Kluwer Arbitration Blog

ICC YAF Warsaw Recap: Position Yourself to be “Lucky”!

Maria Labno (Linklaters) and Jake Lowther (MAGNUSSON) · Monday, June 27th, 2022

After a two-year hiatus, the ICC Young Arbitrators Forum (ICC YAF) was back with a fully in-person program in Warsaw. This unique conference included an interview with Claudia Salomon, President of the ICC International Court of Arbitration, followed by a lively panel discussion on “champagne clauses and what comes next”. The event coincided with the end of the 2022 Dispute Resolution in M&A Transactions Conference in Warsaw.

Attendees of ICC YAF were welcomed by Beata Gessel-Kalinowska vel Kalisz (GESSEL), also known as “the Vivienne Westwood of international arbitration”, followed by opening remarks from Alicja Zieli?ska-Eisen (Queritius & Humboldt University of Berlin), the ICC YAF Representative for Europe and the driving spirit of the event. Ms Zieli?ska-Eisen emphasised the ICC YAF’s role as the global voice of the younger generation and its focus on creating opportunities and promoting diversity and inclusion. Ms Salomon, as one of the founders of the network, strongly encouraged all attendees to join ICC YAF.

This blog post highlights key advice from Ms Salomon on establishing a career in arbitration and takeaways from the panel on negotiating and interpreting dispute resolution clauses.

Interview with Claudia Salomon: Establishing an Arbitration Career

Joanna Kisieli?ska-Garncarek (GESSEL) began her interview of Ms Salomon with questions about her arbitration journey. Ms Salomon, who had never envisaged a career in the field, recalled hearing in 1998 in Phoenix, Arizona, that international arbitration was the “way of the future” given the increase in international disputes. Sure enough, only a few years later Ms Salomon found herself in Prague working on the seminal *Saluka v. Czech Republic* case.

Ms Salomon had three pieces of advice for younger practitioners. First, position yourself to be “lucky”, i.e., try to be seen as the “fire jumper”, willing to do what it takes and able to handle what may come. Second, take care of yourself and be sure to prioritise things like exercise. Third, be curious, ask questions and try to establish how, e.g., a narrow research task fits into the broader picture and the client’s strategy.

For practitioners seeking their first appointment as arbitrator, Ms Salomon noted that most first-time appointments are made by arbitral institutions. ICC appoints approximately 25% of all arbitrators in ICC arbitrations and among the things it looks for is strong commercial experience.

The key is to specialise enough to ensure people think of you when compiling a shortlist of names. Visibility through publishing articles and organizing events such as ICC YAF, is also key.

Turning to the subject of diversity, Ms Salomon paid tribute to her predecessor Alexis Mourre for achieving full gender parity on the ICC Court in 2018. She stressed that diversity is critical for legitimacy and that businesses have the right to expect that diversity in arbitration reflects themselves, which extends to cultural, geographic and disability inclusion. Ms Salomon pointed to the creation of the ICC's LGBTQIA+ Network and Disability and Inclusion Task Force as examples of the ICC doing its part to ensure everyone feels "seen and welcome."

The interview concluded with Ms Salomon's vision for ICC as it looks to its centenary celebrations in 2023. For Ms Salomon, the ICC's vision is to be a one-stop-shop for the dispute resolution and prevention needs of business in all forms, from SMEs to global giants. This can be achieved through innovation, providing access to a suite of services, and really getting to grips with what businesses want and the tools they need. There is significant competition among a growing number of competent arbitral institutions, which Ms Salomon welcomes as it drives everyone to be better. For Ms Salomon, the key is to determine what leads businesses to choose arbitration, to analyse why they would insist on an ICC clause and to ultimately ensure that ICC is the arbitral institution that parties trust.

