# Kluwer Arbitration Blog

## Arbitrators: Immunity, Conflicts and New Challenges – Revisiting the ITA-ALARB Americas Workshop

Paola Patarroyo (Esguerra Asesores Jurídicos) · Wednesday, January 27th, 2021 · Institute for Transnational Arbitration (ITA)

The ITA (Institute for Transnational Arbitration) – ALARB (Latin American Society of Arbitration) Americas Workshop took place virtually on 2-4 December 2020. The conference focused on the role of arbitrators, their liabilities, challenges, and the need for increased diversity efforts.

The conference was co-chaired by Julie Bédard (Skadden, New York), and Maria Inés Corrá (Bomchil, Buenos Aires), and consisted of five panels, an open forum, and networking sessions.

The conference began with a panel entitled “Fernando Cantuarias Salaverry’s Paradigmatic case,” moderated by Estefanía Ponce (Posse Herrera Ruiz, Bogota). Alfredo Bullard (Bullard Falla Ezcurra, Lima) and Mario Reggiardo (Payet, Rey, Cauvi, Pérez Abogados, Lima) explained the case. Mr. Cantuarias participated as arbitrator in an *ad hoc* proceeding in 2012 between Odebrecht and the Ministry of Transportation concerning additional costs in a highway construction in the Peruvian Amazon. The tribunal ordered the payment of USD 23 million to Odebrecht, as approved by the relevant authority overseeing the construction. A preliminary investigation began against the arbitrators for allegedly having received a disguised bribe from Odebrecht through increased arbitrator fees. In that context, Mr. Cantuarias was incarcerated in Peru in early November 2019, and then released weeks later.

https://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2021/01/Clip-1-With-Bumpers-Final-smaller.m4v

Members of the Peruvian arbitral community filed an *amicus curiae* in the criminal proceeding explaining the flaws in the prosecution’s case. They observed that the 2019 fees of the Lima Chamber of Commerce were not applicable to a 2012 *ad hoc* proceeding, and that the fees were reasonable under Peruvian law considering the complexity and amount in dispute. Several institutions and associations submitted briefs regarding Mr. Cantuarias’ record in the field and comparing the arbitrator fees for the same amount in dispute under various other institutions, which would have been significantly higher than those received by Mr. Cantuarias. Mr. Cantuarias’

prosecution continues in Peru, as do investigations in other cases involving alleged corruption by Brazilian companies known as "*Operação Lava Jato*" or "Operation Car Wash".

Karima Sauma (CICA, Costa Rica) moderated a panel surveying immunity of arbitrators and the use of constitutional actions in Latin America. Leonardo de Castro Coelho (Mattos Filho, Brazil), María Angélica Burgos (Baker McKenzie, Bogota), María del Mar Herrera (EY, Central America), and Michael Fernández (Winston & Strawn, New York) shared their perspectives.

https://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2021/01/Clip-2-With-Bumpers-Final-smaller.m4v

The survey suggested that since recent arbitration laws in Latin America follow the UNCITRAL Model Law, they also lack specific provisions or exclusions on arbitrators' liability. In Brazil, arbitrators are subject to criminal liability under the strict standard for judges requiring, for example, a wrongdoing performed with intent or fraud. In jurisdictions with separate regulations for domestic and international arbitrations, such as Colombia, arbitrators may be subject to disciplinary proceedings in only domestic arbitrations. In El Salvador claims may be brought against arbitrators and institutions for damage caused to the parties.

In the United States, arbitrators and institutions are immune from civil cases due to their quasi-judicial role. Arbitrators are generally immune from testifying, and are only exceptionally deposed in vacatur proceedings based on fraud, misconduct, or corruption implicating the opposing party or one or more of the arbitrators.

In Latin American jurisdictions, constitutional actions including *mandado de segurança*, *amparo*, and *tutela* are very exceptional against awards or the process towards the award, and could rarely proceed against arbitrators.

