

3 International Arbitration Trends To Watch In 2018

By **Caroline Simson**

Law360, New York (January 1, 2018, 3:04 PM EST) -- The last 12 months have been a busy time for arbitral institutions and practitioners alike when tackling issues like the future of investor-state arbitration, third-party funding and gender diversity, and experts say they're expecting these trends to continue to take shape in 2018 and beyond. Here are three trends you need to know about for 2018.

Increased Legitimization of Third-Party Funding

Third-party funding in international arbitration has really begun to gain in popularity in the last few years, and in 2017 a number of developments made it clear that the issue will continue to be a hot topic in 2018 and beyond.

Hong Kong passed legislation in June clarifying that third-party funding of arbitration is legal, following on the heels of Singapore, which passed similar legislation in January. The decisions represent significant steps given the importance of those jurisdictions to international arbitration, and the fact that they had traditionally frowned upon litigation and arbitration funding agreements over ethical and other concerns.

Practitioners say this is only the beginning of a movement toward greater acceptance of third-party funding in international arbitration as it becomes more widespread.

"It's an idea that is gaining breadth across the spectrum of the international business community. It's not merely small companies that don't have the wherewithal to assert what otherwise are meritorious claims," said Charles C. Adams Jr., the worldwide head of Orrick Herrington & Sutcliffe LLP's international arbitration practice group.

But the questions raised by third-party funding arrangements remain a concern. Earlier this year, an International Council for Commercial Arbitration task force in collaboration with the Queen Mary University of London released its draft report on third-party funding in international arbitration.

Issues expected to be addressed in a final version of the report relate to disclosure and conflicts of interest, whether third-party funding affects access to justice and whether it increases the number of frivolous claims.

But even with these concerns, practitioners say it's clear that jurisdictions looking to become or remain

international arbitration hubs will have to make clear their position on third-party funding, according to Adams.

"It's driven by the fact that international arbitration is big business," he said. "Places that want to get their piece of the action have to make sure that economic realities are recognized ... and that there's no disincentives to arbitration in the particular venue. That's why third-party funding is increasingly legitimized and unchallenged."

Increased Focus on Diversity

Although the world of international arbitration has long been dominated by men, the last few years have seen a change in attitude, and experts say they fully expect this trend to continue into 2018.

Efforts have been made to draw attention to the issue for years, but 2016 was a banner year for gender diversity in the field. That May, the Equal Representation in Arbitration Pledge was officially launched in London, shining possibly the brightest spotlight yet on the severe gender imbalance affecting the practice and the disproportionately low number of female arbitrators.

Now, institutions, law firms and others have all begun taking real steps to address the issue.

Whereas even just a few years ago it was difficult to get statistics from institutions on women arbitrators, numbers released in 2015 and 2016 by many institutions show more women arbitrators are being appointed.

"There really is a change of attitude," said Vanessa Liborio, an international arbitration partner in Orrick's Geneva office. "You see a lot of [older] arbitrators who are proposing women as co-arbitrators or as a chairwoman, and they are proud ... [to] embrace this cause, which seemed to be impossible four or five years ago."

And it's not just gender diversity that's getting increasing attention. There's also increased focus on age and cultural diversity.

"I'm thrilled to see, more and more these days, serious attention being paid to including young people and particularly to honoring the pledge," said Arent Fox LLP partner Hunter T. Carter. "You see a lot of talk about inclusion, and going beyond that, you see it actually happening. You see more lead counsel who are women, who are extraordinary. ... I do feel like we may be moving away from the time when it was an old white European boys' club. We have a ways to go, but it's clearly a theme."

Continuing Debate on Investor-State Arbitration

The election of President Donald Trump and the decision for the United Kingdom to leave the European Union in 2016 encapsulated a nationalist movement that continued throughout 2017, and the debate over investor-state arbitration has become a noteworthy component of this movement.

The backlash against investor-state dispute settlement, or ISDS, has been going on in Europe and other places like Australia for several years, with critics blasting the system of "secret" courts of unaccountable and unelected arbitrators, who they say can issue potentially multibillion-dollar judgments against countries for hurting a company's profits. This criticism, along with a number of adverse judgments, has caused countries like Ecuador, South Africa, Indonesia and India to either

terminate or re-evaluate their bilateral investment treaties, the vast majority of which contain arbitration clauses.

Simultaneously, however, it's prompted others to look to reform. The European Commission in recent years has floated the idea of an "investor court" with elected judges and an appeal mechanism and has continued to push the proposal throughout 2017. In September, the EC asked the European Council to authorize the opening of negotiations for a convention establishing a multilateral investment court.

And while Europe moves toward a more modernized form of ISDS, it was in 2017 that — arguably for the first time — movement could be seen within the U.S. away from ISDS.

In ongoing renegotiations for the North American Free Trade Agreement, the U.S. has pushed for an opt-in mechanism for the ISDS chapter. It's not clear what this would mean, though experts have speculated that the U.S. would then opt out, so that Canadian and Mexican investors could not bring claims against the U.S.

And within the new administration, there doesn't seem to be much support for protecting American companies abroad. U.S. Trade Representative Robert Lighthizer has suggested in recent months that investor-state arbitration is essentially a government-supported means of encouraging domestic companies to spend their money outside the U.S.

Caroline Richard of Freshfields Bruckhaus Deringer LLP told Law360 that this reaction to globalization and rethinking of ISDS can be summed up using the topic of a talk she recently gave in Canada, "Rejection, Renewal and Reform." Despite the news of BITs being terminated and NAFTA being on the rocks, there continue to be many new BITs and other investment treaties being signed, such as those being signed by China and by certain African countries that view ISDS as a means for encouraging investment.

"The question is which of those two trends is going to prevail," she said. "I think the retreat from multilateralism ... is not likely to be a long-lived or very successful strategy in the long term."

--Editing by Brian Baresch and Katherine Rautenberg.