Kluwer Arbitration Blog

Bucharest Arbitration Days 2024: Critical Developments in International Arbitration

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The fifth edition of the **Bucharest Arbitration Days ("BArD")** took place on 6 and 7 June 2024. It set out to highlight recent critical developments in international arbitration. The first day focused on commercial arbitration, and the second on investment arbitration.

The general consensus? Mission accomplished. Seven panels and two keynotes reunited seasoned experts as well as rising practitioners from about 15 jurisdictions.

Stefan Deaconu (Court of International Commercial Arbitration, the Chamber of Commerce and Industry of Romania) emphasised the importance of maintaining trust in the arbitral process, tracing back to ethics, legitimacy, and personal reputation.

Romania's Minister of Energy, Sebastian Burduja, delivered welcome remarks and highlighted the role of arbitration in attracting foreign investments to Romania.

Day 1: Commercial Arbitration at the Forefront

Professor Julian DM Lew KC gave the first keynote address, drawing on the contrast between international arbitration as it was at its incipience, and now Prof. Lew provided three optimisation avenues: (1) simplify the procedure by reducing the length of unnecessary submissions, (2) only use document production to the extent necessary and familiar to both parties, and (3) rethink witness evidence, particularly witness statements drafted by counsel.

Ethics and Conflicts in International Arbitration

Panel 1 was moderated by Julie Bedard. Gabor Damjanovic, Jens-Hendrik Janzen, Nadja Al Kanawati and Jan Dobrý debated some of the more controversial provisions introduced in the updated IBA Guidelines on Conflicts of Interest (see previous coverage of the Blog here).

First, the panelists discussed the concept of "controlling influence", which, as Dobrý pointed out, varies in practice, and is not limited to structural ownership and can manifest via the exercise of

veto power or the power to appoint board members. Second, arbitrators working as experts are now included under the Orange List, although this may be exploited by counsel to disrupt proceedings, as noted by Janzen. Third, the Guidelines now caution against public advocacy on social media, including the resharing or liking posts, especially during ongoing cases. Lastly, the Guidelines impose a heightened duty on counsel to thoroughly investigate potential arbitrators at the outset of a case. Failure to conduct "reasonable inquiry" risks waiving the right to contest conflicts of interest. This encompasses being aware of public information and conducting specific investigations if there are grounds for suspicion, though excessive inquiries might hinder the procedure.

Interaction Between Arbitration and Courts

Panel 2 was moderated by Jonathan Wood, who memorably pointed out that "courts can do without arbitration, but arbitration cannot do without courts". The panel, reuniting James Hosking, Monique Sasson, Dr. Diora Ziyaeva and Sebastian Lukic, discussed key areas in respect of which national courts intervene in arbitration.

Ziyaeva discussed the UK's use of anti-suit injunctions to enforce arbitration agreements, highlighting the UK Supreme Court's April 2024 decision in *Unicredit v. RusChem* supporting a Paris-seated ICC arbitration. Jonathan Wood noted that the draft Arbitration Bill, based on Law Commission recommendations, includes three main areas in support of arbitration, including reversing *Enka v. Chubb* on the issue of the law applicable to the arbitration agreement.

Hosking explained that in the US, discovery is a key area of court assistance, via three main avenues: Section 1782 28 U.S.C, Section 7 of the Federal Arbitration Act and state International Arbitration Statutes such as California's, similar to Art. 27 of the UNCITRAL Model Law.

Lukic highlighted concerns following the CJEU's *International Skating Union* ("ISU") judgment, which appeared to blur the line between investor-state and commercial arbitration established in *Achmea* and may thus complicate the enforcement of commercial arbitration awards involving EU competition law.

Sassoon shared insights from her recent "Empirical Analysis of National Court Judgements in Commercial Arbitration", which scrutinised over 1,000 court judgments dealing with the setting aside of commercial arbitration awards, revealing that public policy objections and challenges based on the validity of the arbitration agreement and due process, although frequent, are rarely successful.

How (Should) Arbitral Institutions Appoint Arbitrators?

Panel 3 was organised by the Vienna International Arbitration Centre. Niamh Leinwather moderated the panel, which featured Daniel Durante, Natascha Tunkel, Violeta Saranciuc, and Oksana Karel.

