Kluwer Arbitration Blog

New York Arbitration Week 2023 Recap – Highlights from the 18th Annual Fordham Conference on International Arbitration and Mediation

David Blackman (Chaffetz Lindsey LLP) · Wednesday, December 6th, 2023

On November 17, 2023, Fordham Law School hosted its annual full-day Conference on International Arbitration and Mediation ("CIAM"), titled "Key Issues in International Dispute Resolution: 2023." The program concluded the fifth-annual New York Arbitration Week, which ran from November 13 through November 17, hosted by NYIAC and CIArbNY. The program was a fitting capstone to a program of stand-out events throughout New York Arbitration Week and convened leading arbitrators, mediators, academics, and in-house and external counsel from the international arbitration and mediation community, as well as students at Fordham Law School in New York to discuss pressing issues in international dispute resolution.

Ethical Dilemmas Arising in Mediation

Following brief opening remarks by Edna R. Sussman, independent arbitrator and Distinguished Practitioner in Residence at Fordham Law School, and Louis B. Kimmelman, independent arbitrator and Professor of Practice at Brooklyn Law School, CIAM opened with an engaging roundtable discussion of ethics issues for mediators under the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"). The panel was moderated by Ivana Nin?i? Österle, Executive Director of the International Mediation Institute, and featured Bruce A. Green, (Fordham Law School), Linda Gerstel (Fordham Law School; GerstelAdr), Tat Lim (Aequitas Law LLP; Maxwell Mediators), Omer Shapira, (Ono Academic College), and Ellen Waldman (CPR International) sharing their perspectives as panelists.

Ms. Österle led the discussion presenting a variety of provocative hypothetical scenarios that might arise in the course of a mediation, from the case of the mediator who suspects a party is seeking a fraudulent settlement to the case of counsel who appears to be standing in the way of a settlement due to divergent interests. The panelists offered their reactions to these diverse ethical dilemmas, drawing on their experience to offer views from counsel and mediator perspectives. The discussion highlighted the common ethical standards applicable in Singapore Convention mediations and the differences in approach that might be taken based on the different cultural backgrounds and expectations of the participants.

Tools to Efficiently Deal with Technology Issues in Arbitration

The next panel discussion focused on technology disputes. The panel was moderated by Kathleen Paisley (Ambos Law) and Maria Chedid (Arnold & Porter), who are the co-chairs of the ICDR Global Working Group for the resolution of technology and life sciences disputes on its Report on the Effective, Expedient, and Expert Resolution of International Technology, Life Sciences, and IP ("TLI") Disputes (the public consultation draft is open for comment through March 31, 2024). They were joined by Shai Sharvit (Gornitzky), Patricia Shaughnessy (Stockholm University), Steve Smith (Steve Smith ADR), and Gretta L. Walters (Chaffetz Lindsey) as panelists to share their perspectives.

The panel discussion highlighted the work of the ICDR Global Working Group and its nearly two-year survey of arbitrators, mediators, and external and in-house counsel on TLI disputes. In particular, one of the key findings of the survey was that technology issues often arise in many different industries, including construction, defense, energy, entertainment, and transportation, as well as what might be more traditionally thought of as the home of "technology" disputes like life sciences, IT, and telecommunications.

Accordingly, the panel made clear that it was essential for virtually all arbitrators and arbitration counsel to develop and implement strategies for efficiently resolving technology issues in arbitration. The panel therefore discussed the pros and cons of a number of such tools, such as a joint expert presentation on technology issues for the tribunal early in a case and other procedures to efficiently manage and present expert evidence like expert conferencing and substantive midstream case management conferences ("Kaplan" hearings). The panel also emphasized that no one tool will be appropriate for every case, however, and that, for example, an early presentation on technology issues might be counterproductive and inefficient in some disputes—a sentiment also shared by some members of the audience in their questions.

The panelists agreed that the key features of technology disputes—the complexity of technology issues, the prevalence of large amounts of confidential and proprietary information, and the need for expeditious resolution—pair naturally with features of international arbitration—picking expert decision-makers, private and confidential dispute settlement, and finality of awards. So long as it is able to improve its efficient and economic management of technology issues, arbitration should be well positioned as the dispute resolution mechanism of choice for large numbers of the future's disputes.

