Kluwer Arbitration Blog

2024 PAW: 8th ICC European Conference on International Arbitration

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On 18 March 2024, the international arbitration community gathered in Paris to kick off the 8th edition of Paris Arbitration Week ("PAW"). Kluwer Arbitration Blog is again this year the official media partner of PAW. This blogpost offers a summary of notable events that took place on the first day of PAW, and notably of the 8th ICC European Conference on International Arbitration.

PAW Kick-off: A Couple of Firsts

For the first time, PAW counts the Paris Court of Appeal among its partners. This 2024 PAW edition was also – for the first time – under the patronage of the Minister of Justice of France. The Minister, Eric Dupont-Moretti, attended the opening ceremony and offered opening remarks. Representatives of the Paris Bar, Pierre Hoffman and Vanessa Bousardo were also attending. In his address, the Minister highlighted the key role of Paris in the global arbitration landscape, while he also reinstated his support for alternative dispute resolution mechanisms. In parallel, he called for continued reflection on French arbitration law, with a view to, inter alia, streamline the rules and increase efficiency.

It was also the first time that instead of a keynote speech, a keynote interview took place: an interview of Florence Gravellier, a former top-ranked wheelchair tennis player and bronze medalist at the 2008 Beijing Paralympic Games, who is currently a senior consultant on diversity and inclusion at a consulting firm. Gravellier offered a pragmatic vision of diversity as a driver of business success that goes beyond moral considerations. She also shared her own experience of moving from diversity activism to organizational leadership to achieve concrete change in this area. Finally, she encouraged individuals to overcome 'diversity fatigue' by embracing their differences as a source of empowerment and control, while urging the legal industry to view diversity as a catalyst for positive change rather than tokenism. Diversity is an investment not a cost.

The 8th ICC Conference

Claudia Salomon, President of the ICC Court, gave her initial remarks. She echoed Mr. Éric Dupont Moretti stating that arbitration and court jurisdiction shall grow together as two brothers and underlined the importance of the patronage.

Her speech moved between the present and the upcoming future. Salomon emphasized that, in 2023, the year of the ICC Centenary, the ICC had 890 new cases, for a total amount of dispute of 250 billion. The parties are truly coming from around the world, to quote only a few, U.S., France (at the tenth place), Mexico, China. Parties from all around the world trust ICC for their disputes. Salomon also noted that close to 30% of the ICC cases involve parties from the same countries. While it is true that that the ICC's focus is on cross borders disputes, the parties also rely on the ICC for their domestic cases.

Further, Salomon anticipated the upcoming news for 2024 with a view to technology that is changing the world we live in. First, the launch of a new tool, in addition to Case Connect, designed to address the parties' need to communicate and have access to the case information. Second, the reopening of the ICC Hearing Center, in a strategic location.

Navigating the Global Business Landscape: Unveiling the ICC-Jus Connect-McCann Report on Cross-Cultural Business

The first part of the conference was centred on a report commissioned by the ICC and Jus Connect setting out findings of a global survey, offering invaluable insights into international business practices. The report was presented by Nadia Tuma-Weldon (Head of Luxury Strategy & Insights, McCann) and Gideon Wilkins (Group Head of Research, McCann).

The report highlights the pivotal role of emotions in business relationships. It was, for example, shown that at the beginning of an international trade, the overall feeling is "happiness". Lawyers come into the picture at the emotional dip of such a relationship and are therefore hearing only negative feedback. However, we should bear in mind that 99% of the international trade does not end up in arbitration.

After having guided the audience through an interesting journey around the world of business cultures (with France and Saudia Arabia apparently being much closer than France and the UK), the presentation focused on dispute resolution. The vast majority of respondents (77%) prefer a so-called interest-based approach (the parties and their substantial interests being at the forefront) over rights-based (arbitration or court litigation, with the first being preferred by 60% of respondents) or power-based (*e.g.*, press release, informing a regulator) approaches.

Since the preference of the users is clear, the rest of the conference focused on how to become more involved in an interest-based outcome?

A panel moderated by Catherine Baksi (Freelance Legal Correspondent, The Times) discussed the report results. Jean-Remi de Maistre (CEO and Co-Founder, Jus Mundi) shared the story behind Jus Connect, which was created as a tool to rationalise a difficult choice to be made at times of high emotionality, *i.e.*, the appointment of an arbitrator. Emotions and cultural backgrounds are crucial components of business. This comes out also with the use of AI, which is biased on the basis of the cultural background of people that create it. Further to being aware of this, it is therefore also crucial to foster diversity in this regard. Alexander G. Fessas (Secretary General,

ICC International Court of Arbitration) remarked that parties should be wary of cultural affinity when choosing the arbitrator that will likely have the intended hearing of the contract. Further, it is crucial to foster awareness of ways to save the business relationship before (mediation, negotiation) but also after the dispute has ended up before the arbitrators. To those worried that this might reduce the amount of work for arbitrators and counsel, he replied that focusing of party-interest is an exercise that will eventually increase the use of arbitration at the cost of court litigation. Gideon Wilkins shared the positive experience of general counsels being part of the board, engaged in the business and decision-making process. Not being involved only when a dispute arises, they felt a stronger connection with the substantial interests of the business.

Beyond the Verdict: Exploring Interest-Based Approaches to Arbitration

The second panel was moderated by Niuscha Bassiri (Partner, Hanotiau?& van den Berg), who recalled that at beginning of her career she was scared of the staggering number of arbitrations being managed by the firm, but the rule was that "Don't worry. 30% of these cases will settle." To her surprise, this was consistently true at various stages of the proceedings. Once, even at the eve of the hearing, with one arbitrator being already between legs of their flights to reach the hearing venue.

