# Inaugural Washington Arbitration Week: Industry-Focused Perspectives in International Arbitration, Another Layer of Complexity

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Following on the first day of Washington Arbitration Week (WAW), covered in detail here, later programming of WAW did not shy away from further in-depth discussions. This post highlights programming that dug into energy and the environment, arbitration from the client's perspective, infrastructure disputes during the pandemic, and last but not least, damages valuation.

### Fuel, Clean Energy and Environment intersections

Moderator **Marinn Carlson (Sidley Austin)** set the stage by noting that energy and environmental issues often intersect in commercial and investment arbitrations. Each of the panelists—**Tom Sikora (Exxon Mobil Corporation, Institute for Transnational Arbitration), Ian Laird (Crowell & Moring), and**

**Ucheora Onwuamaegbu (Arent Fox)**—described the winding professional journeys they took to the subject.

For Mr. Sikora, the field is "*very specialized*" for three reasons: *(i)* it is *technologically complex*, requiring specially-designed equipment to operate flawlessly, particularly in challenging situations; *(ii) commercially complex* and *(iii) legally complex*, involving a sophisticated suite of interactive contractual and commercial arrangements. Dr. Onwuamaegbu added another level of complexity, mentioning the large public interest considerations in energy and environmental disputes, and the consequences flowing from that, such as civil society involvement.

The State looms over every energy or environmental proceeding. Even in commercial contract cases, a party might have contracted with a national oil company or regional electricity board standing in the shoes of the sovereign, whose interests are profound. The State as regulator can additionally affect the proceeding in direct or indirect ways.

The panelists identified a number of progressive issues in the field, such as new treaty language more overtly protecting the right to regulate. The panelists identified a number of progressive issues in the field, (such as the EU-Canada Comprehensive and Economic Trade Agreement provisions on regulatory measures at Article 8.9 and indirect expropriation at Annex 8-A(3)), and the difficulty of stranded assets, that is, hydrocarbons that will be left unused if States are to meet their climate change obligations. The move to renewables is not without its challenges, as aggrieved investors in green energy have famously initiated scores of investment proceedings. The most pointed question from the moderator—"*what will the situation look like in five years?*"—was carried into the breakout rooms for further discussions by WAW attendees.

International Commercial Arbitration from the Client'**s Perspective**

Moderator **Chip Rosenberg (King & Spalding)** took WAW participants through the looking glass to consider an oft-overlooked perspective: that of in-house counsel. The panel featured **Theresa A. Coetzee (Marriott International)**, **Rafael Boza (Sarens USA)**, **Ariel Wade Trajtenberg (Bechtel Corporation)** and **Alberto Ravell (ConocoPhillips)**.

Each of the panelists evinced a preference for dispute avoidance. Thus, when asked for the typical steps prior to commencing an international arbitration, the answers primarily sought to resolve the dispute or divert it to a more informal forum, such as mediation. Yet, as we know very well, proceedings are often unavoidable, and Mr. Boza offered three main criteria for the selection of external counsel: *(i)* budget and economics, which are "*paramount*;" *(ii)* the jurisdiction of the dispute; and (*iii*) the expertise required, in terms of industry or technical knowledge. Ms. Coatzee added that she prefers to choose a firm with a global reach and a true partnership across offices. This ensures consistency across issues and proceedings, and is additionally useful for finding counsel in less frequently used jurisdictions.

By a show of hands, the panelists agreed with the oft-cited advantages of arbitration over litigation, including confidentiality, flexible procedures, choice of decision-makers, natural decision-makers, enforceability, and speed. Mr. Boza and the participants especially appreciate the finality—"*you get what you get and it's over*." While the advantages are well known, Ms. Trajtenberg identified one of the downsides. While flexibility is a positive, it does not allow for much certainty or predictability, which is equally important when advising the company's commercial executives. Contrary to the findings of the 2015 QMUL Survey, the panelists did not express strong preferences for an arbitral seat, but Ms. Coatzee marveled at the expansion of capable arbitral institutions over the past two decades. When she began her current role, the company's arbitrations were nearly all administered by the ICC; now, they have had positive experiences with regional institutions in Hong Kong, Cairo, and Dubai.

Some of the commentary might come as a surprise to practitioners. For all of the discussion surrounding third-party funding, none of the panelists had even considered the practice in their current roles. Although some seemed open in theory, others felt it would not be well received internally. As to expedited or emergency arbitrations, Mr. Ravell reported positive experiences, particularly in time-sensitive circumstances, such as where there is need to stop the dissemination of protected information.

As in-house counsel, the panelists offered sound advice for their external counterparts. As fundamentally commercial enterprises, the companies have larger concerns than simply winning the case. Ms. Coatzee shared an experience of maintaining a fruitful business relationship with the respondent after winning in the

arbitration. Mr. Boza observed that the parties might have to continue working together on their contracting project during and after the proceeding. A single-minded focus on victory in a discrete arbitral proceeding would fail to appreciate the other important considerations of the client.

