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Commentary

International Arbitration Experts Discuss Shifts In Transparency, Significant Developments This Year And What 2018 May Bring

Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on changes in transparency in arbitration, the potential future impact of awards and other significant events in 2017, where the next hot seat in arbitration is expected to be and what challenges 2018 may bring.

Robert B. Davidson of JAMS in New York, Edward G. Kehoe of King & Spalding in New York, Dr. Alexandre Malan of BELOT MALAN & Associés in Paris, Andreas Dracoulis of Haynes and Boone CDG in London and Dr. Veit Öhlberger of DORDA Attorneys at law in Vienna share their thoughts on these important issues.

Mealey's: How is the shift toward transparency affecting international arbitration?

Davidson: I'm not convinced that there is a real "shift toward transparency". Calls for the publication of awards have been recently renewed, but very few provider organizations presumptively publish awards. In the commercial arena privacy and confidentiality is still very much the norm.

Kehoe: With greater access to information about proceedings, both parties and tribunals face more extensive scrutiny with respect to the issues of a particular matter. This scrutiny may come from arbitration counsel who will generally review awards rendered by particular arbitrators, when considering appointments; but also from civil society which will form views on the substance of the dispute including any elements of public interest. Greater transparency, of course, also provide access to information that often lead to challenges.

Malan: Transparency has already and will continue to have a strong impact on arbitration on various grounds. In France, Courts are still continuing their efforts to model the conditions of the control they are willing to impose on independence and impartiality of arbitrators, which leads them to impose an obligation of disclosure. This trend is not new, but they are now finding a good equilibrium between the interests of fairness and reliability of arbitration, on one side, and the need for a flexible approach which is necessary in the conduct of arbitrations. At the same time, they try to find the right tools to avoid that this question be used by parties as a weapon against arbitration process. The arbitrators have duties, but the parties are also requested to act in a pro-active way to unveil any conflict of interest which is easy to find out (on the web for instance), even if the arbitrators have not disclosed them, and to so without delay.

As regards transparency as an obligation imposed to companies, in particular to international actors, new sets of compliance obligations are imposed by legislators in various sectors, such as anti-corruption, protection of personal data, control of illegal or unfair employment, etc. and the companies are required to set up internal systems and rules to regulate and disclose irregularities (for instance through whistle blowing systems). This is the case in France with the law n°2017-399 which was adopted on 27 March 2017. EU Directive n°95/46 on Personal Data Protection is also coming into force on 28 May 2018. Companies can be potentially held liable towards clients, employees, consumers, subcontractors, and are exposed to be fined by State authorities. These issues will necessarily impact arbitration, in particular because these laws, most of the time, are mandatory, which means that they will reappear in the way public order is used by Courts to control awards. In

other words, we will certainly witness the irruption of compliance in arbitration cases.

The other point, which we see in particular in France — but the trend is also seen in other countries — is that some issues which used to be purely private issues, are now falling within the scope of State control, for the sake of transparency and equity. In distribution contracts, for instance, State agencies have now the power to control that these contracts are properly balanced between the parties to reflect the best interests of both, and that one party is not taking advantage of its situation to impose unfair obligations to the other (article L442-6 of the French Commercial Code). And these agencies (such as the DGCCRF in France, and the Ministry of Economics) are effectively discovering the use of these powers to regulate contractual imbalance. The consequence of this is to draw out of the scope of arbitability — in full or partially — some cases because of the intervention of the State to regulate those contracts. In the case *Apple v. Orange*, the French Cour de cassation admitted (Civ.1, 6 July 2016, case number 15-21.811) that the control operated by the Ministry of Economics on a contract signed between private parties, has the necessary effect to by-pass the arbitration clause and impose local Courts jurisdiction. Under certain conditions, the Ministry can ask the national judge to order damages to be paid to the other contractor, which means that the Ministry is acting *on his behalf*. The result of this is that we are now starting to see companies, in some industries and disputes, taking advantage of this tool to by-pass the arbitration clauses, by simply asking the Ministry of Economics to act on their behalf. This tendency will have to be thoroughly scrutinized over the coming years.

Mealey's: How have transparency laws, such as the Mauritius Convention on Transparency, changed the way in which case information is available to the public?

Dracoulis: The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (known as the Mauritius Convention) came in to force in October this year and, in essence, it seeks to extend the application of the UNCITRAL Rules on Transparency (the "Transparency Rules"). While the Transparency Rules were previously only automatically applicable to investment treaty arbitrations arising out of treaties concluded after 1 April 2014, the Mauritius Convention seeks to extend their application to all investment treaty arbitrations irrespective of the date the relevant treaty the subject of the dispute was concluded.

