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A Beacon in the American South: International Business Disputes in an Era of Receding Globalism

Christopher Campbell (Willoughby & Hoefer) · Sunday, December 10th, 2017

On the heels of a year that has seen the rise of populist nationalism, skepticism of multilateral trade agreements and calls to tighten in some ways the flow of people across borders – perhaps most visibly in the United States and across Europe, but with manifestations elsewhere – many communities saw a retreat from international collaborations. For some, these developments represent a much-needed course correction to protect national security and address macro-economic trends that have hurt workers. Others see them as harbingers of the demise of the post-World War II global world order. These notions set the table for the 6th Annual Conference of the Atlanta International Arbitration Society (AtlAS), held in Atlanta, Georgia, on 22 & 23 October 2017, discussing "*International Business Disputes in an Era of Receding Globalism*".

On 22 October, the conference opened at the Atlanta Center for International Arbitration and Mediation of Georgia State University, with a panel discussion focusing on perspectives from several countries regarding international arbitration. The panel featured speakers from the United States, United Kingdom and Canada and was co-hosted by the ICC Young Arbitrators Forum and the AtlAS Young Practitioners Group.

Thereafter, the main events of the afternoon were the *tertulia* discussions — debates aiming to discuss theoretical and practical approaches within a more relaxed informal context — that were hosted by advocates, academics, and institutional personnel from around the world. The sessions, which were conducted in two consecutive hour-long blocks and spanned through several rooms, examined various topics:

1. Transparency, privacy and confidentiality in international arbitration,
2. Party selection of arbitrators versus institutional selection in international arbitration,
3. The "Americanization" of international arbitration? Discovery? Advocacy styles?,
4. The impact of gender diversity in international arbitration.

These discussions were held with the conference theme in mind, and the hosts pushed attendees to answer topical questions regarding how decreasing globalism might change each of these genres of discussion.

As a host for the first panel, [1. I would like to humbly thank the Atlanta International Arbitration Society for their invitation to lead this discussion and for featuring my article We Want to Be in the Room Where it Happens: A Demand for Practical Transparency in International Commercial

Arbitration] namely "Transparency, privacy and confidentiality in international arbitration"), there were several major conclusions that I observed. **First**, when inquiring whether international arbitration needs greater transparency, one must first distinguish international commercial arbitration and investor-State dispute resolution. Clearly, there are many reasons why private parties, whom have agreed to commercial arbitration, would desire transparency in one sense, yet disfavor greater transparency in others. For example, parties may desire organizational insight into how institutions operate, while those same parties likely would not encourage transparency into the substance of the proceedings. On the other hand, when matters of public interest are at stake, as may be more-typically the case in investor-State dispute resolution, the attendees seemed to unanimously agree that greater transparency was a good thing for such proceedings. Professor Andrea Bjorkland of McGill University observed that investor-State disputes brought under the North American Free Trade Agreement offer a high level of transparency as to the pleadings, exhibits, memos, and awards, that may provide a useful model for citizen-friendly transparency for other regimes that utilize investor-State dispute resolution.

Second, Professor Bjorkland highlighted, both during this discussion and a subsequent panel, the advent of the Mauritius Convention on Transparency. Although the convention has twenty-six signatories, only three of those have ratified the treaty; Canada, Mauritius and Switzerland. The treaty aims to provide States and regional economic integration organizations with an efficient mechanism that extends the scope of the Transparency Rules already existing under UNCITRAL to investment treaties concluded before April 2014. The hope is that this convention will help ensure that both public interest in such arbitrations and the interest of the parties to resolve disputes are taken into account in a fair and efficient manner. However, it is of course important to note that mechanisms to create this greater transparency may be costly and inconvenient for the parties involved.

Finally, with regard to this *tertulia*, it is humorous to note that while both sessions eventually agreed that greater transparency in commercial arbitration–in terms of award formation and other stages of dispute resolution–was a positive development, every attendee thought that such transparency should begin with *other* disputes and not their own.

The conference shifted focus to its major theme on the second day, October 23, during which panel discussions theorized how international arbitration might evolve to meet changing perceptions toward globalism. Because of the pertinent and broad nature of the conference's topic, there were many take-aways to note, however, here are some that resonated most with me:

