YCAP 2018 FALL SYMPOSIUM: Parallel Proceedings and Transparency in Investor-State Arbitrations - Post Event Report

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On Thursday November 8, 2018, YCAP, in conjunction with ICC YAF, held its Fall Symposium with over 50 young arbitration professionals in attendance at Arbitration Place in Ottawa, in addition to those attending via webcast. On the heels of a thought-provoking keynote address by distinguished arbitrator Lucy Greenwood (Greenwood Arbitration, London), two panels of passionate speakers discussed key live issues in investor-state arbitration: parallel proceedings and transparency. A cocktail reception followed, organized jointly with ICC Canada, offering participants and panellists the opportunity to meet and reconnect.

KEYNOTE ADDRESS

Lucy Greenwood addressed with candour and wit the issue of diversity in arbitration, or: "it's really not that bad". Our keynote speaker first undertook to cheer participants by highlighting how the arbitration community has already successfully risen to the serious challenges presented by costs and time issues – not so bad for a young industry. Ensuing high spirits allowed to confront observations that nevertheless raise concern, and which Lucy Greenwood illustrated with statistics and visual support: a survey of arbitrators and counsel shows little to no diversity, whether based on geography, culture or gender. Alternative approaches to avoiding stereotypes in matters of appointment were discussed, with a view to ensuring that users of arbitration benefit from the best, hence more diverse, teams. Although participants have certainly noted the difficulty in rewiring one's brain to such issues – memorably illustrated by the backwards bike – our keynote speaker completed her address on optimistic terms, referring to several initiatives already taken by the community to meet this new challenge.

FIRST PANEL

In a discussion moderated by Alison FitzGerald (Norton Rose Fulbright, Ottawa), panelists Margaret Clare Ryan (Shearman & Sterling, London), Michael Kotrly (Freshfields, London), and Hugh Meighen (BLG, Toronto) discussed a number of issues that arise out of parallel proceedings.

First, with Margaret Clare Ryan dealt with overlapping direct and indirect treaty claims, drawing from her experience as counsel for both claimants and respondents in such contexts. For instance, where direct and indirect shareholders of a company each have a claim against a State for loss to a company, tribunals are frequently asked to rule on their jurisdiction or the admissibility of a claim. For strategic reasons, such claims can be brought based on the same treaty, or more typically, under different ones, each with their own definition of investments and scope of protections. The question of the coordination of claims is thus brought to the fore in light of the risk of contradictory results.

The panel discussed the questions that arise when the relative decentralization of ISDS meets the issues entailed by such overlapping claims, noting an emerging tendency for tribunals to consider the incidence of parallel proceedings when seized with consolidation requests. As most treaties contain no provision for the coordination of claims, or precluding it, the panelists opined on the risk of multiple compensation and the importance of claimants' forthrightness and transparency in this respect.

Michael Kotrly then pursued the discussion from the perspective of overlapping treaty and contractual claims, raising the awareness of the audience to the issues of corporate governance that may be at play when facing such a picture. The panelists also agreed on the role that tax considerations typically have in determining a given corporate structure, interacting with the corporate structure dictated by treaty considerations.

The panel then addressed the issues of confidentiality and privilege that emerge from overlapping parallel claims. The balance between transparency and fairness was identified as particularly delicate in this respect.

Hugh Meighen concluded the presentation with thoughts on overlapping contractual claims, especially from the perspective of his experience with construction claims with several interrelated contracts that do not perfectly overlap. The panel concluded with a discussion on the consideration of evidence adduced in such parallel proceedings and its potential impacts on the tribunal's impartiality was identified as a key concern.

SECOND PANEL

Heather Squires (Global Affaires Canada, Ottawa) and Stephanie Forrest (Wilmer Hale, London), then spoke on the topic of transparency, a discussion which was moderated by Elizabeth Whitsitt, (University of Calgary, Calgary).

The moderator launched discussions by commenting on recent developments in regard of transparency in international investment arbitration, noting the tension between this trend and the tradition of confidentiality in international commercial arbitration. Prominent among such developments are the Mauritius Convention and UNCITRAL working group 3 coming to the conclusion that reform of ISDS is desirable. At the root of this reflection are a number of key criticisms commonly leveraged against such proceedings. Setting the tone for the presentation by the two panelists, Elizabeth Whitsitt framed the issue of immediate interest as an oft-heard question asked of ISDS: should oversight of government regulatory action be covert?

The first panelist Heather Squires took upon the task of walking the audience through the major milestones in the evolution transparency rules, beginning with Interpretation Note issued by the Free Trade Commission at the turn of the century and pertaining to access to file records and the intervention of third parties in proceedings. Canada's leadership in regard of transparency was noted, the FTC having issued a separate note on behalf of the country, stating its intention to hold hearings in public as well. Since, all NAFTA Chapter XI cases were held in public, and tribunals have been called to interpret and apply transparency rules to specific contexts such as the sharing of information between federal and provincial levels of government, and with respect to whom information should be kept confidential in any given case, and the various modalities of publicity used (webcasts, live or not; closed hearings followed by redacted transcripts, etc.). Finally, Heather Squires noted that trend towards consistency and harmonization.

The last presentation of the day consisted of observations on amicus participation in investment arbitration since being first reportedly used in the case of Methanex. Stephanie Forrest shared three main insights on the subject. First, amicus participation was allowed in ISDS without basis in institutional rules or national instrument, and that much later than in other types of proceedings. It is only with the FTC Interpretation Note and the 2006 ICSID and

UNCITRAL rules that it was formally recognized. To this day, it has yet to find its way in rules other than those of SIAC and the 2017 SCC rules. Second, it was noted that the public interest the subject-matter of the dispute is treated as a relevant factor by transparency rules, whether explicitly as under the UNCITRAL transparency rules, or as interpreted by tribunals, such as in Biwater or Philip Morris. Finally, recent amendments introducing more detailed provisions on the matter, including the proposed 2018 amendments to the ICSID rules. The panel seized on the opportunity to address the financial aspects of amicus participation, as third party funding is coming under increased scrutiny, and the power to order costs against an amicus is being considered.

Prompted by quests from the moderator, the panelists closed the day by discussing the relative merit of increased transparency in terms of objectivity in arbitrator selection and coherent development of investment law.

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