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#YOUNGITATALKS MENA
A COMMENTARY ON YOUNG ITA AT DUBAI ARBITRATION WEEK

by Thomas Parkin

I. INTRODUCTION

Young ITA held an "Ask the Arbitrator" panel event on November 16, 2022 as part of the Dubai Arbitration Week. The event was organized by Jennifer Paterson of K&L Gates and moderated by Robert Landicho of Vinson & Elkins. Four leading practitioners who regularly act as both counsel and arbitrators in international arbitrations were invited to put on their "arbitrator hats" and answer intriguing questions about how arbitrators think, how they tackle difficult issues, and what arbitration counsel can do to best represent their client while being helpful to the tribunal.

Jonathan Sutcliffe, Reshma Oogorah, Rupert Choat KC and Ann Ryan Robertson gave some invaluable insights on how to navigate the arbitration process and highlighted the importance of being a helpful and effective counsel. The event was a fantastic opportunity to learn from some of the most accomplished experts in the field and gain a deeper understanding of the mind of an arbitrator.

II. THE PANEL COMPRISED OF FOUR SEASONED ARBITRATION PRACTITIONERS WITH EXTENSIVE EXPERIENCE IN THE MIDDLE EAST

Attendees had a chance to hear from Jonathan Sutcliffe, a partner at K&L Gates based in the Dubai office and a member of the international arbitration practice group. He is dual-qualified in England and Wales and New York, and previously practiced in London, New York, Houston, and Texas. Jonathan has established himself as an expert in disputes and arbitration in the Middle East, and his expertise is highly sought-after. He regularly sits as an arbitrator under a range of institutional rules and in ad hoc arbitrations, and his exceptional track record in this field speaks volumes about his skills and abilities.

Reshma Oogorah joined the panel discussion to share her experience as an international arbitrator and legal counsel with over a decade of experience in high-value and complex commercial disputes. She is qualified as a barrister and solicitor

and is registered in Mauritius, England and Wales, and the United Arab Emirates. Prior to setting up her own practice, Niyom Legal in the United Arab Emirates, Reshma worked at leading law firms in the Middle East and Mauritius, and a leading barristers' chambers in London.

Her extensive knowledge of the legal systems in these regions makes her a highly sought-after arbitrator: she regularly sits as arbitrator in a range of institutional and ad hoc arbitrations.

Rupert Choat KC of Atkin Chambers is a barrister and arbitrator specializing in complex construction, engineering, PFI/PPP and energy disputes. With extensive experience handling disputes concerning projects across more than 50 jurisdictions globally, Rupert has established himself as a go-to expert in these industries, particularly in the Middle East. He sits as arbitrator in institutional and ad hoc arbitrations, and on disputes boards. He also teaches in the master's program of Construction Law and Dispute Resolution at King's College, London.

Finally, Ann Ryan Robertson, a partner at Locke Lord LLP in Houston, brings extensive experience to the panel as an international arbitration practitioner. She has acted as chair, wing, sole, and emergency arbitrator in a variety of cases involving oil and gas, manufacturing, sales, buy-sell agreements, and insurance disputes. She also represents clients as counsel in complex business disputes across a wide range of industries.

III. PANELISTS ENGAGE IN LIVELY DEBATE ON HOT TOPICS IN INTERNATIONAL ARBITRATION

The discussion revolved around questions from the audience on a range of topics of interest to international arbitration practitioners, and provoked lively debate among the panelists.

A. *Qualities of a Tribunal Chair*

The first question asked about the qualities sought in a tribunal chair where co-arbitrators are tasked with appointing a presiding arbitrator. The panelists noted that arbitrators' reputation could be affected by poor procedural management or the ultimate failure to issue an enforceable award. Therefore, co-arbitrators are incentivized to appoint a skilled and competent chair. Besides the obvious technical

and organizational skills, the panelists raised a number of other considerations: the increasing importance of technological familiarity, particularly with regard to virtual hearings, electronic bundles, and electronic presentation of evidence. They also noted the importance of cultural awareness and diversity, particularly where the parties, counsel, and the tribunal come from different parts of the world and with different legal traditions. Lastly, the panelists emphasized the importance of diversity as a desideratum in itself and as a proven technique to ensure better quality decision making.

Competence and sound judgment are naturally important characteristics for an arbitrator and in particular for the presiding arbitrator. It is difficult to easily quantify these skills, as a result, arbitrators tend to rely on their reputation to secure appointments. Co-arbitrators are incentivized to appoint a tribunal chair who can manage the arbitral procedure fairly and competently. Although it is common for the tribunal chair to take the lead in managing proceedings, tribunal's the tribunal's conduct is difficult to attribute to a particular member. Therefore, failings by the tribunal chair "behind the scenes" may reflect poorly on all members.

The author agrees with the panel's comments regarding the importance of managerial and, to an extent, technological competence for the tribunal chair. In principle, much of a tribunal's administrative work can be delegated to a tech-savvy tribunal secretary. However, experience suggests that the most efficient and cost-effective way to administer an arbitration is by appointing a competent and engaged tribunal chair with a firm grip on proceedings.

B. Document Production and Disclosure

Document production and disclosure are often a thorny issue in international arbitration, particularly where parties or counsel hail from jurisdictions with different fundamental approaches. It was observed that the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules) are often used as a framework for document production, being either explicitly referred to by the tribunal or in substance underpinning the procedure which the tribunal orders. However, other systems for document production are available, such as the Prague

Rules, which provide an alternative framework for rules of evidence, which may be adopted in arbitration, with a focus on inquisitorial-style proceedings and minimal document production.

