Kluwer Arbitration Blog

CAM-CCBC Arbitration Congress XI Edition: The Highlights You Don’t Want to Miss (ctd.)

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The second day of the CAM-CCBC Arbitration Congress XI (“Congress”) featured three insightful panels, each addressing critical topics in the field of arbitration. The first panel, moderated by Ms. Niamh Leinwather, discussed the media’s influence on arbitration. This was followed by a panel led by Mr. Pedro Martini, which focused on the possibility of restoring contractual balance. The final panel of the day, moderated by Ms. Marianella Ventura, tackled the pressing issue of the duty of disclosure.

Below, we delve into the highlights of these discussions that you won’t want to miss.

The Media’s Impact on Commercial Arbitration

The second day of the Congress started with a panel moderated by Ms. Niamh Leinwather and composed of Mr. Elliot Hodgkin, Ms. Rekha Rangachari, Ms. Helena Najjar Abdo and Mr. Bichara Abidão Neto. The discussion of the panel was focused on the media’s influence on arbitration.

The debate was initiated by Mr. Hodgkin, who examined the positive impact of media on arbitration. He emphasized that transparency is beneficial and can help combat fake news, thereby legitimizing the arbitration process. Mr. Hodgkin also pointed out the distinction between mainstream and specialized media. Specialized media are often more familiar with arbitration procedures, which means reporters in this field have a responsibility to understand when bad actors may be using the media to shape the narrative around a case. Consequently, specialized journalists can help educate their mainstream counterparts and serve as a bridge to arbitration experts.

Ms. Rangachari recognized that the media can shape public perception of the arbitration process, but highlighted its positive effects, particularly in promoting transparency in disputes involving public interests. Similarly, Ms. Rangachari believed that the media has the potential to educate the public about arbitration. Indeed, with the use of social media by arbitration stakeholders, it will be essential to stay current with developing guidelines and national law to avoid conflicts of interest.

Ms. Abdo explained that the media has a remarkable ability to shape public opinion, which also extends to arbitration. She emphasized that publicity, which fosters accountability, transparency, public trust and legal development, is crucial in arbitration and should be the rule, but must be balanced proportionately with confidentiality, which is essential in certain cases. As a matter of

fact, the arbitration community should improve the best ways to help transparency perform its role. For example, arbitral institutions can identify which cases should be published. The media is important but needs to be prepared to cover arbitration effectively.

Mr. Bichara shared his insights on the media's influence based on his experience in sports arbitration. The sports sector is directly impacted by media coverage, particularly from non-specialized outlets, which complicates efforts to maintain confidentiality. Additionally, Mr. Bichara believes that, while media coverage is not bad *per se*, it often affects public perception more than it influences arbitrators themselves. He also noted that the Court of Arbitration for Sport – CAS website includes a media release section, which aids in press coverage.

It is a fact that the media is everywhere today, and arbitration is no exception. A notable example is the dispute over the control of Eldorado, involving J&F Investments and Paper Excellence. In this case, every new development is covered primarily by the country's leading newspapers. In this context, the arbitration community must be cautious about gossip, since the readers love it but undermines the integrity of the process.

Methodologies for Restoring the Economic and Financial Equilibrium of Contracts

In an panel moderated by Mr. Pedro Martini, the discussion focused on the possibility of restoring contractual balance. As Mr. Martini noted, this topic has gained particular relevance in recent years, especially in light of the COVID-19 pandemic, which has previously prompted in-depth discussions (see here), as well as other relevant events.

In Brazil, this issue has been a continuous subject of debate. For instance, the recent Economic Freedom Law, for example, aims to strengthen the parties' agreements and limit the grounds for contractual revision.

Beginning with the German perspective, Mr. Stefan Kröll explained that the topic centers on the doctrine of changes of circumstances, which can create potential conflicts between *pacta sunt servanda* and *clausula rebus sic stantibus*. According to this doctrine, changes in unforeseen circumstances may justify contract adaptation. However, since doctrine alone is often insufficient, many parties include a hardship clause in their contracts to enable adjustments for future circumstances while maintaining the contractual relationship.

Mr. Kröll raised potential concerns about the challenges involved in a judge or arbitrator when tasked to adapt a contract due to unforeseen changes, especially in the context of long-term transactions, given the creative discretion required to balance future circumstances.

After the German perspective, Ms. Sarah Ganz addressed arbitral tribunal viewpoints. Ms. Ganz argued that several issues must be considered before adapting a contract, particularly whether the arbitrator has the authority to do so. Key factors include the parties' authorization and the applicable law. A critical question in arbitral proceedings is how the tribunal should adapt the contract, taking into account the contract itself and the substantive law.

Furthermore, certain criteria should be used to determine how the adjustment will be made, including the willing, and the nature of the contract, its purpose and interests, the parties' practices, and the general risk allocation. Additionally, Ms. Ganz emphasized that while the tribunal may

adapt the contract, it is not obligated to do so.

