

Kluwer Arbitration Blog

YSIAC Conference Recap: Resolving ESG Disputes Through International Arbitration

Ilene Chua (Oon & Bazul LLP) · Friday, November 12th, 2021 · YSIAC

Earlier this week, the [YSIAC Conference 2021](#) took place virtually for the first time since its inception. The opening webinar was a panel discussion titled “*Resolving ESG Disputes Through International Arbitration*”, which agenda was to analyse the disputes in the buzzing environmental, social and governance (“ESG”) domain, distil the trends and lessons learnt therefrom, and to provide suggestions on the best practices.

As moderator Ms. Kate Apostolova (Freshfields Bruckhaus Deringer) pointed out, there has been an exponential increase in interest in ESG issues in the recent years. Particularly in Singapore, prevalence of such interest is evident from the [Singapore Green Plan 2030](#), the recent introduction of sustainability reporting guidelines, and other local green finance trends.

The distinguished panel comprised of Ms. Gerui Lim (Drew & Napier LLC), Ms. Jennifer Lim (Sidley Austin LLP), Mr. Kartikey Mahajan (Shardul Amarchand Mangaldas & Co), Mr. Devathas Sathianan (Rajah & Tann Singapore LLP), Ms. Khushboo Shahdadpuri (Al Tamimi & Company), Dr. David Tebel (Rothorn Legal), and Mr. Tiong Teck Wee (WongPartnership LLP).

Environment

Mr. Mahajan and Ms. Jennifer Lim kickstarted the panel with exploring the kinds of environmental disputes arising therefrom.

Mr. Mahajan observed that in the context of commercial arbitration, disputes typically arise from or in relation to: (1) international commitments, e.g. the [Kyoto Protocol](#) and its Joint Implementation mechanism; (2) a company’s efforts to reduce greenhouse emissions and its corresponding investments, e.g. in renewable energy projects; and (3) commercial contracts which on its face do not relate to environment issues.

Practically speaking, Mr. Mahajan highlighted the importance of engaging suitable arbitrators and experts. This is especially considering the complexities in the mechanism of renewable energy processes, which are difficult for inexperienced arbitrators to grasp and for inexperienced experts to explain clearly and consistently. He also suggested including contractual terms addressing ESG issues in commercial contracts, such as the consequences of breach(es) of ESG guidelines or delays in delivery due to the environmental reasons.

Ms. Jennifer Lim then elaborated on trends that she has observed in environmental disputes in investor-state arbitrations. Firstly, there has been an increase in investor-state disputes in the last few years. Secondly, while environmental issues were more typically used as a shield in arbitration proceedings in the past (such as a defence to justify a challenge by the investor), they have been increasingly used as a sword instead (such as States making counterclaims based on breaches of environmental law). Thirdly, there is an increased willingness by tribunals to review and deal with environmental law issues.

Social

Mr. Devathas Sathianan, Ms. Khushboo Shahdadpuri, and Ms. Gerui Lim then moved on to speak on social disputes, which usually relate to employment, diversity inclusion, child rights, and modern slavery, though they emphasised that the list is by no means exhaustive.

For commercial arbitration, Mr. Sathianan shared that social disputes may be split into business-to-business disputes and business to consumer disputes. An interesting example for the former category is where companies who are up in the supply chain take on the role of watchdog or governance to impose certain restrictions, such as Mastercard's interaction with the porn industry by requiring banks to ensure that sellers obtain clear and documented consent in adult content.

In the context of investor-state arbitrations, Ms. Shahdadpuri shared that a common way that disputes arise is when States revoke certain rights that were initially granted to investors such that the States would have to justify why the revocation was made. She also noted that an interesting aspect of investor-state arbitrations is the investor's need to obtain a social licence to operate (as opposed to mere legal licence), where the investor would need to convince the State and the community on its legitimacy and gain their consent and trust.

Ms. Gerui Lim then shared that there are common difficulties in investor-state arbitrations and commercial arbitrations, namely the difficulties in ascertaining the soft rules of a community and in holding companies and investors accountable for their actions. Ultimately, Ms. Lim also opined that arbitration may not be the best tool for the resolution of such disputes, which may benefit from the compulsion and transparency that court proceedings can offer.

Practically speaking, Mr. Sathianan also suggested concocting a framework in order to take into account the limitations of arbitration in social disputes such as the limitations to documental access by interested third-parties and the difficulty in enforcing arbitral decisions on non-parties. One example of such framework is the [Bangladesh Accord](#).

Governance

Dr. David Tebel and Mr. Tiong Teck Wee then proceeded to speak on governance disputes, which would include financial issues, corruption, bribery, data protection, and tax. A particularly interesting area of disputes relate to issues arising from bribery and corruption. Quite apart from the fact that any allegation of bribery and corruption would be difficult to prove as is, there is historically a high standard of proof for such allegations. This is particularly in the context of investor-state arbitrations as bilateral investment treaties are often focused on safeguarding

investors' interests. However, this practical difficulty has also somewhat been alleviated by recent developments relaxing the standard of proof to a balance of probabilities.

Another issue in the context of governance dispute is jurisdiction. Fortunately, it has been observed in practice that tribunals are increasingly finding and exercising jurisdiction over States and companies in relation to governance disputes in the recent years.

Conclusion

The panel discussion was power-charged with compelling and gripping analysis of the existing jurisprudence in ESG disputes and arbitrations as well as detailed and thoughtful analysis of how certain ESG issues can develop in the future. The practical insights provided by the esteemed panellists also no doubt shed light on the likely thoughts in developing the area and shaping the practice.

More coverage from YSIAC Conference is available [here](#).

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