2 December 2013 Peace Palace Seminar: “The differing demands on the tribunal in inter-state, investor-state and commercial arbitrations"

Professor Dr. Karl-Heinz Böckstiegel led a wide-ranging discussion that spanned his career experiences and views on a plethora of practical issues.

Report:
Mounia B. Chadlia (LL.M. Candidate, University of Amsterdam)
Brian McGarry (Assistant Legal Counsel, Permanent Court of Arbitration)

On December 2, 2013, Professor Böckstiegel conducted an interactive session for more than 35 lawyers and practitioners, who traveled from across Europe to listen to one of the world’s most preeminent and experienced arbitrators. The Seminar was organized by Young ICCA and took place at the Peace Palace, The Hague.

Prof. Böckstiegel called upon his experience as a member (and often President) of many international and domestic arbitral tribunals, discussing the differing demands on tribunals in inter-State, investor-State and commercial arbitrations. The format of the Seminar was a vivid dialogue in which Prof. Böckstiegel responded to the audience’s questions concerning comparative aspects of arbitration, such as the legal background of arbitrators, the legal framework of arbitration and a wide range of procedural aspects.

Prof. Böckstiegel began by clarifying the reasons why he framed his Lalive Lecture as a comparison between commercial and investment arbitration. He noted that the rules of procedure applicable to either regime are not very dissimilar. According to Prof. Böckstiegel, investment arbitration practitioners are a mix of “old hands” from international commercial arbitration and “new players”, such as diplomats, who may be unfamiliar with rules of commercial procedure. As such, he thought this comparative approach would make for a useful and intellectually interesting Lalive lecture.

Concerning the impact of the Iran-US Claims Tribunal on today’s investment arbitration sphere, Prof. Böckstiegel noted that he arrived at the Tribunal at a tense time during which it was very difficult for the judges to work together. Yet, just as the judges adapted to more cooperative and productive working methods, he observed that counsel adapted as well to the Tribunal’s status as a unique and innovative dispute settlement mechanism. More fundamentally, Prof. Böckstiegel believes that the Tribunal’s publication of judgments was a revolutionary aspect of the proceedings that altered the course of international arbitration. He also affirmed that the Tribunal’s use of the UNCITRAL Arbitration Rules was critical to their growing popularity and uniform application elsewhere.

On the topic of legal framework and applicable law in international arbitration, Prof. Böckstiegel described three different scenarios in international arbitration: disputes between private entities, disputes between States, and disputes between a private entity and a State. He noted that when a State is involved, “public elements have to be

respected". As to the question of whether inter-State arbitration merits greater scrutiny on the basis of heightened public interest, Prof. Böckstiegel rejected this premise. Rather, he observed that investor-State disputes tend to attract a greater degree of public attention than their inter-State counterparts.

In his Lalive Lecture, Prof. Böckstiegel had predicted that "States will continue to need and try to attract foreign investment [and] will only be successful in such efforts if they provide some legal security for such investments including the option for the settlement of disputes." He developed this statement during the Young ICCA Seminar, explaining that there must be a balance between States' need for investment to develop their economy and foreign investors' need for legal security. Nevertheless, Prof. Böckstiegel remarked that "some countries don't want to be bound by any investment rules and it perfectly works for them". He indicated that while many countries have decided to terminate their bilateral investment treaties (BITs), some (such as China) have renegotiated their BITs and others have never concluded any. Prof. Böckstiegel made specific reference to Brazil which, despite its decision to not conclude any BITs, remains an attractive country for foreign investors.

According to Prof. Böckstiegel, the main issue in this regard is State policy. He affirmed that a tribunal is restrained by treaty provisions when rendering a decision and should not be influenced by any new State policies, particularly as States have the sovereign power to terminate or renegotiate treaties. Concluding this point, Prof. Böckstiegel declared that State sovereignty is as fundamental an element of consideration as is the protection of legal certainty provided by BITs. In his view, "it is necessary to find a balanced solution."

Prof. Böckstiegel next addressed the topic of confidentiality and transparency in investment arbitration, noting that this is one of the issues of great recent development in the field. He began by relaying that the drafters of the original ICSID Arbitration Rules considered prevalent rules of international commercial arbitration, such as the ICC Rules. As a result, confidentiality was a foregone conclusion and little reference was made in this regard. According to Prof. Böckstiegel, one of the major forces of change in this context was the development of the U.S. Model BIT, which established a standard of transparency in investment arbitration. He made reference to recent revisions to both the ICSID Arbitration Rules and UNCITRAL Arbitration Rules as further development of transparency standards. With respect to the latter, Prof. Böckstiegel predicted that very few will opt out of the latest UNCITRAL Arbitration Rules' default transparency provisions once they become effective in April 2014.

With respect to public hearings, Prof. Böckstiegel shared his view that—from the perspective of a presiding arbitrator—open hearings make arbitration "less effective". He elaborated that public hearings tend to compel the parties' counsel to make "public statements, rather than arguments". Prof. Böckstiegel extended this sentiment to the drafting of parties' written pleadings in the event that they will be published.

Prof. Böckstiegel indicated that transparency may also have an effect on the drafting of

an arbitral award. For example, he stated that he includes procedural orders in awards to avoid subsequent arguments that there had been insufficient due process. However, while he expressed his hope that the arbitral awards he authors would contribute to the development of international law, he noted that he does not use the public nature of an award to expound academically. Rather, he observed that "the task of an arbitrator is not to write a treatise on international law—just decide the case."

On the sensitive topic of fact-finding, Prof. Böckstiegel asked rhetorically: "If you open Pandora's Box, where do you stop? What are you looking for?" In his view, the presence of equal representation creates the presumption that all relevant issues of fact and law will be introduced into the arbitration. While Prof. Böckstiegel left room for the application of *iura novit curia* with respect to issues of law, he stated his preference to cautiously approach the parties with an interest in particular legal issues, rather than to draw conclusions in an arbitral award without having heard the parties' arguments. With respect to issues of fact, he considered any fact-finding on the tribunal's part to be "too much of a slippery road". Prof. Böckstiegel extended the same logic to arbitrations involving non-appearing parties, while carving out an exception for cases based on contracts that were *prima facie* illegal (e.g., procured through bribery).

Other topics discussed at the Seminar included the implementation of national law to protect investments (as an alternative to the conclusion of BITs). For Prof. Böckstiegel, any national legislation should be considered carefully, as it is always subject to unilateral change. Nonetheless, he observed that, *a priori*, the inclusion of a stabilization clause could permit a foreign investor to avoid such legal uncertainty. The controversial question of the 'double hat' was also discussed, wherein Prof. Böckstiegel expressed his preference for serving as arbitrator, while acknowledging the utility of his experience as counsel.

Finally, when asked for a diagnosis on the general health of the multilateral investment framework, Prof. Böckstiegel noted that some commentators have called for systemic changes within ICSID, such as the establishment of an appellate procedure or the abolition of the list of arbitrators. He observed that, in comparison to the revision of arbitral rules, the amendment of a treaty such as ICSID is a more complex task by several orders of magnitude. While it may thus be difficult for Member States to reach agreement on any specific modifications to the Convention, Prof. Böckstiegel concluded that there is "always room for improvement".

Reading List:

1. Karl-Heinz Böckstiegel, 'Commercial and Investment Arbitration: How Different are they Today?' (Lalive Lecture 2012), in 28 Arbitration International (2012, no. 4);
2. Stephan W. Schill, 'Crafting the international economic order: the public function of investment treaty arbitration and its significance for the role of the arbitrator', L.J.I.L. 2010, 23(2), 401-430.