

# 10 Hot Topics for International Arbitration in 2018

## **Kluwer Arbitration Blog**

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Jonathan Mackojc (Corrs Chambers Westgarth)

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2017 was yet another significant year for international arbitration.

Many arbitral institutions amended their arbitration rules, including:

- the Stockholm Chamber of Commerce (SCC) Arbitration Rules and Singapore International Arbitration Centre (SIAC) Investment Arbitration Rules which both came into effect on 1 January 2017,
  - the Thai Arbitration Institute (TAI) Arbitration Rules on 31 January 2017,
  - the International Chamber of Commerce (ICC) Arbitration Rules on 1 March 2017,
  - the Kuala Lumpur Regional Centre for Arbitration (KLRCA) Arbitration Rules on 1 June 2017,
  - the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) Arbitration Rules on 22 May 2017, and
  - the Chinese Arbitration Association, International (CAAI) Arbitration Rules on 1 July 2017.
- It is anticipated that the Hong Kong International Arbitration Centre (HKIAC) will release a new version of its current Administered Arbitration Rules later this year, in time for the 2018 Hong Kong Arbitration Week.

Undoubtedly, many are looking forward to the results of the 2018 International Arbitration Survey: 'The Evolution of International Arbitration', which invited comments from stakeholders in 2017. While the results from the joint study between the Queen Mary University of London and White & Case will be a good indication of international arbitration's trajectory up until 2020, they will not be the only indication of its growth and direction. The theme of the upcoming 2018 ICCA Conference in Australia is centered on 'Evolution and Adaptation'.

'Evolution' as a shared theme is a strong indicator that international arbitration will not experience radical shifts in 2018 but will instead gradually respond and adapt to the changing forces and demands of the international community – a rise in disputes, the increased need for flexibility in dispute resolution, and increased protectionism among nation states.

How exactly it will respond and adapt is yet to be seen. The following '10 Hot Topics' are one perspective on upcoming trends and developments that are likely to shape international arbitration's evolution and adaptation.

### **1. Cross-border Partnerships, and Collaboration**

Despite international arbitration's inherently cross-border nature, more can be done to promote partnerships across regions and institutions. Notably:

- a. ICC, SIAC, and KLRCA have focused on cross-border relations within the last few years, and may be

regarded as the current leaders in this space.

b. KLRCA notes that it has entered into 50 strategic partnerships since its inception.

Some recent partnerships include:

- **17 October 2017:** SIAC and Institute of Modern Arbitration (IMA) signed a memorandum of understanding (MoU) to 'support and promote the development of Singapore and Russia's arbitration regimes'.
- **1 November 2017:** ICC and KLRCA signed an MoU with the intention of 'promoting Malaysia as a safe seat and venue for arbitration in Asia'.
- **9 November 2017:** ICC and New York Arbitration Centre (NYIAC) signed an MoU to 'reaffirm the Court's commitment to North America'.

It is likely that 2018 will see more institutions enter into strategic partnerships with other institutions, universities, business councils, firms, and other stakeholders. For arbitration to truly experience explosive growth, such partnerships must be meaningful and serve to promote genuine collaboration.

## **2. Increasing Access to International Arbitration**

Another area which will likely come under scrutiny in 2018 is that international arbitration is often inaccessible to many parties. Initiatives such as Expedited Procedures have helped to significantly reduce costs.

The HKIAC's recently published statistics on costs and duration of arbitrations indicate that, on average, parties pay less than a third of the total costs of a standard arbitration if this mechanism is used. Initiatives such as these will continue to assist small and medium sized businesses utilise international arbitration in a cost-effective manner.

An additional concern is that international arbitration is seen as a specialised area of law, and that it has become exclusive. For the most part, this is far from the truth, as arbitration practitioners are open to collaborating with other stakeholders and often share know-how. Unfortunately, misinformed perceptions may exist which the arbitration community must address this year.

The immediate step is to connect with, and communicating its benefits to, a broader group of stakeholders, some of which may include: financial institutions, SMEs, business councils, universities, and other small-scale business associations. Allowing these stakeholders to take an active role in the development of international arbitration is crucial.

Surprisingly, many executives have never been introduced to international arbitration, and even more alarming many in-house counsel are still unaware of the benefits of proceeding with arbitration over litigation. Unfortunately, no reliable statistics regarding international arbitration awareness exist, as surveys such as those conducted by Queen Mary and White & Case are targeted at stakeholders with some form of experience.

It is interesting to observe that the 2017 ICC Arbitration Rules and 2016 SIAC Arbitration Rules are both available in ten other languages. The 2013 HKIAC Rules are available in six other languages, and the proposed amendments include a provision dealing with multilingual procedures. In contrast, the 2016 ACICA Arbitration Rules are only available in one other language (Chinese). The importance of ensuring that institutional rules are accessible to parties in other regions cannot be overstated.

## **3. Educating a New Generation of Practitioners**

One of the most overlooked areas which must be addressed, as international arbitration evolves, is

the importance of educating and empowering a new generation of emerging practitioners.

While universities and institutions currently offer degrees and diplomas for students interested in international dispute resolution, many are broad in nature and are therefore unable to address the issues, complexities, and developments in international arbitration.

Further, if the focus is solely on postgraduate opportunities, we have failed to communicate the importance of international commercial and investment arbitration to a significant number of university students who graduate without an appreciation that international arbitration is a legitimate and effective form of dispute resolution.

