Traversing Cyber, Indigenous, New Space, Mediation, and COVID-19 Disputes: The Schiefelbein Global Dispute Resolution Conference

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The Third Annual Schiefelbein Global Dispute Resolution Conference took place on Friday, January 15, 2021. The conference was hosted by the Lodestar Dispute Resolution Center at the Sandra Day O'Connor College of Law and generously supported by **Les and Linda Schiefelbein**. This post distills selected topics and highlights from the conference – including comments from keynote speaker, **Catherine Amirfar** and highlights from panels focusing on issues related to indigenous peoples, new space disputes, mediation, and disputes arising from COVID-19 related issues – and connects these contributions to broader discussions within the international arbitration field.

Catherine Amirfar delivered the Schiefelbein Global Dispute Resolution Lecture

entitled ***Going Virtual: Implications of the "New Age" of Cyber for International Disputes***. Ms. Amirfar remarked that we are now in a new cyber age where the global community is connected to both our work and home life through all of the digital devices connected via the internet. Virtual hearings are the new norm in international arbitration and, once we go back to some semblance of normalcy, virtual hearings will still play a large role in bringing down costs and reducing the environmental impact of international arbitration. For more on virtual hearings and arbitration's environmental impact, see also here, here, and here.

What can we do to ensure that we have cybersecurity that is as effective as possible to enable and support these advancements? Ms. Amirfar asserted that effective data protection plans require an assessment of the characteristics of the arbitration and the nature of the data that may be shared. She also mentioned that it is important that parties agree in advance – or as soon as possible at the outset of arbitration – regarding what to do in the event of a data breach, and that cybersecurity protocols should be regularly monitored for compliance. The ICCA Reports No. 6: ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020 Edition) and IBA Cyber Security Guidelines provide similar advice.

However, any system is only as secure as its weakest link, and we have repeatedly seen that the weakest link is often the human link. Therefore, it is important to train arbitrators, parties, and counsel regarding how to identify and avoid falling prey to such attacks to minimize the possibility of human error. No system is foolproof, but preventing human error may go a long way to securing international arbitration.

Despite the challenging and dangerous cybersecurity landscape, Ms. Amirfar remains optimistic. She said that institutions can come together and overcome collective action challenges if they can agree on an implementation mechanism that could become universal or at least lead to some unifying standards and procedures for how to maintain cybersecurity. This is crucial because, if the institutions are not secure, then it does not matter how careful the arbitrators, parties, and counsel are. It, therefore, falls upon arbitral institutions to lead in this regard.

Following the Keynote Speech, **Doreen Nanibaa McPaul**, Attorney General of the Navajo Nation, led a discussion on ***Indigenous International Dispute Resolution*** with expert panelists: **Ambassador Keith Harper** (Ret.), Partner at

Jenner & Block in Washington D.C.; **Stacy L. Leeds**, Foundation Professor of Law and Leadership at ASU Law; **Enrique Prieto-Rios**, Associate Professor with the Faculty of Law at Universidad del Rosario in Bogota, Colombia; and **Risa Schwartz**, International Lawyer based in Toronto, Canada.

Keith Harper focused on international tribunals and systems that do not consider the interests of indigenous communities, leading to a breakdown of legitimacy in the eyes of those communities. He asserted that, for indigenous communities, domestic mechanisms are often the best way to resolve their disputes. He also emphasized the importance of building institutional capacity within indigenous communities, noting that there are no fully effective international mechanisms to deal with the rights and needs of indigenous people.

Professor Enrique Prieto-Rios addressed the clash between effective protection of the rights of indigenous people and international investment law's focus on disputes between investors and states. He noted that there are a variety of situations in which indigenous peoples' rights were subjugated to the rights of the foreign investors because the states fear being sued in international tribunals. This 'regulatory chill' has resulted in the rights of indigenous peoples being further marginalized.

Risa Schwartz asserted that trading partners need to consider the governmental relationships that exist with indigenous peoples when engaging in treaty negotiations. She discussed the example of indigenous rights in New Zealand's Treaty of Waitangi, which has been interpreted in the modern era to require government consideration of the rights of the Maori people when negotiating trade and investment agreements. The United States, Canada, and Mexico Agreement (USMCA, the new NAFTA) also includes similar provisions such as the General Exception for Indigenous Rights in the USMCA with uncertain effectiveness. Ms. Schwartz concluded by noting that indigenous peoples' participation is the heart of the UN Declaration of the Rights of Indigenous peoples.

Professor Stacy Leeds noted that each indigenous nation has internal dispute resolution bodies that focus on peacemaking and holistic justice as well as sophisticated tribal courts that handle complex litigation and high stakes commercial disputes. She added that many tribes have international diplomacy built into their system of government and that there have been several nations and tribes that have been involved in renegotiable arbitration procedures called

‘joint panels.’ Professor Leeds concluded by stating that mechanisms and infrastructure must change to ensure that indigenous voices and people are represented in shaping the decision-making processes, and not just as parties. For more on indigenous peoples’ rights and international investment law, see here.

Arnold & Porter’s **Charles Blanchard** moderated a panel on ***New Space: Opportunities and Challenges***, including **Christopher T.W. Kunstadter**, Global Head of Space for AXA XL in New York City; **Caryn Schenewerk**, Vice President of Regulatory & Government Affairs at Relativity Space in Washington D.C.; and **Emilie Marley Siemssen**, Lead Legal & Space Regulatory Counsel and Launch Director for Denmark’s GomSpace.

