Kluwer Arbitration Blog

22nd ICC Miami Conference: Revisiting the Foundations of International Arbitration – Day 2

Jessica Rado · Sunday, January 12th, 2025

After concluding the first day of the 22nd ICC Miami Conference with a dinner and a fun party that kept the attendees dancing until late at night, the conference promptly resumed the next morning. Day 2 (December 3, 2024) featured an exciting lineup of discussions on various topics, including the ICC's own Terms of Reference ("TOR"), the liability of arbitrators, and the ICC YAAF panel on tribunal secretaries.

ICC Arbitration Featured Debate – 'This House Believes' Style Debate

In the first session of the day, Juan Pablo Argentato (Managing Counsel, ICC) moderated two debates: one on the ICC Terms of Reference, and another on transparency in international arbitration. These debates included poll questions that allowed the audience to share their thoughts on these topics.

In the first debate, Sofia Martins (Partner, Miranda) and Elena Gutiérrez García de Cortázar (Founding Partner, EG Arbitration) discussed whether the ICC's very own Terms of Reference (*acta de misión*) are still an essential feature of the ICC. In this lively debate, the audience was reminded of the importance of the TOR and how it can resolve issues arising out of pathological arbitration clauses. However, they were also prompted to consider whether the TOR may be considered an outdated tool that no longer adds value for the final user of the arbitration proceeding.

In the equally engaging second debate, Alexis Mourre (Partner, Mourre, Chessa, Le Lay Arbitration) and Fernando Mantilla Serrano (Partner, Latham & Watkins LLP) analyzed transparency in international arbitration through three subtopics: the balance between publication of awards and confidentiality, communication of reasons for the ICC Court's decisions, and the ICC Court's role in the confirmation of arbitrators.

On the publication of awards, the speakers discussed the delicate balance between the value of published awards in promoting consistency and legal development, while also highlighting the risks of breaching confidentiality and, therefore, losing one of the most appreciated benefits of the arbitration process. Regarding the communication of reasons for the ICC Court's decisions, the debaters highlighted its potential to build trust and enhance procedural fairness, but also discussed

the increased administrative burdens and potential threat to party autonomy that this practice could generate. Finally, on the ICC Court's role in confirming arbitrators, the two advocates stressed its importance in ensuring neutrality, quality, and often times, diversity, while discussing its potential to become an encroachment on party autonomy and a source of inefficiency.

While speakers were instructed to argue for one side or the other, the debates provided new insights on these issues and the interactive format of the panel allowed the audience to truly join and reflect on these tools.

Towards a Uniform System of Liability of Arbitrators

In a plurilingual discussion, this second panel explored the topic of a potential uniform system of liability for arbitrators.

Andrea Carlevaris (Partner, BonelliErede) kicked off the discussion with an overview of the applicable law to the arbitrators' liability, illustrating the various bodies of law that intertwine on this issue, which suggest that uniform legal instruments are not a very realistic solution. At the outset, Mr. Carlevaris explained that when pursuing an action against an arbitrator, one might bring a contractual or a tort cause of action, which would trigger different forums and applicable law. In the case of a contract claim, the jurisdiction would be determined based on the conflict of jurisdiction provisions of the court seized, and would result in the claim being brought to:

- the courts of the place of execution of the contract;
- the courts of the place of residence of the arbitrator; or
- the courts of the place of common residence of the parties.

The applicable law would be governed by conflicts of law provisions and could result in: the law with the closest connection to the dispute (whichever that may be), the law governing the arbitration agreement, or the law of the place of domicile of the party that has to provide the relevant performance. On the contrary, a tort claim would be adjudicated by the courts and law of the place where the harmful event occurred, or where the loss was suffered. Given the plethora of possible applicable laws and forums, it seems clear that uniform legal instruments to address arbitrators' liability are not currently available.

Gonzalo Fernández (Partner, Gonzalo Fernández & Cía) continued the dialogue by explaining the possible civil and criminal responsibility that an arbitrator can be subjected to, and how these derive from the arbitrator's dual function: a jurisdictional function, and a contractual one. As a *quasi-judicial* figure, an arbitrator's liability in its jurisdictional capacity may stem from the improper exercise of their adjudicative duties. For example, an arbitrator might face liability for exceeding their mandate (*ultra vires*), failing to provide procedural fairness, or rendering an award tainted by misconduct or gross negligence. However, many jurisdictions limit arbitrators' liability in this role to protect their independence, often granting immunity except in cases of fraud or deliberate misconduct,

As for their contractual function, arbitrators also owe duties arising from their contract with the parties who tasked them to adjudicate the dispute. Breach of these contractual obligations—such as the failure to disclose conflicts of interest, delays in rendering the award, or failure to conduct proceedings in accordance with agreed procedures—can result in liability. However, unlike the

jurisdictional function, contractual liability often focuses on whether the arbitrator failed to meet the reasonable expectations of the parties under their agreement. Finally, Mr. Fernandez illustrated the *Puma* Case (Spanish Supreme Court, February 15, 2017–also covered here), where the Spanish Supreme Court held two arbitrators liable for breaching the principle of collegiality by excluding the third arbitrator from the final deliberations and decision-making process, and analyzed the standard of recklessness in establishing the arbitrators' liability.

