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TRENDS AND DEVELOPMENTS IN INTERNATIONAL ARBITRATION

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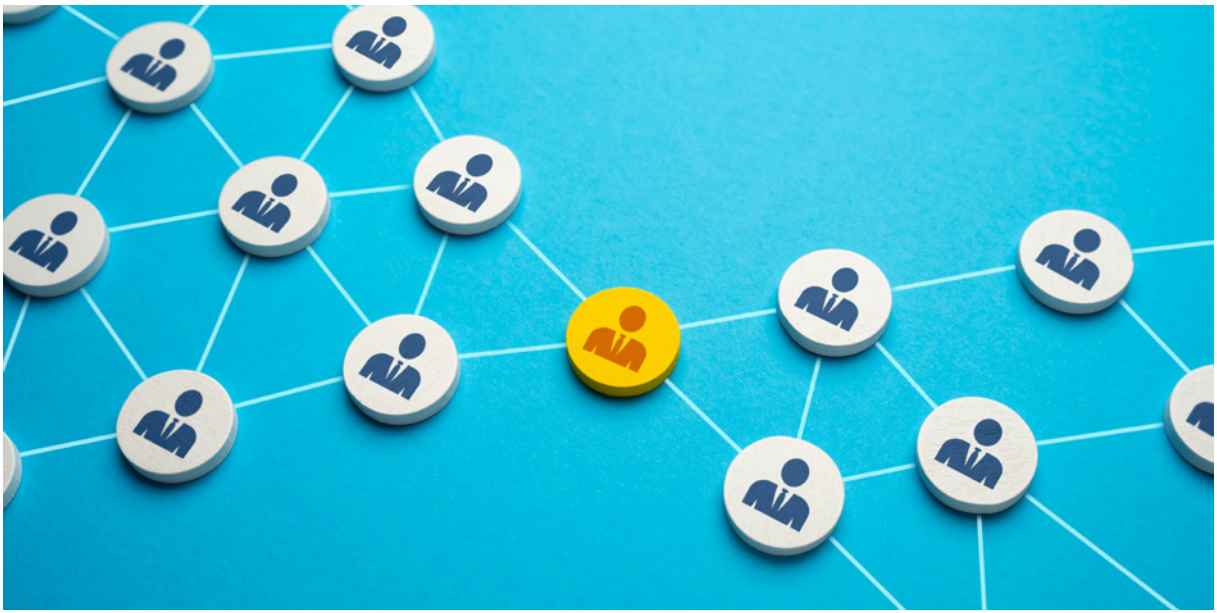
HOT TOPIC

TRENDS AND DEVELOPMENTS IN INTERNATIONAL ARBITRATION



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Jeff Isler is the global lead of graphics for FTI Consulting's Trial & Arbitration Support practice and has been helping both attorneys and corporate clients to present more persuasive arguments for more than 40 years. He also addresses a broad range of applications including regulatory responses and appeals for investment capital – delivering solutions across platforms and media types.

CD: In your opinion, what key developments have dominated the international arbitration space over the past 12 months or so? Have you noted any sector-specific trends, for example?

Rubinstein: I have noticed several developments in international arbitration. First, the enforcement of arbitral awards. This issue continues to attract significant attention, particularly with respect to enforcement of arbitral awards against states in light of ongoing developments in the European Union (EU) with respect to enforceability of intra-EU arbitration agreements. Second, climate change and energy transition disputes. Arbitral institutions are developing rules and protocols to address the specific needs of these disputes, and early landmark cases will shape the future of climate change arbitration. Third, alternative energy disputes. We are seeing an increase in disputes involving alternative energy sources, including hydrogen and renewables, as well as precious minerals such as lithium that are essential to energy storage technology. Fourth, a push for transparency and disclosure. The new United Nations Commission on International Trade Law Code of Conduct for arbitrators in international investment dispute resolution and the revised International Bar Association Guidelines on conflicts of interest will continue to keep arbitrator independence and impartiality in the spotlight. Lastly, artificial intelligence (AI). There also is significant focus on the opportunities and risks of using generative AI (GenAI) in arbitration.

