Kluwer Arbitration Blog

LIDW 2023: The Evolving Role of Arbitral Institutions and Relationship of International Commercial Courts and Arbitration

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Participants in the London International Disputes Week 2023 ("**LIDW 2023**") had great difficulty choosing from a line of outstanding events to attend. This blog post reports on one session from the third and fourth day of the week, respectively, "The Evolving Role of Arbitral Institutions" and "International Commercial Courts and Arbitration: Competitors or Bedfellows?"

1. **The Evolving Role of Arbitral Institutions**

The session "The Evolving Role of Arbitral Institutions" was hosted by Clyde & Co and Queen Mary University of London on 17 May 2023. The large panel consisting of **Luis Martinez** (Vice-President, AAA-ICDR), **Ricardo Aprigliano** (Vice-President, CAM-CCBC), **Mariel Dimsey** (Secretary General, HKIAC), **Colleen Parker Bacqueet** (Counsel, ICC), **Ismail Selim** (Director, CRCICA and President, IFCAI), **Jamie Harrison** (Deputy Director General LCIA), **Natalia Petrik** (Deputy Secretary General, SCC), **Christian Alberti** (General Counsel, SCCA), and **Benjamin Hughs** (Member of the Court, SIAC) was moderated by **Professor Loukas Mistelis** (Queen Mary University of London / Clyde & Co) and **Luiz Aboim** (Mayer Brown) in a "presidential debate" format.

Advertisements in a Minute and Applicable Rules

To open the session, institutions were given a minute to emphasize their strengths and to differentiate themselves from other institutions. Key elements emphasised included cost-effectiveness due to fees being pegged to local currency (CAM-CCBC), air-conditioned rooms (SIAC), modernised rules (ICC, SCCA, LCIA), geographical location (LCIA, GRCICA), and the capacity to navigate proceedings impacted by sanctions (LCIA), longevity, internationalised focus and/or connections to key stakeholders and business groups (ICC, GRCICA, HKIAC), high tech approaches to arbitration including paperless proceedings (SCC), and representation of a high proportion of women in arbitrator appointments (SCC) .

The next part of the session focused on the key changes made by these institutions in recent rule

amendment processes. Several of the institutions have recently adopted modernised rules for proceedings, including for example CAM – CCBC whose new rules entered into force last April. The representatives emphasised particular innovations in their practice as a result of such developments. Colleen Parker, for example, mentioned that in order to increase efficiency and transparency, ICC is now publishing awards if parties do not opt out. She also explained the changes to the expedited procedures in terms of the monetary limits. The ICC is actually observing the use of its own rules in order to adapt them when necessary. Christian Alberti explained that the SCCA up-to date rules were not just a copy and paste of the rules adopted by other institutions. He explained that robust governance and transparency together with reducing cost and time were the main drivers behind this change. SCCA publishes redacted awards unless one party objects. Jamie Harrison, for the LCIA, explained that the LCIA uses a single set of rules to apply to all kinds of arbitrations rather than having sector-specific rules. He noted that consistency amongst different arbitration institutions in terms of their applicable rules is actually useful. ?smail Selim next explained that the 2011 rules of the CRCICA include provisions on emergency arbitration, interim measures, consolidation, and multi-contract arbitrations. Mariel Dimsey highlighted HKIAC's use of an electronic delivery and case management systems over the last 18 months. She further noted that one of HKIAC's solutions to issues of cost is to offer parties a choice to decide between ad valorem and hourly rates.

The panel also addressed the role of soft law in arbitration proceedings. Colleen Parker, for example, stressed how essential the Note to Parties and Arbitral Tribunals on the conduct of the arbitration is in terms of explaining the rules to the arbitrators. Benjamin Hughes also mentioned that practice notes are not very 'soft' insofar as some govern the procedure adopted by tribunals in practice. Finally, Natalia Petrik explained that the guidelines for arbitral tribunals are not binding nor part of the rules, but that they regulate the relationship with tribunals and it is expected from the tribunals to comply with them.

Responding to the Legitimacy "Crisis" and Promoting Efficiency

In this part of the session speakers discussed what can be done to ensure legitimacy in arbitration. Christian Alberti highlighted the importance of training, with Colleen Parker noting the role of the ICC Academy in this context. Jamie Harrison mentioned that the publication of the decisions regarding the challenges made to the arbitrators contributes to the legitimacy of the process. He then explained that LCIA actually rarely receives challenges, and those challenges are generally found unsuccessful. Ismail Selim added that a pro-arbitration environment is required to establish legitimacy and the whole state must contribute to this pro-arbitration environment.

The panellists also addressed ways to boost efficiency in arbitration proceedings. Colleen Parker argued that the reduction of fees of arbitrators in cases of delay plays a huge role in motivating tribunals to deliver their awards on time. She also added that the use of technology and implementing tools to better administer cases can also serve this purpose. Luis Martinez similarly stressed the importance of using AI in increasing efficiency. He also explained that AAA sends a survey at the end of each arbitration to parties to get their feedback and noted that arbitrators with poor reviews would be removed from the list of arbitrators. Benjamin Hughes cautioned that due process paranoia can increase costs undesirably. Jamie Harrison mentioned new Article 14 in the LCIA Rules which provides a list of tools aimed at improving efficiency.