This undoubtedly has the potential to increase the availability of case information given that, subject to certain exceptions, the Transparency Rules provide for, amongst other things, open hearings, the publication of certain documents (including written submissions) and for interested third parties to make submissions. This is a welcome development in the context of investor-State arbitration where not only is the outcome a matter of public interest, but the process itself is one that will benefit from greater accessibility thereby lending more legitimacy to the awards.

The only caveat is that, at the time of writing, there are only 22 signatories to the Mauritius Convention indicating that many states still consider confidentiality to be important. Confidentiality of course remains a significant factor in the choice of arbitration as the method of dispute resolution by private commercial parties; and particularly so where the matters in dispute are commercially sensitive. Indeed in international arbitrations between private entities English courts will uphold an implied duty on the parties to treat the arbitration as confidential, unless there are valid reasons not to such as where disclosure is in the interests of justice.

Kehoe: Transparency laws, or freedom of information legislation, have had a huge impact on international arbitration. The first FOIA requests occurred in the early Chapter 11 proceedings brought against the US, and in due course led to the NAFTA parties agreeing to greater openness in the proceedings. In the subsequent decade and a half, calls for greater openness have grown, and many agreements now, including the US free trade agreements provide for publication of all the formal documents in a case, including the request for arbitration; the pleadings; procedural orders; and decisions and awards.

Öhlberger: In my daily practice transparency laws themselves have not resulted in any immediate changes. However, I notice that arbitral institutions are more active in disclosing information, such as redacted awards and lists of who sat with whom as arbitrator (e.g., https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/ and http://www.viac.eu/en/arbitration/viac-arbitral-tribunals).

Mealey's: What is your favorite arbitral institution and seat of arbitration and why?

Davidson: My favorite arbitral institution and seat is JAMS in New York. The new revised JAMS International Arbitration Rules are state of the art. The venue provided is first-rate and the case management is second to none.

Kehoe: We have had a number of investment disputes administered by the PCA. The experience and professionalism of the PCA staff is second to none. Led by Brooks Daly, the team deserves heaps of praise and selecting The Hague as seat is for the most part not difficult for the parties to agree on. The facilities are excellent and the courts experienced and supportive of international arbitration. SIAC should also be mentioned as a favored venue.

Malan: I do not have one specific favorite institution. I am using the tools and options that are given to me. It is true that I am more familiar with some institutions and arbitration rules, like ICC. This is due to the strong influence of ICC on the western European area. Each time it is possible, I tend to choose the seat of arbitration taking into consideration its liberalism towards arbitration, in order to secure the recognition of the award. Paris is certainly one of the most liberal places in the world in this regard.

Mealey's: Is venue of filings changing? If so, why and how (or to where)?

Davidson: New York is getting even more popular as a venue. The fear of U.S. style discovery if the seat of arbitration is located in the United States was always unfounded, and the market realizes that a U.S. venue does not equate to more or overly intrusive disclosure. The New York International Arbitration Center now provides an attractive venue for ad hoc, ICC or ICDR cases. JAMS has always had its own first-rate facilities. And, of course, New York is New York. It's very easy to get to and hearing logistics are never an issue.

Kehoe: It is not the venue of the filings that are changing. The filings are formally submitted at the seat of arbitration. Some venues have become increasingly popular in recent years, including SIAC. The Bahrain Centre is working on new rules. That might become a more sought after venue in the future.

Malan: I do not think it is really changing. However, as I mentioned we have a strong movement towards Asia, and places like Hong-Kong and Singapore. ICC recently signed a cooperation agreement with the Kuala Lumpur Regional Centre for Arbitration (KLRCA).

Öhlberger: There are signs that Mainland China is about to open its doors for non-Chinese arbitration institutions to validly administer arbitrations in Mainland China. If this materialises, it will result to a certain extent in a shift of case load from several Chinese arbitration institutions to "foreign" ones. It will be interesting to see to what extent this will also lead to changes in the culture and style of arbitrations conducted in mainland China.

Mealey's: Are you seeing an increase or decrease in filings in a particular industry?

Davidson: I am seeing an increase in filings in pharmaceutical licensing cases and other IP matters. The cost of taking these disputes through a court process is so arduous and prohibitive that arbitration has become very popular. The other area is insurance and reinsurance disputes. These are beginning to shift away from ARIAS and towards other arbitral institutions.

