Kluwer Arbitration Blog

18th ICC New York Conference on International Arbitration: The Next 100 Years of Arbitration & ADR

Beatrice Rubin (Brooklyn Law School) · Wednesday, November 15th, 2023

For the centenary anniversary of the ICC International Court of Arbitration, this year's ICC New York Conference on International Arbitration convened over 330 international arbitration practitioners, in-house counsel, academics, students, and outside counsel from 36 countries in the heart of New York City. As ICC Secretary General John W. H. Denton highlighted in his opening remarks, the timing of this year's Conference coincided with the United Nations General Assembly, an auspicious reflection of the ICC's history as a steadfast institution providing neutral, transparent, inclusive, and accountable multilateral platforms for the past 100 years and the century to come.

ICC: The Preferred Option for International Arbitration in North America

To kick off the day, Peter Sherwin (Proskauer Rose LLP & Chair, USCIB/ICC USA Arbitration Committee) and Myriam Seers (Agora & Chair, ICC Canada Arbitration Committee) addressed the critical role that the ICC plays in North America. Citing the 2021 White & Case International Arbitration Survey, Sherwin emphasized that 70% of North American international arbitration users prefer the ICC as their arbitral institution, and those based in the U.S. constitute the largest group of ICC users. Seers echoed this sentiment, noting the growing significance of the ICC in Canada, exemplified by the prevalence of Canadian panelists at the Conference and the record number of Canadian parties involved in ICC arbitrations in 2021, with approximately 30% of those cases involving both a Canadian claimant and respondent.

Looking to the Next 100 Years: A Review of the ICC's Centenary Declaration on Dispute Prevention and Resolution

Mark W. Friedman (Debevoise & Plimpton) moderated a panel discussion centered on the ICC Centenary Declaration on Dispute Prevention and Resolution and its impact in North America. The Declaration lays out an ambitious roadmap to best serve communities in dispute resolution for the next 100 years. The panel presented a lively discussion on four aspects of the Declaration: access to justice and rule of law; independence and neutrality; transparency; and diversity, equity, and inclusion.

First, the panel discussed how costs may impact access to justice in international dispute resolution. Costs have always been a hot button issue when engaging with arbitration, Victoria Shannon Sahani (Associate Provost for Community and Inclusion and Professor of Law at Boston University School of Law) noted. One solution that the panel explored was the use of cost-efficient processes, such as post-Covid technology solutions, to mitigate some of the expenses traditionally required in arbitration.

When it comes to upholding the rule of law in international arbitration disputes, Eugene J. Silva (ExxonMobil Corporation) emphasized that even smaller cases have the potential to significantly influence international rule of law. Rule of law is also a question of transparency. From the standpoint of a corporation, confidentiality acts as a key value proposition of arbitration. For example, the ICC allows users to opt out from the publication of awards. Lack of transparency, however, may impact the rule of law, especially as more State and State-owned entities choose to use arbitration to settle disputes. This "not in my case" attitude toward publishing awards, Mélida Hodgson (Arnold & Porter and Vice-Chair of ICC Institute of World Business Law) emphasized, can be problematic. Parties want transparency from others, as long as they are not required to publish their own awards.

Turning to independence and neutrality, David R. Haigh KC (Independent Arbitrator) remarked on the importance of this subject because a lack of independence or impartiality can be used to set aside an award. The panelists discussed whether disclosures may be being taken too far. For example, can a fear of creating a future conflict prevent arbitrators from building connections and collegiality? It was even suggested that perhaps using predictive analytics to better determine the independence and impartiality of arbitrators could be helpful in the not-so-distant future.

Lastly, the panel turned to diversity, equity, and inclusion ("DEI") in international disputes. Sahani noted that, while the need for DEI in the U.S. context is more acute due to historic systemic discrimination, many factors impact identity formation in the international context, such as language, legal system, gender, race, and ethnicity. Finding the right parameters to make sure everyone feels included in the international arbitration community is challenging but vital. Therefore, Sahani emphasized that, in addressing diversity issues, "the first thing we have to think about is 'which voices are we not hearing; which faces are we not seeing?'" Silva closed out the discussion by noting that many parties in arbitration consider both the corporate need for arbitrators who grasp the underlying legal framework of disputes and the broader societal objective of advancing DEI in all facets of dispute resolution.

Technology Strategies in International Arbitration

ICC International Court of Arbitration President Claudia Salomon next led a fireside chat with Karen Silverman (The Cantellus Group) on the potential impacts on businesses of emerging technologies, such as artificial intelligence ("AI"). President Salomon started by citing a recent Financial Times article, which found that, while 40% of S&P 500 index companies mentioned AI, or related terms, in earnings calls in the previous financial quarter, only 16% actually mentioned it in their corresponding regulatory filings. This led President Salomon and Silverman to discuss the important distinction between the AI "hype" and the current reality for businesses.

President Salomon raised the question of how companies can and should actually integrate these

new technologies into corporate management decisions. To start, Silverman stressed that companies need to empower a small team of advisors to lay out the short- and long-term risks and opportunities of AI and other new technologies. Silverman recommends that companies have a separate governance council to help with the day-to-day process of implementing new technologies strategically, aligning them with existing policies, defining the scope of implementation, and considering their potential impact on people—both internal and external stakeholders.

