Kluwer Arbitration Blog

Italian Arbitration Day: The Geography of International Arbitration

Vanda Kopic (Assistant Editor for Europe) (BonelliErede) · Tuesday, July 2nd, 2024

On 13 June 2024, Italian Arbitration Day took place in Rome. The full-day conference saw a large number of arbitration practitioners dealing with the issue of globalization and geography in the arbitration. This post offers an overview of the key takeaways from the discussion.

Introduction: The Past, Present, and Future of Globalization

After an introduction by the organizers Andrea Carlevaris (BonelliErede) and Stefano Azzali (Chamber of Milan), the keynote speech was given by Lucio Caracciolo (Limes), a journalist with expertise in geopolitical studies. Caracciolo gave an overview of the past, present, and future of globalization. He noted that we are used to a so-called American empire, with American interests spread around the globe. Over time, other players have emerged, such as China, which entered the global economy in 2001 with the U.S. government's underlying idea that the Chinese authoritarian regime would evolve into a democracy. However, the "American Empire" has stumbled globally with the rise of the U.S. national debt and the rise of other independent countries (such as Saudi Arabia and India). The current trend is de-globalization, whereby Western countries do not play a central geopolitical role, and the concept of Europe as an international actor is untenable.

Panel 1: Quo Vadis International Arbitration? Of Parties, Arbitrators, and Arbitral Institutions

The first panel featured Valeria Galíndez (Galindez ARB), Perenami Momodu (Gateley), Paolo Michele Patocchi (PatocchiMarzolini), Samantha Tan (Freshfields), moderated by Cristina Martinetti (Elexi).

Galindez discussed the increase of ICC arbitrations with Mexican parties in 2023 (the number one position in Latin America was previously held by Brazil for almost 10 years), due to the economic and social crisis that Mexico has faced in recent years, which has led to many disputes. In

investment arbitration, unexpected players, such as Uruguay and Chile, have found themselves involved in tobacco and mining (Uruguay) and energy and mining (Chile) arbitration. Clearly, investment relations with countries with strong institutions and stable environments are not immune to investment disputes. On the other hand, some countries have taken steps to opt out of the ISDS (e.g., Honduras and Ecuador). Galindez also discussed the so-called Eldorado saga, which involved issues such as disclosure of an arbitrator's alleged relationship with counsel, and challenges and resignations of co-arbitrators. The case highlights the critical issues of challenge and disclosure standards in Brazil, but also the need for a revision of the Brazilian Arbitration Act. Finally, Galindez pointed to the role of institutions seeking to improve transparency where state entities are involved, by publishing redacted awards, details of arbitrator appointments and increasing public access to information on ongoing cases.

Momodu addressed Nigerian law reform and the Nigerian Arbitration and Mediation Act 2023 (the "Act"). The Act introduced the Award Review Tribunal ("ART") as a post-award review procedure to reduce the enforcement time of the national courts. The ART was introduced, as an opt-in measure, to allow parties to challenge awards before this specially constituted tribunal on very limited grounds and receive a decision within 60 days. In addition, the Act now provides a means for parties to seek emergency arbitration and interim relief within an arbitration (instead of national courts). The Act also introduced rules on joinder of parties and consolidation of arbitrations and recognized the concept of third-party funding in arbitration, which was previously considered illegal. Momodu discussed stay of proceedings, noting under Nigerian case law an application to stay proceedings in favor of arbitration (when court proceedings are also pending) must be made timeously by a defendant before it has "taken steps" in the arbitration. She also considered UK anti-suit injunctions requiring the defendant to discontinue or withdraw from the proceedings in Nigeria. Finally, Momodu commented on the *P&ID v. Nigeria* arbitral award and the issue of fraud and corruption.

Patocchi spoke about the issue of a challenges to awards on grounds of corruption or fraud tainting the proceedings. He focused on civil law jurisdictions and the question whether public policy is a sound basis for annulment of such awards. He considered the set-aside of the *P&ID* award and questioned the broad scope of judicial review in England. The issue of the scope or depth of judicial review of arbitral awards in which there has been a fraud allegation is a disputed issue in France. While in Switzerland the view is that unless corruption has been raised before the arbitrators, the Federal Supreme Court cannot address it, the French courts take the opposite view. He referred to Prof. Charles Jarrosson's recent note whereby the new approach of the French courts, including the Cour de Cassation, must be reversed because it represents an attack on the system of judicial review of awards in French law. The issue of corruption is an issue of public policy, and there is not a rule cast in stone, and one might arguably take the view that the law of procedure is there to serve substantive justice and not the other way of around. Patocchi focused on two French decisions that raised further debate: *Belokon* and *Sorelec*, both decided by the Paris Court of Appeal ("CoA") and the Cour de Cassation. In *Belokon*, Kyrgyzstan failed to discharge its burden of proof regarding money laundering in the arbitration but managed to have the award set aside by the Paris CoA. In *Sorelec*, the Paris CoA set aside the award even though the alleged corruption was not raised before the arbitral tribunal.

