Kluwer Arbitration Blog

Notes on the 35th edition of the Annual Joint Symposium of Arbitrators on 24 February 2020

Giovana Perette Leites (Clyde & Co LLP) · Sunday, April 19th, 2020

For the 35th Annual Joint Symposium of Arbitrators, the ICC Institute of World Business Law and the School of International Arbitration proposed a debate on the participation of "States and State Entities in International Arbitration". This year, Herbert Smith Freehills hosted the event in London.

First Panel: State Involvement in International Business and Trade and International Arbitration

After Professor Julian Lew QC (Twenty Essex) and Craig Tevendale's (Herbert Smith Freehills) welcoming addresses, Karyl Nairn QC (Skadden) introduced the first panel, which set the framework for the day's discussions.

Andrew Cannon (Herbert Smith Freehills) explained how the manner in which states engage in international trade is manifold – referring not only to the many bodies of a state that interact in international business, but also to the myriad of functions states carry out in the public and private law levels. Nairn observed that states are increasingly becoming themselves investors, to what Cannon responded that the rise of arbitration was key to this change of dynamic, as it offers a more secure form of dispute resolution to the investor states.

The next speaker was Carmen Nuñez-Lagos (Nunez-Lagos Arbitration), who explained that in public procurements there is an asymmetry between the state and the private party. Therefore, as she proposed, when it comes to arbitrations arising from Public Private Partnerships, the result is neither a normal investment arbitration, nor a purely commercial one; rather, it is a hybrid, where the two parties are not in equal foot.

We propose, however, that the imbalance between the public and the private agents is restricted to the contractual framework, where, as a consequence of principles of administrative law, the public agent will retain privileges over the private party, such as the right to terminate agreements in light of public interest. The imbalance, however, does not – or should not – reach the arbitration procedure. We agree that the framework of public-private arbitrations is different from that of traditional commercial arbitrations, which are "embedded in private law and developed as an exclusively private mode of dispute resolution".[1)] Nonetheless, the fact that the participation of a

public entity in an arbitration might be subject to conditions such as the publicity of the proceedings, or the possibility of oversight by one of the state's controlling agencies, does not translate into a procedural imbalance between the parties to the arbitration.

Ali Malek (3 Verulam Buildings) followed with a section on case studies. He commented on cases arising from the Military, Energy and Finance sectors, in the context of both commercial and investment arbitration. Malek observed that, even where there is an effective contractual structure governing any given operation, one might still be able to bypass this structure through a treaty claim, if involvement of a state is present. He noted that jurisprudence on the elements of a treaty claim is developing in the English courts and will likely be carefully looked at going forward.

Second Panel: Representing States and State Entities

Professor Stravos Brekoulakis (3 Verulam Buildings) moderated the second panel, which dealt with practical challenges in representing states and its entities.

The first speaker was Paolo di Rosa (Arnold & Porter), addressing the particularities of the selection of counsel by states and State-Owned Enterprises ("SOEs"). He submitted that states' processes of procuring counsel have evolved significantly throughout the years and are, today, much more elaborate. He also addressed the assessment components of states' decision making, pointing out that decisions are not always made based solely on price.

Will Thomas (Freshfields) followed with an observation that the biggest challenge one faces when representing states is decision making, which takes longer than what would be ideal. He explained that decisions are invariably involved in politics, which can directly impact counsel's legal strategy. Thomas also touched upon the challenges in the collection of evidence, submitting that evidential records kept by states are often difficult to access. Lastly, he mentioned that budgets are commonly tighter when acting for states and that cost certainty is of paramount importance.

Christina Hioureas (Foley Hoag) explained that great part of the difficulty of settling cases with states is owed to missed opportunities during the cooling off period. As states often take longer to organize themselves in time to engage in meaningful discussions, she suggested that having a response team in place to quickly grasp the issues when the Notice of Dispute is transmitted is vital.

Eduardo Silva Romero (Dechert) rightly reasoned that, in some countries, a settlement agreement signed by a state might be perceived as a red flag of corruption. The decision to settle will often pass through different sectors within the state and is intrinsically dependent upon political interest. Naturally, concerns regarding corruption play an important role in the decision making. This is true even for jurisdictions where there is a specialized team of in-house counsel for complex disputes, such as the case of Brazil, where since 2018 the Federal Prosecution Office counts with a specialized team to handle arbitrations.