Dispute Resolution Clauses: Perspectives from the M&A Lawyer, the In-House Counsel, and the Arbitration Practitioner

The panel discussion was moderated by Natalia Jod?owska (Webuild). The panel's focus was on the practicalities of negotiating dispute resolution clauses. The panellists took the attendees to the "backstage" of an M&A transaction, to offer perspectives of a transactional lawyer, dispute resolution counsel, and in-house lawyer to this topic. The panellists were Bronte Hannah (CMS Hasche Sigle), Tomasz Mas?lak (WKB), and Judyta Sawicka (Globalworth Poland).

At first, Ms Jodlowska invited participants to consider the validity of some interesting "pathological clauses" referenced in Gary Born's *International Commercial Arbitration* to illustrate the practical problems that may occur. Although all presented clauses were ultimately held to be valid, Ms Jod?owska asked the panel's transactional lawyer, Mr Mas?lak, for an explanation as to why clauses with controversial wording find their way into transactional documents. According to Mr Mas?lak, these might have been examples of "copy/pasting" extracts from previous agreements, including from preliminary documents such as Term Sheets. In his view pathological clauses are not common in practice as the arbitration lawyers will typically be involved in the drafting of arbitration agreements. However, Ms Hannah, as dispute resolution counsel, emphasised that she sees such clauses "all the time", including phrases that do not make sense or incorporations by reference, which lead to the "juiciest" of cases. We must acknowledge that this is unfortunately also the observation of the authors of this blog post.

Providing the in-house counsel perspective, Ms Sawicka confirmed that arbitration was the preferred dispute resolution mechanism, especially in the case of complex transactions spanning multiple agreements. However, for more simple contracts the first choice is typically litigation because it should take less time to obtain an enforceable decision. She further noted that arbitration's reputation as "more expensive" is no longer true; costs are more foreseeable, and the

proceeding is generally quicker and more efficient.

For Mr Mas?lak, where there is an international aspect to a transaction, arbitration is the default. However, it is important to inform the client of the relevant factors, including costs and efficiency. Given his experience, it is generally only in the more complex transactions that he would request the assistance of his dispute resolution colleagues. Ms Hannah noted that dispute resolution counsel can assist more broadly in relation to "the fun stage" of transactions as they have knowledge of the issues that can arise after closing a deal, e.g., enforceability, workability, and time limitations.

In terms of choosing dispute resolution counsel, Ms Sawicka confirmed that "price is a factor", including e.g., hourly rates and pricing structures and that it can be helpful to work with the transactional lawyer's dispute resolution colleagues. However, experience is the number one factor, which may be demonstrated e.g. by a lawyer's international rankings. Personal recommendations from other arbitration practitioners are also highly appreciated and valued. The same applies for arbitrator appointments, with youth not necessarily an excluding factor, particularly on tribunals of three arbitrators.

With a view to business, the parties prefer amicable solutions (effective negotiations). In this sense pursuing litigation is a "last resort" as referral of the dispute to an expert or arbitrator involves a greater "loss of control" for the party and it is important to speak to counsel early to set the matter in context, determine a strategy and ideally pursue settlement or a resolution of the matter. In Ms Sawicka's experience, all disputes that had so far arisen were able to be resolved before escalating into more formal processes. She further confirmed that in most matters, the calm negotiators win over the "fighters" and that the lawyer should generally not be adding to the conflict but working towards its resolution, particularly in cases where preserving the long-term relationships between the parties is a priority.

Following the discussion, the attendees asked questions ranging from the use of mediation, expert determination, and multi-tier dispute resolution clauses, to diversity and inclusion when considering external counsel and arbitrator appointments, to seeing dispute resolution clauses as a window for settlement and an opportunity for litigation funding.

Takeaways: Consider Context and Clear Communication Channels

In summary, this ICC YAF provided numerous useful insights concerning the different stages in the life cycle of a dispute resolution clause. Key takeaways for the authors include the clear preference for the use of arbitration in international transactions, the importance of taking into account the broader context in respect to the client and the dispute, the need to establish clear channels of communication between the stakeholders and participants, and good project management. Although nothing new (see e.g. discussion on this blog here), the emphasis on gaining practical experience and engineering opportunities through hard work and visibility remains invaluable for young and aspiring practitioners seeking their first appointment as arbitrator.

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