Kluwer Arbitration Blog

38th AAA-ICDR-ICC-ICSID Joint Colloquium on International Arbitration: Cutting Edge and Timeless

Diogo Pereira (De Almeida Pereira PLLC) · Monday, July 15th, 2024

The 38th **AAA-ICDR-ICC-ICSID Joint Colloquium** on May 21, 2024 at the World Bank Headquarters in Washington, D.C. brought together leaders from three major international arbitration institutions and practitioners from near and far. The wide-ranging program covered cutting edge technological innovations and timeless human considerations such as persuasion, corruption, and disability inclusion.

Opening Remarks and Institutional Updates

The first panel presented updates from each organizing arbitral institution, reporting on major developments over the last year.

AAA-ICDR

Bridget M. McCormack, President and CEO, AAA-ICDR, began by sharing the AAA-ICDR's international arbitration metrics such as the over 848 international cases heard in 2023 that are valued over 5 billion USD. From there, Ms. McCormack turned quickly to a dazzling array of initiatives that the ICDR is undertaking that take advantage of new cutting-edge technologies. The AAA-ICDR has dedicated innovation staff members and innovation chairs that are working on a series of AI-linked initiatives and analyzing employee ideas to use AI to support case filing, create improved tools, improve process quality, and speed up workflow. The potential ADR use cases being worked on include document analysis and comparison, research, and document generation. The AAA-ICDR is working on a ClauseBuilder AI that can assist in the development of bespoke and effective arbitration clauses. Additionally, the AAA-ICDR has been working on creating automated scheduling orders produced from hearing transcripts. Finally, the AAA-ICDR is working on a natural language interface for the AAA-ICDR filing chat bot which is intended for use by non-lawyers to help expand access to justice. Additional information can be found on the AAAi Lab website.

ICC

Claudia Salomon, President, ICC International Court of Arbitration, provided an update on behalf of the ICC Court. She started her talk with a discussion of things she has learned as Court President from her interactions around the globe with businesses and dispute resolution practitioners. She shared several insights, ranging from views on the future of arbitration to travel tips.

With respect to technology, Ms. Salomon noted that there is a difference between automation and transformation. She said that it is easy to think about how a new tool can help us do the same thing we are doing but faster. It is a different exercise altogether to think about how access to and use of dispute resolution services can be transformed. She noted, however, that the ICC continues to monitor technological developments to find better ways to enhance access to justice and provide value to its users.

Ms. Salomon observed that the ICC takes its values very seriously. From a service perspective this includes ensuring that the trust and predictability that users care about are at the core of the ICC's decision making. Additionally, Ms. Salomon noted that as part of the ICC values, they have made strides to focus on and address diversity in the appointment of arbitrators. In this same respect Ms. Salomon also highlighted the new ICC Commission Guide on Disability Inclusion in International Arbitration and ADRMs. Salomon noted that people are at the core of all business decisions and that the ICC strives to consider the needs of its users.

ICSID

Meg Kinnear, Secretary-General, ICSID, as host of this year's Joint Colloquium provided a warm welcome to the World Bank Headquarters and an overview of developments at ICSID. She noted that the increasing number of cases being handled by ICSID demonstrates the real need for the services being provided.

Nevertheless, Ms. Kinnear noted the shifts in the ICSID caseload such as increasing cases arising out of free trade agreements and multi-lateral investment agreements. She also noted the sunsetting of various treaties and the withdrawals from the ECT, while highlighting the conclusion of new treaties in the Middle East. She noted that these treaties have new clauses including updated FET clauses, allowing counterclaims, and incorporating corporate social responsibility.

Ms. Kinnear noted that ICSID is also taking the "AI journey," sharing that ICSID is currently piloting the World Bank's AI project – mAI.

Enter the Shark Tank: Judging the Most Impactful Innovations in Arbitral Practice

In the "Enter the Shark Tank" panel three ideas were pitched to a panel of experts or "sharks" that included: Eduardo Zuleta J., Marinn Carlson, and Theresa Coetzee. In addition to contestants walking onto stage with thematic music, they were also welcomed by an MC who stayed true to character throughout the show.

The first innovation was pitched by Guled Yusuf. Mr. Yusuf suggested that artificial intelligence could be utilized to create an emergency arbitrator tool. This tool would review documents and

assist arbitrators in drafting non-dispositive sections of an award. Though the idea piqued the panelists' curiosity, they were skeptical about its acceptance among older arbitrators and whether it would be equipped to consider all the applicable laws around the world.

Next, Katie Gonzalez proposed the creation of a Mock Hearing Pilot Program. The program would enable counsel to do a mock hearing in the lead up to their actual hearing. Her idea is based on the premise that young lawyers who are interested in entering the field would likely happily volunteer as mock arbitrators for such a program. The panel of experts questioned whether it was reasonable to rely on free labor from young lawyers and whether such a process would provide useful information on how a real tribunal would behave.

Finally, Gretta Walters pitched a settlement window initiative. The idea behind her proposed innovation is that parties may be hesitant to bring up discussions of settlement for fear of appearing weak, and that arbitrators themselves refrain from suggesting this so as not to overstep the boundaries of their role or appear partial. Ms. Walters suggested that a rule amendment could create space in the procedural timetable for arbitrators to include one or more settlement windows for consultation between the parties. The proposal had echoes of the 2023 ICC Commission Report on Facilitating Settlement in International Arbitration. Ultimately this was the idea that took the day.