1. **Supremacy of Arbitration.** Panelist and attendees alike apparently agreed that international commercial arbitration is still the most predominant way of resolving disputes worldwide, and its evolution is somewhat of trial-and-error process. Discovery, Third Party funding and other issues of this process will ultimately respond to clients' demands more broadly.
2. **Necessity**. While perception of globalism may change, the practical realities do not. Clients worldwide still demand dispute resolution in a neutral, efficient manner, and no national court system currently provides a more satisfactory manner than commercial arbitration.
3. **Perception**. Mostly U.S. panelists, with others joining, expressed frustration with the knowledge level of laypersons, and even of some clients, regarding the operation of arbitration. Notably, poor reporting from U.S. media has extrapolated from negative aspects of Consumer Arbitrations across the entire practice area. Panelists encouraged AtlAS and other arbitral centers to undertake educational campaigns to combat misinformation.
4. **Gender and Minority Representation**. All present agreed that in order for international

arbitration to grow there needed to be more robust and genuine discussion around both: i) greater representation of women, and racial minorities on arbitration panels and within institutions, and ii) less tolerance for discriminatory behavior or rhetoric. One attendee suggested a substantive rule change that would require equal representation of women, and another proposed more programs explicitly granting access to under-represented minorities. However, one panelist pointed out that, especially in commercial arbitration—notwithstanding counsel and institutions' role in advising clients to consider arbitrators from different and diverse backgrounds—these determinations were ultimately made by parties/clients, not the institutions.

5. **Competition**. As competition increases among arbitral centers, the centers with the best and accommodations will succeed. Relevant accommodations include not only substantive rules and means for housing and resolving the dispute, but also support from regional judiciary in supporting arbitral proceedings — or in the case of the U.S., the ability for parties, witnesses and others to gain access to the venue at all. During both informal and formal discussion, panelists observed that other venues in North America, namely Canada, were advertising their arbitral venues as viable alternatives in light of recent political instability and practical access to venues in the United States.

Furthermore, several panelists noted that Atlanta was an exceptional venue because of its lower cost compared to other American cities, ease of airport access, and to one of its city mantras "*Too busy to hate*," which Atlanta practitioners hoped would allow this city to become a *Sanctuary City for International Arbitration.*

In summation, conference was a quality culmination of discourse regarding international arbitration, and a rallying cry that U.S. practitioners, especially those in Atlanta and in the American South, will not flee from the ever-increasing international battlefield.

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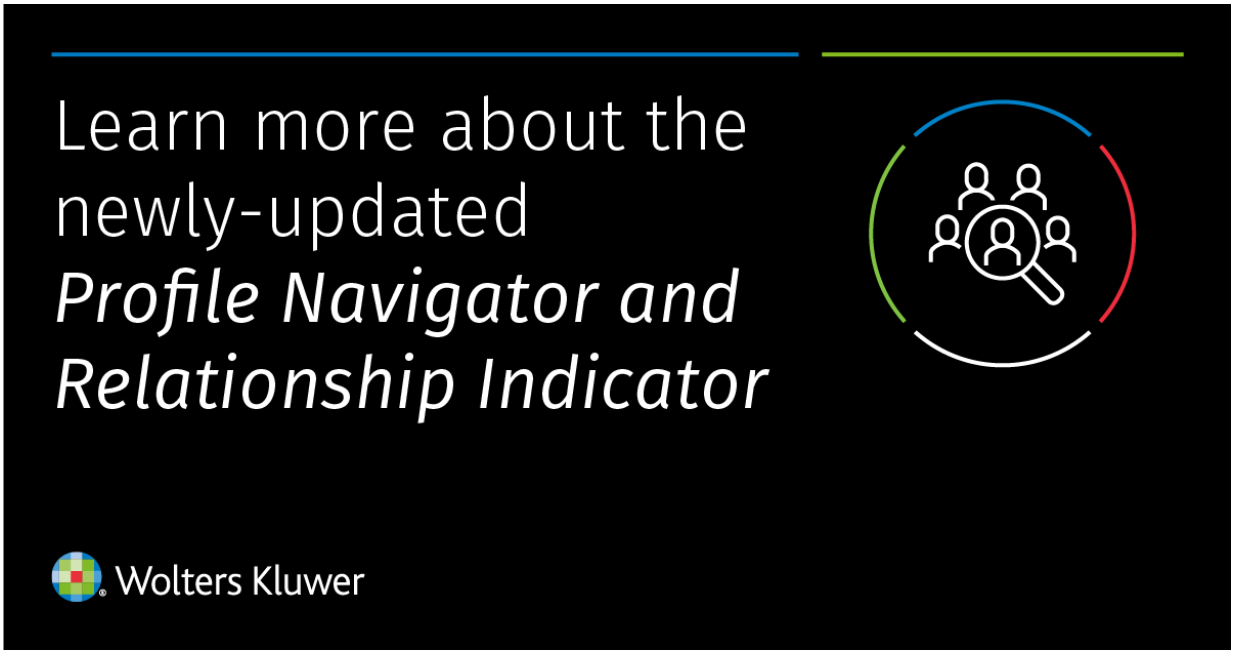

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