Kluwer Arbitration Blog

19th ICC New York Conference: Exploring Cross-Cultural Business Dynamics and New Realities in Dispute Resolution

Eric Lenier Ives (Assistant Editor for Canada and the United States) · Thursday, November 21st, 2024

On 26 September 2024, the International Chamber of Commerce (ICC) hosted the 19th ICC New York Conference on International Arbitration, which brought together over 300 participants from 40 countries to discuss critical developments in international business and arbitration. Held in tandem with the ICC Institute Advanced Training on "The Amicable Settlement of Disputes in International Arbitration" on 25 September and the 9th ICC YAAF Global Conference on 27 September, the ICC Conference explored themes around trust, cross-cultural collaboration, and evolving methods of dispute resolution in the global business landscape. In opening remarks, **Marek Krasula** (Director, Arbitration and ADR, North America, ICC Dispute Resolution Services) set the tone for the conference, reflecting on the 10-year anniversary of the Secretariat of the ICC International Court of Arbitration in New York. **Alexander Fessas** (Secretary General, ICC International Court of Arbitration) and **Philippe Varin** (Chair, ICC) built upon this message, highlighting how the ICC acts as an inclusive platform for enabling business. **Varin** underscored the importance of timing global business events to align with major international movements – like the UN General Assembly – creating synergies that amplify the impact of business initiatives.

Cross-Cultural Perspectives in Global Business

In keeping with the conference's theme exploring cross-cultural business, **Claudia Salomon** (President, ICC International Court of Arbitration), **Nadia Tuma-Weldon** (SVP, Truth Central, McCann Worldgroup), **Jean-Remi de Maistre** (CEO and Founder, Jus Mundi), and **Rozan Simoni** (General Counsel – North America, COFCO International) presented a panel discussion on the findings from the ICC-Jus Connect-McCann report "The Truth about Cross-Cultural B2B Relationships.".

Tuma-Weldon provided a detailed presentation of the report, which was released earlier this year, and which focused on the emotive nature of B2B relationships and how businesses perceive cross-cultural differences. She highlighted that the notion of the "ruthless businessman" is increasingly being debunked, with 82% of global suppliers and customers preferring mutual growth strategies rather than pursuing individual gains at the expense of others, challenging traditional perceptions of global business. She further noted that some business cultures, including the U.S., are chameleonic, adapting their strategies to fit within multiple cultural frameworks. This flexibility allows businesses to operate across diverse regions, using cultural sensitivity to gain a competitive

edge. **De Maistre** built on this point, sharing his experiences of conducting business across various cultures, noting that cross-cultural interactions often subvert preconceived notions. He cited his experience working in Saudi Arabia and France, where the business cultures were far more aligned than he initially expected. This personal insight tied back to the report's findings that successful international businesses must "remap the world" based on cultural perceptions rather than rigid economic or geographic divisions.

The subversion of expectations also meant a redefinition of what constitutes business success. In particular, **Simoni** and **Salomon** explored the nuances of international dispute resolution, focusing on how different business cultures define success in contractual relationships. For **Simoni**, the myth of the zero-sum game, where one party's gain comes at the other's expense, is becoming obsolete. Instead, companies are striving to resolve disputes in ways that benefit both sides, creating lasting partnerships. **Simoni** added that U.S. legal professionals, in particular, have demonstrated a unique ability to navigate these diverse cultural expectations, often achieving successful dispute outcomes through flexibility and cultural sensitivity. **Salomon** stressed the importance of legal counsel being involved in the early stages of contract development, especially in highly regulated industries. She noted that contracts with early legal input are far less likely to end in disputes. However, when conflicts do arise, the involvement of lawyers post-factum can make amicable resolution more challenging, with parties often proceeding to arbitration to settle differences.

Life Sciences Disputes Under the Microscope

In the panel "Arbitration & ADR: the Best Medicine for Life Sciences Disputes?", **Preeti Bhagnani** (Partner, White & Case LLP), **Dorothee Schramm** (Independent Arbitrator, SwissArbitrator.com), **Keren Tenenbaum** (Chief Compliance Officer, Zoetis), and **Nicolas Wiegand** (Co-Head of Dispute Resolution, CMS) discussed the specific challenges of dispute resolution in the highly-regulated life sciences field, where confidentiality and public rights-based disputes collide. Moderators **J.P. Duffy** (Partner, Reed Smith LLP; Co-chair, USCIB Arbitration Committee Life Sciences Arbitration Task Force) and **Hagit Muriel Elul** (Partner, Orrick, Herrington & Sutcliffe LLP; Co-chair, USCIB Arbitration Committee Life Sciences Arbitration Task Force), began the session by noting that life science disputes are often stories of conflicts between small innovators and large corporate clients with long-term relationships that need not be ended by one dispute.

