

Inaugural Washington Arbitration Week: COVID-19 Silver Linings and Prudent Prognostics

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The first edition of Washington Arbitration Week or WAW, took place on-line from November 30 to December 4, 2020, hosting 15 panels with over 4,000 registrations and 1,476 attendees. This post aims to provide a flavor of the first day of programming.

The Co-Chairs of WAW, Ian Laird and Dr. Jose Antonio Rivas, opened the week, introducing Meg Kinnear, ICSID Secretary-General, as Keynote Speaker. She described Washington, DC as a city perceived from the outside as the city of cherry blossoms, or House of Cards, but for those in the virtual room it is the place for international arbitration. She noted that, from ICSID's perspective, the Washington, DC hub has expanded in two significant ways: first, with the recent expansion of the ICSID hearing Center facility. Second, in March, ICSID became an expert in remote hearings, handling close to 145 such proceedings.

The remainder of the programming of the first day capitalized on expertise from around the Washington DC arbitration scene.

Retention of Talent Through Gender Diversity: Women in the Radar

Against the backdrop of the first US Vice President elect and also a recent recommendation of the first woman President to the ICC Court, it seems women are finally on the radar. Thus, WAW's first session was aptly titled "Women in International Arbitration." Margarita R. Sánchez (Quinn Emanuel Urquhart & Sullivan) moderated with Mónica Jiménez (Ecopetrol), Melissa Stear Gorsline (Jones Day), Ashley Riveira (Crowell & Moring), and Ana Stanič (E&A Law) joining the panel.

Flexible Work Arrangements During COVID-19 May Help Harness Talent in the Future: The pandemic has underscored the critical need for flexibility in the legal profession. Ms. Gorsline stressed that a positive spillover of the pandemic is the broad realization that there is no need to be sitting in the office. Ms. Riveira agreed, adding that retention of talent and flexible work arrangements go hand in hand. Dauntingly, an increasing number of women are setting up their own practices because of COVID-19. Ms. Stanič, owner of her own boutique firm, urged women to think outside of the box as "one can trailblaze in whatever direction, it is not linear".

Initiatives and Accountability Mechanisms to Close the Gender Gap: To help further gender diversity beyond wishful thinking, Ms. Stanič discussed the work of the Cross-Institutional Task Force on Gender Diversity. The Task Force, supported by ICCA, has published findings which identify ways to enhance gender diversity and representation in dispute resolution, and confirmed that diversity can improve the outcomes and the legitimacy of such proceedings.

Other accountability mechanisms were heralded by Ms. Jimenez, such as Economic Social Governance ("ESG") company score cards, which may be useful to introduce in the law firm context. There is also a panoply of tools to foster diversity, such as the blind selection of arbitrators, sponsorship opportunities, and shared co-responsibility in the household. The discussions closed with advice on how young female practitioners can break into international arbitration: visibility, mentorship, write articles and "just do it".

Are Virtual Hearings Set to Dethrone In Person Hearings as the "King" of Proceedings?

A further program addressed the rise of virtual hearings, another topic coinciding

with the pandemic. It brought together diverse perspectives, including the arbitrator by Anne Marie Whitesell (Georgetown Law Center), counsel for sovereign states by Mélida Hodgson (Jenner & Block), in house counsel by Karl Hennessee (Airbus), and arbitration institutions, by ICSID Deputy Secretary-General Gonzalo Flores (ICSID).

Program moderator Gaela Gehring Flores (Arnold and Porter) described in-person hearings as the “king of proceedings”. She explained that placing in person hearings on a pedestal presumes that its benefits outweigh the costs. Mr. Hennessee set the pragmatic tone of the discussions, by signaling that much ink was spilled on the topic of force majeure, cautioning against speculation towards a wave of claims related to this area.

Cautious Prognostics About COVID-19-Related Disputes: Panelists concurred that time is decisive in international adjudication, as there is a lag between the facts giving rise to litigation and the litigation of the dispute itself. Focusing on investment disputes, from the sovereign state counsel’s perspective, Ms. Hodgson explained that many treaties, such as the 2012 US model BIT, include state defenses (i.e., “measures necessary”) should the State need to execute certain public policy objectives. Arbitrators have yet to consider whether those provisions could excuse in response to COVID-19. Ultimately, the success of a COVID-19-related investment claim will boil down to a demonstration that any such measures were arbitrary and discriminatory. To add a layer of complexity, in the event that such claims would be funded by third-parties, Ms. Hodgson explained that “another set of eyes will be looking at [those] potential claims”.

Welcome Innovations to Institutional Rules Regarding Virtual Hearings with the Launch of the 2021 ICC Rules: Bringing the arbitrator’s perspective, Professor Whitesell focused on the new 2021 ICC arbitration rules, set to come into effect on January 2021 (the new rules have previously discussed on the Blog, for example here). The ICC notably added a new provision (Article 26) to authorize tribunals to hold virtual hearings. Under the previous versions, the provision stated that the tribunal shall hear the parties together “in person”, a reference which caused much debate on what it meant under the rules.

ICSID’s Approach to Virtual Hearings: Mr. Gonzalo Flores articulated that ICSID did not adhere to new rules for virtual hearings but rather to a set of solid principles. The 4 key principles now imbedded in ICSID Working Paper 4 set forth

(i) an obligation of the parties to conduct proceedings in good faith, (ii) the duty to treat parties equally and ensure the opportunity to present their case; (iii) the parties' right to frame the proceedings; and (iv) the tribunal's duty to consider the conduct of the parties when allocating costs.

