Kluwer Arbitration Blog

New York Arbitration Week 2021 Redux: Getting it Right: Building Quality + Trust in the Arbitral Process

Travis Gonyou (Binder & Schwartz LLP) and Katie Gonzalez (Cleary Gottlieb) · Tuesday, December 7th, 2021

During New York Arbitration Week 2021, the New York International Arbitration Center ("NYIAC") and the Chartered Institute of Arbitrators ("CIArb") New York branch hosted two panels dedicated to the theme of "Getting It Right in International Arbitration." This post presents some highlights.

Getting it Right: How Arbitrators, Counsel, and Institutions Can Improve the Quality of the Arbitral Process

This panel tackled how arbitrators, counsel, and institutions can improve the quality of the arbitral process. The program was moderated by **Professor Gabrielle Kaufmann-Kohler** (Partner at Lévy Kaufmann-Kohler). The panelists were **Adriana Braghetta** (Independent Arbitrator, Adriana Braghetta Advogados), **Dyalá Jiménez Figueres** (Independent Arbitrator, DJ Arbitraje), **Joseph E. Neuhaus**, FCIArb (Partner at Sullivan & Cromwell LLP), and **Elliot E. Polebaum** (Independent Arbitrator, Polebaum Arbitration). Each panelist proposed a method to improve the arbitral process, which was put up for debate.

1. *Early Definition of Key Issues*

Mr. Polebaum proposed that arbitrators create a list defining the key legal issues early in the proceedings to focus counsel on the main points of resolution. He believes parties can become distracted by side issues and narrative disputes that distract from the core issues requiring resolution, leading to inefficiencies. Recognizing that issues evolve throughout a proceeding, the list of issues should be dynamic, giving the parties flexibility.

The panel was skeptical because there is a danger in memorializing issues too early. **Ms. Jiménez Figueres** noted that it presents the risk of prejudging the issues, especially at a time when the arbitrator might not have fully immersed themselves with the context of the dispute. On the other side, there is a concern that memorializing the issues too late could harm procedural efficiencies, because the parties already have a strategy locked in place.

2. *Circulating Draft Procedural Orders*

Ms. Jiménez Figueres proposed that arbitrators circulate drafts of procedural orders to parties that solve interim, non-final issues rather than holding oral hearings. Collateral issues or pre-hearing motions often come before an arbitrator is fully aware of the case and orders can have unintended consequences. By foregoing extensive oral argument and allowing parties to trade drafts of the proposed order, the relief granted is less likely to contain error and will incorporate the parties' relative positions.

The panel again expressed skepticism, noting that this practice can create inefficiencies, risk the possibility of interested parties crafting orders for personal benefit, or raise due process risks that would affect the enforcement of the award. As an alternative, arbitrators may pose direct questions to the parties and allow for submissions of factual errors after the order is entered.

3. *Continuing Arbitrator Education*

Continuing the focus on arbitrators, **Ms. Braghetta** proposed ongoing, and possibly required, continuing education for arbitrators in core substantive areas of law that arbitrators often encounter in their practices. Not only might this decrease errors and avoid the intervention of an institutional scrutiny process, it also prepares the next generation of arbitrators.

While most panelists agreed that continuing education of arbitrators is a virtue, the benefit of such requirement would have limitations. With international arbitration, it would be difficult to implement mandatory education on substantive areas of law where the approaches vary greatly across jurisdiction. Further, if institutions provided or required this substantive training, they may open themselves up to criticism for exceeding their scope as a procedural body meant to facilitate proceedings, not determine the application of law.

4. *The Case for Episodic Justice*

Mr. Neuhaus presented the case for what he termed "episodic justice." Arbitral tribunals often place efficiency as the predominant value of arbitration, and thus are reluctant to engage in dispositive motion practice unless there is a strong showing that it will shorten the overall length of a proceeding. Episodic justice, however, would look more favorably on motion practice even with no efficiency gain. Such motion practice could cull bad claims, focus the hearing on the larger issues, and provide the parties with early and continual feedback throughout the proceeding that would increase the chances of settlement.

Feedback for episodic justice was generally favorable, with only slight caution. This practice presents opportunities to focus the parties on the main issues and can create efficiencies, both in terms of cost and prospects of resolution. However, arbitrators may want to ensure that they make a threshold determination that the movant has shown a reasonable prospect of success in making its motion to prioritize efficiency.

Getting it Right: Should the *Functus Offico* Rule be Reformed?

