MEALEY'S®
International Arbitration Report

Interview: JAMS Arbitrator Dr. Anton G. Maurer Discusses Past, Future Of International Dispute Resolution

By
Dr. Anton G. Maurer

JAMS
New York, NY

A commentary article reprinted from the May 2024 issue of Mealey's International Arbitration Report

LexisNexis®

Commentary

Interview: JAMS Arbitrator Dr. Anton G. Maurer Discusses Past, Future Of International Dispute Resolution

[Editor's note: Dr. Anton G. Maurer, LL.M., FCIArb, is an arbitrator with JAMS who has decades of experience in international law. He worked for one year as a foreign attorney in Dallas, spent in total more than 14 years in the United States negotiating commercial, M&A, IP and financial agreements, attending board of directors meetings and in litigation and arbitration cases. His profile can be found at https://www.jamsadr.com/maurer/.]

Mealey's International Arbitration Report spoke with Dr. Anton G. Maurer about his professional background and the past and future of international arbitration resolution.

Mealey's: How did you first become involved in international arbitration?

Maurer: After I was working as a foreign lawyer in Dallas, Texas, I was asked by an Indian company to enforce an arbitral award in Germany. And then in 1990, I did as counsel — together with an Indian barrister — my first big arbitration under Indian law in India with Indian arbitrators. It was the best bench I've ever seen in my life. It was long, under the old Indian Arbitration Act, so we had cross-examinations for five days; thereafter, we pleaded for 10 full days, morning and afternoon, rebuttal was for 15 days, and we could respond for up to five days. So, I learned a lot of my arbitration skills by this arbitration in India under Indian law, and this was the start of my arbitration career. Later, I additionally attended many courses and seminars and lectured on international commercial arbitration in Asia, Europe and the United States.

I was a commercial lawyer and spent about 80% of my time negotiating international commercial agreements or serving as a board member with companies in the U.S., Switzerland and Germany and about 20% of my time on international litigation or international arbitration. I was a partner for 34 years with CMS Hasche Sigle in Germany. I retired from there in 2016.

For the past seven years, I have basically concentrated on international commercial arbitration. I am also interested in mediation, but predominantly I work in arbitration. I am home-based in Stuttgart, Germany, have a small office in St. Moritz, Switzerland, and am a neutral with JAMS in the New York Dispute Resolution Center.

Mealey's: Were you personally interested in this area of law, or did you just follow your clients into it?

Maurer: I was always interested in international law; therefore, I did my Ph.D. in public international law. I always had a professional interest in ADR [alternate dispute resolution] and in international litigation.

When I did counsel work, it was often related to contracts I had negotiated for clients. I think it's very beneficial for a commercial lawyer to serve also as counsel or as an arbitrator in an international arbitration because you have the opportunity to learn from the mistakes of others. You can see how people were not fully thinking through formulations in contracts and how that may have contributed to a subsequent dispute that could easily have been avoided by drafting the relevant clause better.

I agree that most international contracts, as Prof. [Jeswald] Salacuse [of The Fletcher School at Tufts University] said, are drafted in broken English. Es-

pecially when the parties negotiate their agreements without any legal help, or when they are negotiated by lawyers who do not have a lot of international experience.

Mealeys: In the past, you have written articles including, "How International Commercial Arbitration Can Be More Efficient, Speedier, and Less Costly." In general, how important do you think it is to try to expedite international arbitrations?

Maurer: I think arbitrations could be quicker and thereby they would also be less expensive because if you look at the costs of arbitration, it is predominantly related to counsel work, not arbitrators' fees. Counsel spend a lot of time on depositions, or discovery requests, review of documents and drafting briefs, and they usually demand more time than they would have in court litigation, where you have generally shorter fixed terms to respond.

I recall recently an ICC [International Chamber of Commerce] arbitration where the two parties had agreed that after discovery of documents each side would have three full months for each of the briefs, and they had agreed on two rounds of briefs. The arbitrators are bound to follow the agreement of the parties because otherwise the award could be set aside. You may encourage them to do it quicker, but you do not have the power to say no, it's four or six weeks, if they want to have 12 weeks. Yes, arbitrations could be done quicker by reducing the timeframe for discovery or depositions, or for rounds of briefs or memorials.

Mealey's: Is there a realistic chance that these sorts of changes could be implemented broadly? Some arbitrations seem to go on for exceedingly long periods.

Maurer: You may be relating to very exceptional cases, but I would still say that even with very lengthy briefs, generally, the duration of the arbitration proceeding is shorter to the final award than litigation would be if one of the parties were to file for an appeal. We don't have to only look to countries like the United States, India or Brazil to see this — in many countries, the full litigation process takes a long time.

And then, you have the problems that judgments are often not enforceable abroad. There are not many Conventions except in Europe, or enforcement is based on reciprocity. A few years ago, I was involved in helping an American making a judgment from the federal court in Florida enforceable in Germany, but even that took some time and was quite expensive because the court fees in Germany are based on the amount due involved in the judgment.

Mealey's: There has been some criticism of the United States' involvement in international arbitration. On April 15, 2024, more than 300 professors signed a letter calling on the United States to withdraw from investor-state arbitration agreements[1], which they say improperly privilege foreign investors. Do you have any opinion on the validity of these criticisms?

