Kluwer Arbitration Blog

Columbia Arbitration Day 2024: “The New Era of International Arbitration: A User Guide”

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Columbia Arbitration Day (“CAD”) was held on 1 March 2024 at the Skyline Level of Columbia’s Faculty House. CAD is notable as an entirely student-organized event on the international arbitration calendar.

The first panel, moderated by Professor Alejandro Garro (Columbia Law School), aimed to identify an effective toolkit for managing evidence in construction cases, which generally involve multiple technical issues, numerous technical expert reports, and thousands of documents. Laura Cózar (Partner, Accuracy), Lee Rovinescu (Partner, Freshfields Bruckhaus Deringer LLP), Nicole Duclos (Partner, Covington & Burling LLP), and Jonathan C. Hamilton (Global Co-Chair of International Arbitration, Paul Hastings LLP) brightly brought in the perspectives of arbitrators, counsels, and experts handling evidence in construction cases.

Professor Garro started the discussion by highlighting that the biggest deficiencies in cost efficiency often come from the lack of experience of lawyers and arbitrators and that hearing the perspectives of all involved in construction cases can improve efficiency.

Hamilton started by saying that the key to cost efficiency is understanding the complexities of the case and simplifying as much as possible. He stressed, however, that simplicity is not superficiality. Quoting Steve Jobs, Hamilton emphasized that to simplify, one must truly understand the underlying challenges and dig through complexity.

On that note, all panelists contributed great practical tools to simplify a complex case. The most discussed was providing the Tribunal with a timeline, which tends to be more helpful when focused on the issues at stake, i.e., delay calculations. Duclos advised counsel to deeply understand key claims, key terms, and key people precisely to create a focused chronology.

Rovinescu mentioned that another excellent tool to simplify technical documents is by providing the Tribunal with examples and explanations. For example, if you have 13,000 documents with the same structure, pick one and use it as a reference to explain how they should be read, what they show, and why they are relevant to the case. Develop instructional material that facilitates the understanding of a topic to be discussed. Geology, for instance, can be a critical element of construction disputes, and in a dispute discussing the construction of a tunnel, a diagram of the relevant geological conditions could be helpful. The same is true for financial and technical disputes. Simplicity is always key.

Cózar added an expert's perspective to the discussion by explaining that classical construction arbitration cases have a specific limit of claims, such as delays and disruptions, additional scope and costs, liquidated damages, loss of profit, performance and warranty issues, indemnity, and insurance claims. She emphasized that a helpful tool is aggregating the multiple claims in these different classical bulks. To do so, one must initially understand the narrative of facts and find the most relevant disruption that led to the claims. To Cózar, understanding this concept of disruption is of utmost importance since this will guide the scope of the dispute. The case may have a different focus if the factual background refers to a relevant change in the financial capital structure.

Duclos agreed that understanding the major disruption is essential. She also pointed out that good preparation for any dispute comprises understanding the key people's roles and separating their emotions from the story the documents tell, which must be understood with the help of experts. Rovinescu mentioned that witnesses, in general, play a fundamental role in construction disputes, and that counsel often need to control the volume of information and their emotions, particularly when they are deeply engaged in the project. He stressed, however, that there are great tools to extract the most from witnesses during hearings. Some expert witnesses can be better controlled when questioned together – or "hot tubbing". Such tools, however, require preparation to be productive.

The multiparty nature of such disputes, as well as the multiple perspectives and interests, requires heavy preparation by all stakeholders (including the arbitral tribunal) to simplify the relevant issues as much as possible.

The second panel, "TechTalk: Unraveling the Tapestry – AI's Influence on International Arbitration", included Luke Sobota (Founding Partner, Three Crowns LLP), Nilufar Hossain (Investment Manager and Legal Counsel, Omni Bridgeway), Rachel Thorn (Partner, Cooley LLP), and Marco de Sousa (Senior Associate, Herbert Smith Freehills LLP).

The panelists kicked off the discussion by noting there is no universal definition of Artificial Intelligence ("AI"), but there is unanimity that AI can now make decisions in an equal or better form than human beings. A crucial aspect of generative AI technology is that it is created and administered by a small group of companies that create and train their own models, so it is difficult to manage or control.

Sobota affirmed that a big concern about the use of AI is precisely "the black box effect", i.e., the lack of transparency on the sources and operations of generative AI. However, for Sobota, the Achilles heel of AI is how data is treated and used as input. For example, there is plenty of public information regarding investor-State arbitration. However, the same is not true for commercial arbitration, so there might be a data input problem for AI's use in commercial arbitration cases.

Sobota stressed how efficiency can always be improved with technological tools. He compared the process of consulting a hard copy of Shepard's Citations publications with research in Westlaw. In the law firm space, AI can majorly help with conflict checks, cost estimation, human resources communications, legal assistance with service providers, legal reports, document production, reviewing and summarizing records, etc. However, we need to proactively understand and test the tools, such as e-discovery and TAR (Technology Assisted Review), to better and properly use them.

For these reasons, the panelists do not fear that AI will replace reasonable attorneys, but it can certainly assist them. Soon, clients will not be willing to pay for work that can be reasonably done in a more efficient way via the use of AI.

