Kluwer Arbitration Blog

New York Arbitration Week Revisited: The In-House Counsel's Virtual Roundtable – Discussion on their Approach to an International Arbitration

Luis M. Martinez (International Centre for Dispute Resolution American Arbitration Association (ICDR-AAA)) · Wednesday, December 2nd, 2020 · International Centre for Dispute Resolution (ICDR)

On November 16th, 2020, the AAA-ICDR hosted a webinar entitled In-House Counsel's Virtual Roundtable as part of New York Arbitration Week. The session comprised of in-house counsel from various industries discussed their views and approach to international arbitration from their respective fields. It was moderated by Eric P. Tuchmann, the Senior Vice President, General Counsel and Corporate Secretary for the AAA-ICDR, and featured in-house counsel Suzana Blades (Associate General Counsel, ConocoPhillips), Kai-Uwe Karl (Global Chief Litigation Counsel, GE Renewable Energy), and Michael L. Martinez (Senior Vice President & Associate General Counsel, Marriott/Bonvoy).

Background and Introduction

The panelists provided an overview as to how their legal teams worked on disputes their companies faced. Kai-Uwe Karl noted that because they are a construction company, their team handles disputes from across the world in litigation, arbitration, and mediation venues (depending on the needs and forum selection clauses of the particular case). Mr. Karl added that his specific team participates more in larger cases, while providing input and support to regional counsel in smaller cases. Suzana Blades mentioned that she and her team try to participate more in the pre-dispute phase in an attempt to mitigate potential conflicts and resolve disputes before they reach arbitration or litigation. Ms. Blades noted that they remain active in all their cases, citing that they consider their relationship with outside counsel to be a partnership and that they want to be part of any important decisions. Michael Martinez noted that they have a similar approach. Most of their litigation or arbitration matters arise out of their management or franchise agreements. Mr. Martinez notes that for domestic matters, they use United States courts and prefer arbitration for international matters, but further noted that they have been transitioning more towards arbitration in domestic matters as well.

When asked about selecting arbitration versus litigation, the panel's consensus was that it depends on the venue. For example, Mr. Karl noted that if they were asked to consider arbitration versus litigation in Switzerland, they would be willing to accept both. Ms. Blades agreed, citing her own example that they would be fine with litigation before the UK courts. She added that for domestic disputes in the United States they would opt for the courts as well, unless it involved relationships with long standing partners or if there were confidentiality concerns. Ms. Blades further noted that they opt for arbitration in international disputes. Eric Tuchmann noted that from the AAA-ICDR's perspective, the common hands-on approach favored by all panelists (as opposed to just handing these matters off to outside counsel) results in cases that proceed more efficiently.

The Panel's Views on Arbitrator Selection

When it comes to selecting arbitrators, the panel agreed that arbitrator selection is probably one of the most important decisions and shared a common approach when using the party-appointed method. The panel further agreed that the aim is to find the best person for the case. In that regard, they also agreed that the first step was to reach a consensus with respective outside counsel on the arbitrator's characteristics they would be seeking for the particular matter. Ms. Blades mentioned that they work with outside counsel to receive a list of 5 or 10 names that fit their agreed upon profile and then narrow the list down from there, noting that it can be an intense process. For the panelists, the highly recognized arbitrator was not always important, as they noted each case is unique and prefer the right person for the particular dispute. Important attributes for a strong arbitrator include that the person is well regarded, has the ability to persuade the fellow tribunal members and able to be a "consensus builder," citing a preference for unanimous awards. The panelists also agreed on the need to ensure that the prospective arbitrators have the availability to dedicate the time that is needed for a case, and they all expressed their commitments to diversity when considering potential appointments. Eric Tuchmann noted that the panel shared the same commitment to diversity which is also shared by the AAA-ICDR and is certainly considered when it prepares its lists of arbitrators for the cases it administers. Additionally, when considering the appointment of the presiding arbitrator they considered strong case management skills and the ability to make tough decisions to keep the case on track as important characteristics.

Eric Tuchmann asked the panel about their experience with using the AAA-ICDR's list method for appointing their arbitrators. Ms. Blades mentioned that she had used the list and was a proponent of that process. She also noted that her company has had good experiences with the list, citing a comfort level with the work that the AAA-ICDR does by vetting and training the people on that panel so that they will wind up with a good choice. They have even duplicated the process in some ad-hoc cases. Messrs. Martinez and Karl shared similar approaches, stressing collaboration with outside counsel and their commitment to diversity.

