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International Arbitration Experts Discuss The Major Challenges For Arbitration In 2023

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Commentary

International Arbitration Experts Discuss The Major Challenges For Arbitration In 2023

Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what the major challenges for arbitration in 2023 might be. We would like to thank the following individuals for sharing their thoughts on this important issue.

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Mealey's: What do you believe will be the major challenges for arbitration in 2023?

Guadalupe: The year 2023 will see continued developments and disputes involving artificial intelligence, climate change, and ESG (environmental, social and governance) standards. Arbitration has not lost its appeal as a private, confidential, efficient, and expedient way of adjudicating complex disputes with expert arbitrators, but challenges remain.

A major challenge will be how courts and legislatures may try to limit the reach of arbitration tribunals allowing some discovery. In the U.S., for example, expect efforts to circumvent the landmark U.S. Supreme Court's June 2022 decision in ZF Automotive, holding that Section 1782 of the U.S. Code does not apply to private international tribunals and thus, federal courts cannot order discovery to be turned over to parties in proceedings before those tribunals. Parties will try to use state arbitration statutes (some modeled after the Uniform Arbitration Act) to avoid Section 1782 and persuade state court orders to order such discovery. Expect practitioners using arbitral subpoenas to obtain evidence for final hearings instead of relying on Section 1782.

Artificial intelligence will become more relevant than ever, now with the wildfire caused by chatGPT, the conversational, seemingly all-knowing AI tool. Far beyond AI's role in ESI software, expect advances to detect bias in arbitration awards and algorithms to predict how arbitrators will rule. Affected parties will argue that AI could never replace the judgment of a trial court in confirmation proceedings. Expect to see AI used as a research tool sourcing large data sets from arbitral awards from all over the world that have become public by way of published confirma-

tion or vacatur proceedings. These developments will challenge the notion that arbitration is a confidential process with little risk of public exposure.

Other challenges will be the increasing role of litigation funding in international arbitration allowed by some countries (U.S. and the UK) and viewed with suspicion by the EU, which passed a resolution in 2022 urging robust regulation; cross-border cryptocurrency arbitrations that may clash with countries' investment regulatory policies; arbitration awards advancing ESG standards that will present enforceability challenges in countries not embracing those standards; and disputes arising out of climate change policies meant to stop investment in fossil fuel projects (e.g., cancellation of pending or existing projects, such as government-mandated closures of coal plants or oil pipeline projects). Promotion of diversity and inclusion will also face challenges, as traditional tribunals may be slow to establish a diverse pool of international arbitrators.

Gunday Sakarya and Manfredonia: Virtual hearings, among the immediate changes triggered by COVID-19, appear to be here to stay despite potential challenges down the line to award enforceability arising from a denied right to in-person proceedings. Nevertheless, the pandemic, as well as the Russia-Ukraine war and quickening inflation around the world are likely to present a long-term uptick in arbitration claims on supply chain disruptions and pricing disputes.

We also anticipate a proliferation of arbitrations involving insolvent parties, which in turn may generate more procedural and jurisdictional hurdles, such as delays due to applications for security for costs and challenges to standing. The appetite for litigation funding is likewise expected to grow in the realm of international arbitration and increasingly be viewed as an investment opportunity. Many institutions (*e.g.*, ICSID, DIAC and SCC) have indeed revised their arbitration rules within the past year, introducing changes to articles dealing with transparency, third-party funding and the allocation of costs. However, these new rules only recently came into force and their efficacy will need to be tested this year, as more parties elect them to govern their proceedings. Meanwhile other common concerns in the arbitration community have yet to be addressed in the form of amended rules, such as arbitrator double-hatting and the discretion afforded to tribunals in the assessment of damages.

