Kluwer Arbitration Blog

# The Dawn of a New Era for Arbitration in Pakistan? Highlights from the Inaugural Conference of CIICA's Young Arbitration Group

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On 15 and 16 November 2019, the Centre for International Investment and Commercial Arbitration (CIICA), organised a conference in Islamabad, Pakistan celebrating the inauguration of its Young Arbitration Group (YAG). The conference, titled "International Arbitration in Pakistan: Opportunities for the Next Generation" was, in many respects, a first-of-its-kind in Pakistan. CIICA, based in Lahore, is Pakistan's first centre for international arbitration, and the conference was the first time that over 30 practitioners from all over the world came to Pakistan to discuss topical issues in international arbitration. It also marked the first time that an event supported by Arbitral Women was hosted in Pakistan. This post touches on some of the most interesting points discussed at the conference.

**Keynote address of Mr Makhdoom Ali Khan**

Mr Makhdoom Ali Khan, Senior Advocate of the Supreme Court of Pakistan who is highly regarded for his experience in international arbitration, delivered the keynote address in which he explored the, often difficult, relationship between arbitration and the courts in Pakistan. Mr Khan deplored how courts in Pakistan had on occasion held that contracts were *void ab initio* as a result of corruption, and that arbitration agreements concluded in those contracts could not be enforced. In Mr Khan's view, part of the problem lay with Pakistan's arbitration act, enacted in 1940. Urging that the 1940 Act be updated, he gave the pertinent example that, under this Act, an arbitral tribunal must issue an award within four months from the time the dispute is referred to it, otherwise an extension of time has to be granted by the courts. According to Mr Khan, this provision gives courts an opportunity to interfere – and sometimes significantly delay – the arbitral process.

Despite these problems, Mr Khan asked Pakistan's younger lawyers to not give up on their pursuit of a career in international arbitration, even if they were to "start small", recalling how he was thrown in the deep waters of *SGS v Pakistan*, when he was Pakistan's Attorney General, and how he learned about ICSID arbitration through his exchanges with Professor Emmanuel Gaillard (then counsel for SGS). Mr Khan concluded by sharing with the younger lawyers in the audience an old Spanish proverb: "Traveller, roads are made by travelling".

**Pakistan's experience in investment arbitration: how to revisit the approach and rise to challenges**

Coming only days after Pakistan's settlement of the *Karkey Karadeniz* investment arbitration (see here), this panel of the conference was particularly topical. Ms Mahnaz Malik, of Twenty Essex, helped frame the debate by tracing the history of BITs, and Pakistan's role in that history. She noted that the first ever BIT to be signed was the Germany-Pakistan BIT, in 1959, and concluded that BITs are "here to stay".

This was a view that, Mr Feisal Naqvi, of Bhandari Naqvi Riaz, disagreed with. He argued that BITs do not work for Pakistan because the Pakistan government often does not attribute appropriate importance to commitments under BITs, recounting the *Karkey Karadeniz* and *Tethyan Copper Company* cases, as recent, prominent examples. This view is attractive, and all the more so for its simplicity. Yet many multinational corporations have specifically referenced the provision of international protection of their investments as a reason to invest, so it may be difficult for Pakistan to attract the investment it needs if it were to deprive foreign investors of that protection altogether. It is also important to keep in mind that, whatever the benefits of this approach may be, they would only accrue in the long run: in light of the sunset clauses prevalent in many BITs, foreign investors would continue to benefit from protection for years after the BITs' termination. A prominent example is the Pakistan-Turkey BIT, that gave birth to the *Bayindir v Pakistan* and *Karkey Karadeniz v Pakistan* investment arbitrations, and which provides for a sunset clause of 20 years (see Article IX(4) of the Pakistan-Turkey BIT).

It may therefore be more effective to try and resolve disputes before the stage where they get to international investment arbitration, rather than depriving foreign investors of international protection altogether. This was the view put forward by Ms Sarah Vasani, of Addleshaw Goddard. Drawing on recent examples, Ms Vasani argued that States should pay more attention to how BITs are drafted, as this would greatly help reduce disputes. But even when disputes do arise, Ms Vasani argued that Pakistan could resolve these disputes by managing them proactively when they are still at the "cooling off" phase, rather than tossing the cooling off letter aside as unimportant.

