Kluwer Arbitration Blog

Back to the Future: Young Voices Reflect on How the Past Year in International Arbitration Will Inform Upcoming Years at CIArb, YMG and Young ITA Event

Rocío Digon (White & Case LLP), Ana Gerdau de Borja Mercereau (Derains & Gharavi), and Alexander G. Leventhal (Quinn Emanuel Urquhart & Sullivan, LLP) · Saturday, January 26th, 2019 · Young ITA

Key developments in international arbitration in 2018 were the focus of an end-of-the-year conference held on Wednesday, 19 December 2018, organized by CIArb YMG, the young members' group of the Chartered Institute of Arbitrators, and Young ITA, the young members' group of the Institute for Transnational Arbitration. The event's faculty members were Alexander G. Leventhal (Quinn Emanuel), Ana Gerdau de Borja Mercereau (Derains & Gharavi), Diego Romero (Latham & Watkins), Jil El Ahdab (Bird & Bird), Paula Henin (Freshfields), Rocío Digón (White & Case), and Saadia Bhatty (Gide). The event was hosted by Latham & Watkins.

The event began with a welcome from Rocío Digón, Young ITA's Continental Europe Chair. Digón set the stage for the panel's discussion and introduced the panel's moderator, Jil El Ahdab, the Chair of CIArb's European Branch. She noted that 2018 had been an exciting year for international arbitration with developments in all spheres of the profession – including the taking of evidence, diversity, and investor-state arbitration. Digón remarked that the attendees were fortunate to have Jil El Ahdab and a distinguished panel to guide them through these topics.

The Panel's View

The panel then tackled the following three developments in 2018:

Evidence Taking in International Arbitration: With the official launch, just a few days before the event, of the *Rules on the Efficient Conduct of Proceedings in International Arbitration* (also referred to as the Prague Rules) and developments in the use of Section 1782 (Assistance to foreign and international tribunals and to litigants before such tribunals) of the U.S. Code, 2018 has been an interesting year for evidence-taking in international arbitration. The panel's first speaker, Paula Henin, guided discussion on this issue.

Henin first explained that Section 1782 allows interested persons to elicit the assistance of a U.S.

federal district court to obtain evidence from persons and entities residing or found in its district, for use in foreign and international proceedings. Its availability in aid of international arbitration proceedings, once rejected, has been confirmed in several, but not in all, federal districts since the *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), decision. Henin observed that 2018 brought to light interesting developments in Section 1782 practice in the context of international arbitration. Among those were cases in which litigants sought to use Section 1782 to obtain documents held by US-based law firms on behalf of their clients,[1] or even documents held by arbitrators.[2] In other cases, parties looked for new ways to resist Section 1782 discovery, eliciting the assistance of courts outside the US to enjoin their arbitration adversary from enforcing a Section 1782 discovery order rendered against them.[3] Against that background, the panelists discussed whether Section 1782 strengthens, or instead undermines, the authority of arbitral tribunals to manage the taking of evidence in arbitral proceedings. The consensus among the panelists was that the answer depends on whether the parties are using Section 1782 to work *with*, or instead *against*, the arbitral tribunal.

As for the Prague Rules, Henin explained that these Rules were devised as a more civil-law focused answer to the IBA Rules. In main part, they limit the scope of document production to specific documents – avoiding the type of expansive discovery that results from allowing requests for categories of documents – and allow for a more robust role in the process for the tribunal, which may provide its preliminary views on the arbitration at the case management conference, assist the parties in reaching an amicable settlement, and take a proactive role in fact finding. Henin noted that it is still too early to say whether they were will become an alternative or a supplement to the IBA Rules. However, she noted that, while the Prague Rules may provide an alternative to some of the IBA Rules' provisions on evidence-taking, they also go beyond what is provided in those Rules and expressly propose the conferral of additional management powers to arbitral tribunals – for example, in regards to mediating a settlement – where the IBA Rules are silent.

Investor-State Arbitration in a Post-*Achmea* World: The conference's second speaker, Diego Romero, tackled two recent proposals for change in the post-*Achmea* international arbitration landscape.

First, Romero dissected the proposal for amendment of the ICSID arbitration rules, which includes provisions on third party funding, expedited proceedings, and security for costs. He argued that these proposals went a long way towards dissuading frivolous claims by including an express provision on security for costs and lowering the bar for security for costs applications (to date, only two security for costs applications have been successful under the ICSID Rules). Romero then referred to the Proposed Arbitration Rule 21(2) on the parties' obligation to disclose whether they have third-party funding and the identity of the third-party funder immediately upon registration of the Request for Arbitration or upon conclusion of a funding arrangement after registration of the case. He also argued that the proposals would increase transparency – by creating an opt-out rule in favor of publication of awards and decisions and clarifying rules for the submissions of non-disputing parties – and independence – by requiring parties to disclose the identity of any third party funder for the conflicts purposes. The panel agreed that whether such measures would be "sufficient" to satisfy critics would remain to be seen.

