Kluwer Arbitration Blog

17th ICC New York Conference on International Arbitration: Building Resilience – Part 2

Raoul J. Renard (Assistant Editor for Technology) (Kluwer Arbitration Blog) · Sunday, October 9th, 2022

This post continues the coverage of the 17th ICC New York Conference on International Arbitration that is available in Part 1.

Reimagining Supply Chain Agreements and Dispute Resolution Practices to Better Manage Uncertainty

With supply chain disruptions aplenty (think Russia–Ukraine conflict, Suez Canal blockage, record inflation and raw material shortages, let alone the COVID-19 pandemic), lawyers have their work cut out for them in shaping legal responses to business continuity and dispute risks. Noting the observation by famed military strategist Sun Tze, that "the line between disorder and order lies in logistics," Patrick W. Pearsall (Allen & Overy LLP) opened this insightful panel by asking exactly what a supply chain is.

Vanessa L. Miller (Foley & Lardner LLP) explained that the supply chain refers to everything from raw materials to inputs and components, to final products and their associated transport and logistics. Anyone who has bought an appliance or gone to the grocery store in the last couple of years has experienced supply chain disruptions firsthand. Daniel Hearsch (AlixPartners) deepened the discussion by providing an assessment of current industry conditions. In short, demand continues to vastly outstrip supply. At the same time, we're seeing inflation across a broad basket of raw material inputs. Scarcity and inflation are moving up the supply chain to final sale, a salient example of which is the US $1 billion in greater costs Ford Motor is expected to incur in Q3 of this year.

Sabrina Lee (ABB Inc.) discussed challenges that arise when sourcing chips and related parts in the electrification business. Hearsch then addressed how semiconductor constraints will continue through 2024 as the electric vehicle transition exacerbates wafer availability issues. In the context of this "knife fight" for semiconductors, provenance issues may give rise to considerable liability risks: How do you know if the chips will work? If they've been properly handled? A potential spike in warranty claims across a number of industries over the next year – from automotives to smart phones – is something to watch for.

In such a constrained environment for producers, how can "knife fights" over contracts be

avoided? Luis Ceballos (Bristol Myers Squibb) discussed how the pharmaceutical industry prepares and manages supply constraints. In terms of supply contracting, he addressed the importance of proper contract drafting and Incoterm© choice.

The panel also tackled the issue of preserving supplier relationships. It was noted that generally suppliers have not been taking advantage of excess demand, pointing to the fact that suppliers tend to be in it for the long term: gouging customers to make a quick buck is simply not worth it. To better manage risk, the use of expanded force majeure clauses or "crisis clauses," that encompass civil strife and other risks, are increasingly in play.

What's the best governing law for such clauses? For Miller, jurisdictions are a "hot mess" on force majeure. When talking about the sale of goods – which predominate in supply chain contexts – the Uniform Commercial Code applies in all states barring Louisiana. One might expect, perhaps, a degree of uniformity in the approach taken by state courts. One would be led into error.

When asked whether there was anything unique about a supply chain dispute, there appeared to be general consensus that lawsuits are rare, as parties are thinking about commercial resolutions and the long game. Pearsall added that it should be in the wheelhouse of arbitration to resolve supply chain disputes without destroying the business of one of the parties. Why not, asked an arbitrator in the audience, consider the use of dispute boards as an effective means to quickly resolve differences? Construction disputes have similar relational dynamics to supplier relationships, where a project needs to keep progressing, and parties want to work together into the future. (The ICC Institute incidentally offered a one-day training session on dispute boards the following day.)

Pearsall closed with an appropriately modified version of *The Art of War* author's refrain: "The difference between chaos and order is good contract drafting." Hear, hear!

What Needs to Change in Procedural Orders & Timetables?

A highlight of the conference was an interactive debate-style panel, where practitioners pitched procedural innovations to each other and the audience, with live polling through the dedicated conference app. Moderated by Erica Stein (Dechert LLP), the panel examined how procedural orders and timetables, particularly Procedural Order No. 1, should be remodeled to avoid redundancies, incorporate offramps to settlement and employ other ADR tools. Often jousting with each other, panelists Chris Campbell (Baker Hughes) Stephanie Cohen (Independent Arbitrator), D. Brian King (Independent Arbitrator) and John V.H. Pierce (Latham & Watkins LLP) pitched such innovations as:

- *Video-recorded oral statements to be submitted alongside submissions, that give a roadmap and highlight key issues and evidence.* Such a move would force advocates to step back from voluminous written submissions and encourage crisp distillation of arguments. Against such an idea, concern was expressed that what would begin as a 30-minute, one-take Zoom recording would soon transmogrify into a slick, highly edited Hollywood-style production, at considerable cost to parties and to the detriment of the evidence.
- *In Procedural Order No. 1 ("PO1"), include a provision that if a party objects to a production request on the grounds of overbreadth or undue burden, it must state whether it would agree to a narrower formulation.* Again, concern was expressed from counsel's perspective. Why is not the right answer in cases of overbroad requests that the proposing party bears the onus to

reformulate? Why make the resisting party do their job for them?