Dracoulis: We have seen a significant trend for arbitrations arising out of contracts for the construction of offshore drilling units. The construction of these units are complex feats of engineering taking up to three years to construct and, for the most complex and technologically advanced, at a cost in excess of US$1 billion. Given the significant expense and capital intensive nature of these projects, it is therefore of no great surprise that the sudden and sustained crash in the oil price that began from mid 2014 has severely curtailed the earning potential of drilling units once constructed. The position is made worse still in light of the ongoing chronic oversupply of offshore drilling units; this despite the fact that older units are being scrapped and others taken out of service (either on a warm or cold basis). This has all resulted in a wave of disputes in respect of ongoing construction projects and which are generally characterized by buyers seeking to lawfully exit their construction contracts with shipyards.

Kehoe: Investment disputes seem to continue to rise in numbers. The extractive industries, especially mining, may well give rise to an increase in disputes.

Mealey's: Have there been any awards or developments in 2017 that you believe will affect future cases?

Davidson: More and more cases—even those in arbitration—are being settled through mediation. As more users and law firms become aware of the process and its success in the hands of an experienced mediator, more cases will be resolved prior to a final award.

Dracoulis: Third party funding arrangements continue to become more and more significant in relation to arbitration proceedings, where they are starting to be considered by tribunals when making costs awards. The key decision in late 2016 in *Essar Oilfield Services v Norscot Rig Management* saw the English High Court refuse to set aside an ICC award in which the successful claimant was awarded, as part of its arbitration costs, the costs of its funding agreement with a third party funder. The court emphasised that this would not be appropriate in all cases but on the facts in *Essar* (i) the claimant would not have had the financial resources to bring the claim without the third party funding, particularly given the financial pressure it was put under by the other party; and (ii) the third party funder's fee was in line with standard market rates. Although these facts may not be present in all cases, the decision is undoubtedly a big boost for the role of third party funding in arbitration proceedings.

There is also promising news for third party funding arrangements in arbitration proceedings in other jurisdictions around the world. For example:

- On 10 January 2017 Singapore passed The Funding Bill which provides a framework for third party funding in Singapore. Third party funding will only be permitted for international arbitration proceedings (and related court and mediation proceedings) at the moment, with the next big question being about the possible enlargement of categories of proceedings beyond international arbitration. Additionally, the Singapore International Arbitration Centre (SIAC) Investment Rules (which came into effect on 1 January 2017) expressly empower tribunals to take into account any third party funding arrangements when apportioning the costs of an arbitration.

- On 14 June 2017 Hong Kong's Legislative Council passed a law permitting third party funding of arbitration under Hong Kong law. We understand that the law disapplies the traditional common law doctrines of champerty and maintenance to arbitrations seated in Hong Kong. These doctrines had been the principal hurdles to third party funding in the arbitration context in Hong Kong. The main provisions of the new legislation are expected to come into effect by the end of 2017.

Both the Singapore and Hong Kong legislative enactments show a clear trend towards transparency regarding third party funding — for instance, a key feature is the requirement of prompt disclosure of the existence of a funding agreement, as well as the identity of the funder, to the arbitral tribunal and all other parties.

Kehoe: The current positions of the EU commission on ISDS; the withdrawal of the US from TTP; and the uncertain negotiations of NAFTA could all signal negative developments for continued access to the dispute settlement mechanisms that we currently rely on.

Malan: In the *Yukos* case, the award rendered against Russia by an arbitral Tribunal in The Netherlands was annulled by the Court of The Hague in April 2016. In spite of this, the Yukos companies tried to enforce the award in France, based on the liberal approach offered by the French Supreme Court, which considers that a foreign award can be enforced in France notwithstanding the fact that it was annulled in its country of origin (in Re *Putrabali* decided in 2007). However, the Yukos companies recently announced in press releases that they decided to stop any attempt to enforce the award in France, as they admitted they were not able to prove the link between the State and the State owned companies whose assets they had targeted on the French territory. We represented one of the defendants, and I think the key point remains the difficulty to demonstrate that the company is an emanation of the State, which implies to demonstrate that it has no or little autonomy and its assets are mixed with those of the State. The question of immunity of States is still a hot topic. In France, the Law n° 2016-1691 dated 9 December 2016 imposed new restrictions to the conditions upon which State-owned assets can be seized, therefore rendering more difficult the enforcement of international titles, such as arbitration awards, against States. This law was enacted to respond to social concern on the responsibility of the States in investment

issues, and is also a reaction against a certain vision of investment arbitration.