Hossain illustrated the potential advantages of using AI in arbitration funding. Even though generative AI is relatively new, it can be helpful to match specialized funders to clients and claims of their particular interest and, therefore, eliminate the middle person, be that a broker with high fees or lawyers with biases; to draw conclusions based on arbitrators' public information, among other things.

The panel also discussed several disadvantages, including the problems of authenticity, deep fakes, and false evidence. The legal community has already started valuable discussions, such as the initiative posed by the Silicon Valley Arbitration & Mediation Center in drafting the Guidelines on the Use of Artificial Intelligence in International Arbitration, but this must be continuous work.

De Sousa brought research by Thomson Reuters to the discussion that found 72% of in-house lawyers see using technology to simplify workflow as a high priority. Clients see value in AI replacing routine tasks but are skeptical of using it in high-level work, such as in M&A negotiations. Clients expect lawyers to use data-driven strategies but also want a human check of the work. De Sousa further mentioned that the training of younger lawyers will also be enhanced since they would be able to spend more time on relevant tasks.

Thorn added the need to evaluate whether we would be facing old problems under a new guise. She urged the audience to question whether there is a difference between using AI and quoting a fake case and having a junior lawyer cite a case that is not useful and misleading to the court.

The conclusion is that AI itself is not a problem. The real problems lie in quality control, privacy risks, and the black box system. Its usage must be disclosed, and questions must be raised about privacy concerns, potential biases due to unqualified data, and quality control.

The third panel, entitled "Procedural Toolkit for Efficient and Cost-Effective Arbitration", intended to explore procedural techniques that parties and tribunals can employ to make arbitration smoother to reduce costs and duration. Preeti Bhagnani (Partner, White & Case LLP), Ari MacKinnon (Partner, Cleary Gottlieb LLP), Louis B. Kimmelman (Independent Arbitrator), and Christina Hioureas (Partner, Foley Hoag LLP) provided the audience with great insights and urged the audience to question topics such as:

1. Should the Tribunal require the parties to include a list of issues in dispute at the outset of the arbitration (as required, e.g., under the ICC Rules) and/or indicate specific matters they want the parties to address during the hearing?
2. Should Tribunals provide the parties with a draft Procedural Order No. 1 ("PO1") to be discussed and agreed upon during the Case Management Conference, thereby providing a minimum agenda for the conference, or let the parties draft an order that may be more adequate to the needs of the case?
3. Should the Tribunal be allowed to make significant changes to the calendar without the parties' approval (e.g., anticipating the evidentiary hearing by weeks/months)?
4. Should PO1 provide that a party raising unwarranted or unexpected applications disrupting the proceedings will bear the associated costs, regardless of the outcome of the proceedings?
5. Is there a need for innovation for the current default of the Redfern Schedule (vertical rows) or

the Stern Schedule (horizontal rows)?

6. Should the scope of the second round of memorials be limited to replies to the other party's arguments?

Those are simple examples of the long list of procedural issues that one needs to be observant of during an arbitration proceeding. Of course, the discussions of the panel were mainly instructive, as concrete answers to all these hypotheses depend on the specific case at hand.

Following this panel, is the expected fireside chat between Professor George Bermann and Honorable Bridget McCormack. Honorable McCormack served as the Chief Justice of the Michigan Supreme Court and is currently the President and CEO of the American Arbitration Association – International Center of Dispute Resolution.

Professor Kabir Duggal then moderated the fourth panel, which discussed "ISDS and the new emerging economies: where we stand and where next." Speakers included Yermek S. Kuantyrov (Chief Legal Support & Corporate Governance Officer of NAC Kazatomprom JSC, Kazakhstan), Jaroslav Kudrna (Head of International Arbitration and Investment Protection at the Ministry of Finance of the Czech Republic), Samira Sulejmanovic (Head of Department for Bilateral Trade Relations at Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina) and Ana María Ordoñez Puentes (Former Director of International Legal Defense for Colombia).

Kuantyrov enumerated a few challenges that emerging economies such as Kazakhstan face when negotiating BITs with big economic players in relation to leverage and experience. International prejudice also comes to mind as a severe challenge when negotiating BITs.

Kudrna added that the Czech Republic recently faces new challenges connected with climate change and the developing economies' balance between compliance with international norms and treaties (e.g., the Paris Agreement) and the eventual need to encourage and sustain, for instance, fossil fuel investments. There are challenges with the development of internal resources and questions on how the double hatting issue – or the playing of multiple roles by arbitrators in different ISDS proceedings as counsels, expert witnesses, or tribunal secretaries – particularly harms developing economies.

Sulejmanovic joined the conversation, explaining the complexity of such negotiations in countries like Bosnia and Herzegovina, which does not have investors flowing in regularly and needs FDI and BITs. As such, Bosnia needs to protect itself when negotiating an agreement, and the biggest challenge is balancing and aligning political interests. Internally, coordinating the time of reaction – even procedurally – can be challenging due to limited resources.

Ordoñez Puentes stressed that it is also difficult for some countries like Colombia to accept a modern BIT. She stated that a common fear is having the new language used as a tool to challenge the old one. In addition, she said that if a country modernizes a treaty language, there is a chance this will be used as a comparison in the arbitration to the previous one to argue that "as you did not have that language before, that is not what you meant". Regardless, the major challenge remains politics – whenever its government, politics, and political capitalization come into play.

The panel concluded, and the day ended with everyone excited about the quality of the discussions , as much as the reception that followed.

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