



■ **ROUNDTABLE** June 2019

INTERNATIONAL ARBITRATION

Arbitration offers a compelling forum for resolving international commercial disputes. As a consequence, there is now greater competition between traditional arbitral seats and emerging institutions – rivalry that is leading to greater efficiencies and innovative services. In an ever-changing socioeconomic world, issues such as increasing transparency requirements and transformative technological advances will do much to shape and define the international arbitration community over the coming months and years. ■



THE PANELLISTS



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Timothy Nelson's international litigation and arbitration experience includes disputes involving contracts, international trusts, partnerships and corporate law, as well as cases falling under the 1980 Vienna Convention on Contracts for the International Sale of Goods. Mr Nelson regularly advises sovereign and corporate clients on public international law issues.

FW: What do you consider to be among the key trends and developments shaping international arbitration over the past 12 to 18 months?

Rosher: Several significant trends have impacted the practice of arbitration and will no doubt influence the way it is used and perceived in future. Investor-state dispute settlement (ISDS) has come under heavy fire in the last year and a half, particularly in the aftermath of the European Court of Justice (ECJ) *Achmea* ruling of March 2018. Concerns in ISDS have been spilling over into commercial arbitration. The call for greater transparency in investment treaty arbitrations, for example, is being felt tangibly in commercial arbitration, with some of the major institutions adopting measures to accommodate organisational transparency. There have also been developments – potentially far-reaching – with respect to the perceived dominance of common law-inspired practices regarding evidence in international arbitration, with the launch of the Prague Rules in December 2018.

Diaz: The first development to be heralded is the announcement by the International Chamber of Commerce (ICC) that in 2018 it achieved full gender equality in the membership of the ICC Court. The ICC reported that the number of women arbitrators being appointed in ICC proceedings has grown to almost 15 percent of all appointments. Finally, the ICC has also demonstrated its commitment to continue to enhance diversity through the Young Arbitrators Forum. Arbitration institutions continue to address and try to balance the tension between the interest in greater transparency and desire of many users for confidentiality, most notably with the ICC's move to establish a presumption in favour of publication. Whether this will lead to a significant increase in publications remains to be seen, as the parties are able to opt out of this process. Another topic that is gaining interest is the use of third-party funding. In US litigation, there has been heated debate on the use and disclosure requirements and

standardisation of governing rules, and we are starting to see a similar discourse in the arbitration setting.

Tuchmann: International arbitration is drawing the best and brightest from the legal and business communities. This was illustrated by the Vis Moot competition that recently took place in Vienna, where hundreds of teams from all over the world, from different cultures and different backgrounds, competed to explore the field of international commercial arbitration. Another key trend is what reforms are needed, particularly in the context of investment treaty arbitrations. The desire for a set of standards, rules and laws that would address due process and transparency in international arbitrations are all being considered. On the one hand, you cannot argue against procedures that will improve fairness, or perception of fairness, in international arbitration. However, addressing these issues can result in a trade off in terms of increased time and cost with regard to the arbitration process

Nelson: In international commercial arbitration, the main trend reflects the continued importance of Asia, and, in particular, China, in the international economy. There is a continued growth in Asia-related disputes, as evident not just in the increasing importance of Singapore and Hong Kong as seats of arbitration, but also in the number of Asia-related commercial arbitrations that arise in 'Western' seats such as London and New York. Within investment arbitration, the main development is an attempt by certain European countries to avoid their investment treaty obligations. In 2018, the ECJ held in the *Achmea* case that the investor-state arbitration mechanism under one particular treaty, the Netherlands-Slovakia bilateral investment treaty (BIT), was incompatible with EU law. The wider effects of that ruling, if any, continue to be the subject of debate.

Rana: There is now a plethora of arbitral institutions around the world. As trade has expanded, so too has arbitration as a

preferred form of dispute resolution. This popularity has brought greater competition between both traditional arbitral institutions, such as the ICC, and emerging ones, such as the Singapore International Arbitration Centre (SIAC). This competition between arbitral institutions is leading to greater efficiencies and innovative services. Competition also engenders a need to remain relevant to the community one serves. One of the key challenges in the coming years will be to remain relevant in an ever changing socioeconomic political world.

Duarte-Silva: I have observed an increasing adoption of arbitration among financial institutions. This is borne out of not only the increasing number and magnitude of transactions with emerging or frontier markets, but also the desire for flexibility, confidentiality and decision makers with industry expertise.

FW: In your opinion, which cases have been particularly notable? What insights about the current international arbitration environment can we draw from their outcome?