2023 is also likely to unveil the future of the most litigated investment treaty in history: the Energy Charter Treaty. Despite a major push for modernization in recent years, European states, including Italy, France, Spain, the Netherlands, Poland, Slovenia, Luxembourg, and Germany, are exiting the treaty, or already have, over concerns that it is an outdated instrument, which provides protection to fossil fuel investors and prevents member states from carrying out clean climate policies. Even with a mass exodus, former members are still bound by the treaty's sunset clause, permitting them to be sued for up to 20 years following withdrawal, thus further perpetuating lawsuits that hinder coherence with environmental goals. Will the European signatories jointly agree to withdraw and block applicability of the sunset clause or will they ultimately agree on the adoption of a modernized treaty that does not stand in the way of transitioning to greener energy? Depending on the outcome, the ECT may either become a vanishing treaty or instrumental in promoting renewable and safe energy investments.

Bates and Torres-Fowler: Albeit a perennial issue for arbitration, the inflationary economic environment that has unfolded around the world over the last several months will bring a renewed focus on how arbitral institutions can further improve time and cost efficiencies in arbitration.

Indeed, prior to the onset of the COVID-19 pandemic in 2020, arbitral institutions faced mounting pressure to increase efficiencies, both as a matter of time and cost, during arbitration proceedings. For example, in 2018, the ICC Commission issued the second edition of Techniques for Controlling Time and Costs in Arbitration. These Techniques were designed to assist arbitral tribunals, parties, and their counsel to develop tailor-made procedures for individual arbitrations pursuant to Articles 22–24 of the ICC Rules. The recommendations of the ICC Commission, among other things, encouraged parties to consider appointing counsel with the skills necessary for handling the arbitration, particularly those who are also sensitive to the need for appropriate time and cost management practices. In the Commission's view, such counsel are more

likely to be able to work with the arbitral tribunal and the other party's counsel to devise efficient procedures for the case. Further, the ICC Commission suggested that parties consider selecting arbitrators with strong case management skills, so as to make the arbitration process as cost and time efficient as possible given the nature of the dispute.

Thereafter, with the onset of the COVID-19 pandemic, the focus of most arbitral institutions pivoted towards the use of remote hearings. Since that time, remote hearings—due to the attendant cost and times savings generated by those procedures—have received widespread adoption by practitioners around the world and have been touted as an immense success by arbitral institutions.

But now with fears of inflation rising around the globe, arbitration institutions will likely face, once again, increased pressure to find the "next big thing" in arbitration practice to make arbitration more efficient and effective. Indeed, conferences hosted by various international arbitration organizations over the last year have convened panels focused on identifying novel solutions to the perennial issue of time and cost in arbitration.

We are not yet convinced that novel procedural devices, as opposed to proactive case management by arbitrators and counsel, will be the silver bullet to mitigate against escalating arbitration budgets and delayed schedules. However, as 2023 progresses, arbitrators, counsel, and institutions will face pressure to identify and adopt methods to improve time and cost efficiencies in arbitration in light of the current economic environment.

Lim and Durán: We foresee several challenges for arbitration in 2023. First, with a global economic recession threatening, we expect an uptick in restructuring and insolvency work. Arbitration practitioners and institutions will need to navigate the effects of restructuring and insolvency processes on arbitration proceedings, including: (i) who has the authority to represent insolvent parties in arbitration proceedings; (ii) how statutory moratoria on insolvency proceedings by creditors against the insolvent party may impact arbitration proceedings; and (iii) strategic considerations on whether to pursue claims before national courts or in arbitration.

Second, an economic recession could give rise to legislative and regulatory changes that may impact foreign investments. Such changes could potentially trigger a corresponding increase in investor-State arbitrations alleging breaches of the investment protection standards provided to foreign investors through international investment agreements. An already difficult economic situation for investors, combined with regulatory measures that could affect their investments, could leave investors no choice but to initiate proceedings against the States. In turn, States will need to assess their international obligations and the potential risks of implementing these measures. Moreover, an increase in investors suing States in arbitration in times of economic crisis could feed political backlash against investor-State dispute resolution. Arbitration practitioners, institutions and States alike may not only need to contend with a growing caseload but also to navigate additional reforms to the international investment regime.