Concluding the discussion, Julie Bédard (Partner, Skadden, Arps, Slate, Meagher & Flom LLP) analyzed the three approaches to the issue of arbitrators' liability: (i) the functional status approach; (ii) the contractual status approach; and (iii) the hybrid approach. Under the functional status approach, the arbitrator holds a jurisdictional role similar to that of court judges (*quasi-judicial*) and therefore enjoys absolute immunity from civil claims; under the contractual status approach, the arbitrator has a contractual relationship with the parties and can face liability under the national laws at the seat of arbitration if they fails to meet the expected standard of care and skill; and, finally, under the hybrid status approach, the arbitrator is considered to have a *sui generis* contract, acknowledging its dual function, and should be granted immunity from suit under national laws, except in extreme cases of willful or reckless disregard of their legal obligations. To conclude, Ms. Bédard ended her tri-lingual presentation by taking the audience around the globe while analyzing which approach applies in practice in the USA, the UK, France, Spain, Brazil and Mexico, delivering an insightful overview of the trends and differences in this regard.

Lunch Session—*Acta Non Verba*: The (Un)Conscious Awareness of Culture Differences and Diversity in International Arbitration

Led by Kabir Duggal (Senior International Arbitration Advisor, Arnold & Porter), Susan Franck (Professor of Law, American University, Washington College of Law) and Pablo Mori (Associate, Clifford Chance), this session brought together about 100 attendees, who enjoyed a meal together, while also sharing their thoughts, struggles and hope for a more inclusive future in international arbitration.

Kabir Duggal kicked off the discussion by reminding us of what diversity and inclusion really means, taking us back to basics. To understand the commonly used acronym "DEIB" (Diversity, Equity, Inclusion and Belonging) and its concrete meaning, Kabir explained that: (i) diversity is being invited to the party; (ii) inclusion is being asked to dance; (iii) equity is how much space on the floor you get; and (iv) belonging is who gets to choose the music.

Dr. Duggal then proceeded to explain how these issues matter in the field of international arbitration, which remains an elite community, and what challenges we are still facing as an international community, mentioning that many colleagues or aspiring colleagues are often not able to participate in activities due to a lack of funds, language barriers, or visa-related issues.

Spotlighting the US perspective and the recent US Supreme Court decision on affirmative action, Dr. Duggal explained how the 2023 SCOTUS decisions in *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard College (Harvard)* and *SFFA v. University of North Carolina (UNC)* are now forcing employers (including law firms) to reevaluate their DEI initiatives and recruitment policies, with potentially devastating consequences.

Susan guided the audience through the struggles of cultural differences, citing clear examples from

the book "The Culture Map: Breaking Through the Invisible Boundaries of Global Business", and delivering a truly refreshing and inspiring session. In one interesting example, Professor Frank highlighted the different work cultures by citing the experience of a German national working in the US and receiving feedback for the first time, and how she felt blindsided by the fact that her evaluation began with incredibly positive feedback and then quickly escalated to the possibility of losing her job very soon.

The Q&A following the lunch turned into a moment of reflection, where organizations leading the fight for diversity and inclusion, such as Women Way in Arbitration LATAM and ArbitralWomen, shared their mission and joint efforts.

Ask Me Anything Session With the Secretariat of the ICC Court and Closing Remarks

Wrapping up the conference, members of the ICC Secretariat joined the stage to illustrate the ICC structure: its teams, groups and offices around the world, as well as how the staff interact and work with each other. After a very helpful overview of the Secretariat, the panel opened for questions, allowing the attendees to "ask them anything" about the ICC process and its benefits. One question, which the members of the Secretariat said to be the most common one, was: how does one get their first appointment? And the Secretariat's response was: first appointments often come through national committees, so visibility is key. While a little bit of luck does play a role, excelling in the first appointment ensures the second one will follow naturally.

Finally, Patrícia Ferraz (Regional Director for Latin America, ICC International Court of Arbitration) delivered closing remarks in Portuguese, highlighting the ICC's strong presence in Latin America, stating how the conference has demonstrated the strength and intelligence of our Latin American community and inviting the audience to join again for more thought-provoking sessions next year.

ICC YAAF: The Thin Line Between Administrative Secretary and Becoming the Fourth Arbitrator

Members of the Young Arbitration and ADR Forum were lucky to stay for a bonus panel where Jorge López Fung (Senior Associate, Squire Patton Boggs), Antonio Gordillo (Gordillo Arbitration) and María Marulanda (Independent Arbitral Assistant) discussed the role of tribunal secretaries, and the different provisions (or lack thereof) that regulate their role in various institutions. As mentioned by the speakers, some of the institutions that have addressed the role of tribunal secretaries in notes, guidelines, or policies are: the ICC, the Stockholm Chamber of Commerce, and the Hong Kong Arbitration Center.

The panel, moderated by Katherine Lievano (DRS Engagement & Initiatives Project Manager, ICC Dispute Resolution Service) and introduced by Enrique Molina (Associate, Omnibridgeway) started off by flagging how this kind of discussion has become more and more relevant after the *Yukos* case (reported here), and shared tips and best practices for young practitioners interested in gaining experience as arbitral assistants.

Engaging the audience with poll questions, the panel steered the discussion by analyzing specific

tasks a tribunal secretary may perform and how these fall on Ole Jensen's Traffic Light Scale of Permissible Tribunal Secretary Tasks (*see* here). Ultimately, the panel advised that tribunal secretaries must not handle decision-making or legal reasoning to avoid bias, and agreed that key skills for tribunal secretaries include procedural efficiency, language proficiency, attention to detail, proactivity, and subject matter expertise through academic and professional experience.

Conclusion

A seamless blend of thought-provoking discussions, spirited debates, and interactive sessions, the ICC Miami Conference once again proved to be a dynamic platform for fostering dialogue and sharing practical tips in the field of international arbitration

As the warm sea breeze of Miami marked the end of this year's gathering, participants left with fresh perspectives, eager to implement the insights gained and reconvene for the 23rd edition of this unparalleled LatAm-focused arbitration event.

Follow along and see all of Kluwer Arbitration Blog's coverage of the 22nd ICC Miami Conference here.

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