In his presentation, Eduardo Silva Romero submitted that all challenges in representing states are exacerbated by the idea of transparency. He touched upon six of those challenges. The first, Silva Romero submitted, is that transparency permits the political opposition to scrutinize the handling of the case by the state. Likewise, the second challenge is that, if there are divisions within the government, those handling the arbitration may be criticized. The third, public servants are more

concerned with participating, because they fear facing criticism from the public. Fourth, where there are parallel proceedings, it is necessary to be consistent, which might risk one having to advance a legal strategy that is not necessarily best for all cases. The fifth challenge is that arguments advanced by the state can be resurrected later in other cases by opposing counsel in order to advance an argument based on the principle of estoppel. Sixth, that a state might oppose to document production arguing that the requesting party might obtain the documents elsewhere using a law on transparency.

Third Panel: Representing Private Sector Parties against States and State Entities

The third panel, chaired by Constantine Partasides (Three Crowns), commenced with Epaminontas Triantafilou's (Quinn Emanuel) presentation. Mr. Triantafilou submitted that arbitrators, when dealing with a non-participating party, must ensure opportunity for that party to come back into the arbitration, as well as should be more tolerant towards independent fact finding.

Indeed, in arbitrations involving a non-participating state or state entity, these propositions are especially important considering the public interest at stake. We submit, however, that they should not be limited to public-private arbitrations. Rather, parties' and arbitral tribunal's tolerance towards allowing non-participating parties to come back to the arbitration is likewise important in commercial arbitrations where no state involvement exists. Furthermore, tolerance towards independent fact finding is particularly important where facts suggest the existence of corruption or illegality. In such cases, even if the participating party has not advanced arguments in that respect, arbitral tribunals should still examine, *sua sponte*, the existence of illegality.

Triantafilou also proposed that in situations where there is interference from a state party – *e.g.* commencing criminal prosecutions – one must presume that the state is acting in good faith and the burden is on the opposing party to demonstrate that those measures are far from a bona fide enforcement of the law. He concluded that where states raise arguments of executive privilege to avoid disclosure, there needs to be compelling reasons for allowing the withholding of documents.

Ina Popova (Debevoise), commenting on the *World Duty Free v. Kenya* case (a summary of the case is available here), affirmed that the proposition that transnational public policy renders inadmissible claims arising from investments procured by corruption is wrong as a matter of law, redundant and dangerous. Popova explained how the remedy of inadmissibility is generally restricted to contracts in which the subject matter entails an act of corruption, as opposed to contracts obtained by corruption, and concluded that the proposition ultimately incentivizes the conduct that it wished to condemn in the first place.

Next up was Sarah Vasani (Addleshaw Goddard), who shared her ten golden rules to settle cases with states. The first is to "give it a go", because a reasonable number of disputes actually get settled. The second, to "know your opposition", including identifying who are the state's decision makers. The third is to "know the local law" and speak the local legal language. The fourth, "patience is a virtue", because states move in a different pace from that of private corporations. The fifth is that "timing is everything" both in terms of using a good opportunity to settle, but also avoiding turbulent times such as those of national elections. Sixth and seventh rules are "only negotiate with the person carrying the check book and pen" and "do not underestimate the state". The eighth, "be prepared to use all tools in your tool box", and the ninth, "use international

arbitration as leverage". She concluded by advising to "make sure your agreement is water tight".

Sabine Konrad (Morgan Lewis) concluded the panel explaining that principles such as privity and immunity clash against the need for effectiveness of arbitration in award enforcement. She concluded the presentation on a silver lining that states generally do eventually pay awards, which gives some comfort to those struggling when it comes the time to enforce an award against a state.

Before the fourth panel, Yves Derains (Derains & Gharavi) made the closing speech submitting that one should distinguish cases where states appear in commercial contracts from those arising from treaties. Derains remarked that observations should not be generalized – as each state is different –, and that the difference between states and private parties should not be exaggerated – as much of what is said about states is also true to corporations.

Forth Panel: Investment vs Commercial Arbitration against States and State Entities

Phillip Capper (White & Case) chaired the last panel of the day.