Second, Romero explored the new face of investment disputes in North America under the United States-Mexico-Canada Agreement (USMCA), signed in November 2018. Although the USMCA unquestionably curtails access to investment treaty arbitration to its parties, the panel acknowledged that the USMCA at least brings much needed certainty and predictability regarding certain substantive provisions, such as the minimum standard of treatment and the most favored nation clause. Romero concluded that these reformative movements should not be seen as existential threats to investment arbitration but rather, opportunities to improve it and fix some of its problems.

Diversity in International Arbitration: The final panelist, Saadia Bhatty, touched upon diversity in international arbitration – in all its forms and apparitions.

Noting that there is a general consensus in the arbitration community that diversity is not only beneficial but crucial in international arbitration, Bhatty began by discussing the recent case of *Shawn C. Carter, et al. v. Iconix Brand Group, Inc. et al.*, Index No. 655894/2018, a case before the Supreme Court of New York in which rapper Jay Z challenged the validity of an arbitration clause in favor of AAA arbitration. Carter argued that enforcement of the arbitration clause would be against public policy because the AAA roster of arbitrators did not include any African-American arbitrator. According to Bhatty, the *Carter* case revealed that, despite substantial efforts made by the arbitration community in the past year – the publishing of diversity statistics by major arbitration institutions, the release of toolkits to increase diversity in international arbitration, and the raising of awareness to the importance of diversity in all forms – a lot of work still remains to be done.

Bhatty then discussed another aspect of diversity in international arbitration receiving increasing attention: regional diversity. She noted that China's One Belt One Road (OBOR) project, an Asian infrastructure project led by China whose cost is estimated to go well above USD 5 trillion and which, when completed, will provide infrastructure connecting around 60 countries, would inevitably create a new market for arbitration disputes that would, in part, be serviced by Asian arbitration institutions. Bhatty noted that, while beneficial, diversity also created a risk of parcellisation of international arbitration. She raised the question whether the original purpose of international arbitration was to be transnational, and for arbitrators to be neutral, rather than to be "representative" of the end-users.

The Public's View

After the panel, Alexander G. Leventhal led a discussion with the audience, which included the use of a live poll. While the issue of technology in arbitration may not have been discussed by the panel, it was center stage in the post-panel discussion as attendees were able to voice their opinions to poll questions using their telephones. In the first question, attendees were asked to offer their thoughts on the future of the Prague Rules. Leventhal noted that while a plurality (48%) of attendees believed that the Prague Rules would be a useful supplement to the IBA Rules, a majority either found that they would soon be forgotten (32%) or were not even familiar with the Prague Rules (20%). When asked the most pressing issue of diversity, attendees responded gender diversity (29%), national diversity (29%), and age diversity (27%). Leventhal noted that, despite

the recent *Carter* case, only 7.5% of attendees listed racial diversity. As for the USMCA, a majority of attendees (76%) believed that the agreement would not be passed by the US Congress and would remain a dead letter (a response that, panel moderator Jil El Ahdab noted, was more political than legal). Lastly, a majority of attendees (56%) said that they believed 2019 would be most marked by a reevaluation of existing investor-State dispute settlement procedures and agreements. Leventhal noted the coming year promised to be an interesting one as at least 12% of attendees also believed that 2019 would be marked by a revolt by international tribunals against restrictions imposed by politicians and national courts.

Ana Gerdau de Borja Mercereau closed the conference with recap of the evening's developments and her three wishes for 2019. Her first wish was that arbitrators have the courage to take difficult decisions and not fear the *ex post* review of State courts. She sustained that today's due process paranoia often prevents or slows down arbitrators' decision-making and that a "procedural judgment rule"[4)] could serve as tool to fight this, based on the principles of transparency, proactivity, interactivity, and proportionality in procedural management decisions. Her second wish was that the arbitration community not lose sight of its professional *raison d'être*: to solve dispute and, in doing so, render the best possible dispute resolution services. Mercereau's third and last wish but perhaps the most important one was that the "*enduring social institution*"[5)] of international arbitration continue evolving with a quickly changing world.

References

?1 *See Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, No. 17-424-CV, — F.3d —-, 2018 WL 3352757 (2d Cir. July 10, 2018); *In Re Application of Hulley Enterprises Ltd., Yukos Universal Ltd. & Veteran Petroleum Ltd. for an order pursuant to 28 U.S.C. Section 1782 to conduct discovery for use in a foreign proceeding*, No. 1:18-mc-00435 (S.D.N.Y.); *In Re Application of Hulley Enterprises Ltd., Yukos Universal Ltd. & Veteran Petroleum Ltd., for an order pursuant to 28 U.S.C. Section 1782 to conduct discovery for use in a foreign proceeding*, No. 2:18-mc-00176 (E.D. Penn.).

?2 *See* D Charlotin & L E Peterson, *Challenge against three high-profile arbitrators is spurred by misdirected email to arbitral secretary; Gary Born submits expert report in defence of arbitrators* (IA Reporter Nov. 5, 2018).

?3 *See Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH & another [2018] EWHC 2267 (Comm) (24 August 2018)* (Males J).

?4 *See* Klaus Peter Berger & Ole Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", 32 (2016) *Arbitration International* 415 (Proposing the "procedural judgment rule").

?5 *See* Jan Paulsson, *The Idea of Arbitration* (Oxford 2013), p. 298.

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