IADC COMMITTEE NEWSLETTER

INTERNATIONAL ARBITRATION

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IN THIS ISSUE

International arbitration is increasingly being chosen as the avenue for resolving international disputes, but it is quite a different creature from the traditional US litigation to which many IADC members are familiar. Selection of arbitrators is one of the most critical points in crafting an arbitration strategy, which could determine the outcome of the case. As an ongoing project by the International Arbitration Committee, we would like to provide you a tool to "meet" (get to know) the distinguished international arbitrators among the IADC members.

Meet the Arbitrators Vol. 1

ABOUT THE AUTHORS

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ABOUT THE COMMITTEE

The International Arbitration Committee serves all members involved or interested in international arbitration as in-house and outside counsel and/or as arbitrators. This extends to actions for or against the enforcement of arbitral awards in their jurisdiction and actions aiming at setting aside arbitral awards. Members publish newsletters and journal articles and present educational seminars for the IADC membership-at-large, offering expertise on drafting arbitration provisions, choosing arbitral institutions and rules, and the do's and don'ts in international arbitration. The Committee presents significant opportunities for networking and business referrals. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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In our first Meet the Arbitrators series, we introduce two colleagues who have extensive experience in international arbitrations, Dr. Anton Maurer, LL.M. FCIArb (Anton Maurer International Legal Services, Germany), and Ms. Cecilia Flores Rueda, FCIArb (Flores Rueda Abogados, Mexico). Both have civil law backgrounds, which may be relevant to their general approach as arbitrators. Their comments and suggestions include many practical insights. We hope that you enjoy Meeting the Arbitrators!

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Interview with Dr. Anton Maurer, LL.M. (Anton Maurer International Legal Services, Germany)

A. What types of cases do you handle as an arbitrator (commercial and/or investment treaty?), and what specific area of law or industry (e.g., Aviation, Construction, etc.) are you involved in?

I handle commercial cases, predominantly contractual performance disputes, including commercial disputes being governed by CISG, post M&A disputes, disputes on agency and distributorship claims, and franchising disputes. I can handle investment treaty disputes since I got my PhD in public international law.

B. What arbitral institutions have you arbitrated for?

German Arbitration Institute (DIS), International Chamber of Commerce (ICC), International Center for Dispute Resolution (ICDR), KCAB International (KCAB), and under UNCITRAL Rules.

C. What is your best tip for advocates appearing before you? Or what are your "pet peeves" you wish counsel would avoid?

The facts presented should be precise and concrete. General statements are not helpful to the arbitrators.

D. How did the COVID-19 pandemic impact your arbitrations, either positively or negatively? If you conducted arbitrations via video, how did you find remote hearings or e-arbitrations?

Organizational hearings held by video are a good replacement for organizational meetings previously held by phone. But remote hearings are by far more difficult, and often present many challenges; therefore, I prefer sitting with all arbitrators and all parties and their counsel in one room.

If the parties organize a provider which is in charge of providing the technical infrastructure and controls its operation for and during the virtual hearing, the virtual hearing can go well. However, it can get rather difficult if counsel and the representatives of each party sit in several different locations.

E. Do you have any experience serving in the role of both arbitrator and mediator at the same time? How did you avoid any potential conflicts? Were you able to find that process helpful in reaching an efficient resolution?

Internationally, the expression "mediator" has different meanings. In my opinion, an arbitrator should never serve as a mediator in the sense that he/she would meet with one of the parties separately. Under Art. 26 of the DIS Arbitration Rules, the tribunal shall, unless a party objects, seek to encourage an amicable settlement of the dispute or of individual disputed issues. With the consent of the parties, the tribunal may give the parties a preliminary assessment of the case or a dispute based on the memorials and the written evidence, but it is subject to change after hearing the witnesses and experts. In such a case, the tribunal may explain to each party their stronger and their weaker arguments and which party has the burden of proof for relevant issues (depending upon applicable law, and the relevant standard of proof), but this assessment is only given in the presence of all parties. The tribunal never will speak or meet with one party only. The preliminary assessment often makes the parties review their case and settle the case without spending additional cost.