Astigarraga's Keynote Address Takes on AI as Tool to Enhance Human Logic to Serve Justice

José I. Astigarraga (Reed Smith), who recently announced that he will begin practice as an independent arbitrator in the coming year, offered a keynote address that reinforced the opportunity that the rapid pace of technological change affords international arbitration to improve itself as a preferred method of dispute resolution.

Drawing on the fictional characters of Spock (played most memorably by Leonard Nemoy),the Vulcan Science Officer of the Star Trek series, and HAL 9000, the artificial intelligence antagonist

in Stanley Kubrick's *2001: A Space Odyssey* (1968), Mr. Astigarraga first outlined some of the basic limits of human reason—cognitive biases like the framing effect, hindsight bias, the halo effect, and others—and explained how these cognitive biases can produce substantively worse, less just outcomes in arbitrations. He explained that, by leveraging new technological tools like generative AI, arbitrators should try to exceed the limits of human reason, not to replace but enhance the essential human values of justice, fairness, and equity. Quoting Spock, Mr. Astigarraga affirmed that: "Logic is the beginning of wisdom, not the end."

Mr. Astigarraga hypothesized some use cases for AI by humans in arbitrations, such as generating alternative possible outcomes for events that may not have been otherwise considered because of hindsight bias. While such alternative scenarios would still be explored and considered by human faculties, Mr. Astigarraga struck an optimistic tone when suggesting that AI tools could be used in such a way to augment human decision making in the context of an arbitration.

Recent Empirical Research in International Arbitration

The final panel of CIAM discussed empirical research on international arbitration, including a recent empirical study of national court behavior in connection with annulment and recognition and enforcement actions. The discussion featured Catherine Rogers (Bocconi University; UC College of Law), Rahim Moloo (Gibson Dunn), Jason Yackee (Foley & Lardner; University of Wisconsin Law School), and Trey Childress (Three Crowns; Pepperdine University Caruso School of Law) as panelists to share their views on this research, and the role of empirical research in the practice of international arbitration in general.

The panel discussed that the rise of empirical research on international arbitration is a surprisingly recent phenomenon due to a greater turn towards empiricism in legal research generally. Indeed, the first empirical study of U.S. federal court decisions only occurred in 2008 and, even then, was relatively limited in scope. And while much commentary continues to be based on anecdotal evidence, the panel discussed the growing body of empirically founded research on international arbitration. Ms. Rogers and Mr. Childress presented their forthcoming article (co-authored with Jack Coe (Pepperdine University Caruso School of Law) and Christopher Drahozal (University of Kansas School of Law)), which constructed an original dataset of petitions to confirm, enforce, or vacate international arbitral awards in the United States directly from the dockets of U.S. federal courts. The data shows that the rates at which U.S. federal courts give effect to international awards are significantly higher than prior studies have suggested, vacating awards, denying enforcement, or dismissing such petitions in just 8% of cases. Mr. Yackee discussed his empirical research into the effect of bilateral investment treaties ("BITs") on foreign direct investment ("FDI"), concluding that in fact there is likely not a meaningful effect of BITs on FDI flows. And Mr. Moloo addressed how empirics can inform counsel's and parties' strategies in international arbitrations, from case budgeting to arguing for provisional measures, to framing substantive claims to Tribunals.

Conclusion

CIAM 2023 captured the current focus of the international arbitration community on the effect of rapidly changing technological tools on the resolution of disputes without losing focus on

substantial justice at the highest ethical standards. On the one hand, new technological tools will mean an increasing number of technological issues in disputes from all industries, and a corresponding demand on practitioners and arbitrators to efficiently deal with such issues to maintain arbitration as a preferred means of dispute resolution. On the other hand, new technological tools will, as Mr. Astigarraga's Keynote Address pointed out, offer opportunities to improve the substantive results of the arbitration process—potentially bringing new levels of rigor to arbitral reasoning and argumentation, even as it improves efficiency. Navigating these uncharted waters will require the focus and careful attention of the international arbitration community, doubtlessly aided by emerging empirical research. But if the deep engagement of the participants at this event is representative prologue, international arbitration will ably adapt to this changing reality.

David is an associate at Chaffetz Lindsey LLP in New York and acted as Secretary to the 2023 New York Arbitration Week Organizing Committee. The views and opinions expressed herein are purely the author's, and do not necessarily represent those of his colleagues, the Chaffetz Lindsey firm, its clients, or the New York Arbitration Week Organizing Committee.

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

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