Diaz: The US Supreme Court's *Henry Schein* decision resolved a split among circuit courts as to whether the 'wholly groundless' exception to arbitrability is consistent with the Federal Arbitration Act. The Court held that a court may not override the contract where there is "clear and unmistakable" evidence that the parties had delegated the issue to the arbitral tribunal, even if the court found the claim of arbitrability to be 'wholly groundless'. While this is arguably a narrow decision, it underscores and should reassure users that the US courts will not overrule the terms of an arbitration agreement with judicially created exceptions. Another notable decision is the Swiss Supreme Court's decision in *4A_125/2018* on the ability of parties to retain Swiss law firms under alternative fee arrangements that include a success fee that varies according to the amount of settlement or arbitration award.

Rana: Some of the recent cases which have captured the imagination, as well as polarising the arbitration community, have been those that have been the subject of contradictory judicial decisions during annulment or enforcement procedures. Notable cases have included *Yukos Capital SarL v. OJSC Oil Company Rosneft* in Europe, the *Achmea* judgment in Europe, *Astro Nusantara v. PT Ayunda* in Asia and *Commisa v. PEP* in the US. In all these cases, the clear message sent by the courts was that the impact of a national court's decision to annul an award is confined to its own jurisdiction and that the enforcement court decides whether to enforce, based on its own rules. This means that the same award can be the subject of an annulment and yet be capable of being enforced in other jurisdictions.

Nelson: Three decisions show the reluctance of US courts to get entangled in the merits of cases that get sent to arbitration. First, a DC Circuit 2018 decision, *AWG v. Argentina*, rejected a challenge to an award based on an alleged conflict of an arbitrator who had served on the board of a bank that owned shares in the winning party. They clarified what level of conflict is required to show 'evident partiality' in challenging

an award. Second, the 2019 decision of a New York federal court in *Hanwei Guo* held that US courts lack power to order discovery in aid of a mainland China arbitration. Whether US courts can lend 'judicial assistance' to a foreign arbitration remains hotly debated, and this case may become an important precedent. Third, there is a still-pending case in Texas, *Vantage Deepwater v. Petrobras*, where the losing party in an arbitration is trying to subpoena the arbitrators to try to prove something went wrong in deliberations.

Duarte-Silva: Aside from the *Achmea* case, which has been discussed extensively, there is another decision that warrants more attention for the effect it can have on awards on quantum. Earlier this year, the Paris Court of Appeal annulled the findings on quantum in the award in *Rusoro v Venezuela*. This was an award of over \$1bn associated with the expropriation of the claimant's gold mining assets. The grounds for annulment were that the tribunal had exceeded its jurisdiction under BITs by awarding compensation not reflective of the assets' value prior to expropriation.

Rosher: The most notable case has certainly been the *Achmea* judgment of the ECJ, which has shaken the foundations

of ISDR since it was handed down on 6 March 2018. The ECJ held that arbitration clauses in BITs concluded between two Member States are incompatible with EU law. One year on, and the consequences of this groundbreaking decision are still being assessed very differently by various actors. While EU Member States have agreed to terminate their intra-EU BITs, arbitral tribunals have found ways to limit the reach of the judgment, for example by finding that it does not apply to International Centre for Settlement of Investment Disputes (ICSID) proceedings or to cases brought under the Energy Charter Treaty.

FW: What do you consider to be the most pressing issues facing parties and practitioners in today's evolving international arbitration landscape? How is the arbitration community dealing with these issues?

Tuchmann: Practitioners want to ensure that international arbitration remains viable and effective. Of course, with international commercial disputes, the alternatives to arbitration, such as litigating in court or using less formal means of dispute resolution, are not always an attractive option. Yet there is a desire among practitioners to ensure the process remains true to its underlying principles – being a cost effective and efficient way of resolving disputes between commercial parties. The arbitration community – institutions, arbitrators, parties and their representatives – each have a role and are responding in different ways. Institutions are aware of the high stakes faced by parties in many large-scale arbitrations and have made many rule revisions and appointed committees to look at almost every aspect of the process, with the aim of creating novel approaches to improving the arbitration process.

Rosher: For both parties and practitioners, the list of pressing issues is as long as it is varied. Investor-state arbitration is subject to acute pressures. The interesting issue is whether commercial arbitration will succumb

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to similar pressures. This seems likely – some would say inevitable – bearing in mind that a growing number of sizeable commercial arbitrations involve states, often via a state-owned entity. Others pressing issues are linked more to the evolving arbitral landscape, and include concerns about a perceived lack of arbitrator diversity and its impact on the arbitral process, rising costs, as well as issues raised by advances in technology, particularly cyber security. The arbitration community is actively engaged in addressing such issues.

