions must be adapted to the case at stake, and that gives a different way of looking at legal issues than in the examples that we heard from Arif, for example.

Now, if we go into the court of laws, we hear the panorama is not so uniform, because there are cultural differences, and if you look at the English Channel, if you look at the distance between Calais and Dover, it is twelve miles. But culturally speaking, it is much broader.

The issue that we are seeing there is, for example, the legal principles to incorporate a non-signatory into the arbitration agreement. There are a couple of cases. One is *Government of Pakistan and Dallah*. I am sure that Arif knows that very well. In that case, it was a trust. The trust was a creation of the Pakistani government for the constructions of buildings for pilgrims who went to Mecca, and the trust gets into a contract with Dallah, which is the constructor. There is an arbitration clause, an ICC arbitration clause in the contract; the seat of arbitration, Paris, France. Now, the majority award comes from enforcement in England, and the English judges carry out an analysis, which is, to a large extent, a choice of law analysis, an analysis that examines *de novo* what the arbitrators have decided at the enforcement process. By applying French law, the Supreme Court of England and Wales reaches the conclusion that the arbitration clause could not be extended to the state of Pakistan. Pakistan had not signed the trust but had really been instrumental to the creation and the coming into effect of the trust. The enforcement of the award that had been rendered in Paris, France, was rejected.

But, lo and behold, the same award is subject to setting aside proceedings in France, and the *cour d'appel* rejected the setting-aside proceedings and took a totally different approach as to the interpretation of French law because the English court had interpreted French law to reach the conclusion that the state of Pakistan was not a party to the case. The approach of the French court was totally different. It was not an approach of *de novo* looking at what the arbitrator decided or the applicable law. They said simply it was their consent on the basis of the facts of the case and the law, and this is because the French court is influenced by the *Dalico* decision of the French Court of Cassation, which had set forth some principles that are relevant.

We have two totally different decisions. One could have thought that this was just happenstance, but then we have another case, also decided by the Supreme Court of England and Wales. *The Kabab-Ji SAL (Lebanon) and Kout Food Group* case of Kuwait, again the same issue. Can a non-signatory be incorporated into the arbitration clause? Here, this time, the Supreme Court, on the basis of an analysis of English law and the English Arbitration Act again came to the conclusion that the award could not be enforced in France. Now, the *cour d'appel* in Paris confirmed

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the award on the basis of French law, and one would think this only happens with these crazy Gauls on one side and these Saxons who are always having differences between them.

But what is going on here in the United States? What happened, for instance, in the *Chromalloy* case? Or what happened by interpreting the U.S. Supreme Court decision in in *First Options v. Kaplan*? Unless there is an unequivocal, unmistakable delegation by the parties and the arbitrators to decide on their competence, competence is the right to decide on their own competence, this is something that has to be addressed by the courts.

Now, this is entirely different from the French approach, again. If you look at the provisions of the French Arbitration Act, it clearly says that once the arbitration has commenced, the arbitrators have started to look into the case. The courts are out. No analysis of what is unmistakable, unequivocal. The courts are out. Of course, the award at the end of the case may be subject to setting aside proceedings. But, before that, if the arbitral tribunal has not been constituted, the matter can be decided by a French court, but the French court carries out a very limited analysis. It does not go again into the facts of the case, just looks at the pleadings, and only if international public policy commands a different solution, the case will stay with the arbitrators.

Here, there are cultural differences. There is no magic solution for that. The world is not in a situation today to create a general treaty on this, and I would like to make a very brief comment on what happens when you have an international convention. It is the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, which has been ratified by 172 countries, but this convention has certain limitations. It only addresses the enforceability of an arbitration agreement, giving a lot of leeway for the possibility of that enforceability at the end of the day to be decided by the national court of law. Even Article 5 concerning the enforcement of awards has a limited scope of application because a court of law, the country of enforcement, is the one which is going to decide whether the subject matter of the dispute was arbitrable or not or whether it goes against public policy, and that depends on interpretation of the courts of law of the country of enforcement.

To wrap up, people are talking about modifying the New York Convention. It will open up the Pandora's box for 172 states to share their own opinions: Iran, the United States, Russia, Argentina, Brazil. If it ain't broke, don't fix it.

We have to let cultures evolve. I do not think there is a magic answer to reform if we, by reform, understand an architectural effort of reform at this point of time. Thank you.

Amanda Tuninetti

Let us move on to hear from Isabel on the question of reforming investor-state dispute resolutions specifically.