> **"One of the challenges that AI will face in its application to international arbitration is the inability to understand exactly how AI works."**
>
> *Javier H. Rubinstein, Rubinstein ADR, LLC*

Johnson: After a slowdown during the coronavirus (COVID-19) pandemic and its immediate aftermath, there has been a dramatic increase in construction projects, particularly in the Middle East. Construction-related disputes are often resolved through the arbitration process. With the number of projects and associated deadlines and funding in the marketplace, we could see an increase in construction-related arbitration hearings over the next several years.

Schwartz: Certainly, energy transition and climate change have to be at the top of the list of sector trends affecting international arbitration, perhaps closely followed by AI and environmental, social and governance (ESG). The shift away from fossil fuels and the development of new sources of energy for a warming but still power-hungry planet will spin off an uncountable number of novel disputes, from deep-sea mining rights to cleaning up decommissioned energy facilities. Balancing the needs and responsibilities of the developed world that benefitted from centuries of carbon-intensive energy use, and newer economies that contributed far less to global climate change, will be a key part of international arbitration for decades to come.

Page: The international arbitration landscape has evolved significantly over the past year and will continue to do so, with GenAI technology, the rise of regional arbitration centres, diversity initiatives and sustainability taking centre stage. The geopolitical instability of the post-COVID-19 world is driving a greater need for arbitration, highlighted by sector-specific trends within a broader economic shift that contribute to increased diversity in the nature of arbitration cases. These developments will trigger the evolution of a dynamic and adaptive arbitration community that is poised to address the complex disputes of a rapidly changing world.

> **"Demonstrative graphics have the potential to be an immensely persuasive tool, when thoughtfully and responsibly incorporated into arbitral presentations."**
>
> *Jeff Isler,*
> *FTI Consulting, Inc.*

CD: The use of graphics and demonstratives tends to be discouraged at arbitration tribunals, compared with US courtrooms. Is that changing and are there other key differences between these venues?

Johnson: In my experience, demonstratives were typically used for opening statements and, where applicable, closing arguments. In addition, both liability and quantum experts are utilised when presenting opinions to the panel. For example, in two separate international arbitration hearings that involved complex products with manufacturing,

design and intellectual property issues, demonstrative evidence was used during expert testimony, including 3D models and animations to highlight the components at issue. These graphics successfully assisted the panel in understanding the operation and function of the product and their appreciation of the relevant components.

Page: The use of graphics and demonstratives in arbitration tribunals is indeed evolving, although traditionally it has been less common than in US courtrooms. While the use of graphics and demonstratives has been less prevalent in arbitration compared to US courtrooms where juries are utilised, there is still a need for better graphical media usage in hearing rooms. As visual communication becomes more widely recognised there will be an upward trend of engagement by dispute firms. We are starting to see hearings influenced by technological advancements and cross-border practices. However, the fundamental differences in formality, evidence presentation, decision making, confidentiality, and cultural influences between arbitration tribunals and US courtrooms remain.

Rubinstein: There is a need for the use of graphics and demonstrative evidence in arbitration, although their uses often are quite different compared to litigation in US courts, particularly litigation that is to be decided by jury. Graphics and demonstratives often are needed in jury cases to help lay jurors understand complex concepts in areas where they lack previous experience. While arbitrations are decided by arbitrators selected based on their experience and ability to understand the issues in dispute, demonstrative evidence, such as well-designed timelines or summaries, still can be quite valuable for arbitrators, especially in fact-intensive cases where effective demonstratives can assist the tribunal in analysing significant volumes of evidence and data. To be effective, the graphics and demonstratives should be tailored to reflect the background and experience of the arbitrators.

"We should not rely solely on good intentions to achieve diversity goals, but rather put into place new processes such as blind evaluations to minimise the effect of unconscious bias on hiring decisions."

Steve Schwartz, FTI Consulting, Inc.

Isler: Demonstrative evidence is generally underutilised in international arbitration. I suspect greater fluency with basic visual language would lead to much greater adoption. Demonstrative graphics are just the same as language. While either can be used to communicate complex ideas and information in understandable terms, both are capable of much more. Depending on the choices made, either can be used to inform, persuade or mislead. Demonstrative graphics have the potential to be an immensely persuasive tool, when thoughtfully and responsibly incorporated into arbitral presentations.

CD: What are some of the key attributes and qualities you look for in a firm that is engaged to support the trial and arbitration process?

