

Kluwer Arbitration Blog

LIDW 2021: Corporate Counsel Roundtable on the Top Priorities when Navigating Global Disputes

Giammarco Rao (School of International Arbitration, Queen Mary University of London (QMUL)) · Thursday, May 13th, 2021

In line with LIDW's promise to deliver exceptional events focusing on international dispute resolution (and London) and give a voice to inhouse lawyers, its eleventh session – on 12 May 2021 – concentrated on [corporate counsel's priorities when navigating global disputes](#). Kai-Uwe Karl and Loukas Mistelis elegantly moderated the discussion. The speakers – Stephan Balthasar, Glenn Baumgarten, Teresa Garcia-Reyes, Alison Pearsall – brought to the table their views and practical insights on different topics. The discussion focused on litigation, arbitration, and mediation; how to streamline arbitration proceedings to reduce costs and delays; London as an arbitral seat, and whether Brexit might impact it.¹⁾

As a starting point, in a comparative fashion, the panel discussed the choice between arbitration and court proceedings. For example, Teresa Garcia-Reyes discussed arbitration proceedings' flexibility and predictability. In terms of flexibility, she referred to the parties' ability to agree on procedural aspects – the confidential character of the proceedings being a good case on point. Concerning predictability, she mentioned the possibility of using known procedures, which leads to predictable results.

Stephan Balthasar focused on what disputes might be more suitable for arbitration than court proceedings. For example, court proceedings might be more suitable for small and less complex disputes, while more complex and bigger cases might require arbitration and the expertise arbitrators bring about. He also noted that in some instances, when drafting contracts, arbitration may be the only common denominator between the parties, who are willing to avoid their respective national courts. Similarly, Alison Pearsall mentioned that parties consider whether arbitration proceedings might be the best option for any potential future disputes at the time of drafting contracts – with the important insight that most contracts are drafted by business teams and not by in-house dispute lawyers. The possibility of selecting arbitrators with expertise in certain industries would very much weigh in favour of arbitration.

The discussion then moved to the role of mediation in the context of arbitration and why, notwithstanding the confidentiality of mediation proceedings, it appears a great deal of work needs to be done further to promote mediation for the settlement of business disputes. The panel considered whether mediation is only a formal step and when parties should use it. In answering these questions, Glenn Baumgarten suggested that measuring the success of mediation is not an easy task and that the success of a mediation might at times occur at a later stage of the

proceedings. Indeed, attempts to mediate disputes early in the process might prove very useful at a later stage. However, this is a result, which is not in line with the need of settling disputes efficiently. Further, he touched upon advocacy in mediations and briefly considered how to incentivise external counsel to conduct mediation successfully.

Picking up on this point, Alison Pearsall discussed whether in-house counsel would need external counsel to mediate; mediation, indeed, does represent the last opportunity for business teams to retain any control over the negotiations and the dispute. Further, she touched upon a further practical point: negotiating proposals with external counsel on their involvement in mediations. A thorough case analysis at the beginning of the dispute is necessary to understand the goal of the business. If the objective is to settle, then providing an uplift for external counsel to conduct mediation within a certain period might be the key to incentivising external counsel. More in general on the use of mediation, Stephan Balthasar pointed out that complex multitier clauses providing mediation are not necessarily the solution and, in fact, might derail the arbitration proceedings. Also, Teresa Garcia-Reyes stressed the importance of lawyers focusing on mediation at the training stage.

Then, the panel discussed whether there is a need to streamline and standardise arbitration proceedings. The speakers answered this question in the affirmative. They all agree on the possibility for arbitral institutions or other organisations to provide a standardised procedural order no 1. Such a solution might offer parties a baseline. For example, Teresa Garcia-Reyes pointed out that such a solution might help bridge the differences between common law and civil law approaches. Although experienced arbitrators might have procedural orders templates, more in general – as noted by Kai-Uwe Karl – such a practice might serve as a helpful starting point to streamline the proceedings, reducing time and costs. Perhaps more importantly, it would help when parties are not familiar with arbitration proceedings. Furthermore, in answering a question from the audience, the speakers agree that inclusion of the possibility of mediating during arbitration proceedings in procedural order no 1 might be a good idea – along the line of the practice before English courts. Loukas Mistelis also noted that standardisation would be a baseline and would not limit the capacity of parties and arbitrators to develop bespoke proceedings, where necessary. Standardisation is a move to more efficiency and transnationalisation of arbitration.

A final point which the panel touched upon was the relevance of London as a seat for arbitration proceedings and whether Brexit will impact it. In line with the findings of the recently published [Queen Mary University's International Arbitration Survey](#), they confirmed that companies do consider London as one of the main seats for arbitration proceedings. If any, Brexit might improve its relevance in this sense. For example, Glenn Baumgarten noted that Brexit might increase the perception of London as a neutral seat. Stephan Balthasar echoed this point by noting, for example, that parties will not be able to allege breaches of European law in their attempts to set aside arbitral awards before English courts. However, he pointed out that, in general, the selection of the seat of arbitration depends on different factors; for example, one approach might be to look at the [rule of law index](#) and select a jurisdiction rather than aprioristically choosing a seat. Even under such standards, London would look very attractive to most parties. Finally, it was noted that given the competitiveness of the dispute resolution market, it is important for London to continue to innovate and remain competitive.

The programme of LIDW is available [here](#), and some sessions are [free of charge](#).

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green, and the Wolters Kluwer logo is located in the bottom left corner.

References

- ?1 There was another session focusing on the relationship of the in-house lawyer with external counsel and several other sessions also had in-house lawyers as speakers.

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