Moving forward, we must form more meaningful partnerships with academic institutions, and encourage the emerging generation of practitioners to form and lead new societies and associations, particularly ones with a cross-border mandate. The further growth of arbitration depends greatly on collaboration, interdependence and genuine reform at a grassroots level.

#### **4. Arbitrator Selection Process**

Last year, one hot topic was the need for greater transparency and guidance as to the selection and appointment of arbitrators. It is still the author's view that discussion and developments will begin to surface around this area in 2018.

One sign that this issue may develop into a serious conversation in 2018 is that several questions (12, 26, 27 and 28) of in the 2018 International Arbitration Survey address the arbitrator selection process, and suggest that it may be necessary to provide publicly available information to appease current stakeholder concerns.

Arbitral institutions must be proactive and take the lead on this matter, rather than wait for survey results or further market pressure.

#### **5. The Role of Technology**

The international arbitration community must embrace technological developments, and the shift towards artificial intelligence, big data, and the Internet of Things (IoT). Rather than view these trends as a threat, we must take advantage of the various benefits associated with such change as it is capable of entirely transforming dispute resolution. Developments in technology will:

- assist institutions conduct hearings more efficiently;
- improve security, data breaches, and privacy for parties;
- enhance online repositories, databases and statistics;
- help parties overcome geographic constraints; and
- assist stakeholders to interpret big data via artificial intelligence.

ACICA has highlighted the importance of embracing technology in its Draft Procedural Order for use of Online Dispute Resolution Technologies. In 2017, the ICC Commission on Arbitration and ADR released a comprehensive report on the role of technology in arbitration, which considers a range of issues. The 2018 ICCA conference will discuss the challenges and opportunities associated with technological change and its ability to increase efficiency and disrupt the market. One of HKIAC's proposed amendments to its arbitration rules includes the use of secured online document repositories, which will allow for an alternative means of service and either to be controlled by HKIAC itself, or by the parties' representatives. Other developments are discussed in a previous post. Questions 46 and 47 of the 2018 International Arbitration Survey are focused on technology, and classify developments according to the following five categories: artificial intelligence, cloud-based storage, hearing room

technologies, videoconferencing, and virtual hearing rooms.

## 6. Diversity

Diversity has been, and will continue to be, a hot topic this year.

Instead of further developing arguments as to why arbitration needs to remain inclusive and diverse, we instead need to see some concrete frameworks in 2018.

ArbitralWomen have worked tirelessly in 2017 to ensure that voices are heard, and these efforts have led to other initiatives such as the Equal Representation in Arbitration Pledge, which has received over 2,500 signatures. The most recent development is the Women in Arbitration Initiative. It is likely that other arbitral institutions will follow suit in 2018, to further support individual organisations and associations in promoting diversity.

It is at the same time important to acknowledge that diversity requires more than the mere commitment of promoting equal gender representation. The 2018 International Arbitration Survey acknowledges this, and question 22 lists five categories: age, cultural, ethnic, gender, and geographic. Each of these must be addressed when discussing and addressing matters relating to diversity. The Alliance for Equality in Dispute Resolution, founded in 2018, is a fine example of a not-for-profit organisation which acknowledges this point in its mission statement.

## 7. Innovation

2016-17 was a period in which most institutions chose to revise their arbitration rules. As most will now have a modern set of rules, other innovative developments must be announced in order that institutions remain competitive and in the spotlight.

One strong example of an innovation in 2017 was the KLRCA's (soon to be called the Asian International Arbitration Centre) decision to publish a set of standard form building contracts: main contract, standard-sub contract, and minor works contract. As mentioned in an earlier point, innovation in arbitration will likely take the form of more cross-border partnerships and collaboration in 2018, as well as BRI-related initiatives.

## 8. Belt & Road Disputes

It is inevitable that China's highly ambitious Belt & Road initiative (BRI) will lead to a significant number of disputes being referred to arbitration. Chinese parties seem to regard international arbitration as a viable form of dispute resolution, evident in CIETAC's 2016 statistics, which reported a caseload of 2,183 cases.

Many BRI disputes will have a high dispute value, and institutions such as HKIAC are preparing for what may be exponential growth due to this transnational development programme.

HKIAC is ideally positioned to hear these disputes as foreign parties seeking to enter into contacts with Chinese parties will want to select a neutral seat, and one which offers strong institutional support, language capabilities, and geographic convenience. Hong Kong also has a strong legal system which showcases utmost respect for the rule of law and judicial independence.

Other arbitral institutions such as SIAC are also keen to attract these disputes, and BRI (formerly OBOR) was discussed throughout the KLIAW 2017 conference. For jurisdictions and institutions to remain competitive, 2018 must be the year that bold BRI-related initiatives are announced.

## **9. A Voice for Regional Players**

The international arbitration community must ensure that it works towards giving regional players a voice. Other jurisdictions which are less recognised include: Vietnam, Thailand, Indonesia, PNG, FIJI, and New Zealand. An interesting development is the upcoming [Regional International Arbitration Conference](#) which will be held in FIJI. These regions are increasingly important due to the increase in energy, construction and environment-related disputes. For a recent discussion energy-related arbitrations refer to [this post](#).

## **10. Emergence of Regional Arbitration Hubs**

2018 will see certain regions further voice their desire to be recognised as Regional Arbitration Hubs. Positioning these regions is not overly ambitious, but part of the evolution of international arbitration. Refer to [this previous post](#) for a discussion on the differences between various arbitration hubs, and which regions are fighting for the title.

*The views expressed in this article are solely those of the author.*