Nelson: Parties continue to demand deeper knowledge about the arbitrators who might be available or appropriate to serve in their cases and about the extent of their prior experience. There have been various attempts, based on public information, to build databases or websites profiling some of the active candidates in commercial arbitration. Some voices have called for an even more extensive database. In practice, however, the confidential nature of commercial arbitration, sometimes enshrined in the contract, sometimes in national arbitration laws, means that it is unrealistic to demand arbitrators and parties disgorge information about every previous or pending arbitration in which they were involved. In a related vein, there have been renewed calls for greater diversity in the appointment of arbitrators.

Rana: Delays and inefficiencies are creeping into the system as broader users turn to it as a means of dispute resolution. A 2018 international arbitration survey found that other than costs, “lack of effective sanctions during the arbitral process”, “lack of power in relation to third parties” and “lack of speed” were arbitration’s worst features. Arbitral institutions are attempting to deal with some of these issues by amending their rules to speed up the process, introducing new provisions to allow for the joinder of third parties or to give power to the tribunal to sanction a recalcitrant party. Some, however, are caused by the tribunal, parties or the arbitral institution. There

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is often a delay in the process because of a party’s derailing tactics, poor administration by the institution and a tribunal’s unavailability because they have taken on too much. Self-policing in international arbitration is not working. That challenge awaits the international community.

Diaz: As the 2015 Panama Papers incident and the cyber attack at a major law firm in 2017 demonstrated, lawyers are not immune from cyber security risks. Sensitive information is exchanged by the parties in international arbitration and shared with arbitrators and institutions that might not have the structure in place to protect it. Parties to arbitrations involving EU data will also need to consider compliance with the European Union’s (EU’s) General Data Protection Regulation (GDPR). Fortunately, a number of groups have developed and published draft protocols addressing cyber security issues, that are available for parties to consider incorporating in arbitration clauses or to discuss at the outset of an arbitration proceeding.

FW: In your opinion, how significant is the rising cost of arbitration and what is being done to tackle the perceived problem? What aspects of the

process could be further improved or streamlined?

Nelson: At the risk of being contrarian, I do not necessarily accept that there has been a ‘rising cost’ in arbitration. If anything, the relative cost of arbitrating claims, compared to litigating them in the courts of the US or England, has probably declined. Also, our experience in handling a mix of litigation and arbitration has been that when the stakes demand it, determined commercial or governmental litigants will devote significant resources to disputes regardless of the forum. No amount of tweaks to the system will change that. That said, arbitration protocols, and, it must be said, court protocols, dealing with the disclosure of electronic data have, on the whole, improved over the last decade and there are ways of making the disclosure process smarter or more streamlined.

Rana: Costs and delays continue to be the bane of international arbitration. There have been many initiatives to combat the problem of costs, but there has been little improvement. Interestingly, many court systems have taken a more robust approach and have improved court procedures to introduce efficiencies which have also improved the costs situation. In the past, courts learned from arbitration

in terms of looking for and implementing efficiencies because of an overriding principle of access to justice. There is no reason why that principle should not also apply to parties who have chosen a particular form of dispute resolution. Perhaps it is time for the international arbitration community to look to others for ways in which it can improve the system and to improve the costs nightmare.

Tuchmann: Time and cost issues have received a significant amount of attention over the last 10 years. Though costs have increased, not as dramatically as many perceive. At the same time, parties must opt into the arbitration process and if parties perceive that there is a cost issue, then there is one. There are three elements to the cost issue. One is institutions. The second is arbitrators. And the third is the parties and representatives. One of the challenges is that all three groups must work together to address the issue of cost concerns. For example, if an institution implements a rule which states that costs will not exceed 'X' and the duration of an arbitration will not exceed a certain number of days, the arbitrator and parties themselves may be able to agree to overrule any particular rule. Likewise, parties are at the mercy of arbitrators, in

terms of their decisions about document exchange or the number of hearings – all of which has a cost implication.