Mealey's: Is there an area of the world you expect to become a hot seat for future arbitration and, if so, why?

Kehoe: Chinese infrastructure investments in the developing world: The past decade has seen a huge expansion of Chinese investment in infrastructure (roads, railways, bridges, ports, land development etc.) in the developing world, particularly in Asia and in Africa. Typically, these are being carried out by Chinese companies and labor, with financing provided by State backed Chinese banks. Feasibility studies are seldom undertaken, design and construction are done by the same entities, procurement is not competitive, detailed costings are rarely available making it difficult to verify total costs which can be very high. The scale of Chinese financing is generous, but full terms are seldom revealed. Financing is often provided without regard to the country's ability to repay, and in some cases may be secured directly on future exports. After benefitting from debt relief in the early 2000s, poorer countries are once again loading up with external debt. Kickbacks to politicians and senior officials are widely rumored or reported where the media remains free. Chinese infrastructure investment, however, is attractive to governments because of the allure of mega-projects, the prospect of rapid implementation, the absence of policy conditionalities associated with Western aid financing, admiration for the Chinese development model, and the willingness of the Chinese to extend substantial kickbacks to political leaders for personal enrichment and party funding.

A more critical view on Chinese infrastructure lending is forming. This could become a tide if opposition parties come to power and avoid co-optation; if disputes between governments and Chinese companies grow; if economic growth does not materialize and repayment terms cannot be met; or if concessions granted to Chinese investors (land, natural resources, influx of Chinese traders) provoke popular outcry.

How all this plays out will vary from country to country. China is an ICSID Contracting Party and so are many of the countries where Chinese investment has taken place. There is scope for investment arbitration but other kinds of dispute settlement mechanisms could also come into play, depending on the dispute resolution clauses relied upon.

Malan: China is strongly interested to develop its services in arbitration. There are lots of accredited institutions in China, and arbitration is well developed for disputes between companies on the local level. But the Chinese are also interested in developing international arbitration.

Russia is an interesting point. International economic sanctions have had an obvious impact on the economy, but they have also considerably pushed forward the movement towards the development of the local economy, in particular in the Food industry, in order to produce locally products that are banned from import. For political and legal reasons, Russian companies are often led to choose Russia as a seat for their arbitrations. Interestingly enough, the percentage of international awards that are recognized by Russian Courts is rather high.

Mealey's: Are there any changes in who is being selected as arbitrators? Gender? Nationality? Other?

Dracoulis: Diversity amongst arbitrators remains a key focus for the international arbitration community. It has been almost a year and a half since the Equal Representation in Arbitration Pledge, an initiative which sees signatories declare their commitment to improving the profile and representation of women in arbitration and ensuring they are appointed as arbitrators on an equal opportunity basis. The Pledge has received 2,131 signatories so far.

Earlier this year the International Court of Arbitration of the International Chamber of Commerce also revealed a marked growth in the number of women arbitrators appointed for ICC proceedings in 2016. There was an increase of 4.4% from the 2015 statistics, with women arbitrators representing 14.8% of all arbitrators appointed by ICC Arbitration parties, co-arbitrators or directly by the Court in 2016. While there is still a long way to go, the ICC noted that this figure more than doubles the women arbitrators the Court had recorded in 2011.

Kehoe: There is a natural progression towards the next generation of arbitrators. There is also much greater alertness towards diversity, both as regards gender and nationality. Change will continue to happen. Many arbitrators have come from the ranks of arbitration counsel. 30 years ago that was a male dominated field.

Currently, you see many more women involved in arbitration disputes, both as associates and partners. With the passing of time, they will naturally take their place among the group of international arbitrators that hear both international commercial and investment disputes.

Mealey's: Are you seeing an increase or decrease in filings in a geographic region?

Kehoe: The question can probably easier be answered with reference to particular countries. For example, we have witnessed a significant increase in cases brought against Venezuela. The breakdown of government in that country has much to do with that development. Similarly, we have seen a decrease in new cases brought against Argentina, following the new government taking over.

Mealey's: What development in 2017 do you believe was most significant and why?

Dracoulis: From an English law perspective, the Supreme Court decision in *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* (handed down in March 2017) represents an important restatement of an award debtor's right to raise properly arguable defences to the enforcement of an award without any requirement to put up security for an award sum in advance.

