Kluwer Arbitration Blog

Challenging Conventions and Refining Rules in International Arbitration at the 10th Asia-Pacific ADR Virtual Conference

Scott Heavilon, Hyemin Jeong, Youngjin Lee · Tuesday, December 21st, 2021 · KCAB Next

In the first week of November 2021, Seoul, once again, connected leading ADR practitioners, legal professionals, and scholars from different corners of the world through the Seoul ADR Festival 2021 ("SAF"). The SAF's main flagship event was the 10th Asia-Pacific ADR Virtual Conference. Co-hosted by the UNCITRAL, Korea's Ministry of Justice, KCAB INTERNATIONAL, the International Chamber of Commerce ("ICC"), and the Seoul International Dispute Resolution Center, the Conference was held under the theme of "*Innovating the Future of Dispute Resolution Beyond 2021: The Journey Continues*". 115,651 participants from over 60 countries found the two-day virtual conference as the forum to share their expertise and experience in international ADR practice.

Changes and Proposals for Better Practices in International Arbitration: Challenging Conventions and Customs in Arbitration Practice

Kevin Kim, a Senior Partner at Peter & Kim, moderated the discussion on potential innovative proposals to the conventions and customs in arbitration practice. Kim opened the conversation by addressing the "Gangnam Principles in International Arbitration" as model examples for conducting arbitral proceedings in a more effective and efficient manner.

1. ***Early Engagement of the Arbitration Procedure***

To enhance procedural efficiency at the early stages of arbitral proceedings, Jae Hee Suh, a Senior Associate at Allen & Overy, made two interlinked proposals: the early list of issues and the early tribunal questions. Suh argued that both aimed to crystalize the issues of a case early and would enhance the procedural efficiency of the document production phase. Anton Ware, a Partner at Arnold & Porter, expected these proposals to help the tribunals to be more transparent on the issues and questions that the parties should focus on.

2. ***Tribunal's Questions That Might Give a Notion of Pre-judging***

Wendy Lin, a Partner at WongPartnership, and Ware noted that it is important for the tribunal to properly draft the questions to prevent any notion of pre-judging. They also emphasized the need for the tribunal to distinguish questions as a matter of fact and a matter of law and ask them

respectively.

3. ***Whether Interactive Sessions Between Tribunal and Parties in Early Engagement is Beneficial?***

Lin moved to the next topic by introducing her view on utilizing interactive sessions for the efficient conduct of arbitral procedures. Lin encouraged to have more oral hearings, confrontations between tribunal and parties, and time given to the parties to further elaborate their cases.

Sachin Trikha, a Partner at Clifford Chance, introduced one success story in early tribunal engagement. Trikha suggested that in search of better practices for challenging norms, document processing must be on top of the list because it is widely seen as overly time-consuming and overly costly, and an ineffective process generally. He found that the establishment of new document production protocols and the use of technology like AI can help simplify the documentation process. Una Cho, a Senior Attorney at Kim & Chang, delineated the problems lawyers often face when producing documents because the two parties are not equal during the process. She acknowledged the idea of having a document production protocol and the use of technology like AI as a solution to the current document production process. Also, Ware introduced what he observed from the PRC arbitration procedures where a summary of documentary evidence in a simple evidence chart is required. Ware suggested that such a method to simplify documents can be adopted in international arbitration, particularly in smaller cases.

Cho shared her belief that interaction sessions between tribunal and parties would help bring success to the entire proceedings in arbitration. Her proposal is a two-tiered format, where parties run the hearing as they see fit and thereafter, they can narrow down the proceeding to focus on the issues of the case. Cho expressed her view that these interaction sessions would help reduce the gap and mismatch between the tribunal and the parties' thoughts on the importance of issues.

In closing the session, Kim offered potential solutions to the panelists: 1) have the tribunal begin drafting the award right after hearings while the parties prepare their post-hearing briefs; 2) have the tribunal distribute the draft the award without conclusion; or 3) have the tribunal and the parties draft the award together, so that the tribunal can deliver their decision immediately. The idea is to get the parties more involved in the arbitral procedure. In this way, the parties would feel more confident that they have had a full opportunity to present their case to the tribunal.