Rosher: It is clear that over the past decade, rising costs and issues regarding procedural efficiency have featured prominently in user surveys of criticisms of arbitration. Against this backdrop, a number of institutions have in recent years adopted expedited and emergency arbitration rules for certain types of dispute. This is to be welcomed since procedures obviously need to be expeditious and cost effective. Users should, however, be careful of what they ask for. There is truth in the old adage that one person's delay is another's due process. Success in arbitration – the delivery of an accurate, enforceable award – is not measured by the clock alone, especially not in complex disputes which have a serious impact on corporate or national welfare. Arbitration's contractual nature invites procedural innovation to counterpoise due process and cost efficiency.

Diaz: Spiralling costs are often seen as the worst feature of arbitration. A number of innovative measures have been introduced lately by certain arbitration institutions in an effort to curb costs and streamline the process. For example,

the American Arbitration Association (AAA) has introduced alternative fee arrangements (AFA) to impose caps on the fees of the arbitrators, geared toward making fees more predictable. Discovery is another area that drives up the cost in arbitration. The recently issued Prague Rules set forth a more 'inquisitorial approach' to discovery and encourage the tribunal to be more proactive in managing and streamlining the fact-finding process.

Duarte-Silva: The costs associated with arbitration can be controlled through careful and frequent monitoring and through the use of small teams focused on the case. They can also be controlled by making appropriate choices, such as focusing on the central issues of the case and obtaining key evidence early on.

FW: Could you outline the impact of the UNCITRAL rules on transparency in treaty-based investor-state arbitration? Do you believe they are a welcome addition to the process?

Rosher: The UNCITRAL rules on transparency should be viewed as part of an overall movement to develop transparency in cases of public interest. As regards their actual impact, it is simply too early to draw any conclusions. The reasons for this include the restrictive rules regarding their application – the rules only apply automatically to treaties concluded on or after 1 April 2014 or, if concluded before that date, where parties have effectively opted in by virtue of the Mauritius Convention which to date just five nations have ratified – the fact that no arbitrations subject to the rules have yet been initiated or reported. So, for the moment, it is a case of 'watch this space'.

Rana: Investor-state arbitration is a distinctive form of dispute resolution because, unlike international commercial arbitration where the parties are private companies usually looking to resolve their disputes under a blanket of confidentiality, the respondent in an investor-state arbitration is a state that, if held liable to the claimant, will have to pay from its

“ THE UNCITRAL RULES ON TRANSPARENCY SHOULD BE VIEWED AS PART OF AN OVERALL MOVEMENT TO DEVELOP TRANSPARENCY IN CASES OF PUBLIC INTEREST. ”

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public purse – taxpayers’ money. Although initially viewed as a convention that may significantly affect how most investor-state arbitrations will be conducted, its reach so far has been limited and, in practical terms, its effect may also ultimately be limited. It has been in force for a few years and so far only 23 countries have signed up to it and only five have ratified it.

Nelson: The 2014 UNCITRAL Rules provide a framework for the publication of data about the status of investor-state disputes governed by the UNCITRAL Rules. Well before 2014, however, there was significant transparency in investor-state arbitration, because the ICSID, which handles many, if not most, treaty disputes, has for several decades maintained a database of its pending and concluded cases, with daily updates on case developments. In those same decades, many awards in investor-state cases brought under the UNCITRAL Rules were published. The rules themselves have not yet greatly altered matters, largely because the rules, by their terms, are only of mandatory application where a treaty was concluded after 1 April 2014 and utilise the UNCITRAL rules, and even in those cases, there are some potentially significant exceptions, for example states can exclude data that relates to its ‘essential security’.

FW: What steps can parties take to smooth an arbitration process involving parties from jurisdictions with little synergy? How should parties go about increasing mutual understanding and overcoming potential cultural difficulties?

Duarte-Silva: One aspect that I have seen leading to a smoother process is an agreement between the parties regarding process, for example disclosure rules, expert witness meetings or joint reports. While the latter work better in some cases than in others, it is usually worth considering. It also helps to use counsel, experts and arbitrators who are experienced in international arbitration, with the ensuing familiarity with similar

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issues in the past, such as different legal traditions and procedural expectations.

Tuchmann: How else can parties from different parts of the world, who differ in terms of practices, background and language, come together in a single forum in order to resolve their differences? This is the promise of international arbitration. It offers a process in a controlled environment, assuming an institution is involved. An institution needs to have sufficient experience in dealing with international disputes. The appointed arbitrators will also be a key aspect, and parties need access to a pool of arbitrators that have worked through these types of situations previously. That said, the arbitrator’s position is not really to bring the parties together, but to decide the dispute. But it is critical that each party has confidence in the person or people making decisions, despite cultural differences that may exist. Another evolving issue that will help is the use of mediation, which is not generally incorporated into the dispute resolution landscape for international parties. However, we do have a new convention – the Singapore Convention – which will be formally signed in August 2019. The UNCITRAL Working Group has made a great effort pulling the Convention together over the past few years and

I believe it will make an important contribution to the international dispute resolution process.

