Kluwer Arbitration Blog

Is Arbitration Helping or Hindering the Protection of the Environment and Public Health? Salient Questions from the 6th Edition of the Casablanca Arbitration Day

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The Casablanca International Mediation and Arbitration Centre ("CIMAC") convened its sixth edition of the Casablanca Arbitration Day ("CAD") on December 3, 2020. The virtual CAD presented four panels focusing on one burning issue: "Is Arbitration Helping or Hindering the Protection of the Environment and Public Health?" This question deepens the discussion focused on during the 2019 CAD, "Is Arbitration Contributing to the Revolution?"

Is Commercial Arbitration Apt to Resolve Environmental Issues?

The first panel dove into the main theme of the CAD focusing on international commercial arbitration, inquiring whether it is apt to resolve environmental issues. The panel was composed of Ms Lucy Greenwood (Greenwood Arbitration), the mastermind behind the Greener Arbitration Pledge, and Mr Patrick Thieffry (Independent Arbitrator), co-chair of the ICC Task Force on "Arbitration of Climate Change Related Disputes". It is worth noting that the Report of the Task Force was published last year on "Resolving Climate Change Related Disputes through Arbitration and ADR".

The speakers retraced the historical development of environmental disputes to consider the procedural and substantive suitability of commercial arbitration to resolve those disputes. Mr Thieffry reminded attendees that, historically, arbitrators performing an adjudicative function were not primarily concerned with environment protection issues. They gained, however, significant experience in the domain (climate change and environment-related disputes) by the wide range of disputes referred to them, including disputes arising out of environmental representations and warranties, mining and infrastructures industries, among others.

As to the suitability of commercial arbitration for environmental disputes, both panelists concurred that it provides for a guarantee of expertise already tested, for example, in disputes arising out the UNFCCC's Green Climate Fund and the Kyoto Protocol. Arbitration rules, if necessary, may be amended to encourage parties to appoint arbitrators with relevant expertise and knowledge of environmental law. Such an option – a sample clause – was proposed in the Report above-

mentioned, in the context of an ICC proceeding. Commercial arbitration provides mechanisms such as emergency arbitration and interim measures which play a major role in urgency characterizing environmental and climate change related disputes. It is also marked by confidentiality, as awards and decisions are not always published. Ms Greenwood argued that for the sake of "social acceptability", confidentiality rules should accommodate transparency and public participation through existing mechanisms such as *amicus curiae*.

As both speakers observed, when it comes to arbitrating environmental disputes, the problem is less a question of regulations than a question of applicability. There are indeed more than 2,000 laws and covering environment and climate change related issues. Ms Greenwood stressed in this regard the role played by domestic courts, compelling States to reduce their greenhouse gas emission, e.g. *Urgenda Foundation v The Netherlands*. In the same vein, Mr Thieffry mentioned the practice of the French *Conseil d'Etat,* which, in a recent landmark decision dated November 19, 2020, compelled France to take concrete measures to meet the 40% greenhouse reduction target. With these court-ordered greenhouse gas emission reductions, disputes are likely to rise sharply in the coming years. Arbitration is well suited to deal with them.

Arbitrating in a More Environmentally-Friendly (and Healthier) Way

The second discussion revolved around the significant carbon footprint of international arbitration and the different ways the arbitral community could overcome such challenge. This topic welcomed panelists Ms Laetitia De Montalivet (Director, Arbitration and ADR, Europe, ICC International Court of Arbitration) and Professor Dr Maxi Scherer (Special Counsel, Wilmerhale, London / Member of the Court of Arbitration of CIMAC).

Professor Dr Scherer addressed the underestimation of the impact of arbitration on the environment and recalled figures on the carbon footprint of the arbitration industry. She referred to a study conducted by Campaign for Greener Arbitrations Steering Committee which revealed that up to 20,000 trees would need to be planted to offset the effect on the environment of the carbon footprint of one medium-size arbitration.

This issue recently made its way on the arbitration scene mostly thanks to Ms Greenwood who campaigned for the Green Pledge and emphasized the importance of being able to arbitrate in a more environmentally-friendly way by following the nine concrete steps of the Pledge, such as avoiding traveling by air, corresponding only through electronic means and requesting that electronic rather than hard copies of documents be provided.

Based on her significant experience at the ICC, Ms De Montalivet further provided insight on the role of institutions in reducing the carbon footprint of international arbitration. She recalled the ICC's strong commitment to the objectives of the Paris Agreement and the Sustainable Development Goals ("SDGs"), which is reaffirmed in its strategy to promote sustainable and inclusive economic growth in the context of responsible trade on the political level, but also on an essential personal and corporate level.

Ms De Montalivet suggested that one of the answers to reducing the carbon footprint of arbitration is to always take a critical look at consumption patterns and take modest yet concrete measures. At the ICC in general, and at the Court of Arbitration in particular, the ICC staff has been integrating new practices for several years now in a charter of good conduct, in daily gestures and in

arbitration practices. This commitment resulted, among others, in a total digital revolution of the ICC and in the launching of the ICC application. Such commitment to "*Greener Arbitration*" will also be reflected in the new 2021 ICC Arbitration Rules.

In an interactive debate, the panelists and the audience later discussed the environmental issues that still come with the digital industry and expressed concerns about the carbon footprint of digital communications. If eliminating excess paper and flying less are major contributions towards improvement, the digital industry itself is, however, not carbon neutral and its impact on the environment, increasing exponentially with the development of the new technology uses, is not to be underestimated.