F. Any comments or thoughts on common law vs. civil law approach or IBA taking evidence rules vs. Prague rules?

Unfortunately, the IBA Rules on the Taking Evidence in International Arbitration regarding the request for discovery/disclosure of documents are generally interpreted differently by common law trained arbitrators and by civil law trained arbitrators. This is especially evident regarding the question of whether the requested document is relevant to the case and material to its outcome. Generally, civil law trained arbitrators apply a narrower interpretation. Subject to the applicable arbitration law of the seat or a different agreement by the parties, I try to apply the stricter interpretation in a dispute between two parties from civil law countries or a dispute which is based on civil law, and a more relaxed standard in a dispute between two parties from common law countries or a dispute which is based on common law. The Prague Rules basically reflect how many arbitration proceedings were conducted in civil law countries even before the Prague Rules were introduced. Applying the Prague Rules would make an arbitration proceeding more efficient, shorter, and less costly.

G. What steps do you take to ensure that the Arbitration proceeds efficiently?

Subject to the consent of the parties, I plan to have more than one organizational meeting to ensure a smooth procedure. This also may help the parties to focus on the real issues. My general approach is more hands-on in determining the procedural issues with the parties and not to wait for the parties to come up with their suggestions.

H. Have you used concurrent expert/witness testimony (sometimes called "hot tubbing")? Did it work well?

Yes, I did, but only with experts. However, I did the "hot tubbing" only after each of the experts was examined separately in chief, cross-examined, and questioned by the tribunal; thereafter, the hot tubbing is done with the aim to see whether the experts may, in talking directly with each other in front of the tribunal, agree on earlier disputed topics. Sometimes, an excellent presentation loses its appeal by the result of the "hot-tubbing."

I. What benefits do you see in parties proceeding with Arbitration as opposed to litigation?

I believe that there are the following benefits of arbitration compared to litigation:

i. The parties can select the language of the arbitral proceeding. In distinction thereto, litigation proceedings are held in the official language of the court which has personal jurisdiction, and most likely one of the parties may not understand nor even speak such language. The language of international business is broken English. Arbitration proceedings may be held in the language the agreement was negotiated, drafted, and signed. No translation is necessary; translations are costly and often not identical to the original language.
ii. Arbitration avoids hometown jurisdiction.
iii. The parties can select the arbitrator(s) based on their experience, knowledge, efficiency, procedural approach, etc. I prefer a tribunal of three arbitrators; this may be more expensive but arbitral awards generally are final and cannot be appealed, and 6 eyes may see more than 2 eyes.
iv. The parties can choose the applicable arbitration law and the rules of the procedure. The arbitration proceeding is generally, subject to mandatory law, flexible and determined by the parties, subject only to fair and equitable treatment of all parties.
v. The arbitration proceeding is non-public.
vi. The parties can make the arbitration proceeding, the memorials, documents, etc. confidential, if the applicable arbitration rules do not provide for a confidential proceeding. Exceptions should be limited to the need for court filings.
vii. In distinction to judgments, arbitral awards must be recognized and enforced under the New York Convention in, presently, 167 countries, except in 7 limited circumstances listed in Art. V or some other conventions.
viii. Arbitrators generally give the parties more time to present their cases than judges; this is especially true in civil law countries.
ix. Generally, commercial disputes are decided more quickly in arbitration proceedings than in litigation proceedings, which may permit

sometimes a second and even a third instance.

x. Arbitration proceedings may be cheaper than litigation over several instances.

xi. Additionally, in distinction to many litigation proceedings, in many arbitration proceedings the loser has to reimburse the reasonable legal fees and costs of the winning party.

J. What is the most difficult part of Arbitration for the Arbitrators, and what can the attorneys do to assist the Arbitrators?

For me, the most difficult part is to have the patience to listen calmly when presentations or arguments are not material and relevant to resolving a dispute. Counsel should sometimes take a step back and consider what is really material and relevant to resolve the dispute in their party's favor.

K. What would be one thing you like to see change in the field of Intl Arbitration?

If I could, I would prohibit counsel from drafting the witness statements by more or less copy and pasting the memorials. And I would generally prefer if the tribunal would start questioning the witnesses first and give counsel the opportunity to question the witnesses thereafter.

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Interview with Ms. Cecilia Flores Rueda, FCIArb (Flores Rueda Abogados, Mexico)

A. What types of cases do you handle as an arbitrator (commercial and/or investment treaty?), and what specific area of law or industry (e.g., Aviation, Construction, etc.) are you involved in?