Ms Vasani is not the only voice calling for a pre-arbitration identification and resolution of disputes in Pakistan. In a recent article published on the Kluwer Arbitration Blog, Professor Ahmad Ghouri, a member of CIICA's Global Advisory Board, emphasised the importance of the Government of Pakistan taking an active role in screening foreign investments before they are made, but also in supporting and monitoring foreign investments once established. This approach could enable the Government of Pakistan to coordinate its treatment of foreign investments and, therefore, avoid situations where disgruntled foreign investors initiate arbitration. The panel was completed by Ms Ruba Ghandour, of the PCA, who took a step back from Pakistan's experience with investment arbitration, and focussed on various techniques that the PCA uses to resolve investment arbitrations in an efficient manner.

**Arbitrating power disputes: recurring issues and how to resolve them**

In a separate panel, the discussion focused on commercial arbitration and, in particular, arbitration of power disputes. Most of these arbitrations are commercial in nature, and therefore not public,

but no less significant: in fact, Pakistan's state-owned entities have faced a slew of such arbitrations recently.

Speaking on this panel, the author of this post illustrated how a typical dispute arises in Pakistan's power sector, as many of these disputes concern unpaid dues under Power Purchase Agreements between the (often privately held) power producers, and the (always State-owned) power purchaser. Once these disputes arise, parties to the arbitration agreement have a menu of dispute resolution options typically available to them: negotiations, expert determination, and arbitration. Although many of the disputes arising in relation to Pakistan's power sector are submitted to expert determination due to its perceived efficiency, the author suggested that expert determination may not be the best forum to submit disputes raising complex contractual construction issues, since, as expert determination is only a creature of contract, a dispute will likely end up in arbitration in any event.

Mr Mian Sami-ud-Din, of Bhandari Naqvi Riaz, then explored the submission of power disputes to court litigation, such as public-interest litigation before Pakistan's Supreme Court, or regulatory proceedings before NEPRA, the regulator setting the electricity tariff in Pakistan. In his view, some of the matters that have been referred to such dispute resolution *fora* ought to have been referred to arbitral tribunals instead, in light of the pre-existing agreements to arbitrate. This raises interesting questions of the material scope of the agreement to arbitrate. For example, if the agreement to arbitrate is found in a Power Purchase Agreement, which addresses the sale and purchase of electricity from power producers to the State, should that agreement be construed to also encompass public interest litigation concerning the power industry in Pakistan? What if proceedings initiated by the power producers were regulatory proceedings for the determination of the electricity tariff? These are difficult questions to answer in abstract terms, and any answer requires recourse to the law governing the arbitration agreement. As they have arisen in practice, and will continue to do so, one expects that an arbitral tribunal will have to pronounce on them in due course.

Taking a practical perspective, Mr Samar Abbas, of 39 Essex Chambers, focused on how expert evidence can play a key role in resolving complex power disputes. Mr Abbas suggested that one can divide power disputes as arising in one of three phases in a power plants' life: (i) the development phase, where issues of financing and guarantees are likely to arise; (ii) the construction phase; and (iii) the operation phase, *i.e.*,disputes arising in relation to the sale of power. Mr Abbas suggested that expert determination can be a useful dispute-resolution method for power disputes in any of those phases, and emphasised the importance of parties getting experts involved at an early stage of the dispute. The last speaker on the panel was Mr Usman Piracha of the Attorney General's office, who took a different perspective than the previous speakers, discussing how the Government of Pakistan, as well as private parties, can improve in the drafting of contracts, so as to avoid disputes arising in the future.

**The effect and relevance of corruption in international arbitration**

The subject of the third panel, corruption, was equally current: allegations of corruption had weighed heavily in both the *Karkey Karadeniz* and the *Tethyan Copper Company* arbitrations (see above), which had culminated in substantial damages orders against Pakistan.

Ms Emilie Gonin, of Doughty Street Chambers, led the discussion by identifying the key situations in which corruption may arise as an allegation in an arbitration: as a defence by a State or State-owned entity against the validity of a contract, or, alternatively, as a claim by an investor that a corrupt government has confiscated its investment. The discussion was further advanced by Mr Mark McNeill, of Quinn Emanuel Urquhart & Sullivan, who noted that arbitral tribunals in commercial arbitration typically deal with the question of corruption by employing the doctrine of separability, which can be very useful at preserving the arbitral agreement, as it isolates the arbitral agreement from the effect that corruption may have on the contract as a whole. As for investment arbitration, however, Mr McNeill noted that corruption can potentially have a much more significant effect, depriving the tribunal of jurisdiction altogether. Mr Imad Khan, of Winston & Strawn, agreed with this assessment, noting also that because investment arbitrations were largely in the public domain, this may put extra pressure on States in deciding whether to launch a claim for corruption, as it could implicate past misconduct of a State official. Mr Khurram Khan, of Addleshaw Goddard, concluded the discussion by touching upon the burden and standard of proof, and suggested that calls for shifting the burden of proof and raising the standard of proof in relation to corruption allegations may need to be further considered.