Schwartz: Counsel outside the US have been exposed to US-based consultants who are trained in the US market to be highly skilled in presentation, which has elevated their expectations for arbitration services. As a result, they are now demanding a higher level of presentation skill set, ensuring that arguments are not only well-founded but also compellingly delivered. Additionally, there is a growing insistence on more personalised and responsive service, tailored to the specific needs and preferences of each client.

Rubinstein: I look for a firm that is creative in suggesting ideas on how to present complex concepts in the most effective way. It also is important that the firm be flexible in accommodating the preferences of the legal team as to how they wish to present the case to the tribunal. For example, the firm should be able to organise and store exhibits using the method preferred by counsel or the tribunal, rather than forcing the parties and the tribunal to adjust their approach to meet the preferences of a firm that is asked to support the arbitration process.

CD: How is technology, such as online dispute resolution platforms and artificial intelligence, reshaping the landscape of international arbitration? What benefits and challenges does technology present in streamlining dispute resolution processes and ensuring fairness and efficiency?

Page: Technology is reshaping international arbitration by enhancing efficiency, reducing costs and increasing accessibility. AI offers significant benefits in streamlining dispute resolution processes. It can also provide quicker access to information that might be missed, overlooked or found late through traditional methods and is already providing services in electronic hearing platforms such as

data analytics, document summarisation, speech-to-text transcripts, document auto linking and entity detection. However, technology also presents challenges related to bias, hallucinations, cyber security and regulatory considerations. Balancing the advantages of technology with these challenges is essential in the evolving landscape of international arbitration.

Rubinstein: Technology is already transforming the way in which disputes are being resolved through international arbitration. Video platforms have enabled international arbitrations to be conducted on a virtual or hybrid basis. In addition, the advent of electronic bundles has enabled cases to be presented without the massive volume of paper that traditionally was required. It is likely that AI will provide additional innovations to support the arbitration process. Yet, it is too early to say exactly how AI will impact the international arbitration landscape. One of the challenges that AI will face in its application to international arbitration is the inability to understand exactly how AI works. As a 'black box', it may be difficult for arbitrators and parties to rely on the accuracy and reliability of GenAI tools.

CD: In an era of growing environmental and social awareness, how are international arbitration practices adapting to address disputes arising from environmental regulations, sustainability initiatives and corporate social responsibility obligations?

Johnson: The global pandemic changed many paradigms and international arbitration was not left unaffected. When lockdowns went in place, hearings shifted to the virtual landscape. Hearings had to be conducted exclusively via remote platforms and with the use of electronic evidence. When these virtual hearings began out of necessity in the summer of 2020, there was scepticism that fully virtual hearings could be heard and adjudicated effectively. However, it became apparent that, if managed properly, virtual hearings could be effective and a close substitute to in-person hearings. Firms and corporations learned that witnesses could effectively testify virtually. In addition, virtual hearings allow more spectators to the hearing, such as in-house counsel, additional attorneys and expert witnesses, who might not have otherwise travelled to the hearing venue. Coincidentally, this shift contributed to ESG in international arbitration. Most, if not all, in-person hearings over the last few years have had a virtual component, whether it be remote testimony, a remote panel member or remote counsel. This results in fewer people physically at the hearing, thereby reducing travel and its associated carbon footprint.

> **"It is incumbent upon current international arbitration stakeholders to ensure they are doing their part in deepening the bench of future stakeholders by contributing to their organisations' ERG initiatives."**
>
> *Jamey Johnson, FTI Consulting, Inc.*

Rubinstein: ESG is significantly impacting international arbitration practices in many ways. This is perhaps best exemplified through the ongoing 'Campaign for Greener Arbitrations', which calls upon arbitration practitioners to pledge that they will commit to undertaking practices that minimise the environmental impact of international arbitration proceedings. Examples of such practices include the minimisation of travel for hearings, the use of videoconferencing for hearings and the reliance on

electronic evidence and presentation platforms in order to reduce the use of paper.

CD: Third-party funding has emerged as a common practice in financing arbitration proceedings, especially for parties with limited resources. What impact do you believe third-party funding has on the dynamics of arbitration, including issues related to transparency, conflicts of interest and the potential for frivolous claims?