Mr. Leonardo Florencio followed with a practical analysis based on various cases from different economic sectors, demonstrating how arbitral tribunals react depending on the specific circumstances of each case. The analyzed decisions reveal that courts do not conduct contractual revisions in a broad or general manner. Rather, they recognize that if the parties genuinely wish for adaptation, they should clearly include such provisions in the contract.

To conclude the panel, Ms. Jenifer Alfaro discussed the relationship between hardship clauses and ESG provisions. Ms. Alfaro emphasized the significance of ESG and argued that the ESG clauses in contracts is a shift in mindset since encourages parties to proactively assess potential risks associated with their activities and to share this information with each other. In this context, Ms. Alfaro raised the challenging question of whether the ESG clause, by tracking new costs, could trigger the application of the hardship clause.

One interesting issue discussed by the panel, which Mr. Martini emphasized when addressing the assumption of risk, involves the peculiarities of the applicable law, because each jurisdiction promotes a different approach to contractual analysis.

Duty of Disclosure and the Contribution of Institutions

The last panel of the congress was moderated by Ms. Marianella Ventura, featuring speakers Ms. Debora Visconte, Ms. Catherine Dixon, Ms. Galina Zukova, and Mr. Ismail Selim. The duty of disclosure is a pressing issue. In the international context, in February 2024, the Arbitration Committee of the International Bar Association ("IBA") released a revised version of its Guidelines on Conflicts of Interest in International Arbitration. A key innovation of the new IBA Guidelines was the introduction of rules that enhance the role of parties and lawyers in identifying conflicts.

Brazil also saw significant developments last year. The Brazilian Arbitration Committee ("CBAR") published its own guidelines on conflicts of interest to assist parties involved in Brazilian arbitrations.

The first speaker of the panel, Ms. Débora Visconte, the current president of CBAR, provided a relevant overview of the CBAR guidelines, which have received broad support from many arbitral institutions. These guidelines enhance several key points, including that the duty of disclosure must be maintained throughout the entire process, according to Article 14, §1 of the Brazilian Arbitration Act.

Furthermore, Ms. Visconte emphasized the critical importance of the Guideline 3, which states that any failure to fulfill the duty of disclosure does not necessarily imply a lack of impartiality. This understanding aligns with the position of the Superior Court of Justice ("STJ"), as expressed in case number 2.101.901. Similarly, this concept was upheld in the case of *Halliburton Company v. Chubb Bermuda Insurance Ltd* (see here). In summary, the arbitrator must disclose any fact that raises justifiable doubts (guideline 4). In addition to the arbitrators' duty of disclosure, the parties also bear the responsibility to be informed about public and easily accessible facts and to disclose them at the earliest opportunity (guideline 6). The aforementioned STJ case also addresses this obligation.

Reflecting on the historical context, she noted that today's disclosures are far more complex than in the past. However, Ms. Visconte believes the judiciary is proving to be very engaged in understanding the evolution of arbitration.

From a global perspective, Ms. Dixon offered an interesting reflection on the duty of disclosure, noting that the limits of this duty and the consequences of non-disclosure remain unclear. Ms. Dixon also discussed the contributions of the Chartered Institute of Arbitrators (CIArb) in enhancing the efficiency of disclosure in international arbitration. The CIArb is a global community of private dispute resolution professionals that provides education for arbitrators and develops soft laws to establish best practices.

On the other hand, Mr. Selim introduced the perspective of arbitral institutions, explaining that institutions expect arbitrators to disclose any facts that could reasonably raise justifiable doubts from the eye of the parties, based on objective standards. Institutions then apply these standards when deciding challenges against arbitrators. Regarding practices developed by institutions, Mr. Selim mentioned that some institutions utilize questionnaires that arbitrators must complete, encouraging full disclosure.

Addressing the new IBA Guidelines, Ms. Zukova highlighted significant innovations in the revised version. One key issue relates to principle number 7(a), which establishes that disclosure is a duty of the arbitrator, but also of the parties. As mentioned by Ms. Visconte, this obligation for the parties is also addressed in principle number 5 of the CBAR Guidelines. Other noteworthy updates appear in the Orange List of the IBA Guidelines, such as the provision addressing the scope of duty to disclose when an arbitrator has served as an expert three or more times in the last three years or currently sits on a tribunal alongside a party's counsel.

Conclusion

The second day of the Congress provided valuable insights into the influence, importance and problems of the media, concerns about the nuances of contractual rebalancing, and the new perspective on the duty of disclosure. The Congress was an excellent opportunity to explore today's arbitration framework and its implications for the future. We look forward to next year!

Follow along and see all of Kluwer Arbitration Blog's coverage of the Congress here.

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