Remarks by Isabel San Martin*

Thank you, Amanda. I want to focus only on specific concerns or criticisms of investment treaty arbitration and how they may be addressed through reform.

The first big concern is the lack of consistency of decisions and coherence in the decisions of arbitration tribunals, and I think it is important to take a few things into account when we try to decide what is consistency, what is coherence. The first thing is that investment treaty cases are incredibly fact-specific. They ultimately turn on the facts and on the evidence that is before each tribunal, and then they also depend, of course, on how they are pleaded by counsel.

* LALIVE.

A good example of this is the Energy Charter Treaty cases against Spain, just because there are so many of them. There are more than fifty. They all arise from the same treaty. A lot of them are still ongoing, but many have been decided. They consider the same sector, renewable energy, and essentially the same disputed measures. If we look at the awards and the decisions that have been rendered so far, one can certainly see trends, but one can also certainly see some differences in the decision. I want to focus on why we can see some of those differences.

I should note first, though, that two of my co-panelists have acted as arbitrators in some of those ECT cases against Spain. I might be playing with fire here, but I will not go into any specific case, just some general comments.

Some of the things that were very different in all these cases, for example, was the date of investment. Some investors made the investment a little bit later, maybe at a time when there were rumors about regulatory changes. The cases concerned different technologies and the regimes were not exactly the same for each type of renewable energy technology, and then, of course, there is the factor of due diligence. Each investor's due diligence is different, and some of the investors carried out a very thorough due diligence. Perhaps they had external advisors. Others maybe did it in house. All of those considerations were taken into account by tribunals in assessing the legitimate expectations of each particular investor.

If one looks at the decisions that are public, we also see differences in the way that counsel argued the case and strategic decisions. For example, in some of the cases, we see that the claimants, for example, relied on a witness that worked for the regulator at the time of the design of the incentives regime and provided that witness evidence. Whereas in many other cases, we do not see that witnesses participated.

In other cases, the parties used legal experts on Spanish law. Others did not at all. Those are just a few examples to show how, even in very similar cases, the evidence before each tribunal can be very different. and obviously, that has an impact on the results.

A second point I wanted to make is that I think it is very difficult, if not impossible, to have full consistency on investment treaty arbitration as long as there is still such a wide variety of underlying treaties that have very different provisions and different language, they have different context and purpose, et cetera.

In terms of addressing the lack of consistency, I think the main proposal so far is to create an appellate mechanism, and I will not go into the challenges in creating that mechanism. But I think it is not clear, at least to me, how such a mechanism, an appellate court, can bring full consistency if, again, the underlying treaties continue to be so different. An appellate court cannot ignore the specific terms in a particular treaty. It cannot just adopt a one-size-fits-all definition of FET, for example.

While the broader reform discussion is still ongoing, I want to discuss some ways in which we can try to address consistency in the short term. I want to discuss three ideas. I think the first one is with more transparency. The publication of awards and decisions, the ability to scrutinize those decisions, to analyze them using AI, identify trends, that is going to be really critical in terms of helping with consistency and coherence. In that sense, the ICSID rules have been an improvement in terms of transparency, but I think also trying to make available pleadings and other documents that allow the public to understand what was the evidence before that tribunal, what were the arguments that were made.

A second idea to improve consistency is by states, and I think states can issue joint declarations on the interpretation of certain treaties, and they could do that in relation to specific issues that have, in the past, given rise to different types of decisions by tribunals. For example, they could issue a declaration on whether dual nationals are protected under a particular treaty or what is the scope of the MFN provision in a particular treaty.

The third way, and perhaps the more important one, is for arbitrators to address this and keep this in mind, because they play the critical role in maintaining consistency and coherence in the system. An example here is when tribunals rely on a finding by another tribunal in a different case, it is, of course, really important to make sure you confirm that the underlying treaty in that other case has the same language. There are no reasons why that finding does not exactly apply, and of course, this is something that counsel usually addresses and draws the tribunal's attention to. But to the extent that counsel do not do so, I think it is important for tribunals to make sure they keep that in mind and perhaps even spell it out in their decisions and their awards.

Most of the reforms on investment treaty arbitration so far have focused on the procedural aspects, and of course, they have improved some of those aspects and addressed some concerns. But they ignore the elephant in the room, which is really the main concern, the second concern I wanted to address very briefly, which is that investment treaty arbitration may limit the state's regulatory powers, resulting in a chilling effect.