Rubinstein: Third-party funding is indeed now a part of the international arbitration ecosystem. It has enabled parties to bring international arbitration proceedings that they otherwise could not afford financially to bring, which is more and more prevalent as the cost of international arbitration has continued to increase. I do not see third-party funding as causing an increase in frivolous claims because funders are incentivised only to fund cases that they believe are likely to be successful. One of the challenges with third-party funding in the context of international arbitration is how to deal with the issue of security for costs. If a claimant commences an arbitration and does not have the financial wherewithal to pay an award of adverse costs, thereby utilising a third-party funder, the question often will arise as to whether the third-party funder should be required to post security for costs, even though the funder is not a party to the arbitration agreement.

Johnson: By way of example, in two significant international arbitration hearings that involved third-party funding and expropriation of mines, the party funded by the third party prevailed in both cases, one of which resulting in a multibillion-dollar award. Though these were certainly not frivolous claims, the presence of a third party can affect the dynamic. It is the third party's investment that is at a stake, and this can an add a layer of complexity to the typical counsel-client relationship when making strategic decisions.

> **"Technology is reshaping international arbitration by enhancing efficiency, reducing costs and increasing accessibility."**
>
> *Rich Page,*
> *FTI Consulting, Inc.*

CD: The arbitration community has increasingly recognised the importance of diversity and inclusion (D&I) in ensuring the integrity and legitimacy of arbitration proceedings. How do you assess the current state of D&I in international arbitration, and what steps can stakeholders take to promote greater representation of women, minorities and underrepresented groups in arbitrator appointments and leadership roles?

Schwartz: It is important to recognise the role that unconscious bias plays in shaping what organisations look like. We should not rely solely on good intentions to achieve diversity goals, but rather put into place new processes such as blind evaluations to minimise the effect of unconscious bias on hiring decisions. At the end of the day, international arbitration is about achieving a just and fair outcome, so it is incumbent upon the participants to promote justice and fairness by promoting greater representation by women and other minority groups that reflect the makeup of the global population.

Isler: I have watched expanding diversity, particularly among the international arbitration attorney teams in US firms, and enjoyed the energy and creativity that comes along. A diverse class of attorneys will, I hope, lead to a diverse generation of arbitrators.

Rubinstein: The arbitration community has made progress in addressing diversity and inclusion (D&I). However, there is much more to be done in order to ensure the greater representation of women, minorities and underrepresented groups. To achieve further progress, it is vital that parties and arbitral institutions alike take shared responsibility in the promotion of D&I. Regardless of whether an appointment is made by a party or an institution, there should be a commitment to ensure that the list of potential arbitrators is at least half diverse, whether by gender, national origin or other underrepresented characteristics. This will only be achieved if the arbitration community as a whole accepts the responsibility for achieving additional and meaningful change of their arbitrator appointment practices.

Johnson: Increased D&I is important to the international arbitration industry because people have different views based on their background, education and life experience. Everyone seeking a resolution through the international arbitration process will feel more confident in its legitimacy if they see a diverse representation from various stakeholders, rather than a monolithic population that may not reflect their own culture or identity.

Nearly every large company and law firm these days has employee resource groups (ERGs) that provide networking and support for various historically underrepresented populations within the organisation. It is incumbent upon current international arbitration stakeholders to ensure they are doing their part in deepening the bench of future stakeholders by contributing to their organisations' ERG initiatives, being an ally, identifying promising candidates within these groups, and supporting or mentoring them.

CD: As the field of international arbitration continues to evolve, how can academic institutions and professional organisations better prepare the next generation of arbitration practitioners and arbitrators? What skills, knowledge and experiences are essential for aspiring arbitration professionals to succeed in today's competitive and dynamic environment?

Isler: In my experience, advocacy training is hugely helpful, but mostly provided while practicing, often by the law firms themselves. As such, that training varies widely. The same law and facts can be used to build many different cases, like bricks in a wall. Advocacy training is fundamental to building a winning case.

Rubinstein: As the field of international arbitration has grown over the past 25 years, so has the evolution of accepted practices and standards for the conduct of international arbitration. In order to train future participants in international arbitration, it is vital they be trained in the fundamental skills and practices that are needed to be successful, regardless of where those participants come from. This includes not only education on the laws applicable to international arbitration proceedings, but training in the oral and written advocacy skills that are needed to be successful. Presently, the degree of training available in countries around the world varies significantly. Future practitioners also should try to work in multiple jurisdictions to better understand the many legal traditions that typically come into play in international arbitration. CD