Christopher Kunstadter began the panel by explaining how insurers view the ‘new space’ industry, which involves the evolution of constellations of satellites and new launch vehicles. His company views itself as positioned to reallocate risk and spread it across a constellation of satellites rather than focusing on individual satellites, and he noted that many clients do not see a need for space-specific insurance.

Caryn Schenewerk distinguished between the first-generation integrators that contracted with the government versus the second generation of building space launch vehicles in-house, and added that many of the more recent ‘new space’ companies are raising money like regular commercial ventures.

Emilie Marley Siemssen agreed that ‘new space’ is the move away from government control (like NASA) towards commercial actors and exploration. She added that international space legislation based on earlier UN treaties, such as the 1967 Outer Space Treaty, emphasizing peaceful engagement and other inter-state interactions seems obsolete when compared to the current iterations of private sector space technologies, which have far outpaced the speed of legislative innovation.

Finally, the panel considered what the ideal dispute resolution process should look like given the outdated international legal regime around space. Ms. Siemssen explained that there is no one size fits all dispute resolution regime for ‘new space’ and that there is an immense need for technical experts and market experts beyond generalist judges and arbitrators. Ms. Schenewerk added that arbitration clauses in cross-border ‘new space’ contracts and ‘new space’ insurance policies

are rarely invoked, however, because there are not very many disputes. For more on the resolution of 'new space' disputes, see here, here, and here.

The conference then turned to a panel titled ***Mediation the World Over***. **Wolf von Kumberg**, International Arbitrator and Mediator with The International Arbitration Centre, led panelists including **Karl Hennessee**, Senior Vice President of Litigation, Investigations & Regulatory Affairs for Airbus in Paris; **Christina Hioureas**, Partner and Chair of the United Nations Practice Group at Foley Hoag in New York; **Natalie Y. Morris-Sharma**, Government Legal Counsel at the Attorney General's Chambers in Singapore; and **Tim Schnabel**, Executive Director of the Uniform Law Commission in Chicago, Illinois.

Natalie Morris-Sharma began by noting that the Singapore Convention on Mediation provides harmonization where there were previously many different frameworks for enforcement of mediated settlement agreements and that this certainty and clear enforcement guidance is giving parties more confidence in mediation. **Tim Schnabel** added that, while enforcement of mediated settlements in court has not been a major hurdle, the Singapore Convention strives to adjust the incentive structure and encourage parties to choose the dispute resolution process.

Christina Hioureas stated that most of the international business agreements she sees do not contain a mediation clause. One of the challenges is the sunk cost of travel for a non-binding process – as opposed to the final and binding award that happens in arbitration – but that virtual mediation with proper cybersecurity protocols offers the potential to select the best mediator regardless of location and engage in the process with far lower sunk costs, which may encourage more parties to select mediation in this new era. For more on the Singapore Mediation Convention, see here, here, and here.

Lastly, panelists led by ASU Law Professor **Betsy Grey** tackled the timely topic of ***COVID-19 Class and Mass Disputes***. Panelists included: **Barbara J. Dawson**, Partner at Snell & Wilmer in Phoenix, Arizona; **Marek Krasula**, Director of Arbitration & ADR, North America, SICANA Inc. at the International Court of Arbitration in New York City; **Victoria Sahani**, Associate Dean of Faculty Development and Professor of Law at ASU Law; and **S.I. Strong**, Associate Professor from the University of Sydney Law School.

Professor S.I. Strong explained class arbitration and litigation and distinguished U.S.-style class actions from Canadian class and collective actions and Australian class and mass actions. She noted that many class and mass arbitration cases relating to COVID-19 are percolating but have not yet been filed, such as claims involving nursing homes and cruise ships. She also predicted, and other panelists agreed, that there will be investment arbitration claims arising from investors perceiving governmental pandemic regulations as infringing upon their investments in a way that may give rise to a claim of nationalization or a regulatory expropriation.

Marek Krasula discussed the view from inside the ICC International Court of Arbitration. The ICC saw 940 new cases in 2020, many of which related to COVID-19, as well as a record number of applications for emergency arbitrations. The industries in which these claims have arisen include leisure and entertainment, hotels, health and pharmaceuticals, membership fees, and insurance. The ICC has also handled mass claims, although not yet any relating directly to COVID-19.

Professor Victoria Sahani addressed the impact of third-party funding on COVID-19 class and mass disputes. She mentioned that the present-day third-party funding industry has its roots in insolvency funding and predicted that there are likely to be many funded insolvency-related disputes that arise due to the pandemic's economic toll. She also predicted that there will be mass claims related to pricing for commodities and intellectual property regarding medical equipment design patents (such as PPE).

Barbara Dawson provided a high-level explanation of the current trends in the United States regarding pandemic-related dispute resolution. She noted that parties have been pushing to resolve disputes outside of court, mediation has become much more popular, and that courts have transitioned to remote proceedings after previously halting altogether. She also provided eight areas in which she expects to see a rise in COVID-19 class and mass disputes: contract disputes, fraud claims, housing claims and debt collection, derivative and shareholder actions, employment disputes, bankruptcies, health and safety disputes, and government anti-corruption and anti-fraud enforcement actions. For more information on COVID-19 mass claims, see here and here.

Mr. Schiefelbein, in his closing remarks, recognized two exceptional ASU law students – **Olivia Stitz** and **Vanessa Kubota** – as recipients of the annual

Schiefelbein Global Dispute Resolution Scholarships; noted that the Conference keynote and panels discussed cutting edge issues from which the global dispute resolution community can draw lessons learned to apply in practice; and announced that the 2022 Schiefelbein Global Dispute Resolution Conference is scheduled for January 14, 2022.