The panel focused on the *functus officio* doctrine, which prevents arbitrators from clarifying or correcting an arbitration award after it is issued. The panel was led by **Richard F. Ziegler**, FCIArb (Independent Arbitrator at Acumen ADR). The panelists were **Martin F. Gusy** (Partner at Bracewell LLP), **Eduardo Silva Romero** (Partner & Co-Chair of International Arbitration, Global

Practice, Dechert LLP), **Professor Janet Walker**, C.Arb, FCIArb (Independent Arbitrator, Arbitration Place and Outer Temple Chambers & York University Osgood Hall Law), and **Professor Anne Marie Whitesell** (LLM Program & Faculty Director, Program on International Arbitration and Dispute Resolution at Georgetown Law School).

1. Functus Officio *Reveals Schisms between Competing Values, Civil and Common Law*

The panel began with a robust discussion on whether the *functus officio* rule should remain in its current state or be reformed. **Professor Whitesell** engaged in a passionate defense for the preservation of *functus officio*, contending that arbitrators should be generally prohibited from substantively modifying awards to promote finality. Parties typically choose arbitration instead of litigation to guarantee only narrow bases for "appeal," through the limited grounds to resist enforcement of arbitral awards in the 1958 New York Convention. If arbitrators were permitted to re-open final awards, it could "open the door to chaos."

Building off this focus, **Mr. Silva Romero** noted that the *functus officio* doctrine illuminated a tension between two core values in international arbitration: (1) finality and (2) the quality of arbitral justice. Mr. Silva Romero observed that if a party places the quality of arbitral justice over finality, then it may want *functus officio* to provide some flexibility to allow arbitrators to eventually "get it right" and correct any errors in an award.

Mr. Silva Romero explained that a party's preference regarding a tribunal's ability to change an award after it is issued may depend on whether the party is more accustomed to a civil or common law approach. In civil law jurisdictions, there is more flexibility in devising solutions, while in common law jurisdictions, parties are disposed to adhering to stricter rules. In France, for example, the law codified an arbitrator's ability to correct an award, subject to "classic limitations" as well as the unique instruction for potential revision when fraud is discovered after the final award is rendered.

Speaking from his experience in Germany, **Mr. Gusy** concurred that civil law jurisdictions may approach the rule of *functus officio* on a more issue-by-issue level, drawing comparisons to the UNCITRAL Model Law which provides for some limited corrections of an award.

Professor Walker noted that *functus officio* comes with additional considerations, including whether a court or a tribunal may be tasked with determining an arbitrator's ability to modify an arbitration award. The application of *functus officio* is potentially rife with difficulty, particularly where provisional awards may be subject to revision, or the tribunal that issued the award cannot be re-constituted.

2. *New York City Bar Proposal to Expand the Ground for Revising Awards*

In conclusion, **Mr. Ziegler** prompted panelists to consider a New York City Bar Association's Arbitration Committee Report of 2021, which proposed to expand the grounds on which an award can be revised, subject to four characteristics that (1) provide an opt-in to these expanded grounds at the beginning of the proceeding; (2) allow for an award to be corrected when there is an error or misapplication of fact or law; (3) impose time limitations to seek revisions; and (4) require fee-shifting, so that the moving party cannot apply for its adversary to pay for fees if it succeeds in an application for revision, but if the moving party loses it compensates the other party for costs associated with the application.

Professor Whitesell discouraged adopting the proposal, arguing that the opt-in is unnecessary, because parties already have the autonomy to choose rules governing their disputes, and can select rules that already permit some form of limited appellate arbitral review. Professor Whitesell cautioned that there could be serious due process concerns if arbitrators implement a correction to an award that goes beyond mere clerical correction, such as a substantive change, because due process would likely afford both parties the right to be heard on the merits of the revision. Imposing time limits to correction of an award could also pose practical problems, and the cost-shifting scheme does not align with the notion that a party should not bear the financial burden of insisting that a tribunal remedy a mistake.

Concluding Remarks

In conclusion, although the panelists tackled a variety of proposals and issues, the robust debates demonstrated that while there are creative solutions and innovative reforms that can be implemented into the arbitration process, it may be difficult to gain widespread acceptance of such changes, particularly because there can be diverging views as to how to "get it right" when it comes to case management and determinations in arbitration.

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A recording of the program is available here and Kluwer Arbitration Blog's full coverage of New York Arbitration Week is available here.

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