Rana: Cultural differences are an important aspect of international arbitration. It is not just the parties who might be from different cultural backgrounds, in any arbitration there could be people from seven or more different cultural backgrounds. The possibility of the cultural baggage impacting decision making and behaviours becomes huge. In many ways, arbitration rules are a composite of civil and common law legal systems, but they do not take into account the different ways in which social cultures impact our actions and certainly there is no useful or impactful way of dealing with unconscious biases that also inevitably creep into our conduct. It is an area of emerging interest with many organisations now beginning to undertake research, as well as training in the ways that culture and bias affects us on a daily basis.

Nelson: Translation issues raise special sensitivities. If the subject contract is governed by a ‘common law’, be it New York, English or Hong Kong, the arbitration is usually in English. In such cases, there will be calls for disclosure of each side’s internal documents. Language

can create an ‘asymmetry’ between the documents in the possession of the Asian party, for example in Mandarin or Korean, and the Western party. This is difficult for both parties, but there have been cases where the Western party has tried to make the Asian party pay for the costs of translating all documents produced in disclosure – even documents the Asian party does not intend to use in evidence. This is not always appropriate.

Rosher: Navigating convergence between parties from very different legal cultures is no easy task. A party’s cultural baseline will affect the way it approaches the three important fact-finding tools in arbitration – witness testimony, documentary evidence and expert opinion. To assist in overcoming potential difficulties, culture should be at the forefront of the minds of parties, and their legal counsel, in the selection of arbitrators, since this can significantly influence the arbitration process and its outcome. Parties would also be well advised to take specialist advice from counsel experienced in international arbitration.

FW: How important is it to utilise expert witnesses to illuminate complex issues and provide an informed perspective?

What types of cases lend themselves to expert testimony?

Rana: Expert opinions are a very important part of international arbitration as there may be many areas which require illumination to enable a determination of that issue by the tribunal. Sometimes, a tribunal may have the requisite expertise and are chosen because of that expertise but in many cases they require assistance from an expert in a relevant field to help them grapple with the issues. The expert does not ‘decide’ the issue but provides assistance to the tribunal in understanding the issue.

Diaz: Arbitration proceedings are more relaxed than litigation. Expert discovery and evidentiary rules like *Daubert* to challenge the qualifications of an expert generally do not apply. As such, parties have more flexibility in preparing and using experts in an arbitration setting. Nonetheless, experts should not be overused as you could run the risk of unnecessarily driving up the costs. Where experts are most frequently used is for damages calculations, or where the issues involve unique or highly technical expertise or experience. For example, an expert with industry experience could be helpful in a dispute over whether one party

used commercially reasonable efforts to perform its obligations, and be able to provide important context on industry common practices.

Nelson: Expert evidence is often vital to a case. Most cases involving complex damages issues require a competent damages expert. Industry expert evidence is also vital. Sometimes, one needs expert testimony on legal issues. This is somewhat rarer before international tribunals, which are often presumed experts on the law, but is more common in investor-state cases. It is actually more common to use legal experts when one is litigating in a foreign country.

Duarte-Silva: Expert witnesses help simplify complex issues before the tribunal. Damages experts are used in a considerable number of disputes where assessment of quantum hinges on valuation. Quantum, in some kinds of disputes, requires skills closer to that of a forensic accountant. In addition, arbitrations in some industries benefit from the testimony of technical experts, such as geologists, mining specialists, construction specialists and drilling specialists. Arbitrations in some industries are so common that many arbitrators have developed a more acute understanding of the relevant technical issues.

Rosher: Arbitrations are often won on facts. Faced with complex technical disputes, the ability of a party to portray, with the help of a technical expert, the facts in a manner that the arbitrators will understand, is often a game-changer, especially if the arbitrators come from legal backgrounds. International construction disputes, for example, frequently raise a variety of complex technical issues, such as delay, quantum and defects, which each require expert evidence. Two points are of crucial importance. The first is to select an expert with relevant expertise who can opine credibly on the specific technical issues in dispute. Secondly, remember that the more objective and independent the expert appears, the more credible he or she

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will be and the more weight the arbitral tribunal will give to the expert's evidence.

