Kluwer Arbitration Blog

X CAI Costa Rica 2019: Developments and Challenges in International Arbitration

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The X CAI Costa Rica held by the Costa Rican Chapter of the ICC and its Arbitration Commission, took place in San Jose, Costa Rica between February 24 and 27, 2019. Ten years have led to its consolidation as one of the most important ICC events in the region. This year's intensive program included several academic panels and practical workshops, as well as a meeting of young arbitrators ICC-YAF. The event brought together more than 50 high-level speakers from the U.S. and other countries in Latin America and Europe.

Insights on the Topics Discussed

Making a tight summary of the issues discussed, the Congress began with references to what has happened in the last 10 years in international arbitration, in general, and in some Latin American countries, in particular, such as changes in some legislations confirming the tendency to continue adopting the UNCITRAL Model Law in a greater number of countries. It was also mentioned the amendment of some arbitration rules, or proposals from associations linked to arbitration such as the Club Español del Arbitraje (Spanish Arbitration Club, "CEA" for its initials in Spanish), as for example the CEA Code of Good Practice for Arbitration and the CEA Code for Good Practice for Mediation. The amendment of the Spanish Arbitration Law in 2011 was also commented, which allows the arbitrability of intra-companies disputes, better known as statutory or corporate arbitration.

It was also highlighted that according to the results of recent reports such as the Queen Mary University survey, arbitration remains the preferred method for resolving international disputes. The main reason for this preference continues to be the final nature of the awards, and how easy it is to enforce them in most countries of the world thanks to the New York Convention ("NYC"), on which an entire panel focused on. Among other things, the speakers discussed some practical problems at the time of requesting the recognition and enforcement of an award, the effects of applications for annulment that have not yet been settled, or what happens when an award is vacated at the seat of the arbitration. The future of the NYC was not out of the discussions either.

Recent reports and surveys also showed that the ICC continues to be the preferred institution in the world to administer cases of international arbitration, and currently has offices in New York, Hong Kong and Brazil, from which –and not exclusively from Paris– the institution is able to administer arbitration procedures. Among the initiatives of the ICC are its efforts to reduce the time and cost of arbitration proceedings by the introduction of the expedited procedure in the latest amendment

of the ICC Rules of Arbitration. The advantages and disadvantages of that Fast Track arbitration were discussed in one of the panels because, although brevity is very well received, it entails some procedural issues and concerns about due process when certain procedural acts such as the Terms of Reference or a hearing are excluded.

The speakers also mentioned the constant attacks against arbitration, which have focused more on investment arbitration where the issuance of inconsistent awards is criticized due to inadequate or contradictory reasoning. Both international commercial arbitration and investment arbitration continue to be criticized for their high costs, which is attributed –among other reasons– to high attorneys' fees or complex document production that extend the lifespan of the proceedings. However, criticisms have been much greater in investment arbitration than in commercial arbitration.

The discussions from Europe on the proposal to create a Multilateral Investment Court, or the possible ban of arbitrations based on intra-European bilateral investment treaties –following the Achmea case– were not ignored. It was clarified, however, that this last view would not affect the arbitrations based on the Energy Charter Treaty. It was also said that it is possible to see in the near future the use of financial vehicles through Switzerland or the United Kingdom post-Brexit, to continue using investment arbitration in intra-Europe disputes.

One of the panels dealt with the differences between common law and civil law, as well as, the influence of both systems in the practice of international arbitration. In this and other panels, the recent Prague Rules were mentioned, comparing them with the IBA Rules on the Taking of Evidence in International Arbitration. The comparison was mainly focused on the document production stage in arbitration proceedings –a topic on which there are very different approaches from both legal systems–, and the proactive role that the Prague Rules propose for the arbitral tribunal, granting broad powers to the arbitrators. It was pointed out that this latter could be a problem to enforce an arbitral award in some countries. Among the interesting things that were mentioned about the new Prague Rules, was that these have been described as "reactionary" by many common law practitioners, but surprisingly, they have also received a lot of criticism from civil law practitioners, even if the latter are its main target.

Another subject that was discussed was the different approaches of the above-mentioned legal systems on the value of documents and witnesses statements, since the former tend to be more valued in civil law systems and the latter tend to be preferred in common law systems. This different point of view can explain the importance and high value that common law practitioners give to the examination of witnesses and experts through cross-examination, not only in state courts but also in arbitration.

Another interesting topic that was discussed was the issue related to multi-party arbitrations and the possibility of incorporating into an arbitral proceeding non-signatories of the arbitration agreement. It was commented that this topic has been expressly regulated so far only in the Peruvian legislation, where it is required that the non-signatory has had an active participation in the negotiation, execution, performance or termination of the relevant contract.

Some Challenges to International Arbitration

It is expected that arbitration will continue to grow in many sectors, in which disputes were previously litigated before state courts, as has been happening in areas such as construction,

energy, finance, technology and others. As good news, it was highlighted that arbitration has grown not only because of a greater number of cases, but also because of the nationalities of the parties and arbitrators, and in general it has grown in diversity, and the greater challenge is that diversity and inclusion continue to grow. It is foreseeable that the growth of arbitration will continue as long as it is able to evolve and adapt to the needs of its users, who increasingly demand a greater reduction of time and cost.

Consensus was reached on that it is necessary to continue encouraging and promoting arbitral culture, for which the convenience and importance of understanding technology –which is not an option, but something mandatory nowadays – and learning to work with it was highlighted. The speakers referred to the multiple challenges in this subject, and also mentioned many times terms such as “digital assets”, “databases”, “encrypted documents”, “clouds”, “cyber security”, “blockchain”, “arbitrator intelligence”, and many others.

The importance of continuing to adopt best practices in international arbitration was also highlighted. These best practices could come from both common law and civil law, whose differences tend to be reduced and harmonized when incorporated into arbitration. Each arbitration is different and it is influenced by many factors such as the nationality of the parties, their counsel’s and the arbitrators’, or the law applicable to the merits of the dispute. However, beyond these differences and the particularities of each case, the importance of avoiding assuming biased positions was emphasized, always having in mind the reduction of costs and time for the benefit of arbitration users. It must then be understood, what generates real value for the client.

Finally, it was mentioned that, only to the extent that the challenges to arbitration are understood and solved by arbitration practitioners, the myth that arbitration only works for large cases may be destroyed. The goal seems viable in international commercial arbitration, as has been happening in domestic arbitration in some countries that have knocked down that myth, such as Peru, where domestic arbitration has become the rule and important disputes are no longer discussed in state courts but in the arbitral jurisdiction.

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