Marco C. Laurita (International Legal Negotiator, TotalEnergies), taking from the user's perspective, advocated that the powers of the tribunal to foster settlement should be accompanied by a clear framework in the rules to limit unpredictability. This could be done through the provision of mandatory settlement windows in the rules. As to the choice of external counsel that would appreciate the substantial interest of the client, he pointed to the human element, which may be a sufficient enough indicator of their approach to fostering settlement. Jan Paulsson (Court of Cassation, Bahrain) considered useful internal tools that may be used to evaluate a case and have an informed approach to settlement opportunities; namely, mock hearings and cases, as internal resources may be tougher than external consultants, and decision trees, which consist in a useful exercise of listing all the issues and putting a percentage on the likelihood of success of each. Interestingly, for every new issue, the percentage of overall success keeps lowering. Alison Pearsall (Group Head of Litigation, Eviden International) highlighted that the parties' hesitation to initiate settlement discussions is often driven by the fear to appear weak. Thus, the timing of such discussions may vary and sometimes the best time is after a first round of submissions, when the parties have a clearer view on each other's cases. Arbitrators should be flexible, creative, and adapt the procedure to the needs of the parties, e.g., identifying key issues that can be determined early, or proposing settlement windows right at the beginning of the arbitration. The parties themselves may expect to be given an opportunity to address potential settlement avenues during the process. She considered also some risks of prompting settlement discussions, such as that, if proposed by the tribunal, a party may agree just not to upset the arbitrator but without believing in the process. Tuuli Timonen (Head of Dispute Resolution, Dottir Attorneys) concurred that fear of being perceived as weak was the number one reason for not initiating settlement discussions. Embedding settlement windows in the process may be an effective way of overcoming this fear. There are also several steps that an arbitrator could take. These should be divided in four different categories: (i) steps that arbitrators can always take as an arbitrator regardless of the case (*e.g.*, inform the parties that they can always initiate settlement discussions without the need to inform the arbitrator); (ii) steps that can be taken being aware of the circumstances (*e.g.*, identify issues that the parties should confer about); (iii) steps that need consulting with the parties to be taken (*e.g.*, expressing

preliminary views on discreet issues or introducing settlement windows); and (iv) steps to be taken only if asked by the parties (*e.g.*, propose a settlement).

The moderator closed the panel with the admonition that we all need to adapt more to solve our disputes.

Rendering Decisions with Impact: Writing Awards that Meet Parties' Needs

The third, and last panel, considered how far the arbitrators can go, within the limits of the mandate, towards the parties' underlying interests at the stage of writing the awards. The panel was moderated by Malgorzata Surdek-Janicka (Vice-President, ICC International Court of Arbitration), who at the beginning of the session asked the audience whether they believed that there is room to take into account, acting within the arbitrator's mandate, the parties' underlying interests. 54% of the participants answered in the negative.

Mohamed S. Abdel Wahab (Cairo University, Zulficar & Partners Law Firm) considered the case of multiple arbitrations running in parallel, where it might be appropriate to address the parties' interest of setting principles that may guide the resolution of more than one arbitration. Further examples of cases where an interest-based approach may be warranted are relational contracts or relationship agreements, where principles may be set to guide the parties towards continuing their relationship, as well as cases where the law itself requires the arbitrator to do so (*e.g.*, in jurisdictions applying concepts of abuse of right which embed this type of considerations in the legal reasoning). Karl Hennessee (Senior Vice-President, Head of Litigation, Investigations & Regulatory Affairs, Airbus) shared various examples of cases where the parties greatly benefitted of the arbitrators having taken an interest-based approach. A notable example is related to a 50/50 joint venture that had turned into a toxic relationship. The tribunal took it at heart to analyse the actual interests of the parties and did such a good job that the award was attached to the renewed JV contract. He also made the point that when the parties spend time to put an argument before the arbitrator, they expect this argument to be addressed in the award, regardless of its relevant towards the outcome. A notable example in this regard was of a full win, including costs, which was taken very badly internally because a specific point that was really important for the business was completely ignored. Marieke van Hooijdonk (Partner, Allen & Overy) suggested that sometimes it is useful for the tribunal go beyond of the relief requested in the reasoning (*e.g.*, obiter dicta). As an example, in a joint venture dispute about the supply of products that included a buyout system at the end of the contract, the tribunal clarified in the award that the arbitration was not about who could buy whom and at what price, anticipating that future disputes will have to address this point. This was actually the case and this sentence helped the parties navigate questions of res judicata. Angeline Welsh KC (Essex Court Chambers) focused on the benefits to the parties of the tribunal taking the time to carefully set-out the way they understood the parties' relationship functioned. She also addressed the risks to the arbitrators, namely by way of limitations to enforceability of the award.

At the end of the discussion, the moderator asked again the audience the same question that was asked in the beginning (*i.e.*, whether they believed that there is room to take into account, acting within the arbitrator's mandate, the parties' underlying interests). This time 52.38% of the participants replied positively, showing that the discussion had at least some impact on their beliefs.

Closing Remarks and … the PAW Cocktail!

The master of ceremony, Ulrich Kopetzki, offering his closing remarks, highlighted that business-oriented resolution is key. Under the framework of emotions. Interest-based resolution is one that brings the parties closer to the state of happiness that they enjoyed at the beginning of their relationship. In light of the general consent over less adversarial, more collaborative process, it may be worth exploring whether arbitration could embrace this.

As every year, the first day of 2024 PAW concluded with the Opening Cocktail, that took place – for the first time – at the *Hôtel de Ville de Paris*!

This entry was posted on Tuesday, March 19th, 2024 at 9:17 am and is filed under ICC, Paris

Arbitration Week

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