Kluwer Arbitration Blog

7th Asia Pacific ADR Conference Review: Innovating the Future of Dispute Resolution

Sue Hyun Lim (Kim & Chang) · Thursday, December 20th, 2018

Last month, Seoul was once again brimming with eminent arbitrators and arbitration counsel, and leading alternate dispute resolution practitioners from around the world who had come to attend the Seoul ADR Festival 2018 – a much sought-after yearly event which has grown remarkably in scope and significance since it was first organized in 2015.[1)] The Seoul ADR festival finds its conceptual roots in the Asia Pacific ADR Conference first held in 2012, and unsurprisingly the ADR Conference continues to remain the Seoul ADR Festival's flagship event. The theme of this year's ADR Conference was "Innovating the Future of Dispute Resolution".

Following the tradition of previous years, the ADR Conference was co-hosted by the newly launched international division of the Korean Commercial Arbitration Board ("KCAB INTERNATIONAL"), the Seoul International Dispute Resolution Center ("SIDRC") – which has gone through a significant expansion project earlier this year as it came under the umbrella of KCAB, the Ministry of Justice of the Republic of Korea ("MOJ"), UNCITRAL, and the ICC International Court of Arbitration ("ICC").

The following provides a review of the key events during the ADR Conference.

DAY 1 (MONDAY 5 NOVEMBER 2018)
Keynote Speech

Mr. Neil Kaplan CBE QC SBS delivered the keynote speech and led the audience through a well-structured discourse analyzing ways to increase efficiency of the arbitration process. He started by noting the multiple players in arbitration – namely the parties, commercial advisers, dispute resolution lawyers, advocating counsel, the arbitrators, arbitral secretary if any, the institution, technical supporters, experts, and lastly, the courts. Next, he discussed the factors that are often blamed for delays and waste of costs associated with each of these players. The key takeaway of the discussion was that all participants in the arbitration process have ample room, each in their own way, to exercise more prudence by giving more thoughtful consideration to whether the resources expended are actually essential rather than being the result of reactive habits. Mr. Kaplan topped off the keynote speech by forecasting which topics would be the next hot topics in arbitration. This list included deliberation on cost-shifting rules, including the need to reduce the recoverable arbitration costs relative to the size of the dispute, and discussions on the topic of reasons provided for and the overall length of arbitral awards.

Challenges Faced by Institutions

The first session of the day was led by an impressive panel of representatives from major arbitral institutions. KCAB INTERNATIONAL, ICC, LCIA, HKIAC, SIAC, and DIS, each had their representatives on stage, reflecting a diversity of legal traditions, geographic locations, and gender. Mr. Christopher Lau of 3 Verulam Buildings moderated the panel, guiding the discussion in a logical sequence of which changes in the past, present, and future have or will shape the development of arbitral institutions.

Ms. Sue Hyun Lim, Secretary General of the KCAB INTERNATIONAL, opened the discussion regarding recent innovations in arbitration by noting that the key words and areas to watch for were transparency, diversity, and the newer procedural innovations aimed at improving efficiency of arbitration. Mr. Kevin Nash, Deputy Registrar and Center Director of SIAC, commented that several arbitral institutions, including the SIAC, have introducing procedural rules tailored to investment disputes and their settlements. Dr. Francesca Mazza, Secretary General of the DIS, pointed out visible changes among institutions to becoming more international, such as appointment of non-nationals to their decision-making boards, and noted the increased emphasis on integrity and rigor in the arbitration process. Mr. Alexander Fessas, Secretary General of the ICC, observed that institutions are increasingly adopting and implementing various mechanisms for expeditious resolution of disputes, and that there has been a marked success of emergency arbitrator reliefs. Mr. Joe Liu, Managing Counsel at the HKIAC, explained the recent innovations by HKIAC in the area of arbitrator fees, multi-party and multi-contract disputes, and arbitral secretarial services. Dr. Jacomijin van Haersolte-van Hof, Director General of the LCIA, listed the recent efforts by LCIA to increase the level of transparency and provide guidelines on ethics. Dr. van Haersolte-van Hof added to the discussions by introducing in detail the ethical guidelines provided in the LCIA Rules and how the LCIA deals with tribunal secretaries.

DAY 2 (6 NOVEMBER 2018)
Expedited Procedures in Arbitration

Day two of the conference was opened by a distinguished panel composed of Mr. Richard Bamforth of CMS Cameron McKenna Nabarro Olswang, Ms. June (Junghye) Yeum of Clyde & Co, Professor Benjamin Hughes, Professor at Seoul National University and Independent Arbitrator, Mr. Robert Wachter of Lee & Ko, and was moderated by Dr. Nikolaus Pitkowitz of Graf & Pitkowitz.