Global Economic Prospects

Indermit Gill, Chief Economist of the World Bank Group, in discussion with Meg Kinnear provided a refreshing and frank perspective on global economic prospects and efforts to reduce global poverty. Mr. Gill noted that the global economy is forecast to experience the slowest half decade of GDP growth in 30 years. His perspectives were explained through a series of data-driven slides and analysis of various policy issues in the world's three largest economies that illustrated a somewhat gloomy outlook for the global economy.

Arbitration lawyers often focus on the impact of rule of law and dispute resolution on global development. Mr. Gill's focus was refreshing and surprising. He noted that the key to encouraging international investment lies in improving macro-economic conditions through, for example, providing stable currencies and strong fiscal and financial institutions. He acknowledged the importance of minimizing corruption and improving rule of law but noted that the data suggests that they are not strictly necessary. He gave the example of India which experienced very positive economic growth over a period where its corruption rankings and perceptions were unchanged. Mr. Gill focused on the primacy of economic considerations in development rather than legal considerations, which are too often the center of attention in legal conferences and events.

What Science Tells Us About Effective Persuasion in Arbitral Practice

In this presentation Daniel E. González, Donald E. Vinson, Jeffrey Isler, Sarah Vasani, and Rachael D. Kent set out some science-based perspectives on persuasion. The presentations drew from the fields of psychology, sociology, and communication science to explore the art of persuasion and provide some takeaways for effective opening presentations, witness preparation, and cross examination.

One of the common themes throughout the presentation was the importance of storytelling and creating emotional connections and responses with the decision makers. This was emphasized in the use of visual tools to better tell stories, and strategies to connect with people in different and potentially more meaningful ways.

Roundtable Dialogue: Corruption in Arbitration – Have Expectations for an "Interventionist" Tribunal Shifted?

This panel analyzed the landmark decision of the High Court of Justice in London to set-aside an award in favor of Irish-owned BVI company Process & Industrial Development against Nigeria (**P & ID**). The Award was set aside on grounds that the underlying transaction was suffused with corruption and the arbitration, itself, was unfairly impacted by perjury and fraud, which appears not to have been known to the arbitration tribunal, but which was uncovered during a three-month trial in the English courts on a post-award set-aside motion. The panel consisting of Lucinda A. Low, Aloysius P Llamzon, Sophie Nappert, Kenneth B. Reisenfeld, and Natalie L. Reid discussed whether the expectations for how tribunals deal with corruption have shifted considering P & ID and other high-profile cases. The panel noted that "20-20 vision by a reviewing court is easy in hindsight" and refrained from criticizing the P & ID tribunal. The arbitral tribunal failed during the arbitration to uncover the corrupt scheme. The case, thus, represented an unfair arbitral result. Nevertheless, some panelists seemed intent on deflecting any responsibility away from the Tribunal itself.

The panel explained that under most civil laws and common law arbitral statutes and institutional rules, tribunals are granted significant powers *sua sponte* to investigate suspected corruption in the underlying transaction and in the arbitration procedure itself. These authorities generally arise from the tribunal's multiple duties to treat parties fairly and impartially and to render an enforceable award. Nonetheless, the roundtable explored the legal and practical limitations on a tribunal's powers to investigate and ferret out corruption, including potential challenges to the tribunal's "exceeding its mandate" and limitations arising from due process concerns. These "practical limitations" at times seemed like excuses for the unfair underlying award issued in P & ID or an acceptance that not much more could have been done.

The panel noted several lessons to be taken from this case. First, an investor-state case should not be treated as a purely commercial matter. Instead, the impact on the state party needs to be carefully considered and contextualized. Second, they noted that P & ID was complicated by multiple missed deadlines, delays, and failure to comply with tribunal orders which may have tainted the view of the Tribunal. They noted that tribunals should avoid drawing negative conclusions based on the quality of counsel representation, particularly in cases where important public interests are at play. Last, the roundtable debated whether the P&ID case reflected a broader trend toward more activist tribunals, and whether the High Court's support for an interventionist tribunal was appropriate given the unique nature of the case, bearing in mind the limited police and contempt powers of an arbitral tribunal.

The panel in this session highlighted work being done that aimed at finding solutions that befit the arbitral process and make it more adept at spotting instances of corruption. It raised thoughtful questions on how to balance the interests of various specific stakeholders in arbitration amid overriding concerns about justice and the integrity of the arbitral process.

What Would You Do? Responding to Real-life Challenges in International Arbitration

A popular session at the Colloquium returned with "What would you do?" where a panel was presented with challenging scenarios relating to international arbitration. The Panel consisting of Ank Santens (moderator), Stephen L. Drymer, Tai-Heng Cheng, Mélanie Van Leeuwen, and Tafadzwa Pasipanodya discussed a series of difficult questions. Notable among them was dealing with an arbitrator who may be facing cognitive problems or physical issues that prevent them from carrying out their duties. The panel noted that arbitrators are under no duty to disclose medical conditions, a lack of sleep, or marital problems. The parties are entitled to unbiased and uncorrupt arbitrators but not perfect arbitrators. The panelists also considered how to tactfully address such issues and urged the audience to ask "Does this need to be said? Does it need to be said now? And does it need to be said by me?". Controversially the panelists also put to the audience that the attitude of counsel could depend on whether the decline, or disability, was beneficial to their parties' chances of a successful outcome in the case.

Conclusion

The 38th edition of the Joint Colloquium was a fantastic event marked by thought-provoking discussions and rigorous debates provided in well-organized and entertaining formats. Panelists were unafraid to challenge the notion of the centrality of rule of law to development, the expectation that eager young practitioners should be taken advantage of, and assumptions about the intersection of ethics and arbitral practice. The combination of abstract discussions and futuristic technological possibilities, alongside deeply relatable, familiar, and universal questions led to a memorable and stimulating event.

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