Kluwer Arbitration Blog

Latest Arbitration Trends and the New ICDR International Dispute Resolution Procedures: Highlights from the BIAC – ICDR Conference

Andra Curutiu · Wednesday, November 24th, 2021

On 20 October 2021, the Bucharest International Arbitration Court ("BIAC") and the American Arbitration Association – International Centre for Dispute Resolution ("ICDR") held a conference on the latest arbitration trends and the new ICDR International Dispute Resolution Procedures ("Conference").

The Conference kicked off with a welcome speech by Annet van Hooft (FCIArb, BIAC Honorary President, Founding Partner, van Hooft Legal) who gave a brief introduction of the organizers and the panelists. Mrs. van Hooft then gave the floor to Daniel F. Vi?oiu (FCIArb, BIAC General Secretary, Founding Partner, Vi?oiu Law Firm), who was the moderator of the event.

The Conference was divided into three sessions: (a) the advantages of stipulating arbitration in M&A and VC/PE investments definitive agreements; (b) the necessity to include arbitration in infrastructure construction agreements; and (c) recent changes to the ICDR's new International Dispute Resolution Procedures, which came into effect on 1 March 2021. This post highlights the key takeaways from the three panels.

Arbitration in M&A and VC/PE agreements: Why is this a good idea?

The first panel of the day delved into a discussion regarding the advantages of stipulating arbitration in M&A, Venture Capital/Private Equity (VC/PE) investments definitive agreements. The panel was composed of:

- **Vlad Peligrad**, Managing Partner, *KPMG Legal (Romania)*
- **Alexandru St?nescu**, Partner, *SLV Legal* / President, *Club Español del Arbitraje (Romania Chapter)*
- **András Dániel László**, Partner, *LFB László Fekete Bagaméry (Hungary)*
- **Cristina D?ianu**, Partner, *Dentons (Romania)* / Vice President, *The Court of Arbitration of the Romanian-German Chamber of Industry and Commerce*

Mr. Peligrad started the discussion by analyzing the essential elements of an arbitration agreement. He emphasized the importance of including broad language of the arbitration agreements in order

to ensure that non-contractual disputes are covered as well. Mr. Peligrad then yielded the discussion to Mrs. D?ianu who offered some ‘DOs’ and ‘DON’Ts’ in the drafting of an arbitration agreement. In particular, she underlined that the agreement should be as clear as possible, and not offer alternative jurisdiction to the courts or other arbitration tribunals. In addition, Mrs. D?ianu advised that dispute resolution lawyers should always be involved in the drafting of arbitration agreements. She further noted that standard institutional arbitration clauses should be included if the parties are not familiar with arbitration.

Mr. Vi?oiu then moved the conversation to arbitration and M&A transactions. Mrs. D?ianu first discussed the key issues that may be the subject matter of a dispute with respect to the different stages of an M&A transaction: pre-signing (confidentiality, exclusivity); share purchase agreement (representation, warranties, indemnities, non-compete clauses); post-closing (shareholders agreement). In connection with the pre-signing stage of an M&A transaction, Mr. St?nescu recommended that parties always insert an arbitration clause, including in letters of intent or memorandums of understanding. There are some binding clauses in such types of documents, such as confidentiality undertakings or certain limited intellectual property to be disclosed, which would continue to remain in effect even if the transaction would not be concluded. Likewise, Mr. St?nescu recommended that it is important to contemplate inserting an arbitration clause in the early stages of a VC transaction, given the more informal nature of such types of transactions. Finally, it was noted that VC transactions are very likely to be arbitrable as they have been appearing more frequently on the Romanian market. The discussion was continued by Mr. St?nescu, who offered a particular example of a type of VC investment instrument, that is the use of convertible notes. The assumption with respect to the use of convertible notes is that the value of start-ups is not known during the initial stage and will continue to develop and grow indefinitely until the next stage of investment (i.e., Series A) when the determination of the value of the business will be possible; however, the use of convertible notes is advantageous as continued growth may not always be the case, thus investors include liquidation and anti-dilution clauses in order to be compensated in case of potential bankruptcy.

The third point of discussion raised by Mr. Vi?oiu was the cost of arbitration. Contrary to the assumption that arbitration is more expensive than litigation, Mr. László explained that the procedural costs involved in arbitration may in fact be lower due to the reduced number of or lack of formal hearings, or other procedural matters agreed upon at the case conference hearing. In addition, Mr. Peligrad noted that when analyzing the overall costs of arbitration, one must give due regard to the added-value of an arbitration procedure. Confidentiality, the arbitrators’ expertise, and party autonomy weigh against any perceived or actual higher monetary costs.

The final discussions of the panel were addressed by Mr. László, who covered the interplay between civil and common law in international arbitration. In particular, certain contractual practices and clauses have emerged in common law countries, although they may not exist in all traditional civil law jurisdictions. As such, when deciding upon sophisticated contractual issues, experienced arbitrators are better prepared to find a more efficient solution than judges of national courts, given their more frequent exposure to these matters.