Tan commented that the cases in Asia are commonly M&A-related disputes, disputes arising from earn-out clauses, and broader types of M&A-related disputes arising from joint ventures. These disputes have arisen because of the great deal of M&A activity that Asia has seen over the last several years after COVID. There has been significant investment to South and Southeast Asian

countries, such as Vietnam, Indonesia, and India. Unsurprisingly, there are also many infrastructure disputes. While obtaining recognition of an award is relatively easy, in China if a lower court wants to refuse enforcement, it has to obtain approval from a higher court first. If the higher court believes that enforcement should be refused, the issue is referred to the highest court. Another issue is attachment of assets, as local courts are less familiar with international arbitration, and they will try to protect local businesses. Satellite litigation is significant in India, with parties having to go to Indian courts to obtain interim relief. Significant case developments mostly arise from Singaporean courts, since Singapore is a popular seat and enforcement location. Tan touched on *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 10 where a Singaporean court found that a so-called transnational issue estoppel applied.

After the first panel, Laurence Shore (BonelliErede) led the "reverse debate," asking whether (from the *P&ID* experience) there is something lacking in the arbitral process when high value cases and state entities are involved. There was a general view that arbitrators should be more proactive, but also that the process has become too complex and detailed.

Before the lunch break, Maria Chiara Malaguti (PedersoliGattai) discussed the applicability of the UNIDROIT principles in two recent cases, arguing that this instrument can work as the "governing law," especially when it comes to corporate social responsibility, environment, and climate issues.

Panel 2: International Conflicts and Economic Sanctions: What Role for International Arbitration

The second panel was composed of Hamid Gharavi (Derains & Gharavi), Crina Baltag (University of Stockholm), James Castello (King & Spalding), and Markiyan Malskyy (Kochanski & partners). The moderator was Domenico di Pietro (GST).

Gharavi discussed the procedural complications in arbitration arising from issues in sanctions. The challenge for arbitral tribunals is to find tribunal members that are mature, open minded, experienced, and courageous enough to order production of documents and call witnesses to appear (even if no witness statement is provided).

Baltag raised the issue of sanctions against Russia. On 24 February 2022, when Ukraine was invaded by Russia, there was an unprecedented response from the EU. The EU sanctions system is particularly complex; the two main regulations are Regulation 269 and Regulation 833. The sanctions system includes individual, economic, diplomatic, and visa sanctions. Individual sanctions are relevant to arbitration practitioners as they include travel bans and, perhaps most importantly, asset freezes. Economic sanctions also include a "no Russia" clause, which prohibits the import and export of certain Russian goods. From 2022, the EU has also banned the provision of services to Russia and Russian entities, including accounting, legal, and engineering services. Baltag also pointed out that both Regulations have exceptions and derogations. Article 2 of Regulation 269 deals with the freezing of assets, and this article also raises concerns in arbitration, such as advances on costs, funds remaining at the end of the arbitration, but also damages awarded. The European Commission has issued several clarifications on the notion of control, but the situations are not exhaustive and are very fact-specific. Another implication of Article 2 is a continuous obligation to keep an eye on the parties, as the beneficial owner may change during the

course of the proceedings, leading to reporting and investigation obligations.

Castello explained the differences between the UK-US and EU approaches to sanctions. A key feature of US sanctions is their expansive jurisdictional reach. Even if the tribunal is not located in the US or the members of the tribunal are not US citizens, they could still be affected by US sanctions. For example, if payments in the arbitration (to the arbitral institution or to an interim measure) are made in US dollars, those payments will be made through a US bank and thus US sanctions may apply. In addition, if a lawyer is admitted to the US bar (even if not a US citizen) or if a lawyer works for a US international law firm, this could be another basis for the application of US sanctions. Another feature is the general license, and while the US grants a license allowing lawyers to represent sanctioned parties in litigation and other types of disputes involving courts, the license has not been extended to arbitration. In the absence of a specific license, US persons may not act as arbitrators in private commercial arbitrations involving blocked persons, nor may they represent blocked persons as counsel in arbitrations. An individual license can be obtained, but this will take time. In terms of the UK sanctions regime, a significant development is that the LCIA was granted a general license in October 2022, which allows the LCIA to receive funds, and the LCIA banks to process funds from sanctioned parties.

Malskyy focused on the impact of sanctions and war on the Ukrainian legal system. He noted that the issue of sanctions and licenses, perhaps otherwise tedious, becomes very interesting to a practitioner as soon as she or he has to deal with sanctions personally. While sanctions may not have an immediate effect, their impact is long-lasting. He noted that an issue often is raised in relation to sanctions is *force majeure*. In Malskyy's experience, *force majeure* is analyzed too strictly and in too much detail (e.g., non-payment is subject to detailed examination and factual analysis). Another issue of practical concern is bank-related issues, including payments and receipt of payments from Russian or Belarusian parties.

Baiju Vasani (Twenty Essex) conducted a reverse debate in relation to topics addressed by the second panel. The audience discussed the practicalities of obtaining a license. Another issue discussed was the relationship between access to justice (or rather, a restriction of the same) and the application of sanctions. The debate also focused on the effect of sanctions on frustration, illegality, and the lack of performance of contracts.

The IAD concluded with closing remarks from Maria Beatrice Deli (DeliSasson).

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