As an arbitrator, I handle commercial arbitration cases. I strongly believe that my early professional experience as Secretary General for the Mediation and Arbitration Centre of the Mexico City National Chamber of Commerce (CANACO) was a relevant factor in receiving my firsts appointments as an arbitrator. The following appointments have been a result, I believe, of the reputation I have gained.

In arbitration, I have also acted as party representative. Both experiences combined, as a party representative and as an arbitrator, have allowed me to gain experience with cases related to governmental entities (administrative law), shareholders' disputes, energy, oil and gas, clean energies, infrastructure projects, trusts, construction, joint ventures, lease agreements, transportation and logistics, international sale of goods, distribution, insurance and reinsurance, e-commerce, intellectual property, and commercial transactions in general.

B. What arbitral institutions have you arbitrated for?

I have arbitrated in *ad hoc* arbitration proceedings under the UNCITRAL Arbitration Rules, and I have also arbitrated under the rules of several arbitral institutions for CANACO, the International Chamber of Commerce (ICC), the Commercial Arbitration and Mediation Centre for the Americas (CAMCA), the Inter-American Arbitration Commission (IACAC), the International Centre for Dispute Resolution (ICDR), the Centro de Conciliación y Arbitraje de Panamá (CeCAP), and the Mexican Arbitration Center (CAM), amongst many others.

C. How many cases have you served on as an arbitrator, and from among them, how many cases have you acted in the capacity as the chairperson or sole arbitrator?

I have participated in more than 50 cases as an arbitrator. In those opportunities, I have acted as chairperson in 15 cases; as sole arbitrator in 20 cases; and as co-arbitrator in 15 cases.

D. How did the COVID-19 pandemic impact your arbitrations, either positively or negatively? If you conducted arbitrations via video, how did you find remote hearings or e-arbitrations?

Regarding submissions, the pandemic did not have a negative impact in the arbitration proceedings I have conducted. On the contrary, it was a definitive step to transition to paper-free submissions.

Regarding hearings, during the first year of the pandemic, the parties required the hearings to be postponed. At the end of the day, such hearings took place completely virtual or hybrid. The parties did a good job preparing themselves to present virtually and to have all the technological means necessary for them. From the second year of the pandemic onwards, I noticed that the parties did not care much about the hearings being virtual.

The hearing being virtual, remote, or hybrid is something not highly relevant for me, unless a feature of the case would require a particular modality. However, when the hearings are held virtual, I always take care to avoid long sessions that could cause boredom of the parties, experts, or myself. We all know that virtually it is more difficult to keep our mind focused on something.

E. Have you used concurrent expert/witness testimony (sometimes called "hot tubbing")? Did it work well?

Yes, I have used hot tubbing. I must say that experts who are used to performing in civil law proceedings aren't used to this kind of participation. On the contrary, they feel like "a duck to water" when their participation is limited to elaborate written submissions. Thus, when one of the parties is experienced in common law practice and the other one in civil law, sometimes it takes a moment for the one with the civil law experience to get used to the dynamic. On the other hand, when both experts have a civil law background, sometimes they do not really get a grasp of the dynamic entirely, even though the corresponding party representatives and the arbitral tribunal explain it to them. However,

the exercise can still be productive when addressing particular topics.

F. What benefits do you see in parties proceeding with Arbitration as opposed to litigation?

In arbitration, parties' cases definitively receive attention, which is not attention from just anyone, but attention from experts in the topic of the dispute. This is particularly important when the dispute is highly technical and in countries, like those in Latin America, in which state courts were overworked before the pandemic and which are now buried under tons of files. This takes me to another of the perks of arbitration -- time efficiency. In arbitration, there is only one instance, and parties get a final award to which they have committed to comply with and is subject to recognitions and enforcement; while in litigation there are many instances and resources available to the parties that can make a proceeding long and exhausting.

G. What would be one thing you like to see change in the field of Intl Arbitration?

What I would like to see in International Arbitration is more arbitration agreements entered into.

There are undefeatable reasons to maintain that arbitration is the most adequate and efficient dispute settlement mechanism in most of the commercial disputes. However, the number of parties that agree to arbitration is really low. Why? I do not know. I just know that we should do something to promote it at a greater scale.

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