The second day began with a keynote speech on arbitrators' immunity and liability by Eduardo Zuleta (Zuleta Legal, Bogota). A panel followed, moderated by Calvin Hamilton (Independent Arbitrator), with Eduardo Silva-Romero (Dechert, Paris), Valeria Galíndez (Galíndez Arb, Sao Paulo), and María del Carmen Tovar (Estudio Echecopar, Lima).

https://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2021/01/Clip-3-With-Bumpers-Final-smaller.m4v

Mr. Zuleta explained that while domestic laws rarely refer to arbitrators' liability, some assimilate arbitrators to judges or consider arbitration a contractual issue. Contractual arrangements (such as limiting liability in the terms of reference) and indemnities in arbitration rules would not be a standing solution without involving the applicable local law in assessing the validity of the limitation. He proposed limiting liability for adjudicative and non-adjudicative functions to protect arbitrators from claims intended to harass them and to implement rules designed to prevent the

parties from relitigating certain issues. Mr. Zuleta proposed that gross negligence or willful misconduct should be the liability standard for the adjudicative function. If the standard was lower, the arbitrator could be liable for an annulled award. A standard of professional due diligence would apply to duties such as disclosure, independence, impartiality, and confidentiality.

Mr. Silva-Romero highlighted that limitations of liability clash with Latin American laws that prohibit the waiver of future claims for willful misconduct or that equate gross negligence to willful misconduct. Ms. Galíndez recalled cases where arbitrators had to reimburse fees and expressed concern over possible orders to compensate for lost opportunities or moral damages. Ms. Tovar mentioned that the key should be preserving the independence of arbitrators and institutions and protecting the award.

The panel addressed the relationship between the validity of the award and the arbitrators' liability. While a set aside proceeding against the award does not necessarily involve arbitrator negligence, it might entail an assumption of negligence, that the arbitrator is wrong, and that the court is always right. Such exposure to liability for misapplication of the law could prevent arbitrators from acting in certain jurisdictions. Mr. Silva-Romero warned that, as in ICSID annulment proceedings, there must be an "egregious" error in the application of the law or be equivalent to not applying any law.

The panel agreed that "immunity" limits civil liability but does not address criminal liability. Some pending questions included (i) whether one may simultaneously seek annulment and initiate actions against the arbitrators; (ii) whether there should be a waiver of eventual criminal proceedings; and (iii) how to tackle the lack of knowledge of arbitration rules by a criminal judge that could conclude that a criminal offense was committed.

Prof. Catherine Rogers (Queen Mary University, London) gave a keynote address on the duty of disclosure and conflicts of interest. A panel followed, moderated by Sandra González (Ferrere, Montevideo), with Claudia Salomon (Latham & Watkins, New York), Eduardo Damião Gonçalves (Mattos Filho, São Paulo), Guido Tawil (Independent Arbitrator, Buenos Aires).

Professor Rogers explained that the duty of disclosure is subject to multiple regulations including the IBA Guidelines and the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. Difficulties include the use of that binary terms (biased/unbiased, partial/impartial) that prevent nuances and new conflicts such as double-hatting, issue conflicts, conflicts with expert witnesses and third-party funders. Stakeholders apply different standards: (i) arbitrators deciding what to disclose; (ii) parties deciding whether to file a challenge; (iii) institutions as *de facto* regulators in admitting challenges, establishing disclosure requirements, creating rosters and blacklists, providing for fee reductions, publishing case details; and (iv) courts reviewing awards under national laws or the New York Convention.

Mr. Tawil suggested that the main challenge is to determine what is transparency and what should be disclosed to achieve the standard of transparency. Excessive disclosure might give place to "unfounded and frivolous challenges." While the IBA Guidelines and the ICC rules provide guidance on what should be disclosed, self-regulation by arbitrators would be preferred. For Mr. Damião an additional challenge is that today's actions and disclosures may be judged in five years with future standards. Thus, if the door was open to more rules on disclosures, there will always be

more rules to come, and strict definitions make sense only in specific cases.