In addition to being long-term relationships, **Bhagnani** pointed out that parties to life sciences contracts are often contracting around intellectual property (IP) rights. This leads to some arbitration clauses including carve-outs for some IP disputes which require public adjudication. Patent infringement or breach of confidentiality, for example, are frequently publicly litigated because of their broader implications for public health and competition; however, arbitration remains the preferred method for resolving other disputes in life sciences contracts, particularly because it offers the confidentiality that companies need to protect sensitive data and trade secrets.

Schramm elaborated on the time sensitivity of disputes in the life sciences sector. She shared an example where a disagreement over the reporting of a pharmacovigilance signal to the FDA threatened to derail a drug's future. In such cases, having a standing dispute advisory board for the R&D cooperation, as is done in construction cases, could meet the need for quick guidance before the issue escalates into a more significant problem, and could thus also save cost. Alternatively,

expedited proceedings and emergency arbitration can provide the speed necessary to resolve certain issues. **Tenenbaum** echoed this sentiment, noting that arbitration is often the best fit for the fast-paced life sciences industry, where delays can lead to significant market losses.

Finally, **Wiegand** noted that life sciences disputes often involve a novel approach to remedies, including a particular usefulness for specific performance rather than damages, even when claims can theoretically reach into the billions of dollars.

Underutilized ADR Tools and Techniques for Conflict Management

In the panel "Time to Retool: Unleashing the Potential of Under-Utilized ADR Tools and Techniques," the theme of conflict prevention was in full focus, with panelists **Kathleen Paisley** (Arbitrator; Partner, Ambos Law), **Myrna Barakat Friedman** (Independent Commercial Arbitrator and Mediator, BarakatADR), **Andrea Gross** (Manager of Litigation, Bechtel Global Corporation), and **Kyle R. Olson** (Senior Counsel, Boeing) each pitching a tool or technique that parties should consider incorporating more often in this session moderated by **Martin J. Valasek** (Partner, Bennett Jones LLP).

Paisley first highlighted the recent ICC Commission on Arbitration and ADR Guide on Effective Conflict Management, which found that ADR practitioners are increasingly using mediation as the precursor for settlement. She noted that even if a settlement does not actually occur during an initial mediation, additional information allows the parties to become more geared towards settlement. **Barakat Friedman** suggested the inclusion of dispute prevention clauses in contracts, which allow for structured off-ramps to resolve conflicts before they escalate to legal disputes requiring mediation or adjudication. These mechanisms include nominating internal officers who are required to try to resolve conflicts as they arise, and appointing one or more independent third parties to shadow the parties from the onset of the contractual arrangement and help them navigate their relationship to avoid conflicts and address them promptly if and when they arise. **Gross** discussed the advantages of agreeing in contracts on the joint appointment of expert neutrals to provide independent and objective input on potential contentious issues as they arise throughout the course of contract performance. She commented that such expert neutrals are most successful when work is put in up front to identify neutrals who are good fit with the parties and contract, when specific procedures are put in place to govern the neutrals' work, and when both legal and business stakeholders are fully engaged participants in the process.

Olson and **Barakat Friedman** expanded on the concept of early conflict prevention, explaining how businesses should identify potential points of friction during the life of a contract and address them proactively. He also stressed that face-to-face engagement between legal and business representatives is crucial for reaching swift resolutions. After a dispute has arisen, **Olson** noted, mediation is far less effective without the buy-in of all stakeholders, including those who manage the commercial and operational aspects of the project.

Arbitration with States and State-Owned Entities

One of the most complex areas discussed was arbitration involving states and state-owned entities (SOEs). The panel "Contracting and Arbitrating with States and State-owned Entities: Emerging

Trends, Challenges and Best Practices," moderated by **Jonathan C. Hamilton** (Partner and Global Co-Chair of International Arbitration, Paul Hastings LLP) and featuring **Gabriel Costa** (Associate General Counsel, Shell Brasil Petróleo Ltda.), **Christina G. Hioureas** (Partner, Foley Hoag LLP), **Amanda Jiménez Pintón** (Counsel, ICC International Court of Arbitration), **Yasmin Lahlou** (Partner, Chaffetz Lindsey LLP), and **Paula Linhares Karam** (Senior Counsel, Petrobras), explored the unique challenges of this kind of arbitration.

