Kluwer Arbitration Blog

II Oxford Symposium on Comparative International Commercial Arbitration

João Ilhão Moreira (University of Macau) · Friday, November 3rd, 2017

On 20th November 2017, the II Oxford Symposium on Comparative International Commercial Arbitration will take place at Wolfson College – University of Oxford.

This conference brings together specialists from the Americas and Europe to discuss key issues in international commercial arbitration from a comparative perspective. This year we again have a particularly strong set of speakers.

After the welcome address delivered by Professor Louise Gullifer (Commercial Law Centre) and André Luís Monteiro (Andrade & Fichtner), the conference will start with the keynote speech from the Right Honourable Lord Saville of Newdigate PC QC, who was responsible for drafting the English Arbitration Act 1996 (Act), and sat as Justice of the UK Supreme Court. Lord Saville will discuss the relevance and appropriateness of the Act today, more than 20 years after its inception.

The conference will then discuss pathological arbitration clauses. Michael Tselentis QC (20 Essex Street), Ana Serra e Moura (ICC), Charlotta Falkman (SCC) and Carlos Forbes (CCBC) will explain how the institutions and courts interpret these clauses, under the guidance of panel chair Felipe V. Sperandio (Clyde & Co).

Omissions and drafting errors in arbitral clauses can be a cardinal sin in arbitration. In these cases, how should arbitrators deal with these problems? Do arbitral tribunals have the power to delete, replace or modify wrong words written by the parties, following previous judicial decisions (Lucky-Goldstar v. Ng Moo; Travelport v. Bellview; Deko v. Dingler) and arbitral decisions (ICC 6709; ICC 10097; ICC 7920; ICC 6000; ICC 9473)? Do arbitral institutions have the same power? How far can arbitrators and arbitral institutions go in giving effect to pathological arbitration clauses? Consider, for example, an arbitration agreement that uses the ambiguous expression “London Court of the International Chamber of Commerce”. How should LCIA and ICC handle this arbitration clause? What happens if both institutions understand they have power over the dispute? These are some of the issues that will be addressed by the panellists.

The second panel will debate the contrasting views on the degree of disclosure to be undertaken by arbitrators. It will focus on the impact of this issue on the setting-aside and recognition proceedings. The panel is comprised of Professor Catherine A. Rogers (UPenn and Arbitrator Intelligence), Professor Carlos Alberto Carmona (USP), Pedro Metello de Nápoles (PLMJ), José Antonio Fichtner (Andrade & Fichtner); and directed by Gloria Alvarez (University of Aberdeen).

The duty of disclosure is recognized as a fundamental principle of international commercial arbitration. Nevertheless, to which extent does this principle applies is required is a complex issue. Is there an international standard for disclosing? Should arbitrators reveal all the facts that link themselves to the parties and the case (full disclosure)? By adopting this standard, is there a risk of over disclosure and, consequently, of frivolous challenges to arbitrators? In other words, is there the risk that some irrelevant facts that were not disclosed, end up being used by the losing party to set aside the arbitral award? Is the arbitrator's failure to disclose per se grounds for annulling the award? Do parties' counsel have a duty to supplement the disclosures with research into publicly available materials? If they do not fulfil this obligation, does this failure impact on their right to challenge the arbitral award? The speakers will support a variety of points of view.

In the afternoon, the conference will discuss whether arbitral tribunals are bound by court precedents in international commercial arbitration, and whether the "arbitral precedents order" is on the rise. A panel composed of Teresa Arruda Alvim (PUC/SP), Peter Hirst (Clyde & Co), Paula Costa e Silva (Universidade de Lisboa) and Christopher Harris (3VB) will be led by Victoria Narancio (WilmerHale).

Except where parties have agreed to arbitration *ex aequo et bono*, arbitral tribunals must decide cases by applying the law chosen by the parties. In doing so, arbitrators should give the same weight and legal effect to previous judicial decisions. Taking a philosophical approach, arbitral awards should apply judicial precedent because they also constitute law. In addition, applying judicial precedents, arbitration may provide predictable results to the parties. If arbitrators do not apply judicial precedents, can arbitration turn into an "outlaw land"? From another perspective, however, the question is: should an arbitral award be set aside because it did not follow a judicial precedent? Regarding the role of arbitral decisions, rather than judicial decisions, can an arbitral award be a precedent? Is the answer the same when we are thinking of sports arbitrations, domain arbitrations and investment treaty arbitrations instead of commercial arbitrations? Shall such "arbitral precedents" be followed in future arbitrations? Are they also binding for judicial courts? Or is it just a one-way street (judicial-arbitral, but not arbitral-judicial)? These complex issues will be discussed by the speakers.

