Kluwer Arbitration Blog

Proceedings from the 6th Annual Schiefelbein Global Dispute Resolution Conference

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On January 11, 2024 the Sandra Day O'Connor College of Law at Arizona State University hosted the sixth annual Schiefelbein Global Dispute Resolution Conference. Like the past iterations of this conference, the program featured top lawyers, mediators, arbitrators, academics, and leaders of arbitration institutions discussing timely issues in international dispute resolution. This blog post recaps some highlights and offers additional thematic remarks.

Evolution of Korean Arbitration

Kevin Kim, Founding Managing Partner of Peter & Kim, delivered the keynote address, "From Discord to Accord: Breaking Language, Cultural, and Other Barriers in Global Dispute Resolution." Kim argued that international arbitration's ability to replace local courts for international business disputes is the biggest change in litigation practice over the last 30 years. He noted that both his career and Korea's ascendency as a home for international arbitration practice benefited greatly from this shift. As a successful lawyer, Kim did not enjoy arbitration at first. It felt like beginning his career all over again and he was concerned that his English language skills were not strong enough. However, he soon realized that with Korea's increased trading power, an understanding of Korean culture was often a key to success in arbitration. While his goal was not to take arbitration mainstream, his global success—driven by efficient and flexible representation—helped him raise the profile of Korea's arbitration market. In closing, he compared his success, and that of arbitration in Korea, to the international success of K-Pop. Originally K-Pop was criticized for having deep roots in Korean culture, but before long, those roots became a crucial part of its success. While he recognized that international arbitration will never be as popular as K-Pop, he has found that a grounding in local language and culture has driven his success—both in Korea and around the globe.

The Remote Future of Arbitration

The Conference's first panel, Arbitration 2050: Facing the Future, moderated by *Paul Cohen* (4-5 Gray's Inn Square), began with a discussion of the difficulties of predicting the future, followed by a question of what the future might look like. *Brandon Malone* (Arbitra/Quadrant

Chambers/Ampersand Advocates) joined the panel via life-size hologram from a studio in Amsterdam. For the in-person audience, he may as well have been in the room. However, Malone noted that his experience was quite different—the audience was captured on a small monitor in the remote studio—but that he could see it evolving to be more like an in-person experience. *Gary Marchant* (Sandra Day O'Connor College of Law) echoed Richard Susskind's belief that courts are not places like buildings, but instead are constructs for communication. As a result, he expects all arbitrations, mediations, and courts to be conducted virtually within the next 25 years. *Colin Rule* (odr.com) said that technology trends evolve with the culture. As legal culture moves to incorporate Artificial Intelligence, many people risk being left behind. However, the major difficulty for using AI in legal decision-making will be that humans' psychological journey for justice, which is much slower than AI, will still need to be addressed. *Bridget Mary McCormack* (American Arbitration Association) shared her surprise that following the switch to virtual courtrooms during the COVID-19 pandemic that a large number simply reverted back to pre-pandemic modes—especially given the reduced number of default judgments across the country during the pandemic. McCormack also noted that ChatGPT was able to achieve a top 10% score on a bar exam in 2023 and predicted it would soon be malpractice for practitioners not to use AI regularly.

Negotiating Through Crises

The second panel, moderated by *Art Hinshaw* (Sandra Day O'Connor College of Law), discussed Crisis Negotiations, defined as high-stakes negotiations with heightened emotions, often including existential threats to individuals and/or organizations. When asked about the top thing to consider in crisis negotiations, *Christine Pearson* (Thunderbird School of Global Management) suggested recognizing that negative emotions are going to run high. Then we must do two things: understand how to manage other people's negative emotions and stop trying to control them – which is best done by listening like our lives depend on it. *Calvin Chrustie* (The Critical Risk Team) added that when emotions are high, rational thinking goes down as does our ability to negotiate. Thus, the need to regulate emotions starts within our own team. *Tom Villalón* (Three Crowns/Free Afghan Women Now) noted that from an organizational perspective, the core question is why an individual or organization wants what it wants. He suggested teasing out potential substantive outcomes, as well as the emotional outcomes, and then using each to better understand the other.

Moving the discussion to negotiation preparation in crisis situations, *Ambassador Miomir Zuzul* (Arnold & Porter) discussed his role in the Dayton Peace Accords, which ended the Bosnian War in 1995. He advised that preparation for negotiation is critical. He advised that the most difficult part of preparation is learning to think like the other side, rather than "how I would be thinking" if presented with the same information. The panelists agreed on the importance of understanding different cultures, and how culture may affect the parties' desired outcomes, which makes crisis negotiation that much more difficult. In closing, the panelists all stressed the importance of listening, with Chrustie noting that negotiation is both a "head and heart" process. He shared the best negotiation advice he has ever received—use "less of the head and more of the heart" to make a human connection.