At the end of the day, as shared by Mr. Ravell, arbitration practitioners would do well to remember the most important rule that clients expect from external counsel—"*no surprises*." That sentiment was widely shared, as was the panelists' confidence that they would continue to work well along their external counterparts.

Infrastructure Disputes in International Arbitration

We live in the era of the global megaproject, but also that of the global megaproject gap—that is, a gap between expected economic growth and productivity of infrastructure development. Megaprojects invite complexity and are inherently challenging—this creates a paradox in which the higher importance placed upon the project, the more difficult it is to complete. This program was moderated by WAW Co-founder **Ian Laird (Crowell & Moring)**. He was joined by **Meagan Bachman (Crowell & Moring)**, **Don Harvey (Secretariat)**, and **Michael Nolan (Milbank),** each of whom agreed that the infrastructure field was among the most complex and rewarding in international disputes.

The discussion was framed around an unavoidable topic: the effect of the COVID-19 pandemic on infrastructure development and disputes. Ms. Bachman and Mr. Harvey agreed that a "*wave*" of COVID-related disputes was building, but it is yet unclear how significant it will be.  Ms. Bachman identified several types of claims that were possible, and noted a shift in language from *force majeure* at the outset of the pandemic, to "change in law" or "delay by authorities" in contract provisions, which in addition to being easier to establish also grant costs, not simply time extensions in the manner of *force majeure*.

One under-appreciated aspect of the effect of COVID-19 is the restrictions on the movement of persons and labor. In an industry that often relies on foreign workers living communally, this can have a profound effect and the result is yet uncertain. In addition to the creative dispute reduction and avoidance techniques that Ms. Bachman suggests to her clients, COVID-19-specific task forces might dampen the force of the crashing disputes wave.

Mr. Nolan introduced several more of the applicable legal issues. Despite the prevalence of *force majeure* claims, he agreed with Ms. Bachman that it is not easy to establish, pointing to the reasoning of ICC Award in *National Oil Corporation v Libyan Sun Oil Co.* He observed that several governments, including China, Italy, France, Iraq, and the UK, have issued pandemic-related declarations purporting to establish a *force majeure*. This issue is especially sensitive when establishing whether it is a shield for those governments or meant to be a sword for companies established under those State's laws working abroad.

In any event, global megaprojects are as much drivers of economic activity as they are reflective of it. Their resilience in light of the pandemic will have a profound effect over the next few years.

## Alternative Approaches to Valuing Early Stage Investments in Investor-State Arbitration

Valuation of damages is a vexing problem faced in every arbitral proceeding, rendered even more acute for early-stage investments, whose cash flows are more uncertain than more established ones. **Borzu Sabahi (Curtis Mallet-Prevost Colt & Mosle)** began by identifying three main principles that underlie the legal standards for the assessment of damages: (*i*) the articulation by investment treaty provisions of the compensation due for expropriation; (*ii*) the familiar Chorzów Factory principle, and (*iii*) further precepts on reparation contained in the ILC's Articles on State Responsibility. Panelist **Miguel Nakhle (Compass Lexecon)** built upon that foundation by introducing three main approaches to valuation: an income-based approach, a market-based approach, and a costs-based approach ("*sunk costs*")

A decade ago, tribunals tended to award sunk costs for early-stage investments owing to their inherent lack of certainty. Beginning with the "*watershed case*" *Siag and Vecchi v. Egypt*, however, tribunals started using the market-based values of compensation to award damages. According to Dr. Sabahi, one can draw a line between *Siag* and recent, eye-popping "*mega-awards*" such as *Al-Kharafi v. Libya*, *Tethyan v. Pakistan*, and *P&ID v. Nigeria*.

**Mark Kantor (Independent Arbitrator)** underscored that despite the prevalence of highly-valued awards for early-stage investments, he identified a

positive development of a move from black-letter law to an evidence-based approach in valuation, a shift that began in Delaware (USA) state courts a few decades ago. He explained that such approach can take many forms, ranging from analysis of future prices and revenues, comparisons to competitive bids, to determining the guaranteed rate of return specified in investment contracts. **Garrett Rush (Versant)** concurred, and expressed a preference for third-party models, such as those conducted by a bank or other investor, which are not affected by the dispute itself.

## Conclusion

WAW's industry-focused panels have a high likelihood of converging in practice over the coming years. The anticipated "wave" of COVID-19 related claims will require creative dispute avoidance and resolution, as clients will prioritize continuity of operations and seek to minimize a multiplicity of legal proceedings. The energy sector has been affected by the pandemic in various ways, with a collapse in oil demand and a reallocation of energy usage to facilitate alternative working arrangements. It was, in some respects, an unexpectedly green year as well. The unique, unanticipated effects of the pandemic will undoubtedly confound valuation exercises as well. The convergence of these issues, the disposition of COVID-19 related claims, and the continued dialogue among parties, counsel, experts, and arbitrators, will have a profound effect as the legal community begins to contemplate the post-pandemic future.

***Kluwer Arbitration Blog's full coverage of Washington Arbitration Week (WAW) is available here.***