Kluwer Arbitration Blog

Riding New Tides: Arbitration in a Changing World – A Conference Report

Meha Tandon, Pragya Singh (Indian Journal of Arbitration Law) · Sunday, December 20th, 2020

The Centre for Advanced Research and Training in Arbitration Law (CARTAL) and the Indian Journal of Arbitration Law (IJAL) organised the 5th Annual Conference on International Arbitration titled 'Riding New Tides: Arbitration in a Changing World' ('Conference') on 9–11 October 2020 with the support of the SAARC Arbitration Council. The Conference comprised three panel discussions on forward-looking topics in the field of international arbitration, which are discussed below.

Arbitration in a Data-Driven World

The first panel discussed best practices for compliance with data protection laws in the arbitral process. Ms. Kristin Campbell-Wilson (Deputy Secretary-General, SCC Institute) observed that since most arbitrations involve multiple parties, institutions, and documents which may be in various jurisdictions, the data processed in arbitration could be subject to multiple data privacy regulations. Flagging the same concern, Prof. Dr. Jacomijn van Haersolte-van Hof (Director General, LCIA) emphasised the need for harmonising different data protection standards across jurisdictions.

Ms. Mélanie van Leeuwen (Partner, Derains & Gharavi International, Paris) then explained how the classification of arbitral participants as data controllers, processors, and subjects further determines the data protection obligations that may apply in an arbitration proceeding. By way of illustration, Ms. van Leeuwen mentioned that as arbitral institutions and arbitrators define a purpose and means for processing of personal data, they become data controllers (or fiduciaries). She emphasized that by being aware of these classifications, each participant can better ensure compliance with applicable data protection laws. For example, there may be situations where the data collected from employees (by a firm) or from an e-mail (by a CEO) is analysed by an arbitrator. In such instances, Ms. van Leeuwen mentioned that the arbitrator will be using data as a secondary processor, such that care has to be taken to ensure that the use of such data is consistent with its original purpose. Similarly, Prof. Dr. van Haersolte-van Hof explained the data protection provision in the new LCIA Arbitration Rules 2020 to highlight the need for those dealing with protected data in arbitrations to balance concerns about transparency, confidentiality, and cybersecurity.

Recognising the potentially arduous requirements associated with complying with data protection standards, both Ms. van Leewen and Ms. Marily Paralika (Partner and Head of the International Arbitration Practice, Fieldfisher, Paris) stressed the importance of identifying where data is located, which jurisdictions are involved, and where data will have to be transferred even before the arbitration commences. Ms. Paralika recommended that any potentially relevant information about the data involved in the dispute – such as where it is located, stored, or how it has been collected – be mentioned in the notice for arbitration (or response to the notice of arbitration). The objective behind this approach would be to give all of the arbitral participants enough time to check what their compliance requirements might be with regard to sharing and processing the data involved. The Panel emphasised that there exists a shared responsibility amongst the arbitral participants towards data protection that must be fulfilled together with other stakeholders in the process. Ultimately, however, the Panel emphasised that minimizing data collection is the safest option in like of current data protection frameworks.

State-State Dispute Settlement: A Viable Alternative to Investor-State Dispute Settlement?

The second panel considered the criticisms against the investor-State Dispute Settlement ('ISDS') system to discuss the viability of State-State Dispute Settlement ('SSDS') as an alternative to ISDS. Dr. Prabhash Ranjan (Senior Assistant Professor, South Asian University, New Delhi) opened the discussion by noting that several recent Bilateral Investment Treaties ('BITs') have included SSDS as the sole mechanism for resolution of investment disputes.

However, this extreme approach is not predominant at the multilateral level as highlighted by Dr. Catharine Titi (Research Associate Professor (tenured), French National Centre for Scientific Research (CNRS)-CERSA, University Paris II Panthéon-Assas). Dr. Titi recalled that the UNCITRAL Working Group III on ISDS Reform has considered several alternatives (such as mediation and dispute prevention) to date, but it is yet to consider SSDS as a reform option. From an investor's perspective, Dr. Titi observed that it is better to have access to ISDS as the investor will not have to depend on its home State to bring claims against the host State. However, for States, there are various factors at play. In theory, a capital-importing State might consider opting for SSDS instead of ISDSto discourage investor claims. Capital-exporting States might be concerned, by contrast, about the potential re-politicisation of disputes through SSDS mechanisms. Dr. Titi noted that the dangers of re-politicisation led to the replacement of SSDS by ISDS in the first place. Dr. Titi concluded that the ISDS system may be 'very far' from being perfect, but it is considerably a better option than SSDS. Dr. Ranjan concurred and observed that if a country truly believes in upholding its international obligations, it would retain ISDS as a deterrence against breaching its treaty obligations. He compared this to SSDS, where relief will be generally declaratory in nature. Dr. Ranjan, however, did not agree that re-politicisation is a concern for SSDS alone as the ISDS system is also mired in similar controversy.

