Kluwer Arbitration Blog

New York Arbitration Week 2022 Redux: Who's in Charge? — 37th AAA-ICDR/ICC/ICSID Joint Colloquium on International Arbitration

Bhushan Satish (Willkie Farr & Gallagher) · Saturday, December 3rd, 2022

The 2022 New York Arbitration Week opened on 14 November 2022 with the Joint Colloquium co-organized by AAA-ICDR, ICC, and ICSID. The Colloquium tipped its hat to the Week's overarching theme "*who is in charge*?" That is, why and how the objectives and expectations of various parties involved in international arbitration — such as clients, arbitrators, counsel, arbitral institutions, third party funders, and expert witnesses — could, and often do, diverge. The panelists also touched on how that impacts the legitimacy of international arbitration. For instance, one panel explored the role of codes of conduct in addressing conflicts of interest and attendant disclosure expectations. Another explored variance in approaches adopted by governmental and private clients, and potential differences within those two broad classifications of clients. The theme was brought into sharp focus by the last panel discussing how theory and practice diverge amongst participants in the arbitration community, depending on whether one dons the hat of a counsel, arbitrator, or an arbitral institution. This post presents a few highlights from the program.

Opening Remarks and Institutional Updates

The day's proceedings launched with an opening address delivered by the AAA-ICDR's Senior Vice President, General Counsel & Corporate Secretary Eric P. Tuchmann. The first panel presented updates from each organizing arbitral institution, reporting on major developments over the last year.

Meg Kinnear (Secretary-General, ICSID) provided a brief overview of the 2022 revisions to the ICSID Rules and Regulations ("the Rules"), achieved after a 5-year long, comprehensive and transparent amendment process that involved publishing numerous working papers explaining the draft amendments and undergoing extensive consultations with Member States and other stakeholders. The legitimacy of the process and of the end-product was evident from the smooth passage of the Rules, which were adopted on 21 March 2022, with 85% of the Member States supporting the revisions and no delegation voting against them.

Building on the theme of legitimacy, the next speaker, Claudia Salomon (President, ICC International Court of Arbitration) drew inspiration from the genius American photographer and conservationist, Ansel Adams, who developed the idea of "making" photography (versus merely

taking them, denoting a more intentional, effortful process) as part of his advocacy to recognize photography as a legitimate art form. In turn, Ms. Salomon advocated for turning to one's unique experience and perspective when leading authentically. In particular, Ms. Salomon spoke of bringing to the table her "client mindset," thus enabling her to serve the interests of a key demographic for the ICC Court, i.e. the disputing parties. To better serve them, one must identify opportunities that deepen the involvement of in-house counsel and devise methods to assist resolving parties' disputes beyond employing (standard) pre-arbitral procedures. (For instance, it would be useful to keep open avenues to negotiate and mediate disputes even after arbitration proceedings commence.)

Mr. Tuchmann closed the panel with an overview of the AAA-ICDR's activities over the past year, including amending the ICDR IA Rules, making brick-and-mortar investments in upgrading hearing facilities to better serve remote or hybrid hearings, further developing proprietary online platforms (AAAWebfile and Panelist e-Center), and deepening initiatives by the ICDR Foundation, which in 2022 provided USD 1.1 Million in scholarships and in support of various causes aimed at supporting D&I initiatives and reducing community conflicts.

Conflicts of Interest & Disclosures: Codes of Conduct

The second panel of the day was moderated by Julie Bédard (Skadden, Arps, Slate, Meagher & Flom, NY), who opened by querying the utility of soft law norms by way of, for instance, the draft Code of Conduct for Adjudicators in International Investment Disputes, especially given the widespread use of the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration and the 2013 IBA Guidelines on Party Representation in International Arbitration.

Chiann Bao (Arbitration Chambers, Singapore) suggested that the draft Code, especially because it was a joint initiative of UNCITRAL and ICSID, would conceivably have implications outside of the main area of application, i.e. investor-state arbitration. The draft Code brings the added utility of addressing issues that are unique to investor-state arbitration, which are not specifically addressed in the IBA Guidelines and need separate attention. More generally, the framework provided in such soft law norms offers a starting point for dialogue and introduces the baseline expectation when discussing conflicts and disclosures. Aisha Nadar (Advokatfirman Runeland AB, SE) added that the framework in the draft Code allows parties to take comfort in the integrity of the system as a whole by addressing all players, including counsel and experts, pointing out that the IBA Guidelines address a limited set of issues and that for other issues, such as expert disclosures, one needs to look elsewhere. The systemic implications of double hatting was underscored by pointing out that in investor-state arbitration, if a party loses confidence in the independence and impartiality of an arbitration, then any resultant award is subject to annulment, which in turn chisels away at the foundation of the system as a whole, and not just the arbitral award alone. Oliver Armas (Hogan Lovells, NY) admitted that while it is hard to argue against the basic premises that inform the draft Code, it runs the risk of over steering when setting out strictures that don't comport with practical realities. However, the exercise overall would be useful to prevent ceding valuable policy space to tribunals or annulment committees, which might otherwise be tempted to address larger policy questions going beyond the immediate dispute at hand.