Indeed, it is worth noting that this digital evolution requires infrastructures that consume substantial energy. Ms De Montalivet recalled estimations stating that in 2023, digital technology will use about 20% of the world electricity, taking into consideration that two-thirds of the world's electricity is produced using fossil fuels. Added to this energy-consuming process, the need for equipment, plastics, metal spares, raw material issues, geopolitical conflicts over access to these resources and the issue of electronic waste, the carbon impact of the digital industry is not to be underestimated. Thus, there are points of vigilance with the digital asset, and faced with these exponential needs, one question remains: is the digital a hope or threat to the environment?

The panel also addressed other concerns that come with the use of digital tools. Some pertain to procedural aspects of such use: whether arbitrators can impose a paper-less arbitration process on the parties and vice-versa. Some other concerns are health oriented. Indeed, one additional aspect to address would be the health impact of digital use, with the appearance of concepts such as "*zoom fatigue*" and how to limit it.

Protecting the Environment through Investment Arbitration

The third panel discussed the protection of the environment through investment arbitration. Professor Jorge Vinuales (University of Cambridge) and Professor Arnaud de Nanteuil (University Paris Est Créteil) empirically shared three figures with the audience:

1. treaties that have clauses or references to the environment are about 10%;
2. from 2008, 89% of treaties contained references or clauses relating to the environment;
3. between 15 and 20% of all cases have an environmental component.

Professor Arnaud de Nanteuil explained that environmental questions in investment arbitration have gone through four evolutions. In the first stage of investment arbitration, environmental issues were not considered because arbitrators did not give deference to state measures citing to *Metaclad*. In the second stage, the cross-polinization of investments in environment related fields (*i.e.* the peak of disputes in renewable energies, with the example of the Spanish ECT saga) helped in the numerical growth of environmental issues in investment arbitration.

In a third stage, environmental provisions have permeated investment treaties, in the preambles with references to international conventions, and subsequently in the bodies of treaties, for instance with obligations towards the investors. The Moroccan Model BIT of 2019 is a prime example of making sustainable development a condition for the application of the treaty, for instance the preamble elevates sustainable development to an overarching goal, as well as forming part of the

definition of investment “contributing to the sustainable development of the host country” (article 3.3.). Finally, the last phase of the evolution points to the consideration of environmental issues by arbitral tribunals.

Professor Jorge Viñuales referenced the Morocco-Nigeria 2016 BIT, as a remarkable instrument that raised the precautionary principle to the level of international law. He indicated that an alternative way to deal with the application of specific environmental clauses is to recuperate non compliance in the damages phase, by reducing compensation. The panelists collectively concluded]that environmental clauses should continue to be included in investment treaties, favoring more concise language, as opposed the more elusive clauses that are currently common.

Procedural Challenges and Substantive Aspects of Covid-19 Related Disputes

The last session touched upon the topic du jour “COVID-19 and Arbitration” with a focus on procedural and substantive aspects of virtual hearings. On the procedural aspects, the challenges and protocol for virtual hearings were discussed. Jalal El Ahdab (Bird & Bird) pointed out that visas could be an issue, however virtual hearings tackle this hurdle especially in the Gulf region or politically sensitive states.

Whilst there has been a cost reduction regarding travels and accommodation, online platforms with golden standards signify a new line of costs. Overall as regards big cases, Dr. Mohamed Abdel Wahab (Zulficar & Partners) stressed that there is still a significant cost saving.

Protocols are still a work in progress, with a common denominator of protocols is the use of technology. Dr. Wahab presenting the 2020 Africa Arbitration Academy Protocol on Virtual Hearings in Africa, explained that the Protocol opted for goals rather than specific requirements. He highlighted that there is now a new constant element which is the presence of technical service providers. The audience raised the point that some witnesses may be less forthcoming in testifying through a screen. This point ultimately will depend on whether the arbitral rules allow it or not, as discussed on the Blog by Dr. Wahab here, noting that the newly adopted ICC rules explicitly provide the tribunal with the power to conduct a virtual hearing at article 26(1).

This point tied the discussion to the second part of the panel, which focused on how Covid-19 is impacting the substance of arbitration proceedings. Although investors are considering claims related to Covid19 measures, Dr Wahab pointed out that options should be weighed before the filing for a dispute. This view echoes the prudent prognostics expressed in other conferences organized 11 months after Covid-19 was declared a global pandemic. Beyond Covid-19, Dr. Wahab predicted there would be a rise in disputes in biotechnology and the construction sector post-pandemic.

Conclusion

The CAD differentiated itself from global virtual events by gathering speakers involved in dispute resolution in the MENA region to bring a regional flavor. The CAD also continued its tradition to center discussions on one critical central theme, with a particular focus this year on the environment, and inter-connected topics such as virtual hearings. In his Closing remarks, Laurent

Lévy recalled it is about time to adopt a proactive and not a reactive attitude, referencing to UNCTAD's 2020 International Investment Agreement Reform Accelerator, whereby Morocco is mentioned extensively in the inclusion of environmental provisions. The interactive nature of the CAD signified the involvement of the arbitral community with environmental concerns, thus contributing to the revolution.

Disclosure: the participants all spoke at CAD in their personal capacity.