By way of very brief summary, the Supreme Court found that there was no power under the Arbitration Act 1996 (the "Act") to require the award debtor in the case (Nigerian National Petroleum Corp) to put up further (substantial) security for the award sum as a condition of its challenge to the enforcement by the award creditor (IPCO (Nigeria) Ltd) of a Nigerian arbitral award. This was also consistent with the provisions of the New York Convention 1958 (the "Convention") relevant to the recognition and enforcement of awards; in particular the court endorsed the view that these provisions constitute a "code" excluding any requirement for security for an award sum in the face of a good arguable challenge. The only exception, both under the Act and the Convention, arises where enforcement proceedings are adjourned as a consequence of set aside proceedings at the seat of arbitration; in those circumstances security may be ordered as the "price" of the adjournment but this was plainly not the position in the current case.

The decision of the Supreme Court is, in our view, entirely sensible and reflects the careful balancing of interests inherent in both the Convention and the Act.

Malan: In terms of global development of international arbitration, we are witnessing the confirmation of the growing development of Asia, in particular China, which is not surprising, as it follows the economic growth of this region. Some countries, like Vietnam, are weighing the interest to ratify the Washington convention on the settlement of investment disputes, which is seen as an asset to attract investments.

Öhlberger: The coming into force of the new ICC Rules with its provisions on expedited procedures. These new rules deal with the critique voiced by users that arbitration has become to lengthy and cumbersome and is a result of a trend to provide for shorter and more efficient proceedings. This has sparked many interesting and important discussions.

Mealey's: What do you believe will be the major challenges for arbitration in 2018?

Davidson: Major challenges include keeping case management of high quality. Increasing diversity is also a constant challenge.

Dracoulis: One issue that has gained increasing prominence over recent years relates to the concern of arbitrators that procedural decisions they make will be challenged later in court by a disgruntled party on the basis that the decision has violated that party's right to be heard. The issue is often referred to as "due process paranoia".

The danger for the arbitral community is that the threat of these types of challenge, unmeritorious though they may be, leads to an overly cautious approach to case management with the result that the proceedings are not conducted in an orderly and efficient manner. Under English law, the risk of an award being set aside on this basis is considerably lower than in other jurisdictions and particularly so where the tribunal is constituted of senior English lawyers with significant experience of arbitration (and court) proceedings.

However this is an issue that the arbitral community must remain alive to especially as it is one that can, in large part, be policed by the parties' lawyers. A failure to effectively do so may only lead to parties becoming deterred from increasingly lengthy and costly arbitrations.

Kehoe: Avoiding any major setbacks to the system of investment arbitration as we know it today.

Malan: There is still a difficult challenge to convince the public opinion that arbitration is a valuable tool, especially in investment cases, and that it does not undermine democracy. During the negotiations concerning the TTIP, the European Commission rejected State-Investors current system of arbitration, and proposed an International investment Court, with a Court of appeal, to be established by the European Union.

Concerning BIT treaties, the European Commission has expressed strong reservations as to their compatibility with EU law, when they are used in disputes between EU member State and an investor from another EU State. The Commission is of the opinion that the EU system of free trade already offers the investors all the legal tools they need to protect their investments. It also considers that the European Court of Justice should have exclusive jurisdiction to deal with those kind of issues. In the pending case *Achmea v/ Slovakia* (C-284/16) the European Court of Justice will have to decide on this compatibility issue. In his report dated 19 September 2017, the Prosecutor General Wattelet considered that the BIT treaties are not incompatible with EU law, as far as they were ratified before the adhesion of (one of) the State(s) in the EU. The case *Micula v. Romania*, where the Commission intervened to oppose the enforcement of the award it considered to be against EU law also shows that investment arbitration is not straightforward between EU member States. In France, the confidence of public opinion has been undermined by the *Tapie* case.

One of the major challenges in 2018 will be to convince major actors, in the political and social arena, that arbitration is a safe and reliable system of justice. This is also our duty, as arbitration practitioners, and the trend towards more transparency is essential to us in this regard.

Öhlberger: The public debate around investment treaties and arbitration as forum for investor state disputes has resulted in bad press for arbitration. These, at least to a certain extent not justified messages have also arrived at less sophisticated users of commercial arbitration and have caused some reluctance towards arbitration as a means of dispute resolution in general. It is important to set the record straight. In addition to correctly informing actual and potential users about the pros and cons of arbitration, this will also require arbitrators and party counsel to set good examples and make room for truly efficient proceedings.

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