As pointed out by Professor Whitesell, this approach raises two issues, namely cross-examination of fact witnesses as arbitrators prefer to see those witnesses, and the synergy among the members of the tribunal. Given these concerns, the panel concluded ambivalently, casting doubt on whether virtual hearings will in fact dethrone in-person hearings.

Third-Party Funding Developments, Pitfalls and Looking to the Future

A program on third-party funding ("TPF") drew upon the idea raised by Ms. Hodgson in a separate program held earlier in the day, regarding the "new set of eyes" on international disputes. This program was moderated by Tim Feighery of Arent Fox, joined by speakers Michael P. Kelley (Parker Poe Adams & Bernstein), Ty Ludbrook (Allegiance Capital), William Marra (Validity Finance), and Michael Perich (Westfleet Advisors).

Whilst transparency surrounding TPF is often conceived in light of disclosures to avoid conflicts of interest, the perspectives of funders during this program highlighted another angle: transparency to the funders from the investor and counsel by being upfront on the pros and cons of their case. Such transparency allows for parties to align on their interests, fomenting a cooperative view of TPF rather than an antagonistic one. Mr. Marra highlighted that TPF is a collaborative effort in view of adding value to the claims. As to the control of the case, identified as "the most controversial", Mr. Kelley explained that funders are present throughout the duration of the case to provide an alternative view that may assist with the process, rather than stand in the way. Additionally, the TPF agreement structure is crafted to allocate roles of the funder, counsel, and the client involved.

Asked about the impact of the pandemic on the risk/benefit analysis of prospective disputes, the speakers observed that, at the dawn of the pandemic there was a slower learning curve for deals, but that activities are returning to business as usual. What is more, Mr. Marra indicated the pandemic has been a driver for demand for investors that lack liquidity to fund their claims.

Panelists presented their views on the crucial question of whether TPF serves the access to justice of meritorious claims, to which all concurred with a positive answer. In times where law firms and companies are concerned with withholding cash, funders were confident that the “TPF bubble” is not going to burst any time soon.

The Rise of Technology in International Arbitration

Moderated by Nigel Blackaby (Freshfields) the panel focused on what technology can and cannot do for different stakeholders in international arbitration with interventions from Isabel Yang (ArbiLex), Jonathan Hamilton (White and Case), and Claire Morel de Westgaver (Bryan Cave Leighton Paisner).

Technology as A Tool: Delivering a legal tech perspective, Ms. Yang indicated that artificial intelligence (“AI”) could be leveraged to predict outcomes. Notably, counsel can use data to complement their analysis in advocating arbitration disputes.

Opting for a balanced approach, Mr. Hamilton pointed out there is a role for technology, but it must be framed as a tool. Ms. Morel concurred that technology serves as a tool for counsel, adding that potentially the technology and AI can also have an impact on the decision. Mr. Hamilton agreed, pointing out that the war shack test of the arbitrator’s rationale, is now balanced with statistical information one can rely on.

Ms. Morel focused on predictive coding as a form of AI which identifies the documents sought through the use of an algorithm. Counsel could apply the algorithm and identify the best document to advise the client. The second way AI can impact the decision is where it will effectively accompany the assessment of evidence. Concerning the tools that are already available like predictive coding, there is at the moment a lack of regulation regarding what counsel can do, and how could it impact proceedings as to equality of arms between the party that uses AI and the one that does not.

Although witness and expert cross-examination remain difficult to undertake online, a post-pandemic world will likely conserve a hybrid “in person” – online nature, making virtual hearings a reality. The panel concluded that the rise of

technology in COVID19 irremediably implicates that “arbitrators are being forced into the 21st century”.

Technology as A Steppingstone for Young Practitioners: Ms. Morel mentioned in the breakout room discussions that tech will be a winning ticket for tech savvy young practitioners.

Relatedly, Pablo Mori (GST) moderated a panel targeting young practitioners. Claire-Naïla Damamme (White and Case) explained how to break and succeed in the field of arbitration. Enrique Molina (King and Spalding) elaborated on how to successfully second-chair an oral argument and a cross-examination. María Lucía Casas (Xstrategy) then shared on the opportunity to clerk for an arbitrator, an additional venue in the career path of young lawyers.

Finally, Daniela Paez (Herbert Smith Freehills) presented Kleros, a dispute resolution system based on Block Chain in which young practitioners could apply to serve as “adjudicators” of these peer-to-peer disputes, and give them the experience to serve as an arbitrator in the future.

Conclusion

To counter arbitration conference fatigue, WAW managed to scrutinize major developments in the field by a plethora of experts. The panels brought a nuanced view on the predicted wave of COVID-19 disputes, taking stock of past experience in ISDS factoring in the time lag and case-by-case nature of ad-hoc adjudication. Although it might be “too soon to tell” for actual COVID-19 arbitrations, the timeliness of the discussions allowed for panelists to highlight silver linings in arbitral proceedings. Those upsides included the availability of tools for remote legal work, increased flexibility with the advent of mass virtual hearings, exponential financing of claims, and opportunities for tech savviness.

The author of this blog and the WAW organizers thank Vienna Messina for her reporting.

Kluwer Arbitration Blog's full coverage of Washington Arbitration Week (WAW) is available [here](#).