Sharing her expectations from institutions, Tunkel suggested efficiency, experience in accordance with the demands of the case, sector-knowledge, and compatibility with the tribunal as selection

criteria.

Saranciuc indicated that parties expect institutions to honour their choice of arbitrators, with institutions retaining an important role especially in complex cases with multiple parties or potential conflict issues (as demonstrated for example by Art. 18.4 of the VIAC Rules). She proposed that institutions encourage arbitrators to disclose potential conflicts and, if necessary, inform parties indirectly or refuse confirmation of the appointment to maintain integrity. On this point, Karel emphasised the different institutional approaches towards increasing transparency vis-à-vis arbitrator appointments, with counsel being responsible for learning the practice of each institution.

Durante advocated for more involvement from institutions in disclosures and conflict checks and highlighted the lack of standardised institutional approaches. Finally, Karel pointed out that while institutions have improved on diversity, with the ERA Pledge being an important milestone, a recent survey report "The Usual Suspects: Deciphering Decision-Making in Arbitrator Selection" revealed that actual selection criteria still prioritise experience, availability, and language skills. Institutions are therefore encouraged to ensure broader representation in arbitrator appointments.

Evidence

Panel 4, comprising Dr. Christopher Boog, Davine Roessingh, Marc-Olivier Langlois and Scott Vesel, tackled current difficulties related to evidence in international arbitration, under the moderation of Eduardo Silva Romero.

Boog critiqued the current methods of presenting evidence to arbitrators, emphasising the need to adapt to the decreasing attention spans of younger generations. Roessingh emphasised that arbitration is no longer a speedy process, with commercial arbitrations averaging 26 months, excluding enforcement. Delays often stem from the excessive and misleading presentation of documents.

Vesel addressed the issue of illegally-obtained evidence, referring to the 2020 update to the IBA Rules on the Taking of Evidence that allows arbitral tribunals to exclude such evidence. He reviewed varying seminal decisions in which arbitral tribunals dealt with allegations of improperly obtained evidence (*Methanex Corporation v. United States of America*, *EDF v. Romania*, *Libananco Holdings Co. Limited v. Republic of Turkey*, *Glencore v. Colombia* and *FC Karpaty v. FFU and FC Mettalist Kharkiv*), noting that US courts impose strict duties on counsel to inquire as to the provenance of evidence. Langlois discussed the challenges of lengthy fact witness evidence clearly prepared by lawyers, often going far beyond the knowledge and recollection of the witness.

Day 2: The Future of Investment Arbitration

Professor Maria Chiara Malaguti made a keynote speech inviting reflection on the heightened role contracts might play in light of the ongoing ISDS reform. She provided an overview of the progress made by the joint UNIDROIT-ICC Institute project on International Investment

Contracts.

States' Right to Regulate and Due Process

Panel 5 was moderated by Kabir Duggal and featured Jaroslav Kudrna, Mahnaz Malik, Florian Haugeneder and Ileana Smeureanu.

Malik traced the first discussion of state sovereignty in the United Kingdom in 1215 with the Magna Carta, which effectively decreed that the king must be subject to the law because the law makes the king. The same principle applies today: the State is a creation of international law, and thus it is subject to international law.

Kudrna reflected on the Czech Republic's history of arbitration decisions concerning solar investments and referred to the one case where the Czech Republic was found liable on Fair and Equitable Treatment grounds (*Natland and others v. The Czech Republic*) as an example of the underlying tension between the legitimate expectations of investors and states' right to regulate.

On this topic, Haugeneder discussed one of the Draft Provisions on Procedural and Cross-cutting Issues and emphasised the need to find balance between the right to property and the right of the state to regulate the use of that property. He noted that Draft Provision 12 appears to move away from that balancing act, instead legitimising any form of state regulation.

Smeureanu discussed expropriation protections. She observed that older decisions looked at the economic impact that measures had on an investment, whereas newer cases look at whether the measures deprived the investors of using their investment in a "meaningful way" and focus on the loss of potential, rather than whether there was substantive deprivation.

