Strict Estoppel for Complaints that the Right to be Heard has been Violated? An ICSID-Annulment Inspired Approach to Increase Efficiency of International Arbitration

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Summary

In order to remain competitive vis-à-vis other forms of dispute resolution, international arbitration must constantly monitor its efficiency. By minimising unnecessary battles over procedural issues, international arbitration can ensure that parties avoid having to deal with costly side-issues.

One of the reasons for considerable – and often excessive – attention being paid to procedural issues is the fear that a failure to do so could violate the right to be heard, leading to annulment or hindering enforcement, which itself undermines efficiency. Yet excessively guarding against the possibility of such violations is equally inefficient. To minimize efficiency losses, the authors draw on an emerging line of case law in ICSID annulment proceedings as well as waiver provisions applicable in a range of leges arbitris to propose a strict principle of estoppel. This approach forces parties to raise procedural issues before the instance most capable of resolving them quickly and fully – the arbitral tribunal – and limits both recourse to costly annulment proceedings and enforcement problems. A party should be allowed to invoke a violation of the right to be heard at the annulment or enforcement stage only to the extent that it has specifically raised its concerns and sought corollary relief before the arbitral tribunal.

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I. International Arbitration in a Competitive Environment

1. Dispute resolution mechanisms need to be effective and fair, but users also expect them to be efficient. International arbitration increasingly faces competition from ‘alternative’ mechanisms of dispute resolution, such as mediation or conciliation, as well as from litigation in standing domestic and international courts and tribunals.

2. As is well known, investment arbitration is coming under sustained attack, with the European Union and now UNCITRAL Working Group III looking at reforming the current investor-state dispute settlement system (‘ISDS’) to significantly alter if not abolish many of its ‘arbitration-style’ features. Indeed, investment arbitration is likely to soon face competition from permanent, two-tiered, transparent and generally more heavily-regulated dispute settlement bodies, such as those already included in the text of EU free trade agreements currently being finalized with Canada, Vietnam and Singapore; and

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4 EU-Vietnam Investment Protection Agreement, Chapter 3, Section B, http://trade.ec.europa.eu/doclib/html/157394.htm (provisional text from end of negotiation published on 24 September 2018), accessed 20 January 2019. This agreement contains provisions on the establishment of an investor-state tribunal that were removed from earlier drafts of the EU-Vietnam FTA (‘EVFTA’) after a 16 May 2017 opinion of the European Court of Justice determined that ratification of an agreement establishing such a tribunal by the EU alone would be impossible. The separate text of the EU-Vietnam IPA will accordingly enter into force only after EU Member States have ratified it and therefore after the other provisions of the EVFTA. See further www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-vietnam-fta, accessed 20 January 2019.

potentially even a plurilateral or multilateral investment court, such as the ‘MIC’ being championed by the EU.  

3. At least some states are also trying to regain control of international commercial dispute resolution by setting up state courts for international civil disputes, as well as by ratifying the Hague Convention on Choice of Court Agreements which has now entered into force for the EU (as of September 2018 including Denmark), Mexico, Montenegro and Singapore, with full effect in the People’s Republic of China and Ukraine likely to follow soon.

4. In order to remain competitive, international arbitration must therefore strive to simultaneously satisfy demands for effectiveness, fairness and efficiency. Procedures allowing for the review of arbitral awards must be carefully calibrated if these goals are to be achieved. The very possibility of having an award not enforced or set aside might appear to run counter to the goals of effectiveness and efficiency, but such review constitutes an essential procedural safeguard to ensure fairness. On the other hand, too great a focus on procedural safeguards might undermine the reputation for efficiency that attracts many users to arbitration.

5. In the following pages, we will focus on one means through which review procedures may be tailored to increase efficiency and effectiveness without

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undermining fairness: the handling of alleged violations of the right to be heard, violations frequently raised in enforcement proceedings and in annulment applications before state courts[^10], as well as in ICSID’s ad hoc annulment committees.[^11]

6. While the need to afford each party its right to be heard is universally accepted, many rules of arbitral procedure limit the scope of this right (below II.). We argue that objections based on an alleged violation of a party’s right to be heard should be even more strictly policed, requiring a party not only to raise any objection during the arbitral proceedings themselves, but also to describe what specific relief it seeks (below III.). Requiring such pro-activeness has many advantages from a policy perspective (below IV.). The proposed estoppel-like approach could be implemented within the bounds of the existing applicable legal regimes (below V.).

II. The Right to be Heard and its Limits: A Comparative Account

7. A party’s right to be heard, *audiatur et altera pars*[^12], is a fundamental and universally acknowledged principle of justice (below 1.). Yet there are limits on the circumstances in which it may be invoked, and a party may be deemed to have waived it with regard to specific instances of its alleged violation (below 2.).

1. The Legal Bases of the Right to be Heard

8. Under the ICSID Convention, either party to investment arbitration proceedings may request annulment of the tribunal’s award on the ground ‘*that...*’


[^11]: At least 20% of ICSID annulment applications invoke a violation of the right to be heard. Significantly, a violation of the right to be heard was held to be the sole basis for the annulment of two of the handful of ICSID awards annulled in their entirety by ad hoc committees: *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on the Applications for Annulment of the 1990 Award and the 1990 Supplemental Award of 17 December 1992 (*Amco II*); *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines* (ICSID Case No. ARB/03/25), Decision on the Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide of 23 December 2010.

[^12]: Different terminology is used for similar or overlapping concepts: due process, right to be heard, right to present one’s case, right to adversarial proceedings etc.