FW: How would you characterise the uptick in the number and spread of relatively new arbitration centres? What challenges and issues exist for institutions facilitating the arbitration process in 'developing' regions?

Duarte-Silva: The increase in the number of arbitration centres is a natural outgrowth of the appeal of arbitration as an industry and the dispersion of commerce in regional centres around the world. The challenge for those centres is the consistency of the number of disputes heard, which is tied to the related challenge of establishing themselves as unbiased seats.

Rana: The *raison d'être* of, and the challenges facing, all arbitral institutions are primarily staying relevant and providing services that respond to the clients' needs. They provide a valuable service since an unadministered arbitration can add immeasurably to costs and delay as the tribunal will be required to administer the process itself. New local arbitral institutions have developed in part due to the growth in arbitration in local regions. Local institutions aim to capture their local market and rely on their local knowledge and cultural synergies as being the attraction. Many new arbitral institutions are positioning themselves as the next new alternative to old institutions and are promoting their specialist knowledge in a regional or technically specific market.

Nelson: We have seen, over the course of the last two decades, various bids by various cities, and centres, to establish themselves as new dispute hubs. Some have met with more success than others. The one centre that has significantly increased its standing in the last two decades is Singapore, though Hong Kong is also holding its own. The challenge for any putative arbitration venue is, first and foremost, to persuade the users that it has a track record of consistency, that its

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courts work well and that its local laws and infrastructure will support arbitration.

Tuchmann: There has been a proliferation of new institutions, and many of them are in countries that do not currently have a dominant or prominent international institution but want to develop one. This is because it highlights that jurisdiction as a place or seat that is welcoming to international arbitration and, where arbitration institutions are established, it brings together thought leaders in that jurisdiction in a way that is appealing, interesting and attractive to investors. The fact that new institutions are being built and developed throughout the world is another example of the remarkable interest and enthusiasm that international arbitration is generating. That said, there are tremendous challenges with establishing a viable institution. When you have parties from different parts of the world, they may not want to place their trust in an unfamiliar international institution or arbitrator appointment process. It takes a long time to develop a reputation for neutrality, expertise and competence in administering cases.

Rosher: The uptick is a natural part of a process of evolution. It reflects not only the ongoing appeal of arbitration, but also its increasingly international presence and

demand. Particularly in jurisdictions where the state is willing to resolve disputes via local arbitration, arbitral centres have had a chance to establish themselves, albeit that this takes time. In Peru, for example, most state contract disputes are subject to local arbitration, so places like the Lima Center have strong caseloads, and they are now bringing in international arbitrators. Regional centres that are not as strong can find strength by banding together.

Diaz: 2018 saw the creation of several new arbitration organisations in Africa, including the launch of the African Arbitration Association (AfAA). At the same time, the ICC has expanded into Africa with the African Commission, a French-based non-profit organisation AfricArb, has also entered Africa. While these are positive developments, much will depend on the approaches taken by the African judiciary with respect to the recognition and enforcement of arbitral awards. In the *Natural Minerals* case, the Ethiopian Supreme Court recently decided that it had jurisdiction to review, and subsequently annul, an award against a joint Ethiopian and Djibouti government, even though the parties had expressly waived their appeal rights. Until there is more uniformity and consistency among the African judiciary, large-scale international arbitrations will likely

continue to be dominated by international arbitration centres.

FW: In terms of the enforcement of arbitration awards, what particular hurdles might parties face and what recourse do they have if arbitration orders are not appropriately followed or enforced?

Nelson: Enforcement of arbitration awards is often the most important concern for parties, particularly in cross-border disputes. Effective enforcement often consists of coordinating simultaneous enforcement proceedings in courts of several different countries. One of the most important challenges is to know which country to go to. Another is whether the courts will be willing to give urgent relief, such as freezing orders, to prevent the dissipation or repatriation of assets. Dealing with a difficult or evasive debtor is, unfortunately, a reality in many cases and litigation tactics need to be tailored to the individual case.

Rosher: If an arbitration award is not executed spontaneously, enforcement is one of today's most important systemic challenges faced by arbitration. While the widely-recognised 1958 New York Convention limits the grounds on which a party may resist recognition and enforcement of an award, their interpretation by local courts is not uniform, and the length of procedures varies greatly. When enforcement is resisted, a party may seek judicial measures, such as seizing assets belonging to the award debtor, via the assistance of the local courts where enforcement is sought.

