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International Arbitration Report

International Arbitration Experts Discuss The Major Challenges For Arbitration In 2024

By
Luis Perez
and
Genesis Martinez
Akerman
Miami, FL

John Branson
Squire Patton Boggs
New York, NY

Omer Er
Michelman & Robinson, LLP
New York, NY

John Dellaportas
Emmet Marvin
New York, NY

A commentary article reprinted from the March 2024 issue of Mealey's International Arbitration Report

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Commentary

International Arbitration Experts Discuss The Major Challenges For Arbitration In 2024

Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on what the major challenges for arbitration in 2024 might be. We would like to thank the following individuals for sharing their thoughts on this important issue.

- Luis Perez, Chair, Latin America and the Caribbean Practice, Akerman, Miami
- Genesis Martinez, Associate, Akerman, Miami
- John Branson, Partner, International Dispute Resolution, Squire Patton Boggs, New York
- Omer Er, Partner, Michelman & Robinson, LLP, New York
- John Dellaportas, Partner, Emmet Marvin, New York

Mealey's: What do you believe will be the major challenges for arbitration in 2024?

Perez and Martinez: There are many challenges confronting arbitration in 2024; however, it is our opinion that the biggest challenge is presented by Artificial Intelligence ("AI"). This will be the most ominous disruptor of all aspects of our life, but it presents unique challenges that will affect arbitrations. Some of the developments that AI will bring about might be helpful, yet some will, by all accounts, present a hindrance.

AI will certainly affect how arbitrations will be conducted in the future. Although, to our knowledge, there has not been an AI powered program or software (like ChatGPT) that can effectively prosecute or defend an arbitral claim in its entirety, there are some aspects of an international arbitration in which AI could assist. For example, AI could facilitate the translation of documents; review of a large amount documents by conducting a search of key words or phrases; research and investigation of the members of the tribunal; legal research of similar issues in other cases; research and investigation of the adverse party; research and investigation of witnesses and experts; research to assist in the preparation of adverse witnesses for cross examination, areas or questions to present; and preparation of first draft of memorandums, briefs, and the like. We acknowledge that most major law firms frown upon the use of AI for the preparation of such important documents, but it is possible that major law firms may start embracing AI for assistance in the preliminary stages of preparing these types of documents. But we are certain that in the future there will be more reliance on AI and new uses of this technology will be developed, as well as further sophisticated systems that have greater flexibility of use.

The other big challenge we anticipate is political and economic woes, especially in Latin America. We believe that political and economic woes will give rise to more disputes as they will cause some parties' failure to comply with their contractual obligations or will cause them to seek to renegotiate the same. This will undoubtedly lead to an increase in commercial disputes and if the parties provided for such in their contracts, should also lead to more arbitrations in order to resolve these disputes. These days, most major contracts between parties located in different jurisdictions contain a provision calling for arbitration as the mechanism for resolving disputes. This is because neither party wants to subject themselves to the courts of the other party to the agreement, thus, arbitration

is seen as a more "neutral and unbiased" forum to resolve controversies. In addition, the judicial system in most jurisdictions is not properly equipped to deal with effective and economical means to address commercial disputes. This is easily surmised when lawsuits can take between 3-10 years to reach a final judicial resolution. This is not acceptable to the business industry that demands a quick and effective resolution to any controversy. In fact, there are many instances where the parties must continue the commercial relationship despite the existence of a specific controversy and arbitration, and other non-judicial means of dispute resolution will allow the parties and the tribunals to address the specific dispute while continuing with the on-going commercial relationship.

In conclusion, AI is a reality that will disrupt all aspects of our lives, it is here to stay, and the arbitration community needs to understand it much better and make certain that it impacts our profession in a positive way. New technologies are not bad, we just need to worry about bad use of new technologies. Further, political and economic woes are on the horizon, and we may see more arbitrations resulting because of it.

Branson: In an age of increased political populism and anti-globalist sentiment, one of the primary challenges facing international arbitration remains protecting its legitimacy in the eyes of the public and in domestic courts. Foremost among the oft repeated complaints is that parties use the same clique of arbitrators to resolve large disputes with little transparency. Allegations of arbitrator bias can arise due to various factors, such as prior professional relationships. While exceedingly rare in practice, instances where an arbitrator's credibility is questioned due to bias or conflicts of interest allegedly undermine the integrity of the arbitration process.

