Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: Is Arbitration Sustainable?

Felicia Cheng, Dominique Yong (Clifford Chance) · Thursday, October 24th, 2019 · HK45

Introduction

The fourth annual Harbour Lecture took place on 21 October 2019, with hundreds of attendees packed into the Eaton Club, Hong Kong to hear a thought-provoking lecture delivered by Sophie Lamb QC, global co-chair of the international arbitration practice at Latham & Watkins.

The theme of this year's lecture was whether arbitration is sustainable. The premise was the necessary and unavoidable disruption (a 'great transition' of sorts) that will affect not only the arbitration industry, but life and business more broadly. Ms Lamb used the UN's Sustainable Development Goals ("SDGs") as a loose framework to take the audience through a wide array of topics and ideas, from crowd-funded robot arbitrators to climate change, rapid urbanisation, and a growing 'silver economy'.

Each audience member will have been informed and inspired by the lecture in their own way. This recap sets out some of the key issues discussed by Ms Lamb, as well as the authors' impressions and concluding thoughts.

Climate change and business

It is no surprise that environmental, social and governmental ("ESG") issues have made it to the top of the corporate agenda. The World Economic Forum has identified extreme weather and climate change policy failures as among the gravest threats to the global economy.

Undoubtedly, the effects of the climate crisis and strain on resources, including loss of biodiversity, will impact business and relationships. Examples given in the lecture include shifts in the 'users' of international arbitration such as energy companies; necessary updates in the law to deal with arguably increasing foreseeability of 'extreme' events; and the need for financing from private sources, noting already the innovation of 'green bonds' as a collective response.

Moving on to the role of company directors, Ms Lamb shared that there have been calls (including from Lord Sales, Justice of the UK Supreme Court) for company law to require directors to have regard to climate change effects and adopt climate risk management as part of their fiduciary duties. This may involve greater reliance on soft laws and best practice, the importance of which

has become generally-accepted over recent decades. On the latter, a balance must be struck between letting companies pursue commercial objectives and also allocating responsibility for the consequences if companies fail to account for ESG factors in their decision making.

On investment law, changes to the ESG context may necessitate shifts in the concepts of 'investors' and 'investments'. The investment arbitration sector faces numerous challenges including the need to counter the public perceptions that 'justice is being privatised', that investment arbitration is to blame for regulatory chill, and a general sentiment of anti-globalisation as well as opposition to trade deals. In addition, the status of intra-EU investment law remains in a state of flux with the consequences of the Achmea decision still transpiring.

Diversity and equality

Diversity and equality are specifically identified as SDGs, and have been in the spotlight in the arbitration sector for some time, especially given the historical lack of both in the industry demographics. Ms Lamb considered it undeniable that gender equality and diversity are vital for the health, sustainability and legitimacy of arbitration, particularly in light of the increasing diversity in users of arbitration.

On gender equality, statistics show that there is still some way to go to achieve equality. Whilst LCIA figures show that women represented 43% of all arbitrators selected by the LCIA Court in 2018, this can be compared with a figure of 23% of appointments overall, suggesting that parties and counsel may lag behind the LCIA in pursuing equality. ICC figures in 2018 are lower, with 27.6% of appointments made by the ICC Court and 18.4% overall being of women.

Ms Lamb identified that another challenge to diversity and equality lies in the difficulty of procuring one's first appointment as arbitrator. In particular, the market tendency to carry out extensive due diligence on prospective arbitrators and the emphasis on past experience means that the pool of candidates will be limited instead of expanded. This is exacerbated by the IBA Guidelines on Conflicts of Interest in International Arbitration, which Ms Lamb considered do not reflect the realities of modern law firms and require urgent attention to address, for example, ways that firms can manage potential conflicts by implementing information barriers and protocols.

Ms Lamb suggested that these structural barriers could be ameliorated by, for example, allowing junior arbitrators to shadow experienced arbitrators on a disclosed basis in order to gain practical experience and increase prospects of future appointments; a concept that was enthusiastically received by the audience.

Technology and data protection

Technology in the arbitration sector has had a slow start, with most arbitration hearings still relying on voluminous hard copy bundles. Although technology has been used to assist with research, document review, discovery, bundles and translation, it is typically limited to fairly pedestrian tasks.

Ms Lamb pointed out that there is a clear opportunity to adopt much more sophisticated uses of

technology, and this has already been done in certain sub-sectors. Businesses such as eBay already use artificial intelligence for dispute resolution, which involves using an algorithm to generate a suggested settlement figure and allows the business to process an extremely high volume of disputes. This type of technology use is particularly suitable for low value and/or routine disputes. Various US government entities also have online dispute resolution platforms for tax and traffic matters.

Ms Lamb gave illustrations of other potential uses of technology such as using Blockchain to authenticate evidence, algorithms to process high volumes of data, and to calculate pricing or quantum in gas and construction disputes. Technology may also assist in mitigating the environmental impacts of modern international arbitration, which involves copious amounts of travel, for example by opting for virtual hearing rooms.

Concluding thoughts

In addition to the broad categories of disruption and progress mentioned above, Ms Lamb commented that there exist other challenges to the future of arbitration such as the emergence of regional international commercial courts (particularly in financial centres), as well as the rise of mediation including the Singapore Convention on Mediation and increasing tendency of parties to opt for a commercially pragmatic rather than legal solution.

As climate change related disputes increase, particularly energy, construction and land use disputes, this will affect various aspects of the arbitration industry. Arbitration is uniquely placed to adapt to these effects, including allowing the choice and application of specified governing laws including climate change instruments, and the choice and appointment of arbitrators and experts with climate change and scientific expertise.

The arbitration industry must persist and do more to achieve gender equality and diversity. This should be viewed as vital to the health and sustainability of the industry. Practical measures such as allowing juniors to shadow arbitrators and updating the IBA Guidelines on Conflicts of Interest in International Arbitration would be moves in the right direction.

Use of technology must be embraced and not feared. That said, opportunities to embrace technological advancement must be accompanied by measures to manage associated and new risks. Data protection and cybersecurity risk management programmes should be implemented such as contractual protection, staff training, and policies for detection and analysis, breach management and containment, and PR and dispute resolution strategy.

More coverage from Hong Kong Arbitration Week is available here.

---

subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Thursday, October 24th, 2019 at 2:01 am and is filed under Climate change, HK Arbitration Week, Hong Kong, Investment, Sustainability
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.