Following this, João Ilhão Moreira (University of Oxford) will chair a panel composed of Horst Eidenmüller (University of Oxford), Giovanni Ettore Nanni (CBAr), Chris Parker (Herbert Smith Freehills) and Andreas von Goldbeck (University of Oxford) on whether and how arbitrators should sanction parties and counsel who breach accepted rules of behaviour during arbitral proceedings.

All parties in arbitration must observe the highest standards of good-faith and fairness in relation of the arbitrators and the counterparty. This obligation derives from the implied promise not to frustrate mutual expectations. Sometimes, however, arbitrators are faced with guerrilla tactics and need to take measures to keep the proceedings under their control. In these situations, it is worth understanding if arbitrators have the power to sanction parties for misconduct. Is it an "inherent power" that permits an arbitral tribunal to sanction a party even in the absence of a provision in the arbitration agreement or arbitration rules? What role does the law of the seat of arbitration play in this matter? When the applicable law applicable law admits this power in general terms (v.g..: Hong Kong, England, France, and Brazil), which measures can be adopted by the arbitral tribunal to sanction party misconduct – adverse inferences, exclusion of evidence, monetary sanctions, costs allocation? Can the arbitrators impose sanctions on the parties' counsel as well? Were the decisions reached in the cases of ReliaStar v. EMC; Hrvatska v Republic of Slovenia; Superadio v.

Winstar; Metropolitan v. Connecticut; Re Interchem v. Oceana correct? This panel will explore these questions in detail.

The last panel of the day will take the conference to one of the hottest topics in arbitration today. In September 2017, the ICCA-QMUL Task Force on Third-Party Funding released its draft report for comments. Since then, a few of the players in the market have their disagreement with the report's findings. Steven Friel (Woodsford Litigation Funding), Leonardo Viveiros (Leste Litigation Finance), Diego Saco (Lex Finance Arbitration Financing) and Duarte Henriques (ICCA-QMUL Task Force on Third-Party Funding and BCH) will discuss the draft report, in a panel led by Napoleão Casado Filho (Clasen, Caribé & Casado Filho).

Third-party funding is a reality in both the judicial and arbitration fields. However, there are a few countries in which maintenance and champerty are prohibited by law (Ireland, for example). In these cases, is third-party funding allowed? If not, is there a risk of the enforcement of the arbitral award be denied if the winning party had the support of a third-party funder? Regarding the conflicts of interest, should a party disclose the existence of a third-party funder? Is this a mandatory and general rule, applicable for all cases? In doing so, should the party also reveal the terms of the funding arrangement to the arbitrators, or just the identity of the funder? In the absence of this disclosure, do the arbitrators have the power to expressly request that the parties disclose whether they are receiving third-party support? Can this order be issued directly against the funder? If these facts have not been revealed during the arbitral process, can unknown conflicts of interest be a basis for an effective challenge to an arbitrator or an arbitral award? Should all kinds of third-party funding (single-case funding v. pool of cases involving the same party and funder) be given the same treatment? These are just some of the issues that will be addressed by the panellists.

Justice Luiz Fux from the Brazilian Supreme Court will be the keynote speaker closing the conference. Justice Fux will deliver a speech on the continuing necessity to improve the relationships between courts and arbitrators towards the development of a secure and stable business environment.

This conference is co-hosted by the Commercial Law Centre at Harris Manchester College (University of Oxford) and the Oxford University Brazilian Society. The event is sponsored by Center for Arbitration and Mediation of the Chamber of Commerce Brazil Canada, Andrade & Fichtner Advogados, White & Case LLP, Leste Litigation Finance, Lex Finance Arbitration Financing, L.O. Baptista Advogados, Fux Advogados and Lex Anglo-Brasil. A post will follow on this blog with a summary of the discussions.

Registration for the event can be done at: https://billetto.co.uk/e/ii-oxford-symposium-on-comparative-international-commercial-arbitration-tickets-221136

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