Maurer: I do not agree that bilateral investment treaties or treaties between the foreign investor and the host state privilege foreign investors. And statistically, host states win more investor-state arbitrations than they lose. I think people who think state-investor disputes should not be arbitrated in a neutral forum, but by litigation in the host state, don't understand why foreign investors do not want to litigate in front of the national courts of the host state whose government violated the investment treaty or public international law or who illegally confiscated property without any compensation, etc. Because even in international commercial litigation, we can sometimes find home court bias. And what do we expect in front of the courts of the country who breached its contract with an investor who has to litigate his damages in the home state's courts?

In Germany, state-investor arbitration is unpopular since the government changed its policy and terminated or closed all nuclear power plants, and then the operator sued Germany because no compensation was offered. A country can change its laws and order the closure of nuclear power plants, but then it must pay damages.

It is true that sometimes the damages awarded which were based on the prospective future profits may be too high. There one could think that damages should be calculated differently. My position would be more inclined to say the investor should get back what he has invested and lost, but they should not be entitled to future profits, which are not certain at all, but

rather a prognosis for future earnings. But to abolish investor-state disputes dispute resolution in a neutral place by neutral arbitrators is not wise if one wants to encourage foreign investments. If you want to say, "No foreign investments anymore," then you don't need investor-state arbitration anymore.

Mealey's: Are there any cases of note or areas where arbitration is happening that you're watching with interest to see how they're developing?

Maurer: In terms of substantive issues, it's very hard to say because most commercial arbitrations are still confidential and many parties still object to the publication of even anonymized awards. So it is hard to say what's going on in post mergers and acquisition, intellectual property or energy arbitrations except what is said in conferences.

But if I look to the procedural aspects, then there are at least three things to which I look forward with great interest. One is the developments with possible conflicts of interest for arbitrators in the IBA [International Bar Association] guidelines, and the CPR [International Institute for Conflict Prevention and Resolution] conflict of interest guidelines.

Mealey's: In terms of conflicts of interest, what are you interested in specifically?

Maurer: I am especially interested in observing the rules of conflicts of interest for arbitrators who are partners of large domestic or international law firms and seeing where the guidelines and later courts in different countries draw the line. Will it be the clear-cut Brazilian model or the more flexible Swiss model?

And then there is the issue of what nominated arbitrators shall disclose. Some candidates are extremely cautious and disclose any relationship or any contact they had with any of their 5,000 acquaintances, for example, on LinkedIn. Practically, I do not see a conflict of interest in such a connection. You cannot be appointed as an arbitrator if you don't know people, and not every connection poses a theoretical danger that you would not be independent and impartial.

Therefore, I think the pendulum on what arbitrators disclose has swung too far by being overcautious. I would rather prefer to go back to what is really relevant for an objective party. The new rules will hopefully give clarity to parties and to arbitrators as to what they should disclose.

Mealey's: What are the other procedural issues you are currently interested in?

The second issue is the development of international commercial courts in many countries. I am still convinced that this will not fly very well, because you still may have the home court bias. And next to all the general problems with legal systems in many countries, judgments are often not enforced abroad. There are many reasons that I think that international commercial courts will not really fly, with the exception of Singapore.

Third is the discussion of the value of witness evidence — this goes back to a Kaplan lecture by Toby Landau many years ago[2] and later on the ICC commission report on witness testimony[3]. Most of these issues relate to the fact that an arbitrator generally does not hear the original memory of the witnesses. The lawyers will talk with the witnesses, refresh their memory, perhaps even coach them, and this is one of the issues where we will see how the development will go in different countries. I think the U.S. is a very special case because you have the professional obligation of the lawyer to talk with the witnesses and prepare the witnesses for the testimony. Everyone knows that the more often you talk on the same subject with a witness, the more his or her recollection is blurred. And the witness may even believe that what he/she has heard 10 or 15 times might be the truth.

We also will see whether depositions, which are in the U.S. standard practice of domestic arbitration and also of some international arbitrations, will get introduced into international arbitration proceedings. I heard recently that even in Germany a deposition was allowed in an international arbitration, so this may be a development that we may see more often.

A deposition may also be in some cases better than an affidavit by the witness prepared by the lawyer. Yes, the witness will also have been briefed, but the record shows what the witness is really saying. Some arbitrators request now in the case management conference or in Procedural Order #1 that a witness has to declare who drafted the witness statement and how it was

drafted, to get a better idea if the statement contains the words of the witness or how much is, in a worst-case scenario, copied and pasted from the memorial.

There is also a development on expert reports, whether they are acting as hired hands or whether they are acting as true professional experts. Generally, each expert report supports the position of the party who engaged him and is based on this party's facts. Some people tend to discuss if the expert should not be appointed by the arbitral tribunal or whether the experts should be given a joint set of facts stipulated by the parties. This could help avoid the concern surrounding whether expert reports are comparable.

This interview has been lightly edited for clarity.

Endnotes

1. https://www.citizen.org/wp-content/uploads/2024-Professors-Letter.pdf
2. Toby Landau, *Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration*, The Kaplan Landau Lecture 17 November 2010, at 7 seq.
3. ICC Commission Report: The Accuracy of Fact Witness Memory in International Arbitration, at 5, 7. ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Samuel Newhouse
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397