**Disputes in the China-Pakistan Economic Corridor and effective methods for their resolution**

A further panel focussed on the resolution of disputes arising in the China-Pakistan Economic Corridor ("CPEC"), which forms part of China's Belt-and-Road Initiative. The CPEC is likely to become key in the new future, in light of the increasing Chinese investment in Pakistan.

Ms Samantha Lord-Hill, of Freshfields Bruckhaus Deringer, set out the fundamental aspects of CPEC. Listing the dispute resolution options available to parties involved in CPEC disputes, Ms Lord-Hill suggested that, although on occasion very useful, mediation and expert determination may be abused by recalcitrant parties in an attempt to delay the resolution of a dispute.

Mr Emmanuel Jacomy, of Shearman & Sterling LLP, agreed with this assessment, also noting the many practical issues that one may face with enforcing a foreign arbitral award in China. Mr Jacomy then observed that, although choosing a neutral seat in an independent country is a crucial consideration, neither the arbitration law of China, nor that of Pakistan, refer to the concept of "seat". This could raise significant difficulties with enforcing a foreign arbitral award, which Mr Jacomy illustrated with the example of Chinese courts holding that an ICC award by a tribunal with its seat in England would actually be a French award, because the ICC is headquartered in France. Practically, parties engaged in CPEC projects would be well-advised to select a seat in the same country as that of the headquarters of the arbitral institution, pursuant to the rules of which the arbitration will be conducted.

Ms Kiran Sanghera, of the HKIAC, seized of the opportunity to suggest Hong Kong as a neutral seat that is well-positioned to resolve Belt-and-Road Initiative ("BRI") disputes. Ms Sanghera also referred to a ground-breaking development in Hong Kong, pursuant to which parties to arbitrations seated in Hong Kong may obtain interim relief in mainland China if that arbitration is under the auspices of one of a certain number of arbitral institutions, one of which is HKIAC (for a discussion of the development on this blog, see here).

Ms Olga Boltenko, of Fangda Partners, concluded the panel on CPEC disputes on a positive note,

observing that the statistics of enforcing foreign awards in mainland China are particularly good, as compared to other jurisdictions, at approximately 70% of publicly available cases (for a publication on this point, see here). Ms Boltenko also contemplated the usefulness of having an arbitration centre which focusses exclusively on the resolution of BRI disputes

**Concluding thoughts**

In the wake of the *Karkey Karadeniz* and *Tethyan Copper Company* arbitrations, international arbitration is front-page news in Pakistan, and globally. In some quarters this has led to an angry reaction, with commentators labelling international arbitration as "flawed", "capricious" and "corrupt" (see here).

Such sweeping criticisms are seldom of much help. They do little to help Pakistan, which is party to a number of BITs, and whose State entities strike up contracts with arbitration agreements for virtually every major foreign and domestic investment. They also fail to recognise that international – but also domestic – investors regard access to arbitration as a valuable right, and will insist on its inclusion. The power industry serves as useful reminder, where virtually all of the major domestic players have concluded contracts for the sale of power which provide for arbitration in Singapore, London, or elsewhere. Indeed, it is difficult to argue otherwise, when only a few years ago, in 2017, a State-owned entity of Pakistan was able to convince Lahore's Civil Court to pass an interim order setting aside an award in an arbitration that was seated in London, England (the interim order was later suspended through an order of the High Court).

Greater promise lies in preventing disputes from arising, rather than precluding them from being arbitrated. For this to take place, the first step is for Pakistan's legal community, as well as its judiciary and Government, to become even more acquainted with international arbitration, and how they can use it to their advantage.

In this endeavour, conferences such as the CIICA YAG Inaugural Conference have an important role to play. Many of the most important arbitration issues pertinent to Pakistan were discussed at the conference, which can serve as fertile ground for an exchange between international and local practitioners, and especially young practitioners of the "next generation". What is more, by creating a Young Arbitration Group, the CIICA permits this dialogue to continue beyond the confines of a one- or two-day conference, educating international lawyers about court process and culture in Pakistan, and local practitioners about the latest developments internationally. In the author's view, it is this "next generation" that presents the greatest promise in helping Pakistan overcome some of the most difficult international arbitrations that it may have to face.

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