Thus, in 2024, a potential key development to monitor will be whether the U.S. Supreme Court grants certiorari to resolve a long-standing circuit split concerning the standard for establishing arbitrator bias in setting aside an arbitration award. The circuit split revolves around when apparent bias of an arbitrator can be proven to set aside an arbitral award. For instance, the Second Circuit has traditionally applied a higher standard, requiring clear and convincing evidence of bias that 'entirely frustrates' the arbitration process. In contrast, the Eleventh Circuit has applied a lower burden of proof, where the mere appearance of bias is sufficient to challenge the award. In *Grupo Unidos por el Canal, S.A., et al., Petitioners v. Autoridad del Canal de Panama*, 78 F.4th 1252 (11th Cir. 2023), *cert. petition pending*, the Supreme Court is presented with the opportunity to resolve this conflict. The Supreme Court's anticipated intervention could establish a uniform standard for establishing arbitrator bias that would promote consistency and legitimacy in arbitration outcomes.

Another highly political topic to monitor in 2024 remains the enforcement of intra-EU arbitration awards. While ICSID tribunals have routinely concluded that the European Commission's decision in *Achmea* (Slovak Republic v. Achmea B.V., No. C-284/16, CJEU (Mar. 6, 2018) does not preclude jurisdiction over intra-EU investment disputes, arbitration awards involving intra-EU treaties are not enforceable within the EU. Thus, investors who have obtained such awards have looked to U.S. courts to enforce these awards. Generally, U.S. courts have enforced investment arbitration awards; however, the U.S. Court of Appeals for the District of Columbia is currently considering arguments on the effects of the *Achmea* decision in the context petitions to enforce ICSID awards against Spain. If these awards are deemed unenforceable in the U.S., then it is likely that there will significant reduction in new intra-EU claims as investors consider the lack of available options to enforce such awards.

Er: In the wake of COVID-19 and ongoing geopolitical conflicts, we are experiencing heightened global polarization and economic challenges. This environment is likely to complicate the enforcement and recognition of arbitral awards, potentially leading to less cooperative attitudes from national courts towards international arbitration bodies. In extreme cases, there could be a trend of sovereign states withdrawing from arbitration treaties.

Moreover, geopolitical shifts may stall bilateral investment accords, impacting investor-state disputes. Another significant concern relates to the global economy. While the beginning of 2023 was marked by fears of a recession in developed economies, there has since been a shift towards a consensus on a 'soft-landing' outcome. This optimism may boost conventional investment methods, potentially reducing the availability of litigation funding.

Economic issues also extend to the costs associated with arbitration. Inflationary pressures have led large corporations to cut costs, which may result in delays in initiating arbitration processes. Additionally, data privacy and cybersecurity remain paramount concerns, as the independent and flexible nature of arbitration processes—despite their efficiency—could expose parties to increased cyber threats.

Finally, the integration of AI presents both opportunities and challenges for international arbitration. The rise of deepfake technology, in particular, poses a significant risk during discovery processes. It is crucial that legal counsels implement multiple layers of accuracy control standards to combat misinformation and ensure the integrity of arbitration proceedings.

Dellaportas: Arbitration is inextricably intertwined with commerce, and in the commercial world, the last few years have been like no other.

First, as everyone knows, across the globe established contractual relationships have been fractured by the COVID-19 pandemic. *Force majeure* clauses—previously regarded as mere "boilerplate" to be tucked away in the back of contracts—have suddenly taken on great significance. In 2024, tribunals will continue to tackle thorny legal issues of how to allocate loss between contracting parties in the face of these extraordinary events. Such loss allocation, at least in common law jurisdictions, depends on intent of the parties, which can be difficult to decipher. In most jurisdictions, there exists little to no factually analogous legal precedent, meaning arbitrators will be working without a proverbial net.

Add to that Russia's 2022 invasion of Ukraine. Of course, the human cost of the war is (correctly) forefront in everyone's mind. For purposes of the arbitral world, however, what is salient is the worldwide sanctions regime imposed in response to the invasion, designed to curtail Russian aggression. Such sanctions have disrupted global supply chains and cross-border contracts to an extent previously unimaginable. In response, parties are (again) invoking *force majeure*, as well as termination clauses under various other legal doctrines. Meanwhile, in Russian courts, such sanctions are deemed illegal and unenforceable. Indeed, Russian law now permits that nation's courts to extend jurisdiction where a matter is governed by the laws of a sanction-imposing country, dislodging (in theory, at least) existing arbitral provisions.

Ultimately, arbitral jurisdiction is based on consent. When bonds previously held together by treaty and by contract are torn asunder, arbitration is plunged into unchartered territory. In the absence of broader political measures, arbitral tribunals will have to continue confronting and resolving these matters with the limited tools at their disposal. ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Samuel Newhouse
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397