Finally, data privacy issues could pose another major challenge for arbitration in 2023. In recent years, more countries have introduced or are looking to introduce major data protection laws, including China, India, Brazil, and Indonesia. The cross-border nature of international arbitration means that the data protection laws of multiple countries likely will be implicated in any given dispute when there is cross-border transfer of data, such as in document collection and production. These laws can vary widely in terms of the permissible legal bases for the cross-border transfer of data, notification requirements, and data processing. Despite this, at present many tribunals and parties do not have the practice of affirmatively addressing these issues in the procedural orders, creating the risk that proceedings may be disrupted at a later stage if any infringements of such laws occur. Tribunals and parties should take care to expressly address issues of data protection early on in arbitration proceedings.

Perez: There are a handful of challenges that practitioners will encounter when engaging in arbitration in 2023.

First, many parties will face issues with the high cost of arbitration. Arbitration involves a variety of fees that are paid by the participating parties. When the amount of controversy for a matter is large, the cost

of arbitration is reduced. On the other hand, if the amount in controversy is low, the cost of arbitrating may be so high that it will prevent the parties from moving forward with arbitration.

Timeliness is another a major issue presented by arbitration. Originally, parties turned to arbitration in hopes that the process would be more expeditious than a traditional trial in the courts. Now, some arbitrations are taking as long as trials in the United States. The arbitration process has to be expedited. The rules of arbitration lead to a lot of wasted time and unnecessary delay.

Most importantly, arbitrations often lead to predictable results. Depending on the composition of the arbitral panel, the decision is likely to follow previous rulings made by the arbitral panel in cases involving similar issues. The bottom line is that the arbitrators are likely to rule in line with previous thinking. This gives the party who selects the arbitral panel the upper hand in the ultimate result of the arbitration.

Next, the changes to 28 U.S.C. § 1782 have restricted discovery in the United States. The Supreme Court has made clear that parties engaging in private arbitrations in other countries cannot use § 1782 to engage in discovery with U.S. persons. This change severely hampers parties engaged in arbitration from participating in meaningful discovery needed to advance their case.

These challenges are reduced by the option to conduct the arbitration remotely. Remote arbitrations allow the parties to reduce the cost of arbitration and help streamline the arbitration process. Conducting arbitrations remotely also helps to reduce the chances of the arbitration being interrupted by unplanned events or circumstances such as wars, viruses, or even flight delays.

Abrahamson: Can international arbitration adapt and move at the speed of business to remain the preferred choice for dispute resolution? The largest challenge facing international arbitration in 2023 and beyond is how to adapt and make the necessary changes to continue to be the dispute resolution mechanism of choice for corporate end users. From surveys such as the 2020 Queen Mary and Corporate Counsel International Arbitration Group survey (one of the only surveys solely of corporate in-house counsel and their clients) to panels at conferences such as the USC-JAMS Arbitration Institute's annual symposium on March 16 during California International Arbitration Week, it is clear that corporate clients are increasingly concerned that international arbitration must improve in order for it to continue to be preferable to litigation in local courts. Even though corporate respondents in the Queen Mary survey may still overwhelmingly prefer international arbitration to litigating investor-state disputes in the courts of the host state, almost 4 out of 5 think there is scope to improve the consistency of investor-state international arbitration, and 3 out of 4 believe that reforms could lead to a greater level of efficiency.

For international commercial disputes, the need for movement is more urgent. Commercial parties are understandably less concerned about international arbitration providing an even playing field, which parties to investor-state disputes fear may not be possible if they try to litigate in a foreign court against the host government. Instead, in the commercial context, in-house counsel who choose international arbitration are looking for other advantages, such as speed, cost-efficiency, predictability, certainty and enforceability. As in-house counsel increasingly voice frustration that international commercial arbitration is not meeting their needs, this is an existential threat. Arbitral institutions and arbitrators need international arbitration to remain commercial parties' preferred choice for dispute resolution. To do so, institutions and arbitrators must demonstrate that the value proposition for international arbitration is still valid and deliver the benefit of the bargain for commercial parties, particularly in terms of cost and time to decision. In other words, international arbitration must adapt and move at the speed of business. ■

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