Kluwer Arbitration Blog

LIDW 2019: International Commercial Arbitration and Gala Dinner, 9 May 2019

Crina Baltag (Managing Editor) (Stockholm University) · Friday, May 10th, 2019

London International Disputes Week continued yesterday with the session dedicated to international commercial arbitration, hosted by Herbert Smith Freehills LLP.

The first panel, moderated by Chantal-Aimée Doerries QC, Atkin Chambers, discussed the future of international arbitration in London, and in particular what London offers and where it must improve in order to maintain its place as leading seat of arbitration.

Ania Farren, Vannin Capital, highlighted that from the perspective of arbitration costs, parties appreciate that the English law embodies the rule that costs follow the event (or loser pays). Further, Ania Farren referred to the role of third-party funding in international arbitration and the fact that London is a sophisticated place, not only accepting, but also encouraging funding in arbitration proceedings. Ania emphasised the support given by the English courts in the development of the funding practice, as well as the fact that third-party funders in London have managed a way to self-regulate and to ensure that high standards are followed.

Jacomijn van Haersolte-van Hof, LCIA, noted, also related to the costs of arbitration, that LCIA sees the need of more transparency when it comes to the time spent by arbitrators in a case, given that some institutions, including LCIA, work with hourly based fees for arbitrators.

Noradèle Radjai, Lalive, commented on one of the key themes of the arbitration panels of previous days, namely the “English way” of conducting arbitration. Noradèle explained that one should consider whether we are in fact in the presence of a protracted procedure, with long hearings and even longer document production phase. In this sense, the reaction should be “why doing it this way?” and proceed to considering other procedures. Ania Farren replied to this and suggested that the real question stakeholders should focus on is how to make arbitration going forward in an efficient manner.

Moving to the issue of Brexit, Mark Ferguson, Mylan, showed concerns as to whether Brexit would adversely impact the cultural awareness in London, while Jacomijn van Haersolte-van Hof suggested that one should also consider the short term problems generated by Brexit, such as tax issues or visa requirements for those attending an arbitration hearing, rather than only focusing on the long term consequences. On this line, Noradèle explained that Brexit would probably generate more competition between arbitration institutions, while Mark made the point that London should find a way to remain a dynamic seat of arbitration.

The second panel focused on whether technology will make international arbitration better and was moderated by David Brynmor Thomas QC, 39 Essex Chambers. Duncan Morely, Relativity, gave a short presentation about the technologies available at this point and which facilitate a more efficient arbitration procedure, in particular when it comes to document production. Nevertheless, Duncan emphasized that even with the varieties of technologies available, there is still a need for lawyers to be present in the process.

Professor Julian Lew, Queen Mary University of London, noted that arbitration files nowadays are electronic, with few documents submitted by parties in hard copy. Professor Lew suggested that now is indeed the time for arbitrators and counsel, when commencing an arbitration, to pragmatically sit down and agree on how the case will be presented, and this should include a decision on the use of technology.

Lucy Greenwood, Greenwood Arbitration, made the point that arbitrators and parties trust and use technology in arbitration proceedings, but that we now have to enhance the ways in which arbitration also adapts to the different tools enabled and developed by the use of technology. Suber Akther, Siemens, also confirmed that in-house counsel are fond of technology and they employ it to a great extent not only in arbitration proceedings, but in dispute resolution, in general. In this context, Suber made reference to the use of Online Dispute Resolution and Artificial Intelligence in the decision-making process, picking up on certain points raised at the Flagship Conference of Wednesday.

The third panel was moderated by Barry Fletcher, LexisNexis, and discussed the balance between the finality of arbitral awards and the safeguards before the English courts, with focus on sections 67, 68 and 69 of the 1996 English Arbitration Act. Matthew Weiniger QC, Linklaters, focused on whether one should consider challenging an arbitral award or not. Matthew explained that even when there is no prospect of a successful outcome of such challenge, there are collateral advantages that motivate a party to proceed with such challenge, such as delaying the payment under the award. Peter Hirst, Clyde & Co, emphasized that parties, when they sign up for arbitration, they are sophisticated enough to understand that finality of arbitral awards is one of the advantages offered by the process. Aloke Ray QC, White & Case, also suggested that there are, indeed strategic reasons for challenging an arbitral award and one of these could be that the losing party might be pushing for a settlement agreement. Ruth Byrne, King & Spalding, also suggested that one should consider the costs with challenging the arbitral awards, which could be significant.

The final panel of the session dedicated to international commercial arbitration was moderated by Chris Parker, Herbert Smith Freehills LLP, and debated whether there is diversity in international arbitration. The discussion kicked off with a short presentation by Stephen Jagusch QC, Quinn Emmanuel, of the Jay Z case and its effects on diversity in international arbitration. Stephen underlined that while the impact of the case was immediate, so far this was only with respect to the arbitration institution concerned and that one should take this as an opportunity for enhancing diversity more globally.

Vyapak Desai, Nishith Desai, explained that the real question about diversity is how to link it, as an objective, with the scope of arbitration, which is the adjudication of a dispute. Vyapak gave the example of India, as a diverse jurisdiction and culture, but that faces significant challenges in terms of ensuring that this diversity is represented, including in arbitration.

Mimi Lee, Chevron, highlighted the importance of promoting diversity, including by businesses.

Mimi pointed out, however, that when it comes to selecting arbitrators, parties are more focused on finding a competent person, with the risk of not promoting diversity, and therefore, a solution for ensuring diversity must necessarily refer to increasing the pool of talented, diverse and competent arbitrators.

Source: Crina Baltag

The day ended with the Gala Dinner hosted by Global Arbitration Review in the superb setting of the Mansion House, the official residence of the Lord Mayor of London. GAR editor David Samuels introduced the keynote speaker, Michael Mcilwrath, Global Litigation Counsel at Baker Hughes GE in Florence, Italy, as a long-time "voice of the user."

By a raise of hands questions at the start of Mcilwrath's presentation, nearly half the diners indicated they had been born outside the UK, and a visible majority of all those present had worked in the past year on a dispute seated outside the UK. Touching on what he termed the "elephant in the room," the impact Brexit may have on London as a seat, Mcilwrath argued that those present at the dinner had provided evidence that more important than the popularity of the seat as a measure of London's success as a center for international dispute resolution is the breadth and reputation of the diverse people working there.

Offering a personal illustration, Mcilwrath said he had just spent his own "Arbitration Week" not in conferences but working on three arbitrations in London. He said that in none of the cases had the parties chosen London as the seat, nor English law, nor had they even appointed English-qualified counsel. The substantial work being carried out in London was instead by world-class experts in two cases, and the third was foreign counsel based in London handling an arbitration in another country (and not in the English language).

Mcilwrath concluded by suggesting that to maintain its leadership position, London should think of its community as an “organization,” in the sense of different people all sharing a common purpose. To thrive, it will need to preserve its robust, global pipeline of talented people. For example, while Brexit may bring about a more restrictive approach to boarders, London’s dispute community will need to be even more expansive, in order to keep London as the place where the world’s brightest practitioners want to come with their families to study, work, and live.

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