Kluwer Arbitration Blog

ICCA Sydney: New Voices

Jonathan Mackojc (Corrs Chambers Westgarth) · Thursday, April 19th, 2018 · Young ICCA

The afternoon session of the second day of the ICCA Sydney 2018 Conference on "New Voices" was moderated by *Monty Taylor* and had the insightful contributions of *Jawad Ahmad*, *Lucas Bastin*, *Samantha Lord Hill* and *Solomon Ebere*.

Monty Taylor opened the session by noting that not only was this a new initiative for ICCA, but that panellists were selected following a public call for paper abstracts and a rigorous selection process.

Arbitration in conflict and post-conflict zones

Samantha Lord Hill immediately set the scene for a topic that is often overlooked, but highly relevant considering recent geopolitical tensions and conflicts. Samantha Lord Hill noted that there have been over 20 armed conflicts in recent years, many giving rise to lucrative investment opportunities for foreign investors, and noted the World Bank's commitment of over US$4 billion to restore Iraq. Samantha Lord Hill cautioned legal professionals that timely advice regarding project opportunities for interested investors is not enough; such advice must outline potential disputes and provide guidance on relevant risk assessment and management within these regions of instability. Delegates were provided with an overview of three key risks:

1. A poorly drafted dispute resolution clause – a clause must be correct from the start, with an appropriately selected institution and seat. A fundamental risk is where an institution ceases to operate, or where local judges and lawyers flee the area due to fear of persecution. To avoid this, the designated seat must always be outside the conflict zone.

2. Party non-participation – where the respondent is unable to, or chooses not to, participate in the arbitration. This is less of a concern if it occurs at the beginning of proceedings, but difficult to manage later in the process. Although the tribunal has inherent power to continue with the arbitration, it is important that the non-participating party is still given the opportunity to re-engage, by continuing to copy them into communications. Such an approach will reduce the risk of a challenge or a refusal to enforce the award.

3. Lack of documentary evidence – evidence is often seized or destroyed and access to project areas is limited or restricted. Risks involve parties being unable to produce sufficient supporting documents to prove their own case, or an inability to comply with disclosure obligations. The solution is to ensure that a proper document management process exists, and to store documents outside of the jurisdiction facing conflict.

Fresh approaches to briefing damages in investment arbitration

Jawad Ahmad commenced with an interesting observation – we are preoccupied with issues relating to investment arbitration, such as legitimacy concerns and areas of reform, to the extent that we often forget what it is all about – money. It was also stressed that despite the importance of compensation, lawyers and academics regard quantum as the 'poor cousin', when compared to merits or claims.

Jawad Ahmad briefly discussed two significant points:
• date of breach affects the availability of the contributory fault analysis or the mitigation analysis as defences pleaded by the respondent; and
• depending on which analysis is used, economic consequences will be vast.

Contributory fault and mitigation analyses both focus on the investor's conduct but have different economic consequences. Contributory fault discounts are expressed in the form of percentages ranging from 25 % to 50 % of the total value of damages available to the investor. Mitigation analysis, however, produces discounts that are 'hard numbers' of a financial gain acquired—or not acquired—with respect to an identified activity. There is thus less discretion involved in the mitigation analysis.

Contributory fault analysis takes place prior to the date of the breach. Mitigation analysis, however, is carried out after the date of the breach. The date of breach is not, however, always clear. It will depend upon the primary obligation at issue and the factual circumstances of the case. For example, in 'creeping' expropriation cases any series of measures could be conceivably the date of the breach. Therefore, if the date of breach is undetermined then investor's conduct could be analyzed through the lens of either contributory fault or mitigation.

Jawad's presentation highlighted the importance of determining the date of breach at an early stage of one's case as it affects both liability and quantum.

Emergence of sovereign wealth funds as active players

Solomon Ebere presented his topic in three key parts – a background on sovereign wealth funds (SWFs), references to several cases involving SWFs, and technical issues in the context of investment treaty arbitration.

Solomon Ebere indicated that SWFs are regulated according to the Santiago Principles – a framework of generally accepted principles and practices that relate to governance and accountability. It was noted that SWFs have, in recent years, attracted significant criticism whereby it is argued that they operate as investment vehicles fostering geopolitical, rather than commercial, interests. Solomon Ebere noted that SWFs can broadly be categorised according to three waves:

1. born in the 1970s, in the Gulf countries;
2. the China and Russia phase; and
3. more recently, born in emerging markets.

As SWFs are significant investors, they are a natural candidate for new commercial and investment arbitrations. Most cases involving SWFs are largely related to the 2008 Financial Crisis, or from high-level corruption scandals. Technical issues that were discussed involved jurisdiction, whether

the definition of ‘investor’ includes an SWF and whether their actions may be regarded as an ‘investment’, under BITs and the ICSID convention.

In response to a question from the panel, Solomon Ebere noted that in many BITs, the definition of ‘investor’ encompasses SWFs, but others still require clarification. Amendments to investment agreements will likely occur once countries notice more claims coming from SWFs.

Inter-generational blame and praise in investment arbitration

Lucas Bastin surveyed a group of emerging arbitration practitioners under the age of 40, predominantly practising in investor state dispute settlement (ISDS). These interviews generated a report card on perceptions of experienced practitioners.

A recurring issue, which forced Lucas Bastin to revise the scope of his paper, was the concern that ISDS allowed for personal preferences and biases to permeate the practice, which ultimately affect the decision. Those in a position of influence were seen to be caught up in ‘decision-making individuality’, which questions the legitimacy of ISDS. A key concern was that not only does this diminish integrity and impartiality among legal practitioners, but that one must create a brand in order to be recognised and selected as an arbitrator.

In response to a question regarding solutions, Lucas Bastin noted that one (more extreme) response suggested that an overall cap be placed on the number of ISDS appointments.

Lucas Bastin acknowledged that previous generations have worked tirelessly to build and develop ISDS, and the speed of development has not been mirrored in other international legal practices. The emerging generation means no disrespect, but asks that we regulate the role of the individual in ISDS.

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