Enforcement of Investment Arbitration Awards

Panel 6 was organised by the Institute for Transnational Arbitration. Ioana Knoll-Tudor, Maria Fogdestam Agius, Lucian Ilie and Anne-Carole Cremades delved into recent developments regarding the enforcement of investment arbitration awards in national courts in France, Sweden, the UK and Switzerland, respectively.

According to Knoll-Tudor, there is an increasing tendency on the part of States to challenge the awards against them and resist enforcement.

Knoll-Tudor covered annulment and enforcement in France. Regarding intra-EU awards, two concurrent decisions by the Paris Court of Appeal in 2022, *Strabag v. Poland* and *Slot v. Poland*, were annulled based on the decisions in *Achmea* and *PL Holdings*. This was applied to non-intra EU awards under the Energy Charter Treaty, as shown in *Komstroy v. Moldova*. As regards other investment treaty awards, these are typically annulled based on the five grounds under Art. 1520 of the French Civil Procedure Code.

Moving on to Sweden, Fogdestam Agius shared that this is an arbitration-friendly jurisdiction with a longstanding tradition. The Stockholm Chamber of Commerce is the second largest after ICSID

for investment awards. New developments on state immunity may make this an attractive enforcement jurisdiction, should assets be identified there.

Two recent cases on state immunity from the Swedish Supreme Court both uphold a high threshold in respect of enforcement immunity (*Sedelmayer v. Russia* and *Stati v. Republic of Kazakhstan*). Fogdestam Agius indicated that, apart from the intra-EU BIT issues, Swedish courts show a fairly deferential approach to arbitration. According to her firm's study of investment awards over the past twenty years, only six of the 22 investment awards challenged before Swedish courts were annulled or set aside. In the past two years, four intra-EU investment awards were annulled, of which three were based on procedural public policy, including *PL Holdings v. Poland*.

Cremades revealed that investment awards have mostly been upheld in Switzerland, owing to a general pro-arbitration policy. Moreover, the Swiss courts have made it clear recently that they are not bound by the CJEU's anti-arbitration jurisprudence. They consider EU law to be *res inter alios acta* for Swiss courts.

Ilie provided an overview of recent English caselaw and explained the process of challenging investment awards before the English Commercial Court under the English Arbitration Acts of 1996 (non-ICSID investment disputes) and 1966 (ICSID investment disputes). While there have been several applications in the last years to set aside investment arbitration awards in England, only three were successful.

*Does EU Law Provide the Same Protections as Intra-EU BIT*s?

Panel 7, organised by the Young Romanian Arbitration Practitioners ("YRAP"), consisted of an Oxford-style debate held under the Chatham House Rules, moderated by Liana Cercel and Gabriel Fusea. The motion was "This House Believes that the EU Law Framework Provides the Same Protection for Foreign Investors as Intra-EU BITs", with the pros and cons sides played by Iuliana Iancu, Andreea Nica, Ioana Bratu and Camille Strosser.

Cercel provided an overview of the topic. Until recently, the investment protection system within the EU had been governed by national laws and/or BITs. After the 2009 Lisbon Treaty, the EU was tasked with governing "commercial policy", including investment protection, which led to BITs being declared incompatible with the EU legal order, resulting in the well-known CJEU jurisprudence and the Termination Agreement in 2020. The EU's position is that EU law protects intra-EU investors to a more satisfactory degree. Thus, the YRAP put this issue to formal debate.

According to the pro-EU side, considering the EU law objective of harmonization and integration, the relation between investment law and EU law should not be understood in terms of a conflict. EU law offers robust protections enforced at national and EU level in the form of the four freedoms, comparable to BIT provisions. Additionally, while investment arbitration can be prohibitively expensive and lengthy, the enforcement of judgments within the EU is facilitated by the Brussels I Regulation, making domestic courts a viable alternative to investment arbitration.

Speakers arguing against the motion emphasised that EU law can only be relied upon by investors before domestic courts to the extent that the law invoked has been transposed into domestic law or is directly applicable. As for dispute resolution, investors have no direct recourse before EU institutions against Member States for breach of EU law, being limited to domestic courts which

many companies distrust for neutrality reasons.

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