Diaz: The perception that arbitration awards are enforced more readily than court judgments is often one of the key reasons that parties agree to arbitrate international disputes. And while enforcement is usually not a problem, it can present real challenges where the losing party does not voluntarily comply with the decision. The party seeking to enforce the award will need to expend

significant resources to locate assets, and then seek to enforce the award in potentially multiple jurisdictions. This may prove particularly difficult in jurisdictions that are not pro-arbitration, or where the court in the seat of arbitration has annulled the award. For example, in *N. V. Maximov v. Open Joint Stock*, a Russian arbitral award involving one of Russia's largest steel companies was set aside by the Russian courts. The claimant sought to enforce the annulled award abroad in France, the Netherlands and England. The English and Dutch courts both refused, finding that enforcement of an award annulled at the seat can only be done in exceptional circumstances. On the other hand, the Paris court enforced the award, finding that the annulment at the seat of arbitration was not a reason under French domestic law not to enforce the arbitration award.

Tuchmann: The big concern is about whether courts are intervening, unnecessarily, in the arbitration process – particularly at the award stage when challenges to awards are made. Allegations may be made that due process protections have not been followed or that public policy, according to the law of the seat, has been breached by the award, for example. A recent study found that, across a number of jurisdictions, perceptions were unsubstantiated by court opinions where due process challenges had been raised, which is good news for the arbitration process. Courts in many jurisdictions around the world are observing and respecting the relationship between courts, arbitrators and institutions, and the process itself. There is perhaps a perception issue, with parties feeling that unnecessary award challenges are being made at an increasing rate. Part of this perception goes back to the fact that the breadth and magnitude of cases being submitted to arbitration is increasing. So, while a greater number of challenges may be being made, I do not believe this has been adequately quantified.

Rana: Enforcement is a matter that, in real terms, comes at the end of the

process, but is one that the parties and their advisers need to think about at the point the transaction is entered into and the dispute resolution process agreed between the parties. Where are the other party's assets held? Which jurisdictions are members of the New York Convention 1958? Does the other party's home state have an interventionist judiciary? This ground produces the most unpredictable and bizarre decisions. An award that is not enforced after a lengthy and costly exercise is worthless.

FW: When drafting international contracts, what considerations should parties make in terms of outlining the possibility of resolving disputes through arbitration? What provisions do you believe contribute to a sound dispute resolution clause?

Diaz: Drafting an arbitration provision is not difficult. For the majority of agreements, simpler is better. Drafters need to expressly consider confidentiality in light of the increased focus on transparency in international arbitration and, more specifically, the ICC's recent shift toward a presumption in favour of publication. Furthermore, the seat of arbitration is critical, so drafters should carefully consider this issue. Drafters should expressly consider including mediation as an interim non-binding step in the dispute resolution provision. Including it up-front removes any posturing or discussion about whether to be the party that first suggests mediation. There is little downside to mediation and it often pays to sit down with the other side in a formal attempt to resolve a dispute before significant fees are incurred.

Tuchmann: It is surprising how frequently we see arbitration agreements that are drafted in a way that cause unnecessary problems. In some cases, the way clauses are drafted result in unnecessary litigation surrounding the interpretation and applicability of the arbitration agreement itself. The last thing parties want to do is to first have to litigate about exactly what they intend to arbitrate.

So, the main consideration is for parties to ensure their arbitration agreement is clear. Do not equivocate. If you are submitting a dispute to arbitration, indicate that you are submitting all of the disputes arising out of the agreement to arbitration. If there must be some sort of carve out, or if there is a condition precedent, it should be specified clearly along with a relevant time frame. If you are going to mediate before arbitrating, do not just say you are going to mediate, indicate that mediation will take place within a certain number of days. If mediation fails to resolve a dispute within this time frame, a party can refer to arbitration or have the option of running the arbitration process concurrently. However, it must be specified what process is being used.

Rana: Clarity and certainty are the hallmarks of good drafting, whether in an arbitration clause or any other clause of the contract. Consideration should be given to enforcement and how local laws may impact enforceability of the clause. The essential elements of an arbitration clause are a defined legal relationship or scope, reference to arbitration, the seat or place of arbitration, a differentiated venue – considering jurisdictional attributes, such as arbitration law, support and the New York Convention – the use of foreign counsel, convenience and the incorporation of arbitration rules. Parties should draft contracts carefully.