Infrastructure construction agreements: Arbitration increases the chances of successful projects?

The second panel primarily addressed the necessity to stipulate arbitration in infrastructure construction agreements. The panelists were:

- **Ioana Knoll-Tudor,** Partner, *Jeantet (France, Hungary, Spain)* / Vice-President, *Club Español del Arbitraje (Romania Chapter)*
- **Jay Range,** Partner, *Hunton Andrews Kurth LLP (U.S.A.)* / Chair, *ABA Section of Infrastructure and Regulated Industries Alternative Dispute Resolution Committee*
- **Adrian Iordache,** FCIArb, Partner, *Consortium Legal (UK, Romania)*
- **Wojciech Sadowski,** Partner, *Queritius (Poland)*

The first question addressed by Mr. Vi?oiu was whether foreign investors insist on arbitration as a dispute resolution method. Mr. Range opened the discussion by addressing the interplay between national courts and arbitral tribunals, and the recent discussions in the U.S. with regard to the application of Section 1782 to international arbitration procedures. He also emphasized that the decision also depends on the possible existence of external funding from financial institutions. Dr. Knoll-Tudor added that foreign investors would most likely prefer to have a choice as to the drafting of their dispute resolution clause, but that is not always the case, especially in public procurement procedures. States usually have model contracts that they present to investors and some of them include dispute resolution clauses referring to national courts or to specific arbitral institutions.

The second topic for discussion concerned how parties can make use of Dispute Avoidance/Adjudication Boards ("DAB" or "DABs") to ensure they achieve their purpose in streamlining the dispute resolution process. Dr. Knoll-Tudor mentioned that the first step is to check whether the contract contains a DAB reference; and if it does, the DAB should be constituted immediately, instead of waiting for a dispute to arise. Mr. Sadowski pointed out the CEE dispute resolution culture, and also the fact that parties do not always consider the DAB decision as binding. Finally, Mr. Iordache discussed the importance of DABs in providing certain expectations to the parties with regard to future expert determination in full-fledged arbitration or court proceedings.

Mr. Vi?oiu then turned the conversation to the necessity of customization. Mr. Range opined that customization should be necessary particularly because infrastructure contracts generally involve multiple parties and the dispute resolution clause should be adapted in order to empower arbitrators to consolidate any potential disputes. Dr. Knoll-Tudor further emphasized the importance of customizing pre-arbitral dispute resolution mechanisms and making them less sophisticated than those stipulated in FIDIC contracts. Mr. Sadowski agreed that customization may be efficient, but he argued that it should only happen when the dispute is complex enough to justify the legal costs involved in customization.

The panel discussions were concluded with Mr. Iordache's comments on the Romanian legislation which, on the one hand, mandates arbitration in public procurement contracts, but also limits the reference to a stipulated institution and does not allow negotiation of any other term of the arbitration clause. Mr. Iordache emphasized that foreign investors are reluctant to agree to such a limitation mainly out of a concern for neutrality of the dispute resolution mechanism, especially for first-time investors in the region dealing with state entities. For this reason, in order to promote and attract investment, it is advisable to allow the parties to adapt their dispute resolution clause to international best practices and negotiate and agree terms appropriate to the contract, including by way of the place of arbitration, institution or other specific rules of procedure.

The ICDR updates its international best-practices rules

The last panel presented the recent changes to the ICDR's Dispute Resolution Procedures which became effective on 1 March 2021 ("Rules"). The changes aim to further enhance the efficiency of ICDR proceedings. The panelists were:

- **Luis M. Martinez**, Vice-President, *American Arbitration Association – International Centre for Dispute Resolution (AAA-ICDR)*
- **Rafael Carlos del Rosal Carmona**, Director, *American Arbitration Association – International Centre for Dispute Resolution (AAA-ICDR)*
- **Yanett Quiroz**, Director, *American Arbitration Association – International Centre for Dispute Resolution (AAA-ICDR)*

The 2021 revision reflects the commitment to greater transparency so that every administrative step is prescribed by the Rules. For example, Mr. Martinez explained that the new Rules enshrine the procedure to be followed in arbitrator challenge procedures. In addition, the current Rules give special attention to the pre-arbitral procedure. In this sense, there was an update in the international mediation procedures, and international arbitration as well as mediation best practices were incorporated. Ms. Quiroz mentioned that the current Rules provide a detailed description of the mediation procedure administered by ICDR and that they also refer to the enforcement mechanism established under the Singapore Convention. Lastly, the revision aims to improve economic efficiency in order to reduce the duration and costs of ICDR procedures. In terms of technological advances, Mr. Carmona pointed out that the ICDR has implemented extensive cybersecurity measures and has established cybersecurity training programs available to all of the AAA-ICDR's arbitrators.

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