Where document production is contentious, members of the panel said that there is a case to be made for erring in favor of allowing disclosure. This is to ensure that parties cannot argue that they have not had the chance to have their case properly heard (where document production is in some circumstances essential for one party to advance their case), and because it can, even if uncommonly, produce pivotal evidence.

It is certainly correct that practitioners from different legal backgrounds may have a different perspective on the concept of disclosure and the extent to which it should be employed. However, experienced international arbitrators, despite their background, usually tend to adapt well to the concept and typically adopt an approach which is more generous than that of a typical civil law court, though less extensive than that of a British or American common law court. While the panel addressed contested disclosure requests through the lens of whether or not to order document production, they did not address the arguably more difficult situation where one party discloses documents pursuant to the tribunal's order, and the other party argues forcefully that disclosure is incomplete and that material is being (deliberately or otherwise) withheld. This situation may potentially be even more challenging for a tribunal, as they lack the authority and powers of a national court. Obtaining satisfactory disclosure from an unscrupulous opposing party can be a frustrating experience for many practitioners.

C. Guerrilla Tactics

Moving on to another topic discussed by the delegates, "guerrilla" tactics are commonly used to delay or derail arbitration. They may be more or less transparent, but it is critical for the tribunal to ensure that the arbitral procedure is sufficiently thorough and meticulously recorded. Ultimately, such tactics may "poison the well" by affecting the credibility of a party that employs them and be taken into account in the allocation of costs.

The panelists observed that the proper way for a tribunal to counter guerrilla tactics is to strictly comply with the relevant arbitration law and institutional rules where applicable. This helps to avoid opening the door to further grounds of challenge. In the short term, this can unfortunately play into the hands of the "guerrillas", in absorbing time and inflicting cost on the other party, such as the thorough hearing of a spurious jurisdictional challenge. However, the panel observed that in the end, guerrilla tactics usually do not ultimately benefit those employing them and are more likely to harm or hinder their prospects in a final award.

D. Expert Evidence

The panel next moved to discuss expert evidence and provided guidance on what they consider beneficial in expert reports and particularly joint expert reports. There was a strong preference expressed by the panelists for short, properly referenced joint reports set out in tabular form. They also recommended that (where applicable) experts opining on quantum issues should provide an Excel spreadsheet with easily identifiable formulae that allows the tribunal to input their own numbers and dates to perform their own calculations, such as for interest claims. One key consideration, often overlooked in arbitration, is the value of ensuring that experts are dealing with the same issues. An agreed list of issues developed at an early stage can serve to channel the discussion. The panel also remarked that there is value in ordering the experts to deal not just with their own assumed set of facts but also with their counterpart's assumed set of facts.

On this subject, the panel referred to a common issue encountered in international arbitrations where the parties instruct independent experts whose reports address quite different issues. This is less common where the arbitral procedure calls for memorial-style pleadings where the respondent's expert report(s) will necessarily respond to those of the claimant. However, it frequently occurs that the tribunal adopts a common law-style procedure, and the parties simultaneously exchange expert reports that barely correspond with each other. This practice is unhelpful to the tribunal and sometimes results in additional costs or delays as the parties request additional rounds of expert evidence to deal properly with the issues

raised. The problem is that arbitrations sometimes adopt the basic sequence of a common law court, without any order as to the questions that experts should seek to answer. It is standard practice for parties to disclose the number, identity, and disciplines of the experts they will call on in advance, and in many cases the issues in dispute are evident from the parties' respective pleadings. Therefore, in principle it should be entirely possible to agree or set the issues for experts to address in advance in these cases. However, this is a step often omitted by tribunals (and, in fairness, in many cases it may not be requested or argued for by the parties).

E. Virtual and In-Person Hearings

Before concluding the discussion, the panel also discussed virtual hearings, which are here to stay in some form or another. Members of the panel expressed support for, ideally, having the tribunal together in the same room in person to establish better cooperation and interpersonal dynamics between the arbitrators. This militates in favor of in-person hearings or a hybrid model, depending on the circumstances.

The panel considered that having people in the same physical space tends to result in better communication and better teamwork. However, this does not necessarily prevent a tribunal from forming a strong working relationship without ever meeting in person, as was the case in numerous arbitrations during the COVID-19 pandemic. Subjecting a witness or expert to cross-examination is also often better done in person, face to face, to allow the tribunal the best possible opportunity to consider their responses and credibility. Few would argue that there are not (at least in principle) some benefits to holding substantive proceedings in person. It is harder to make a case for anodyne case management conferences, procedural hearings, and such to be held in person, with the attendant cost and inconvenience. The debate is likely to focus on whether it is appropriate for major hearings to be held wholly in person or whether, and to what extent, some hybrid element should be adopted, and this is often a question of proportionality (and sometimes tactics) to be considered on a case-by-case basis.

The panel discussion shed light on some of the most pertinent issues faced by

practitioners and arbitrators in the field of international arbitration. From the challenges posed by guerrilla tactics and document disclosure to the increasing prevalence of virtual hearings, the discussion highlighted the need for arbitrators to remain vigilant and adaptable in order to navigate these issues effectively. While there may be no one-size-fits-all solution, the panel's insights provide valuable guidance for practitioners seeking to optimize their strategies and procedures in international arbitration.

THOMAS PARKIN is an associate in the international arbitration and dispute resolution team of K&L Gates LLP's Dubai office. Thomas is experienced in representing high profile corporate clients in complex, high value, and often multi-jurisdictional disputes in the Middle East and internationally, with a particular focus on international arbitration and commercial litigation.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a

free subscription to ITA's quarterly law journal, World Arbitration and Mediation Review, a free subscription to ITA's quarterly newsletter, News and Notes, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to ITA's World Arbitration and Mediation Review, a law journal edited by ITA's Board of Editors and published in four

issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

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