Silverman urged companies to take on an "explorer's mindset" in incorporating new technology that focuses more on the journey than the destination. Throughout the journey, companies need to create spaces that allow for "constructive interrogation" of these new processes and technologies, giving employees the opportunity to ask questions while relying on leaders to set the tone. As Silverman noted, "we're underestimating how much change is coming," and businesses—and governments deciding upon regulations applicable to those businesses—should be ready to embrace it with practices and regulations that are agile, aspirational, human-centered, trustworthy, and fair.

In the afternoon, a panel led by David Earnest (Diamond McCarthy LLP) highlighted the potential for technology integration to enhance arbitration efficiency. Throughout the discussion, Professor Abdi Aidid (University of Toronto Faculty of Law) reassured the crowd that lawyers will not necessarily be replaced by AI, but that lawyers who use Al will replace those who do not. Aidid stressed that lawyers should harness AI for computational tasks where it excels, while capitalizing on our strengths in interpreting emotions, offering creative judgment, and drawing from our arbitration experience to make informed decisions.

For those not as AI-literate, Isabel Yishu Yang (ArbiLex) and Professor Costis Daskalakis (Massachusetts Institute of Technology) offered an introduction to the difference between supervised learning (such as e-discovery and contract analytics tools) and unsupervised learning (like ChatGPT). Kathryn Khamsi (Three Crowns LLP) used a slide showing the many interconnected factors impacting the success of NATO in Afghanistan to illustrate the type of modelling that can be used in arbitrations, and discussed the new challenges that raises, such as bias in data and model boundaries, outdated information due to data input timing, and the complexity of converting human behaviors into numerical data. To ensure that existing social and systemic problems don't make their way into AI algorithms due to biased source data, Aidid stressed the importance of including stakeholders in the development of these tools.

Finally, Khamsi highlighted the debates about transparency which emerge, including allegations as to the "black box" of machine learning. As a result, a new breed of machine learning experts is essential and already emerging to validate these tools within a legal context.

Dispute Prevention and Resolution in the Mining Industry

In a panel on dispute prevention and resolution in the mining industry, Henry G. "Harry" Burnett (King & Spalding LLP) kicked off the panel with a discussion of the relationship between the mining sector and the energy transition. Geoffrey David (Rio Tinto) started by stressing that, while the types of critical minerals in highest demand have shifted towards minerals used in battery technology, including staples like copper, the need for mineral resources remains intrinsic to technological advancement. Juliette Fortin (FTI Consulting) noted that "the world's 40 largest

mining companies are gaining an increasing portion of their revenue from base metal [such as] copper, gold." To prevent and mitigate potential disputes in this vital industry, Poupak Bahamin (Barrick Gold Corporation) emphasized that companies and their investors must engage directly with mining host States and local communities.

Good arbitration clauses can also help protect foreign mining investors from State action. Where the negotiation of an arbitration clause is possible, investors should choose rules and a seat based on factors such as familiarity with a State's court system, potential arbitrators should one need to be appointed under the rules, and the capability of the rules, in conjunction with the seat, to address complex, multijurisdictional disputes quickly for expedited relief, Rachel Howie (Dentons) stressed. Even when a desired arbitration clause is unavailable because a host country employs "take it or leave it" form contract terms, Caroline Richard (Freshfields Bruckhaus Deringer US LLP) noted that parties may be able to also turn to treaty-based protections.

While strong treaties offer broader protection to foreign mining investors, they do still run the risk of being denounced by the State in the future or being overly protective of the State. Therefore, Geoffrey David (Rio Tinto) highlighted the importance of parties, at the time of contracting, identifying the essential clauses in their mining contracts required to safeguard their investments against potential disruptions in the next 5 to 10 years, whether due to changes in investor management or shifts in the host State.

Another risk faced by mining investors involves human rights obligations set forth by States and their courts, Richard noted. These obligations—some of which may even be applied *ex post* by courts—are sometimes used by States as arguments to shield themselves from treaty violation claims or diminish compensation owed to investors, as in cases like *Bear Creek Mining Co v. Peru* and *Copper Mesa v. Ecuador*. States may also cite a project's general lack of community support as grounds for denying an investor's claim in whole or in part. This is further complicated by the creation of entirely new regulatory bodies such as the Canadian Ombudsperson for Responsible Enterprise ("CORE"), which is broadly tackling foreign human rights claims by individuals or corporations, Howie added.

Draft Scrutiny in a Mock ICC International Court of Arbitration Session

The day concluded with an interactive mock session of the ICC Court led by President Salomon. The Court included Paul Di Pietro (ICC International Court of Arbitration Counsel), Cecilia Azar (Galicia Abogados), Patricia Shaughnessy (ICAL Master Program, Stockholm University), Alexander G. Fessas (ICC International Court of Arbitration Secretary General), Samaa A. Haridi (King & Spalding LLP), and Eduardo Damião Gonçalves (Mattos Filho).

The mock tribunal demonstrated the ICC Court's scrutiny process, in which the Court reviews an arbitrator's draft ICC award before it is finalized. This in-depth process, President Salomon noted, is unique to the ICC and has the ultimate goal of improving the quality and enforceability of the award by identifying possible defects in the draft award. As illustrated in the mock session, after the ICC Secretariat and Court both examine and comment on issues evident in the award, the ICC Court has the ability to approve an award with no comments, approve an award subject to comments, or not approve an award.

Conclusion

After a thought-provoking day filled with panel discussions and networking opportunities, North America Director of Arbitration and ADR Marek Krasula closed by thanking his team for their hard work in making the 18th ICC New York Conference a success, thanking sponsors for their generous support, and thanking the audience for attending.

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