- *Borrowing from Article 2.2(a)(ii) of the Prague Rules, why not direct the parties to agree on a list of disputed or non-disputed facts for discussion at the first procedural conference?* This proposal also received short shrift from the panel. While the underlying desire for streamlining is laudable, parties are likely in arbitration to begin with because they cannot agree on anything.
- *In highly technical disputes, PO1 should provide, immediately before or after briefs, a science lesson for the tribunal, jointly delivered by the experts.* This proposal brought skepticism from the audience, with one arbitrator pointing out that party-appointed experts are apt to spin what is presented as objective scientific fact, and that such moves could materially sway some arbitrators, particularly those who have insufficiently prepared.
- *Allow for direct examination of witnesses not called for cross examination.* This innovation stems from the understood rule that there is no direct examination in arbitration absent a few warmup questions, and the concern that opposing counsel can therefore "weaponize" this practice by refusing to cross examine any witnesses, thereby effectively silencing their evidence.
- *Include "mandatory phasal offers." After each phase of the arbitration, parties must exchange confidential offers, outside the tribunal process.* Functionally similar to a Calderbank offer, this would help the parties continue to "temperature check" the contours of potential resolution and incentivize early settlement. This idea was embraced, with a modification to soften the innovation to "recommended" phasal offers. There is some existing support for sealed offers: see the 2021 *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* at p. 38.
- *After the statement of defense, the tribunal delivers an anonymous short-form award.* The idea here being that parties get a sense of "which way the wind is blowing," and may thereby be incentivized to settle. This proposal was met with some enthusiasm, although concern was expressed that it could give rise to concerns of prejudgment.
- *Call upon parties to provide the tribunal with a jointly agreed decision tree, supplemented by 3-5 bullet points of issues of fact, law, or mixed law and fact, after which parties exchange sealed offers.* Views were mixed on this innovation. Like mandatory phasal offers, the proposal would remove some of the current baggage of the settlement offer (i.e., that it is a sign of weakness), but forcing parties to agree on a decision tree was viewed as untenable in practice. A modified proposal was for the tribunal to draft such a decision tree.

The session provided much food for thought. A common theme throughout was the need to keep the parties talking in the hopes of streamlining the issues, minimizing costs, and enhancing prospects for early settlement. All of these ideas are consistent with the ICC's goal of supporting global business needs.

Spotlight on the ICC International Court of Arbitration: A Behind-the-Scenes Look

The final session of the conference gave attendees a peak behind the curtain of deliberations of the ICC International Court of Arbitration ("Court"). With President Claudia Salomon presiding, five additional members of the Court – Maria Chedid (Arnold & Porter LLP), Sandra González (Ferrere) Samaa A. Haridi (King & Spalding LLP), Tafadzwa Pasipanodya (Foley Hoag LLP), Ina C. Popova (Debevoise & Plimpton LLP) – deliberated on two challenges to arbitrators, ably assisted by Secretary General Alexander G. Fessas and Counsel Paul Di Pietro.

Paul Di Pietro; Tafadzwa Pasipanodya; Samaa A. Haridi; Alexander G. Fessas; Claudia Salomon; Sandra González; Ina C. Popova; Maria Chedid (L to R).

The first challenge alleged a lack of independence and impartiality of a party-appointed arbitrator due to repeat appointments. Chiann Bao (Independent Arbitrator) acted as the Court's rapporteur, setting out the issues and providing a recommended course of action. The Court first deliberated on the admissibility of the challenge, followed by the merits.

The second challenge involved different sets of issues: an alleged financial relationship between the arbitrator and a party; and an alleged undisclosed relationship – as well as work together on another tribunal – between the president and a co-arbitrator.

While the issues were different, a few common themes emerged as to the deliberative process:

1. Court Members raised arguments against and in favor of the various challenges, openly debating various aspects;
2. challenges to arbitrator independence and impartiality are contingent on the facts of each case; and
3. soft law instruments such as the *IBA Guidelines on Conflicts of Interest in International Arbitration* were mentioned but do not bind the Court.

President Salomon closed the mock session by noting that the six female Court Members on the stage reflect the gender parity achieved by the Court in 2018, a commendable legacy of former President Alexis Mourre. Salomon also noted that of 195 Court Members from 120 countries, she is the only Member to be paid to do the work. Appointment to the Court may carry prestige, but the many hours of unpaid work stems from a shared commitment to improve the arbitral process for the benefit of all.

After an immensely enjoyable and fruitful day, Director of Arbitration and ADR for North

America Marek Krasula gave closing remarks, and commended his colleagues Abbey P. Hawthorne, Kiara Williams, Katharine Bernet and Belinda Johnston for their tireless work to make the 17th ICC New York Conference in International Arbitration a great success. The theme for 2022 was "Building Resilience." Judging by the strong turnout, the emphasis on digital adaptation and the abundance of creative ideas, arbitration in North America has emerged from the pandemic stronger than ever.

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