Advice for Young Professionals

Les Schiefelbein (Schiefelbein Global Dispute Resolution) moderated the third panel, Breaking In: Careers in International Dispute Resolution. *Abbey Hawthorne* (International Chamber of Commerce) advised students and young attorneys to commit to breaking into the field and to work hard to position themselves to succeed. She advised starting with manageable steps, including developing language skills, and making sure that each step builds to the eventual goal. *Chris Campbell* (Baker Hughes) agreed that entering this field requires conscious effort, persistence and skills, as well as three to five years of legal practice. Campbell advised participants to create online content in order to learn about the field and to connect with other professionals, using his podcast "Tales of the Tribunal" as an example. *Nilufar Hossain* (Omni Bridgeway) echoed the importance of getting involved and connected. She encouraged attending networking events and conferences and getting involved with professional associations like the International Council for Commercial Arbitration, including their Young ICCA group. She also counseled that careers are very long with no single path to success. She and her co-panelists promoted organizations like the ABA's International Section and the ICC's Young Arbitration & ADR Forum. The overarching message was that breaking into international ADR takes focused effort, determination, and hard work.

Entertainment Disputes Around the World

Michael Maddigan (Hogan Lovells) moderated the day's fourth panel, Global Entertainment Disputes. *Caleb Jay* (Arizona Diamondbacks) discussed the baseball salary arbitration process and Major League Baseball's international drafting challenges, especially in the Dominican Republic where the government is looking to regulate major league baseball academies located there. *Roger Kennedy* (The Walt Disney Company (ret.)) highlighted arbitration's role in protecting trade secrets, particularly with international partnerships. He also noted that more companies with major intellectual property assets have moved away from courts and towards arbitration as they learn more about its cost-effectiveness and the increasing professionalization of the field. *Anat Levy* (Anat Levy & Associates P.C.) noted that members of the film and entertainment industry often prefer arbitration because its confidential procedures protect reputations and relationships. She also pointed out that the efficiency of the arbitration system is well-suited to an industry that operates with very quick and strict deadlines. *Nicholas A. Trutanich* (Fox Corporation) observed that large companies producing events overseas with myriad international stakeholders might prefer arbitration, because of the certainty involved over several variables—especially timing—when compared to litigation. In closing each panelist discussed the need for subject matter expertise as a crucial element in achieving effective and efficient arbitration processes.

Managing Supply Chains

The conference's final panel was Supply Chain Disputes with *Abby Cohen Smutny* (White & Case LLP) moderating. She started the discussion by asking *Ruth Franklin* (Taiwan Semiconductor Manufacturing Company Ltd.) about the methods she set up to avoid arbitration of supply chain disputes during TSMC's construction project in Arizona, considered to be the largest construction project in the United States. Franklin discussed the use of a third-party neutral who worked with all of the contractors and subcontractors during all phases of construction. She described the third-party neutral as a "wise uncle without a favorite nephew" who was able to coach parties through

disputes as they arose and before they became larger problems. *Mark Danis* (The Clorox Company) discussed what he considered the most important point he has learned: supply chain partners have close relationships, working hand-in-hand when problems arise. Often parties collaborate outside the four corners of their contractual agreement to find solutions, which may undercut the crisp contractual arguments they might make during a legal dispute. As a result, Danis said business empathy is critical.

Karl Hennessee, FRAeS (Airbus) discussed business costs of arbitration, both on the assembly line and on the supplier relationship. He stressed the importance of finding opportunities to discuss with those involved the process surrounding disputes and potential settlement. One suggestion was to have the client read both parties' briefs and watch the opposing party be deposed, to understand what they will experience. Finally, *Scott Statham* (Freeport McMoRan Inc.) discussed how nation-states can interfere with and disrupt supply chains. In his professional experience, Statham said it was rare that he could not find "a BATNA and a ZOPA and a win-win situation." However, when a nation-state is a party to an agreement, issues usually arise when there is a change in governmental leadership. New leaders typically have very little incentive to settle a dispute with a foreign company, and it may be a political risk for individual politicians to allow or encourage settlement. Cohen Smutny agreed, adding when politics is the primary motivation, companies are in a real bind.

Concluding Remarks

This year's conference covered a lot of ground, but most speakers touched on the importance of the human element in successful dispute resolution practice. The powerful tools of language and cultural understanding can drive individual careers as well as entire arbitration markets. Listening closely and understanding interpersonal and emotional issues can help parties navigate through all types of crises. And as technology is likely to supercharge international dispute resolution practice, it is the ability to enhance the human element—not replace it—that creates the conditions for future success.

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