The In-House and Government Counsel's Roundtable – Discussion on their Approach to an International and Investment Arbitration

The third panel was steered by the inimitable John M. Townsend (Hughes Hubbard & Reed, Washington, D.C.), who peppered the panel with more than a dozen short, punchy questions to precipitate discussion. The first issue explored how to manage a dispute with a counterpart where the disputing parties are engaged in a long-term relationship.

The first speaker, Effie D. Silva (Fresh Del Monte Produce, FL), noted it was better to engage in preventative dispute resolution by approaching the other side as if it were a long-term relationship and not a one-off incident, and that doing so was easier at the contract conclusion stage than later in the relationship. The second panelist, Charles N. Juliana (IPS-Integrated Project Services, PA) agreed that the longer a dispute festers, the more difficult it is to continue the relationship. Introducing the idea of a "3-layered cake" approach, he discussed agreements that allowed for three levels of escalation. The first layer requires working-level employees who are closest to the potential dispute to liaise with their counterparts without the involvement of counsel, a process that mostly leads to a full resolution. The second layer envisages discussions that go from the relationship management team right up to the C-suite, which are more protected and involve counsel. It is only after those two processes fail that arbitration. the third layer, is considered. Under this approach, projects are typically monitored throughout their lifecycle based on key performance indicators that identify potential issues early. The third panelist, Shane Spelliscy (Trade Law Bureau, Government of Canada) echoed the sentiment that clients do not want to find themselves in a dispute and observed that this preference is even stronger with governments. Because of peculiarities of litigating with a government, there is limited time to settle in the beginning of the dispute before it catches momentum. Governments tend to be slower to react, especially when the dispute implicates larger policy issues, and so there is limited scope to reach settlement once the arbitration is underway. Governments often look to forms of ADR other than arbitration — increasingly, mediation — to preserve both the relationship and the investment.

Other issues explored included: (i) how to deal with time-sensitive disputes, (ii) how arbitrator nominations are decided and whether those factors differ when selecting mediators, (iii) what issues the panelists wish were addressed in the arbitration agreement (unanimously, limiting discovery), and (iv) what the panelists most appreciate when interacting with outside counsel (unanimously, counsel who do not shun from admitting a certain issue under consideration does not fall within their area of expertise and are reliably able to find and refer to a true expert on the subject).

What Would You Do?

Finally, the last panel of the day, enigmatically titled "What Would You Do?" was guided by Jose Astigarraga (Reed Smith, Miami), with three panelists propelling discussions: Mélida Hodgson (Arnold & Porter, NY), Abby Cohen Smutny (White & Case, Washington, D.C.) and John A. Terry (Torys, Toronto). The underlying idea was to explore hard questions that yield no clear answers and where reasonable people can disagree on the preferred approach, based on whether one adopts the view of an arbitrator, counsel, or arbitral institution. Navigating that remit, the panel placed before the audience for voting by a show of hands numerous hypotheticals, and subsequently addressed those hypotheticals in greater detail, providing their tentative view on the

suggested outcomes. While a full recap is outside the scope of this post, the questions included "what would you do" when faced with: (i) a co-arbitrator who evidently comes prepared to a hearing and indeed proceeds to pose many, often lengthy questions aimed solely for witnesses of the party that did not appoint them; (ii) the aged, male, white president of a tribunal demonstrates impatience with a young, female counsel of color and is much more polite when interacting on the same issue with the older, white male counsel leading the case; (iii) a dispute where you are the sole arbitrator and the dispute cries out for settlement, the inquiry being the outer bounds of how far one could go in suggesting the parties settle; (iv) an arbitration agreement that allocates costs for the prevailing party and to what extent policing costs would be justifiable in that context; and (v) an impecunious party from a developing country that suffers serious problems with internet connectivity, where that party can't afford costs of an in-person hearing and the opposing party insists on in-person hearings.

Conclusion

Given the sheer practical expanse and academic rigor of the Colloquium — boasting a high pedigree and now in its 37th iteration — this post necessarily aims at the modest goal of covering a high-level summary of panel discussions alone, with the usual caveats that any omission or mistake should be solely attributed to my individual (and this format's) limitations. Undoubtedly deserving a separate mention, but unfortunately not much more due to space constraints, the stirring luncheon address by the President of the American Bar Association, Deborah Enix-Ross (Debevoise & Plimpton, NY), on "International Arbitration as a Cornerstone for Democracy and the Rule of Law," was received with much admiration and thunderous applause. The Colloquium provided a start to both New York Arbitration Week, and the conversation surrounding the question of "who is in charge." By way of an epilogue, I would note that the Week's central theme of "who is in charge?" is a topic that would benefit from greater participation from other key stakeholders beyond the Colloquium. Think national courts, third party funders, academia, civil society (especially on issues of legitimacy in investor-state arbitration), and perhaps more voices from the international arbitration bar.

Kluwer Arbitration Blog's full coverage of New York Arbitration Week is available here.

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