When asked about tools or measures of particular value to address impartiality, Ms. Salomon mentioned the power of arbitrators under the 2021 ICC Rules to exclude new counsel, considering the facts and circumstances of the case. The rule seeks to address cases where counsel might bring in new counsel that would result in one of the arbitrators having a conflict and potentially resigning, which could cause a delay in the arbitration. Mr. Damião Gonçalves mentioned publicity initiatives at the ICC including the publication of awards, the composition of tribunals and counsel, and requiring the parties to give reasons when formulating challenges.

https://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2021/01/Clip-4-With-Bumpers-smaller.m4v

On institutions as *de facto* authorities, Ms. Salomon mentioned that the clients determine whether more transparency is required, and the system should be responsive to such expectations. Additional guidelines may help to level the expectations of the parties in the process, and arbitrators may have additional layers of duty if they have their own codes of conduct or ethical obligations. ICC Note to Parties and Tribunals mentions what should be disclosed, for example, if the arbitrator has been appointed by the parties or counsel or acted in a related case (¶23). The issue then is if the arbitrators will be challenged after all these facts are disclosed.

Carolyn Lamm (White & Case, Washington DC) moderated a panel addressing gender diversity in arbitration. Alexis Mourre, (President, ICC International Court of Arbitration, Paris), Yas Banifatemi (Shearman & Sterling, Paris), Patricia Kobayashi (CAM-CCBC, São Paulo), Mónica Jiménez (Ecopetrol, Bogota), and Wendy Miles QC (Twenty Essex, London) shared the perspectives of counsel, institutions, clients, and arbitrators.

https://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2021/01/Clip-5-With-Bumpers-Final-smaller.m4v

The panel acknowledged the increase of the appointment of female arbitrators since 2005 and praised initiatives such as the Arbitration Pledge. Arbitral Women and Women Way in Arbitration have also raised awareness on diversity and provided a search base with qualified candidates.

Mr. Mourre highlighted the achievement of gender parity in the ICC Court in 2018. He called for an effort on education, since diversity is broader than gender diversity. The 2019 ICC Dispute Resolution Statistics indicated that women represent 21% of arbitrators in ICC arbitrations. Regional diversity remains limited, as 66% of arbitrators are from Western countries, a figure that has remained relatively stable in recent years. He urged a deeper consideration of the career lives of women and the role of counsel in choosing arbitrators. What is imposed on attorneys at law firms may be a major element of discrimination, and helping young women to achieve a balance between work and personal responsibilities should be part of the solution.

Ms. Banifatemi encouraged a conscious and systemic among counsel to ensure that women represent at least half of the individuals in each list of arbitrator candidates. She observed that only 20% of ICSID arbitrators are women and 47% of ICSID arbitrators are from Western countries.

Within law firms, a structurally diverse arbitration personnel will occur with diversity in exposure, mentorships, recruitment, and promotions. Ms. Kobayashi shared the institutional perspective, explaining the CAM-CCBC's commitment to have at least 30% women in conferences, appointments, and lists of arbitrators.

Ms. Jiménez stressed the need to commit clients in the appointment process, presenting lists of female candidates and informing them of diversity initiatives. Explicit diversity policies may be incorporated in arbitration clauses and even in the bylaws, as she shared her experience of both of those practices at Ecopetrol. Ms. Miles suggested the creation of webinars interviewing female practitioners, including local experts in topics that arise in arbitrations involving such discrete issues as the environment, indigenous communities, and human rights.

A final informal open forum was co-moderated by Cecilia Azar (Galicia, Mexico) and Tai Heng-Cheng (Sidley, New York). Participants discussed changes during the pandemic, sharing experiences in virtual hearings with participants in different time-zones, challenges to cross interrogate virtually, and changes in organizations, including remote work, and how to continue with the training process of younger associates.

---

This entry was posted on Wednesday, January 27th, 2021 at 6:53 am and is filed under Arbitrators, Code of Conduct, Disclosure, Diversity, ISDS, ITA, Liability, UNCITRAL Model Law
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.