Dr. Romesh Weeramantry (Counsel, Clifford Chance, Singapore) thereafter discussed the rare SSDS case of *Italy* v. *Cuba*, in which Italy had invoked the SSDS provision under the Italy-Cuba BIT to exercise diplomatic protection in relation to its investors. Deciding upon the admissibility of the claims, the tribunal emphasised the role of exhaustion of local remedies requirements in this context. It held that the ISDS provision under the Italy-Cuba BIT waived the requirement for exhaustion of local remedies for investors, but the SSDS provision remained subject to exhaustion of local remedies as a mandatory requirement under principles of customary international

principle.

The Panel unanimously concluded that while both systems have their advantages and disadvantages, the ISDS system is more favourable. It was also noted that SSDS may serve as a complementary mechanism, but was not a viable alternative to ISDS.

Rise of Effective Cross-Border Litigation and Mediation: Does Arbitration Still Wear the Crown?

The third panel debated the most effective method of international dispute resolution, in light of the United Nations Convention on International Settlement Agreements Resulting from Mediation ('Singapore Convention') and Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ('Hague Convention'), which facilitate enforcement of mediated settlements and court judgments respectively.

Enforcement has always been a concern for parties seeking resolution of international disputes. Edna Sussman, Esq. (International Arbitrator and Mediator) and Ms. Sherina Petit (Partner and Head of India Practice, Norton Rose Fulbright, London) took the view that while the recent Singapore and Hague Conventions are a step in the right direction, they will likely take considerable time to become as widely accepted as the New York Convention.

Mr. Paul Mason (International Counsel, Arbitrator, and Mediator) noted several reasons why the Singapore Convention may become more effective than the New York Convention in time. For instance, since the Singapore Convention does not impose an additional requirement of recognition, it may prove less time-consuming and expensive to enforce mediated settlements in comparison to arbitral awards. He further noted that the Singapore Convention better respects confidentiality, given that the text of mediated settlements need not be disclosed for enforcement. Lastly, Mr. Mason observed that the Singapore Convention removes an obstacle to enforcement by not including a reciprocity-based reservation, unlike the New York Convention which permits an optional reciprocity declaration by parties.

Prof. Robert Volterra (Partner, Volterra Fietta, London) lauded the Hague Convention's endeavour to avoid the conflict surrounding the interpretation of the term 'contrary to public policy' under the New York Convention, by imposing the standard of 'manifest violation of public policy' to refuse enforcement.

The Panel also considered Arb-Med/Med-Arb procedures for international dispute resolution. Ms. Sussman observed that some jurisdictions require the existence of a dispute when an arbitrator is appointed, and already having a mediated-settlement may pose a problem for enforcement of consent awards obtained through Med-Arb procedures, especially, as noted by Mr. Mason, if the Singapore Convention is not widely ratified.

Lastly, Prof. Dr. Katia Fach Gomez (Tenured Associate Professor, University of Zaragoza, Spain) stressed that in investor-state disputes, with the new ICSID Mediation Rules, mediation may be conducted prior to or in parallel with arbitration proceedings. However, in her view, arbitration would still be the predominant mode of resolution of such disputes in the near future.

The Panel concluded that both the Hague and Singapore Conventions have built on the experience

of implementation under the New York Convention. Nevertheless, with limited signatories at present, there is a long road ahead for achieving effective cross-border litigation, mediation, and Med-Arb procedures.

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The Conference concluded with closing remarks from Dr. Nidhi Gupta (National Law University, Jodhpur), with hopes for more certainty on these challenges in the future. The Conference was supported by SARCO. Wolters Kluwer and TDM were the Media Partners. ICC, LCIA, SIAC, VIAC, HKIAC, SCC, AAA-ICDR, AIAC, MCIA, Young ICCA, CIArb (India), Bar Association of India, and Society of Indian Law Firms were the Institutional Partners. SCC Online and EBC were the Knowledge Partners.

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