Michael Schneider (Lalive), the first speaker, addressed the issue of umbrella clauses in treaties, focusing on jurisdiction in contract versus treaty arbitration. He submitted that if parties have contracted on the way disputes are to be resolved, their agreement should be observed. He concluded with a reference to the *SGS v. Philippines* case (a summary of the case is available here), where the Tribunal stayed the treaty based proceedings to await the Philippines' Courts ruling on the contract based claim.

Next was Massimo Benedettelli (Arblit), who submitted that the "conventional wisdom" on applicable laws should be revisited. In the context of commercial arbitration, he proposed that parties are not entirely free to choose the applicable law to non-contractual issues and that, likewise, arbitrators are not completely free in cases where the parties' choice is absent. In investment arbitration, Benedettelli submitted that the roadmap starts from the treaty and gaps should be filled following the "real hierarchy of sources".

From an in-house perspective, Monica Jimenez Gonzalez (Ecopetrol) explained how the functioning of SOEs is different from that of states and explained how Ecopetrol, despite having the State as its largest shareholder, is very distanced from political interference.

Gonzalez's comments with respect to the independence of Ecopetrol from political interference bring to mind a recent case decided by the Brazilian Superior Court of Justice ("STJ") involving Petróleo Brasileiro S.A. – Petrobras, a company that is not as distanced from political interference as Ecopetrol. The case arose in connection with an arbitration procedure commenced by a number of investment funds seeking payment for the devaluation of Petrobras' assets following the scandals brought to light in the context of the Operation Car Wash. The claimant funds in the arbitration sought to hold the Federal Government of Brazil liable for the wrong choice of the directors appointed for Petrobras, as well as for the lack of oversight on the administration of the company. The STJ did not decide whether the Brazilian Federal Government can be held liable or not. In this instance, it ruled only that the Federal National Courts in Brazil will be competent to decide whether the Government should or not participate in the arbitration, rather than the arbitral tribunal. Albeit the STJ's decision leaves room for much criticism – which will not be advanced in this opportunity – the question of political interference is noteworthy and will likely be relevant for

the determination of the case by the Federal Courts.

Norah Gallagher (Queen Mary University of London) was the last speaker of the day. She submitted that transposing notions of transparency from treaty to commercial arbitration would make the latter less attractive to parties. Gallagher explained that she is not convinced we will have better performance because of the publicity of information. She concluded that the parties' choice to include an arbitration agreement in their contracts, as an expression of their preference for a confidential procedure, should be respected.

We propose, however, that public-private commercial arbitrations, as Carmen Nuñez-Lagos submitted in the first panel, are subject to a few particularities, one of which is the loosening of the notions of confidentiality that are key in conventional commercial arbitrations. As an example, in Brazil, this issue is no longer subject to debate. Indeed, Article 2, paragraph 3, of the Brazilian Arbitration Act provides that arbitration proceedings with the Brazilian public administration shall abide to the principle of publicity. A recently concluded arbitration between two private port operators and the Dock Companies for the State of São Paulo (see a comment here) was divulged through a specific website held by the Brazilian Federal Government and, still, despite the need for publicity, certain sensitive documents were kept confidential following an order from the arbitral tribunal. We agree with the proposition that confidentiality should not be disregarded when it comes to commercial arbitration cases between private corporations, but the affirmative should not be transported to public-private arbitrations. This is because, as discussed above, the latter are subject to a different framework, which is not entirely based on private law, and in which the public interest is also taken into consideration.

Conclusion

This year's Symposium, like its previous editions, was an invaluable chance to gain knowledge on how some of the most experienced and respected minds in the field of international arbitration see the future of this ever important mechanism of dispute resolution.

The Symposium's tradition as a space for debate of relevant topics of the practice of international arbitration makes it today, as it already was 35 years ago, one of the most important events in the arbitral community's calendar every year.

References

?1 Stavros Brekoulakis and Margaret Devaney in “Public-private arbitration and the public interest under English law”, available at: https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/15489/Public-private%20arbitration%20in%20the%20UK%20-%20Accepted%20version.pdf?sequence=1&isAllowed=y.

This entry was posted on Sunday, April 19th, 2020 at 8:00 am and is filed under Confidentiality, Corruption, public-private partnership, state-owned, States
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.