Rosher: Poorly drafted arbitration clauses may produce exactly the kind of consequences that recourse to arbitration is intended to avoid: parallel litigation over their meaning and scope, and burdensome enforcement proceedings. In order to avoid this, parties should do the following. First, focus on the choice of the seat of the arbitration, as this often has the greatest potential impact of all the elements of an arbitration clause because of the supervisory function of the courts of the seat and the seat's impact on the enforceability of an award. Second, choose the rules to fit the seat and when in doubt, opt for institutional rather than ad hoc arbitration by choosing an institution

with a good track record for efficient administration. Third, do not reinvent the wheel – adopt the recommended clause of the chosen institution. Fourth, to the extent you may need to adapt the recommended clause – for example if multiple parties or contracts are involved – seek specialist knowledge. Finally, ensure that the contract contains a governing law clause.

Nelson: A good arbitration clause is usually an exercise in conservatism. It needs to provide a simple road map toward resolution of all disputes, under a clear governing law, in a known seat, before a familiar and trusted arbitral institution. Most parties, at least in large disputes, prefer to be able to choose one of the arbitrators, meaning that a three-member arbitration clause is usually best. The clause should make clear when, and under what circumstances, the parties are entitled to go to court for supplementary relief, and should separately indicate that the award can be enforced in any court of competent jurisdiction. Some drafters like to load the arbitration clause with elaborate, pre-programmed procedures, including very prescriptive discovery rules or strict, sometimes unrealistic, deadlines for the completion of the case or rendering of the award.

FW: What issues do you expect to dominate discussions in the international arbitration community over the coming months? What overarching trends are likely to unfold?

Tuchmann: The big arbitration topics are going to involve transparency issues, accessibility of information about arbitrations, and public access to information about how the process works. For example, issues such as arbitrator removal requests from institutions and the publication of arbitration awards tend to generate tension. Parties are not particularly interested in having their own awards published, even in a redacted form, but they are at the same time very interested in seeing the awards from other arbitrations. Even if you do your best to

redact an award, the description of the dispute may be enough to infer the identity of the parties involved. So, transparency and access to information will remain topics of discussion. Another issue is due process concerns in an investment arbitration context, such as the continued desire and viability of investment treaty arbitrations and potential reforms that may be taking place.

Rana: Even though the award is said to be final and binding, it is not unusual that when a party loses it wants to have another bite at the cherry. Enforcement and annulment procedures are not a form of appeal since the matter is not heard *de novo*, and other than procedural unfairness there is no ground under the New York Convention for appeals on questions of law. Some jurisdictions have provisions for appeals on questions of law but they are limited in nature and extent and very rarely succeed. For instance, in England & Wales in 2017, only 10 out of 56 appeals were granted. One of the reasons put forward for allowing appeals has been that arbitration hinders the healthy development of common law.

Rosher: There are already a number of recent developments which will set key trends – as well as defining and shaping discussions throughout the international arbitration community – over the coming months and years. These include the future of intra-EU investment arbitration following the groundbreaking *Achmea* ruling and the impact of the wave of transparency washing over international arbitration more generally, the transformative effect that varied technological advances will have on international arbitration – notably in relation to cyber security and artificial intelligence (AI), which is seen as a means to correct biases such as anchoring – and the dual impact of the growing ‘regionalising’ and increasing specialisation of arbitral offerings.

Nelson: In commercial arbitration generally, there have been several recent initiatives among professional

organisations to address cyber security concerns. In the last year or so, a Working Group on Cybersecurity consisting of representatives of the International Council for Commercial Arbitration (ICCA), the International Institute for Conflict Prevention & Resolution (CPR) and the New York City Bar Association have been developing a final protocol for arbitrators and practitioners that will address issues such as security of filings, the format of filings and the way that parties communicate with each other. This may well result in changes, hopefully for the better, in the way tribunals operate.

Diaz: In an intriguing announcement, the Ministry of Law in Singapore intends to consider whether to reform the Singapore International Arbitration Act (SIAA) to allow parties to appeal arbitration awards on questions of law. The finality of decisions in arbitration has long been

viewed as a key attribute of arbitration. But conversely, when the stakes are high, some parties are reluctant to give up their right to appeal. The Ministry of Law specifically noted that it will be looking at the experience of other jurisdictions, presumably such as the UK. An arbitration system built on an opt-out appeal mechanism could appeal to some litigants and enhance Singapore's ability to compete as a key arbitral centre. The discussion about diversity in arbitration will continue to build, particularly with respect to investment arbitration where the progress has been particularly slow. The Equal Representation in Arbitration Pledge has already increased the appointment of women arbitrators, but there is a need to similarly increase representation of other types of diversity, such as regional, age, cultural and ethnic diversity. ■

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