Mr. Pitkowitz started the discussion by introducing the topic of expedited procedures and their essential defining elements. Mr. Pitkowitz also discussed recent efforts by the UNCITRAL Working Group to focus on expedited procedures in view of their growing demand. Mr. Pitkowitz then gave the floor to the panelists to discuss issues and possible steps to enhance the use of expedited procedures. Mr. Wachter spoke first and discussed the standard of what could be considered “expedited” and noted that the current practice is moving away from the initial goal of making arbitration a tailor-made process to something more standardized. Mr. Bamforth presented an analysis of the comparison between expedited procedures introduced in arbitral rules of ICC, HKIAC, and SIAC (noting that LCIA does not provide for it). Ms Yeum. offered her comparison of the AAA/ICDR and CIETAC expedited procedure rules, while emphasizing that the success of the procedure is dependent not so much on the rules but on the right case manager who can enforce the rules.

The Seoul Protocol on Video Conferencing

The second session of the day introduced the much-anticipated draft Seoul Protocol on Video Conferencing – a protocol on the use of video conferencing in arbitral proceedings. The panel consisted of Mr. Kap-You (Kevin) Kim of Bae, Kim & Lee and Vice President of the ICC, who co-incidentally attended and moderated via live video conferencing from London, Mr. Yu-Jin Tay of Mayer Brown, Mr. Ing Loong Yang of Latham & Watkins, and Ms. SeungMin Lee of Shin & Kim.

The session started off with playing of a short demonstration video on the things that could possibly go wrong when running a video conference during arbitral proceedings, such as the witness may not be free to testify or might not be allowed to enter the conference facility. Next, the panelists discussed the importance of arranging the specific logistics of video conference in advance to avoid unnecessary delays and frustrations during arbitral hearings. They also stressed the fairness aspect of why it is so important to ensure that video conferencing allows the proper presentation of each parties' case. Mr. Kim led the audience through the key provisions in the Protocol and explained the reasoning and objective behind them. The panelists then took turns explaining other provisions in the Protocol and coupled it with narrating entertaining yet very relevant personal accounts of their experience with using video conferencing, and elaborated how that prompted the need to develop a protocol addressing similar and commonly faced issues.

Investor-State Dispute Settlement (ISDS)

The third session was moderated by Professor Hi-Taek Shin, Chairman of KCAB INTERNATIONAL, and the participants included Mr. Arne Fuchs of McDermott Will & Emery, Mr. Nicholas Lingard of Freshfields Bruckhaus Deringer, Mr. Jae Sung Lee of UNCITRAL, Professor Joongi Kim of Yonsei University, and Professor August Reinisch of the University of Vienna.

Professor Shin opened the discussion by pointing out that 10 years ago, issues related to Investor State Dispute Settlement ("ISDS") were primarily raised from developing States' perspective. However, now he notes a shift in focus where concerns are being raised by States who initially pioneered and embraced the ISDS system. Professor Shin highlighted changes in the area reflected in recent EU treaties, reform focus of UNCITRAL through its Working Groups, and recent amendments proposed by ICSID. He then invited the panelists to share their expert views regarding these changes.

Mr. Jae Sung Lee gave a detailed overview of the work and progress of the UNCITRAL Working Group III ("WG III") on possible ISDS reforms. The WG III has so far broadly categorized three concerns as i) outcome, ii) arbitrators, and iii) cost and duration; and has now moved into its second phase where it will deliberate possible action plan. Professor Kim discussed ICSID's proposed amendments and especially focused on highlighting three issues: i) third-party funding, ii) arbitrator appointment, and iii) general time and efficiency. Mr. Fuchs introduced the recent EU approach to reforming ISDS as a whole. He pointed out that EU's policy in practice can be gleaned from the CETA, which includes provisions that take a stricter approach to the interpretations of otherwise broad concepts like "fair and equitable treatment" and "full protection and security". He cautiously characterized this as a retreat, rather than reform of ISDS.

Professor Reinisch discussed the recent mandate of the EU Commission to negotiate the composition of an international investment court with the view of enhancing transparency,

consistency, and accuracy. He observed that the current discussions favor a multilateral treaty by which an international organization would be established, and that a two-tiered organizational structure with full appeal was being considered.

Mr. Lingard discussed the recently announced US-Mexico-Canada agreement, which he believes could illuminate some key features of the changing US policy on investment arbitration. He noted with interest that the definition of investment largely incorporated the elements in the Salini test, and that the scope of “fair and equitable treatment” and “most favoured nation” has been clarified somewhat. Another feature of this new investment agreement is that there is mention of double hatting by arbitrators sitting in tribunals under the new US-Mexico-Canada agreement, which depending on the interpretation of the relevant provisions may be prohibited under the agreement.

References

?1 This article was written with the assistance of Vaishali Sharma.

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