In terms of how to address this, I think the only way really is through treaty reform. States are being really active in replacing the old investment treaties with new ones that specifically recognize the regulatory powers, the right to regulate in specific areas.

At the moment, I think there is no consistency in the position of states in this regard. Some are very active and see this as an urgent issue to address, others not so much. But we are definitely seeing a trend in that direction.

Despite the backlash against investment treaty arbitration, we definitely have seen some improvements, at least on procedural aspects so far, and we continue to see that states are still signing bilateral investment treaties. Just last month Colombia and Venezuela signed a BIT that included UNCITRAL arbitration. They certainly still see value in these instruments, but we will definitely continue to see a lot more reform.

Amanda Tuninetti

Thank you. That is great. A very good overview of the challenges in ISDS and the reform proposals out there. I think it is a great segue to our last speaker Arif Ali, who will be addressing the role and duty of arbitrators and decisionmakers. What are we doing about reform, and what is the role of arbitrators, and what is their duty?

Arif Ali

Congratulations on setting this panel up in a way that everything has flowed in an extremely logical fashion toward the comments that I have to make and those that will springboard off Isabel's excellent remarks.

The system of international arbitration can be broken into three components: the system of investor-state arbitration; international commercial arbitration; and international construction arbitration. We do need to keep in mind that they really are very distinct areas, substantively and procedurally. I think the system works in spite of itself, and I say that, Horacio, because I think the overall treaty framework generally works, and it works extremely well. I agree with you that we should not be looking to reopen multilateral instruments that were negotiated within a particular geopolitical context in the immediate post-World War era when international institutions were being set up.

But within that broader framework, there is a need for reform, and why? I think we tend to become ossified in a way of thinking, and I do not think that that is correct. The system that was set up was set up with a particular Western occidental intellectual impetus or legal framework, one in which even if you look at the states that were part of the new international economic order

did not have the leverage that they do today to contribute in fora that are far more developed today, such as UNCITRAL, to push for the reforms that would reflect a greater balance across legal systems and greater perspective as there are more participants in the world of international arbitration. Undoubtedly, we have seen far greater participation today in terms of counsel, in terms of parties, in terms of judicial systems in the world of arbitration than thirty years ago, forty years ago, or even ten years ago.

I am going to focus in specifically on the role and duty of arbitrators and decisionmakers within that context of the greater participation of a global community in this superstructure that we have of dispute resolution.

Now, let us start with the role of and duty of arbitrators, and these generally also apply to decisionmakers. Fundamental role and duty of arbitrators: treat the parties fairly. That applies across all legal systems. Make sure that the arbitrators shall be at all times independent and impartial. That applies across all legal systems and even if one goes back into the history of religious arbitration. I am particularly familiar with arbitration in the context of Islamic law, but you go back to the arbitral guilds in Sicily, you go back to the arbitral mechanisms that were in place in ancient China, there was always this notion that the decisionmakers should be independent and impartial.

More recently, we have tended to focus on maximizing efficiency, and that is something that arbitrators should do. Arbitrators should issue an award that is enforceable or at least that optimizes enforceability. Those are the duties of arbitrators.

Within those broad duties that are reflected in all major arbitral regimes, whether it is a regime that is like CTAC, which is informed by particular sets of rules and policies, or it is a more didactic set of rules that reflects the common law tradition, such as the LCIA rules, or rules that are perhaps provide more of a superstructure, such as the ICC rules, we have a system in which arbitrators need to be more proactive.

My first proposal for specific reform is a need to put in place regulatory initiatives that will require arbitrators not just to be efficient, independent, and impartial and render an enforceable award but that require arbitrators to be more proactive. There is a tension between arbitral control and party autonomy.

We all know that party autonomy is one of the fundamental principles upon which the system of international arbitration is based, but I would put to you that party autonomy does not mean party control or arbitrator abdication. Arbitrators have become extremely passive procedurally. If you look at what happens in a typical investor-state arbitration or commercial arbitration, you have the request for arbitration, the answer, the memorial, the counter-memorial, there may be some document discovery, there will be another round of pleadings, there will be a merits hearing, post-hearing briefing, and then we are done. It is cut and paste. I would say that is a disservice to the parties.

Arbitrators are the agents of dispute resolution, service providers. It is a service that is being provided, and a service needs to be customized to service those who are retaining these arbitrators, who are looking to these arbitrators to run a particular process that will service the dispute and ergo service the parties and ergo service the system.