D-i-v-e-r-s-i-t-y

The fifth part of the event focused on diversity. Colleen Parker explained that the ICC always sends requests to the national committees in encourage them to consider young practitioners together with consideration for an equal geographical representation. Natalia Petrik highlighted the fact that last year 51% of appointed arbitrators at the SCC were female. Still, she emphasized that the issue is actually much more complicated than this since SCC only made 30% of the appointments. On the other hand, when appointments were made by the parties, only 27% of the arbitrators were female. Finally, Mariel Dimsey provided a comparison by stating that around 50-60% of the appointments were made by HKIAC. She also stressed that they are trying to expand the pool. Moreover, she highlighted the fact that the issue is not just about gender but cultural sensitivities should also be considered. She concluded her speech by underlining the fact that in HKIAC, every agenda includes at least one female candidate.

2. **International Commercial Courts and Arbitration: Competitors or Bedfellows?**

The fourth day of LIDW 2023 saw a stimulating discussion on the differences between international commercial courts and international arbitration as mechanisms for resolving international disputes. This panel was chaired by **The Rt. Hon. Dame Elizabeth Gloster DBE** and included as panelists, **Michael Frisby** (Stevens & Bolton LLP), **Frederico Singarajah** (Gatehouse Chambers), **Chris Johnston** (FTI Consulting), and **Kevin Nash** (SIAC).

Dame Elizabeth Gloster began by highlighting the changing landscape of international disputes in a rapidly evolving world which necessitated an understanding of the mechanisms employed for cross-border dispute resolution. She added that the effective resolution of such disputes was crucial for driving business plans, models, and attracting investments in a country.

What is an International Commercial Court?

Dame Gloster raised the question about what an international commercial court is and what it is supposed to do. Frederico Singarajah answered the question by citing an article titled “The rise of the international commercial court: what is it and will it work?” (C.J.Q. 2014, 33(2), 205-227), which outlines the key characteristics of an international court, including the existence of a permanent body established independently, reliance on international law, decision-making based on pre-existing rules of procedure, legally binding outcomes, impartial judges, and having at least one international party in the claim brought before such a court.

Mr Singarajah then highlighted several international commercial courts that handle both domestic and international commercial disputes, such as the London Commercial Court, the Delaware Court of Chancery, and the United States District Court for the Southern District of New York. Additionally, he discussed certain courts that were specifically established for resolving international commercial disputes, including the Singapore International Commercial Court (SICC), Astana International Financial Centre, The International Chamber of the Paris Court of Appeal, and Dubai International Financial Centre Courts.

Standing International Forum of Commercial Courts

Michael Frisby spoke about the significance of the Standing International Forum of Commercial Courts (SIFoCC) in facilitating best practices and collaboration among commercial courts worldwide. With membership from about 45 jurisdictions, he noted that the SIFoCC served as a guide for practitioners, adding also that in addition to its practical significance it also had certain limitations.

Impact of Singapore International Commercial Court on Arbitration

Next, Kevin Nash addressed whether and how the establishment of the SICC in Singapore impacted the Singapore International Arbitration Centre (SIAC). He noted that when the SICC was first established in 2015, many had raised concerns that the SICC would "cannibalize arbitration". However, what had been observed instead was a boom in the number of international arbitration cases due to the increased confidence parties had in the Singapore legal system. He added that the Singapore High Court's reputation as a pro-arbitration court instilled confidence and enhanced the international arbitration process.

Efficiency and Case Management

On the differences between proceedings before international commercial courts and international arbitration tribunals, Chris Johnston, commenting as an expert, noted that courts tended to be more proactive in case management compared to arbitral tribunals, where over-formalization often lead to delays and increased costs. He suggested adopting early management of experts, as seen in courts, to increase efficiency in the arbitration process, particularly in complex construction cases involving various experts such as delay and quantum experts.

Deficiencies in Arbitration and Litigation in the International Context

Mr Frisby pointed out certain deficiencies of arbitration as noted by the SICC. These included the inability to join third parties in arbitration proceedings, lack of finality due to the various mechanisms for challenge during enforcement of arbitration awards, and the more supportive nature of courts during the stage of disclosure, especially with regard to obtaining documents.

Mr Singarajah noted that despite these alleged deficiencies, users still preferred arbitration as the go-to method for resolving cross-border disputes, as had been noted by a QMUL survey in 2018 and 2021.

Mr Singarajah then referred to an article titled "The Rise of the International Commercial Court: A Threat to the Rule of Law?" by Lucas Clover Alcolea, which raised two potential problems with international commercial courts. He noted that the first concern revolved around the issues of sovereignty, as significant cases may bypass domestic courts, hindering the development of a

country's own rule of law. The second issue related to ethical concerns, including the potential misuse of international commercial courts to conceal problems within ordinary courts or legal systems, effectively "whitewashing" issues.

When concluding the discussion, the panelists were in agreement about transparency and enforceability being crucial factors to consider when choosing between international commercial courts and arbitration. They generally agreed that if transparency was a priority for a party, resort to international commercial courts might provide the answer, whereas if confidentiality was a priority, international arbitration would offer an effective solution. Thus, understanding the characteristics, impact, deficiencies, and ethical concerns surrounding international commercial courts and international arbitration was agreed to be essential for businesses, legal practitioners, and policymakers alike.

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