At the outset, **Hamilton** set out the oft-repeated question, "is investor-state dispute settlement dead or dying?" He stated that it is a misguided question driven in part by pockets of procedural discontent, frustrated parties and recalcitrant States. According to Hamilton, the real issue is the relationship between long-term shifts in globalization and international arbitration, and it is unsurprising that conventional notions of investor-state dispute settlement are evolving from late 20th-century norms. He emphasized that the frameworks for arbitration involving sovereigns is robust and that consent through contract remains at the heart of arbitration, including a return towards contract-based arbitration with State-owned entities (SOEs) that was central to the origins of contemporary international arbitration. Against this backdrop, he moderated a discussion that incorporated the perspectives of public and private actors in the energy sector, as well as institutional and enforcement perspectives.

Linhares Karam highlighted how Brazilian law has evolved to allow state organs to engage in commercial arbitration. She explained in the 1990s, several laws were enacted, incorporating provisions for arbitration across multiple sectors, like Brazil's 1997 Petroleum law that requires arbitration clauses in all concession agreements, making arbitration a standard practice in the country, and a modern success story of commercial arbitration involving SOEs.

Gabriel Costa discussed the political and economic risks involved in long-term energy projects. He stressed the importance of choosing the right arbitration seat, as disputes in state-controlled sectors like oil and gas often involve substantial political and economic ramifications. **Costa** explained that Shell mitigates these risks by insisting on arbitration venues with a track record of fairness and transparency, ensuring consistency and predictability in their dispute outcomes.

Jiménez Pinton framed the issue from the institutional perspective at the ICC, noting that in 2023, 16% of new ICC cases involved a state or SOE, with energy and construction disputes being the most common. She also noted practices of the Court in ICC arbitrations involving States and SOEs including additional institutional processes for draft award scrutiny. **Hioureas** added that arbitration involving SOEs before the International Centre for the Settlement of Investment Disputes (ICSID) raises a unique set of jurisdictional requirements, given that state-owned entities are by themselves not party to the ICSID Convention. The ICSID system therefore requires States to designate their SOEs to ICSID so that SOEs can be party to ICSID disputes. **Hioureas** further highlighted the approach adopted by a minority of ICSID tribunals to lower the threshold of exercising jurisdiction over SOEs by "implicit" designation, posing a dilemma for States given its incompatibility with the plain text of the ICSID convention and principles of State consent. Hioureas stressed the importance of faithfully applying the principle of consent in accordance with the ordinary language specified in the treaty and/or contract.

Finally, **Lahlou** noted that issues in enforcement are evergreen for SOEs, with jurisdiction-by-jurisdiction approaches to sovereign immunity, including particular waiver systems still used in places like the United Kingdom. Some common ground remains, however, as **Lahlou** noted a recent decision by the D.C. Circuit Court of Appeals, holding that the New York Convention

applies to the enforcement of an arbitral award against a sovereign entity.

The (ICC) Court is in Session: A Closer Look at Multi-Party and Multi-Contract Disputes

Finally, the ICC offered a "Spotlight on Multi-Party & Multi-Contract Issues and Consolidation" with a mock session of the ICC Court, featuring ICC Court members **Natalie L. Reid** (Partner, Debevoise & Plimpton LLP), **Sandra González** (Head of Arbitration and Litigation, FERRERE and Vice President of the ICC International Court of Arbitration), and **Peter J.W. Sherwin** (Partner, Proskauer Rose LLP), with **Salomon** acting in her role as President of the ICC International Court of Arbitration. The session, also featured **Paul Di Pietro** (Counsel, ICC International Court of Arbitration) and **Stella Leptourgou** (Counsel, ICC International Court of Arbitration), who provided attendees with a rare behind-the-scenes look at how the ICC Court handles complex multi-party and multi-contract issues.

The first session examined a fictional case, where the Court had to decide, under Article 10, whether to consolidate two arbitrations involving the same parties under different contracts. In the second half of the session, the panel then addressed multi-party and multi-contract issues under Article 6(4) of the ICC Rules.

Looking Ahead to Collaboration and Innovation

The 19th ICC New York Conference showcased the importance of adaptability in international disputes practice, but also highlighted that, no matter which side of dispute a party finds themselves, the world shares a common set of values implicated in managing conflict. In his closing remarks, **Krasula** fittingly reaffirmed the ICC's dedication not only to resolving international disputes, but also to advancing access to justice and the rule of law.

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