Let me give you a few of the ways in which these different policies or values are reflected in the arbitral rules. You look at the AAA's rules. Article 20 on the conduct of proceedings states, subject to these rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality, and that each party has the right to be heard and is given a fair opportunity to present its case. The arbitral tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. Now, implicit in all of the arbitral regimes is the notion that the parties can agree to opt out or modify the rules, but the AAA system does not necessarily emphasize that, putting a lot more power in the hands of the arbitrators.

We look at the CTAC rules, Article 35 on the conduct of the hearing. The arbitral tribunal shall examine the case in any way it deems appropriate, unless otherwise agreed by the parties. Under all circumstances, the arbitral tribunal shall act impartially and fairly and shall afford a reasonable opportunity to both parties to present their case. So we have within the CTAC system a reflection of the ultimate authority of sovereignty lying with the parties.

Arbitrators need to be more proactive. Arbitrators need to engage with the parties on a constant basis as a dispute resolution process unfolds, and I think, most importantly, within the context of roles of arbitrators, they need to engage parties more in the drafting of the arbitral award, within the process of the drafting of the arbitral award. I can elaborate on that more.

I will throw out one other particular proposal for reform, and I think as the arbitral world has become much more multijurisdictional, multicultural, I think it is imperative as a criterion for arbitrators to be impaneled that they be required to take gender and cultural sensitivity training. We are no longer in a world where arbitrators represent only particular genders and particular ethnic backgrounds, but in a far more multijurisdictional, multilingual, multicultural arbitral framework, I think it has become far more important that the imperative of arbitral trainings be focused not just on procedure or on substance but actually on sensitivity, on implicit bias, on linguistic sensitivity so that the playing field can be more leveled.

Amanda Tuninetti

Thank you. Wonderful reform proposals. I would like to open it up to your co-panelists to react to any of your comments before we open it up to the audience.

Hélène Ruiz Fabri

Just one quick remark. You say that arbitrators are too passive procedurally. I hear what you say, and you call for a regulatory system. You have quoted many provisions that are already there and would allow arbitrators to be less passive, and nevertheless, people remain passive. I think a reflection is necessary of the reasons why arbitrators are so deferential to the wishes of the parties or their counsel. Let us say I am putting it in provocative terms.

Arif Ali

Hélène, I think, in large part, this is because arbitrators tend to be very busy. They tend to focus on the cases at the time they start drafting the award as opposed to being sufficiently informed at the front end, but that is not their fault. That is the fault of the way in which the rules are structured, whereby requests can be very skeletal, and by the time arbitrators get to the first procedural hearing, they do not really know that much about the case in order to be able to fashion a dispute resolution process that is tailored to the particular dispute at hand. Then by the time the procedure has been defined, there is very little room to modify it as the arbitration progresses.

Ten years ago I would have been of the view that we should just do it by guidelines. Today I think you need regulatory direction for arbitrators that reflect the very rules that I was talking about. I think there needs to be a more proactive approach by the institutions to fix the problems that we now think should be left to party discretion and kind of the general arbitrator power.

Horacio Grigera Naon

I have a brief comment. The ICC arbitration rules, as I remember them, have a provision saying that the arbitrators have to instruct the case by all possible means, which would imply that there is a very proactive attitude allowed by the rules for arbitrators. But why this is a difficult thing to do,

because being too proactive might be seen that you are going in the direction of the case of one party and leaving aside the case of the other party. This is a very difficult, delicate task. It does not mean that the arbitrators are passive. There are certain limitations inherent in their kind of role or function. I see it as very difficult to regulate on this.

Isabel San Martin

I agree with everything you said, Arif, and I think arbitrators definitely should be more proactive, at least sometimes as counsel you have the perception that they do not read any of the pleadings until the hearing, and sometimes it is not even clear if by that point they have done so.

But I think the ICSID arbitration rules have a provision on this to encourage case management conferences earlier on because those kinds of tools can also help in efficiently managing the case and narrowing down the issues, so that the parties are not wasting too much time.

I do want to say I really agree on the proposal regarding training on cultural sensitivities and unconscious bias. I think that is really important, and I would just mention that there are some initiatives in arbitration. It is quite an active practice in that sense. There is a toolkit by arbitral women on unconscious bias status. Really helpful.

Amanda Tuninetti

Thank you. And that is available online on the Arbitral Women website.