Refining Rules and Structures of ISDS Mechanisms

In this session, Professor Hi-Taek Shin of KCAB INTERNATIONAL moderated a panel of practitioners, academics, and experts who discussed the current efforts to reform ISDS mechanisms. The panel discussed both UNCITRAL and ICSID's responses to recent criticisms over the state of ISDS.

1. ***On Amendments to the ICSID Rules***

Meg Kinnear, the Secretary-General of ICSID, addressed the current ICSID reform initiatives, specifically the amendments to the ICSID Rules which was last amended in 2006. Kinnear highlighted the new rules on third-party funding. The proposed rules would require parties to disclose the name and address of any third-party funder supporting the parties' ICSID proceeding.

Several states sought outright abolition of third-party funding, but ultimately this new rule was agreed upon. Kinnear also noted that the amended rules are expected to be implemented by the second quarter of 2022 and that the ICSID Secretariat will be authorized to draft Mediation Rules in the future.

Dr. Richard Happ, a Partner at Luther, joined Kinnear and addressed the amendments to the ICSID Rules. Dr. Happ spoke about how the amendments reflect already existing practices and norms in the field of ISDS. Dr. Happ said all experienced practitioners will be familiar with these new rules already. Nevertheless, their codification is a welcome change that should increase efficiency.

2. ***On the New VIAC Investment Arbitration Rules***

Next, Claudia Annacker, a Partner at Dechert LLP, spoke on the Vienna International Arbitration Centre ("VIAC")'s new investment arbitration rules. The new rules are specifically tailored for investor-state disputes. The rules also aim to increase efficiency and diminish the cost of ISDS. Annacker introduced two examples of how the rules could enhance procedural efficiency. First, the rules have no objective requirements regarding the parties or the subject matter of the dispute. Therefore, parties can avoid the jurisdictional requirements of Article 25 of the ICSID Convention and the procedures associated with these requirements. Second, the rules require the constitution of the tribunal to be completed within ninety days while the average ICSID tribunal constitution lasts about seven months.

3. ***On the UNCITRAL-ICSID Draft Code of Conduct for Adjudicators***

Dr. Jean Ho at the National University of Singapore spoke on the Joint UNCITRAL-ICSID Draft Code of Conduct for Adjudicators. One provision of this code addresses conflict-of-issue concerns related to the ISDS platform. Due to the limited pool of arbitrators, many arbitrators are appointed by the same party multiple times. Such repeated appointments by the same parties may raise questions regarding the arbitrators' impartiality. In response to this problem, the proposed Code would require adjudicators to not be influenced by "self-interest" when accepting appointments. Ho believes this is an impossible standard for arbitrators to meet because they must necessarily act in their self-interest as their income comes from appointments. To avoid these conflict-of-interest issues, Ho suggested that institutions, not parties, should appoint arbitrators.

4. ***On Calculations of Damages***

Dr. Judith Knieper of the UNCITRAL Secretariat spoke on the draft to amendments on the calculations of damages. UNCITRAL's Working Group III is currently working to improve the calculation of damages in ISDS. Working Group III is considering all of the calculations of interest, causation standards, evidentiary requirements, valuation method, valuation date, potential limitations for compensation, allocation of costs, selections of experts, and the primacy of restitution.

Next, Jonathan Bonnitcha and Malcolm Langford gave an overview of the paper they wrote regarding calculations of damages in ISDS. The focus was on the damages phases of proceedings and the discounted cash flow valuation method. These procedures can cost parties several million dollars, highlighting a need for reform. They noted there is little consistency on valuation methods and that treaties are generally silent on what standard to use.

Closing Notes

The COVID-19 pandemic has forced many industries to change quickly. International arbitration is no exception. Throughout this conference, practitioners and experts spoke on how these changes have changed the landscape of international arbitration. Looking to the future, international arbitration will continue to adapt and develop to new challenges in order to remain an attractive dispute resolution service.

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