Mr. Karl added that they also consider the type of dispute and its applicable law, as in many of their cases they lean towards a preference for an arbitrator with a civil law

background who will focus more on the documents, less discovery, and arguably less hearing days.

The Panel's Views on Using Mediation

Mr. Martinez mentioned that he is always open to mediation and the early resolution of these cases before they may get to arbitration or litigation. He added that timing is important as, while it may work early on, it seems that mediation may be more effective if conducted after you have had some exchange of documents as you get closer to the hearing. Mr. Martinez noted that he believes mediation should always be encouraged but not a mandatory step. Mr. Tuchmann added that the AAA-ICDR's practice is to offer mediation in every case it administers, which is incorporated in its rules.

Mr. Karl stated that they were great supporters of mediation and that it should be included in the toolbox of processes used to resolve disputes. He also stressed that their outside counsel should consider mediation and be well versed in the process and its possibilities. Mr. Karl was in favor of including mediation in its arbitration agreements as a mandatory first step of their escalating clause, citing that if it's not included in the arbitration agreement, it is difficult to get the parties to agree to mediate once the dispute has arisen. Mr. Tuchmann noted that the AAA-ICDR rules contemplate that mediation can be conducted concurrently with the arbitration so as to avoid delay. Ms. Blades also expressed support for the use of mediation, noting that she sees it being used more often domestically in the United States. Ms. Blades prefers that it would be optional but believes it would be used more often internationally if arbitrators suggest its use to the parties at the appropriate time (including reminding the parties of its use prior to the hearing).

Mr. Karl also noted that mediation offers another advantage, in that parties most often overestimate their case's strength and may not fully appreciate weaknesses in their position. Parties and their counsel are trained to think of their legal rights and while working with their team and outside counsel they all may be reinforcing their version of reality (i.e., confirmation bias). This dynamic may also be happening with opposing counsel and that diminishes possible opportunities for early settlement. Mr. Karl said that participating in mediation may result in a reassessment of the parties' respective views and result in an early settlement.

Selecting New York as a Seat or Venue

Since the webinar was taking place during New York Arbitration Week, Mr. Tuchmann asked the panel for their views in selecting New York as a venue for litigation or arbitration.

Mr. Martinez mentioned that historically they opted for United States' courts to resolve domestic disputes and include contract terms providing for the application of New York law when agreeing to a New York juridical forum. He has had good

experiences with New York state courts' specialized commercial division, noting that the judges were sophisticated and provided well-reasoned decisions fairly quickly. In terms of arbitration, he stated that his company has found New York as a fine venue, although cites that the costs of arbitration can be high (which is true of many of the often used arbitral hubs, such as Geneva and London). Ms. Blades generally agreed, adding that if your contract has New York law, New York is a great option as a seat. Ms. Blades stressed the importance of selecting the right seat for their arbitrations and it was a part of the arbitration agreement that they would insist on more so than other issues, as the choice of the seat is so important because the courts at the seat will have supervisory jurisdiction over the arbitration.

Mr. Karl noted that New York like other major cities (for example Geneva) has high-quality lawyers and arbitrators and a quality process. Mr. Karl noted that if you are participating in a domestic US arbitration it could be more expensive, as you may have depositions, more witness testimony, the potential for more discovery, and more hearing days consistent with the common law practice. Mr. Karl expressed a preference for an international arbitration proceeding which he noted could also be conducted in New York as well by the agreement of the parties.

The COVID-19 Impact on International Arbitration

The panel generally agreed that they were seeing fewer disputes during the pandemic and that there was a focus on trying to resolve disputes faster and on quicker business terms. They added that if one good thing could be said about the COVID experience it is that there has been a leap forward in the use of technology in international arbitration. The increased use of virtual hearings is here to stay, including in some hybrid capacities for case management and procedural conferences. They have also added the possibility of more settlement conferences conducted when the possibility may arise without the travel costs and the logistical challenges. We now have more options for our international arbitrations.

The recording of this program can be accessed here.

Recordings for all New York Arbitration Week 2020 events are available here, and Kluwer Arbitration Blog's full coverage is available here.

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