

ICCA Sydney: Hot Topics

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In a much-anticipated session at ICCA Sydney Conference 2018 moderated by *Mark Kantor*, the panel: *Joongi Kim*, Yonsei Law School (Republic of Korea); *Judith Levine*, Permanent Court of Arbitration (Australia, Ireland); *Natalie L. Reid*, Debevoise & Plimpton LLP (Jamaica), tackled the following four “hot topics” in international arbitration:

1. illegally obtained evidence;
2. the One Belt, One Road initiative;
3. parallel proceedings; and
4. harassment & sexual misconduct.

1. Illegally obtained evidence

Whether evidence that was illegally obtained will be thrown out of the tribunal largely depends on who obtained the evidence.

If the party, or its counsel, had a hand in obtaining evidence in a less than kosher way, that evidence will be considered inadmissible on the basis that the party bringing the evidence does not have “clean hands”.

A party who relies on illegally obtained evidence “found” in the public domain (e.g. through Wikileaks), may find the evidence admissible. One of the considerations to allow the evidence is whether the party against whom the evidence is brought, objects to its admission. In cases where no objection was made, generally, the evidence was admitted. In cases where the party did object, the tribunal weighed the interest to find the truth against the risk of allowing the evidence would cause damage to the objecting party.

Another consideration is the interest for the tribunal to know relevant information that is already in the public domain. Sometimes, an independent advisor will assess the evidence and report back to the tribunal in an attempt to protect the tribunal from being influenced by any privileged information the tribunal would not have known, but for the leaked evidence.

The panel pointed out that the IBA Guidelines on Party Representation in International Arbitration (2013) and Article 9(2) and 9(3) of the IBA Rules on the Taking of Evidence in International Arbitration (2010) are of limited help. These soft-laws address the issue of inadmissibility of false evidence but is silent on the question of illegally obtained evidence, which may not necessarily be false evidence.

So what can be done? The tribunal has the power to rule on the admissibility of the evidence. As mentioned above, whether this type of evidence will be admissible generally depends on considerations of involvement of the party, or its counsel, and the egregiousness nature of how the

evidence was obtained.

The panel concluded this topic by posing the question who should sanction the party who obtained evidence illegally? Is the function of a tribunal to be a watchdog, limited to assessing admissibility of such evidence; or act as a bloodhound, sanctioning the party or counsel? Is it more appropriate for the court of the seat to address this issue; or is it the bar association or law society to which the counsel is admitted?

2. One Belt, One Road initiative (OBOR)

China's monster construction project of constructing a maritime silk road (One Belt) and a land based silk road (One Road) will connect China with 71 countries and its markets, with a potential of more countries to follow. Of those 71 countries, 55 also have BITs, but many of them are challenging jurisdictions.

A recent development in China is the creation of "OBOR-courts". A court in Xi'an will hear disputes on the Road initiative; a court in Shenzhen will hear disputes on the Belt initiative; where a court in Beijing will operate as a "headquarter".

Other developments triggered by the OBOR initiative are CIETAC's recently published investment arbitration rules, and the creation of an e-OBOR initiative in Hong Kong.

With over a trillion dollars in projects, it is surprising that no investment has been made to date in the OBOR initiative by the Asian Infrastructure and Investment Bank (AIIB).

Where there are construction projects, disputes usually follow. With 71 jurisdictions involved, of which many States are not near at arms length with China, parties in dispute will very likely seek a neutral forum to bring the dispute; international arbitration is an attractive option.

The panel drew attention to China's multi-tier dispute resolution clause of going through stages of negotiation and mediation before arbitrating. Clauses like this, if carefully drafted and applied, have the potential of preserving long time commercial relationships. However, the potential delay in finalising a dispute, especially when delaying a contraction project, may very well kill the project or bankrupt the construction company.

3. Parallel Proceedings

Over the last four years, it has not been uncommon for a party to seek provisional measures to address the issue where one of the parties or witnesses is also involved in domestic criminal proceedings. In assessing this request, the tribunal has to balance the sovereign right or duty of a State to prosecute criminal proceedings with the principle of due process, more specifically the right to access to an international forum and the integrity of arbitral proceeding. In general, tribunals have granted provisional measures where the criminal proceedings negatively impact the integrity of the arbitral proceedings, e.g. where a witness is unable to provide its testimony because he or she is unable to attend the tribunal.

The Permanent Court of Arbitration has a system in place to allow for safe passage of a key witness against whom an INTERPOL or EUROPOL arrest warrant has been issued. The tribunal has also taken the voluntary action to travel to the witness.

An interesting point was raised by the panel discussing the impact the conclusion of the domestic criminal proceeding may have on the arbitral proceedings still on foot. Considering the burden of proof is higher in a criminal proceeding, would a tribunal be tempted to put more weight on relevant

factual evidence from the criminal proceedings?

Another intriguing question posed by the panel was what if the tribunal ignores or denies the domestic criminal judgment? Would this open up the arbitral award to scrutiny of not be recognised or enforced under the New York Convention's public policy ground?

4. Harassment & Sexual Misconduct

Confidentiality and privacy have long been saluted as a major advantage arbitration provides to court proceedings in a commercial dispute.

However, consumer and employment law arbitrations are challenging these very notions of confidentiality and privacy, demanding instead transparency and public accountability.

One of such cases where the demand for transparency and public accountability is especially strong is where an arbitration clause in an employment or other contract is used to hide a case of harassment or sexual misconduct from public scrutiny.

The "hot topics" panel certainly left the attendees with lots of interesting talking points for the gala dinner tonight.

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