

Kluwer Arbitration Blog

Hong Kong Arbitration Week Recap: Reimagining Arbitration – Technology and the Pandemic

Noble Mak (Davis Polk & Wardwell LLP) · Wednesday, October 21st, 2020

On the second day of the Hong Kong Arbitration Week 2020, the British Institute of International and Comparative Law (“**BIICL**”) hosted a virtual workshop on the impacts of technology and the pandemic which allows (or rather, demands) us to “re-imagine” arbitration.

Smart Contracts, Blockchain and Cryptocurrencies

The first panel discussion addressed “*Smart Contracts, Blockchain and Cryptocurrencies*”. Panelists include **Sir William Blair**, former Judge of Commercial Court (England and Wales), **Sir Bernard Rix**, former Lord Justice of Appeal, **Mr Jacob Turner**, barrister of Fountain Court Chambers, and **Dr Mimi Zou**, Lecturer and Director of Studies in Law of the University of Oxford. The panel discussion was moderated by **Professor Spyros Maniatis**, Director of BIICL.

Non-deterministic technologies

Mr Turner started the discussion by exploring legal challenges posed by “*non-deterministic technologies*”, which develop minds of their own. Mr Turner gave the example of Alpha Go which not only beat the human world champion in the chess game of Go, but did so through surprising moves that even human experts did not understand at the time of watching the game. The challenge in the legal context therefore is, while existing laws and ethical standards are designed for and by humans, non-deterministic technologies are capable of making “*surprising decisions*” that is beyond the human mind which could in turn become very difficult to supervise. As raised by Mr Turner, there is also the broader question of who is responsible for the harm caused and who is entitled to the benefit created by such technologies? It was suggested that arbitration could be valuable to both common and civil law jurisdictions as a “*test bed*” for these unprecedented issues.

Potential of DLT in arbitration

Sir William highlighted the potential for employing distributed ledger technology (“**DLT**”) including smart contracts in arbitration, as it could enable automated initiation of proceedings, collection and integration of data as evidence, production of arbitral awards compatible with relevant digital platforms, and the automated enforcement of awards. Further, Sir William pointed out the synergies between green/spatial finance and dispute resolution; for example, spatial finance offers potential for certification of projects by embedding smart contracts, which could then serve

as useful evidence in case of dispute. Sir William then summarised that technology would improve “*not only in the efficiency but also the quality of decision-making*”.

New challenges and old principles

Also in connection with smart contracts, Sir Bernard offered valuable insights by juxtaposing two propositions: (i) there is “*nothing new under the sun*”, but at the same time (ii) “*the past is a foreign country and each day dawns anew*”. Put in the context of smart contract dispute resolution, while issues have to be decided by application of existing legal principles, those principles will also have to be applied “*with a new understanding of new things*”. Sir Bernard illustrated this by way of a lively case study of the Singaporean case of *Quoine Pte Ltd v B2C2 Ltd [2020] SGCA (I) 02*, which raised important questions as to how to balance between conflicts of fundamental legal principles, such as between achieving certainty and substantial justice. On this point, Sir Bernard remarked that since arbitration awards do not have binding precedential effect, there may be more flexibility in finding a position that leans on the side of substantial justice.

DLT and dispute resolution

Dr Zou gave an overview of the Aragon Court, a decentralised dispute resolution mechanism based on DLT designed to handle disputes requiring human judgment. Dr Zou then highlighted the irony when Aragon decided to file a traditional lawsuit against a blockchain developer funded by it, which sparked much controversy. Dr Zou also took the opportunity to highlight the need for “*trust*” as it is important for blockchain networks to provide trustworthy dispute resolution methods and services. Dr Zou also opined that given the novelty involved and the need for speed and confidentiality, arbitration is very much suited to resolve smart contract and blockchain disputes, hence there will be ample opportunities for arbitral institutions to develop new initiatives in this emerging market space.

Responding to Pandemic Disputes: Breaching Space and Guiding Principles

The second panel discussion was on “*Responding to Pandemic Disputes: Breaching Space and Guiding Principles*”. Panelists include **Professor Eva Lein**, Director of the Comparative Law Center at BIICL, **Ms Helen Dodds**, Global Head of Legal, Dispute Resolution of Standard Chartered Bank (London), and **Professor Dr Maxi Scherer**, Professor of Law of Queen Mary University of London and Special Counsel at WilmerHale. The session was moderated by **Ms Chiann Bao**, Independent Arbitrator and Vice President of ICC International Court of Arbitration, and **Professor Chin Leng Lim**, Professor of Law of the Chinese University of Hong Kong and Barrister of Keating Chambers.

Breathing space

Professor Lein started with the idea of “*breathing space*” in the context of COVID-19, where businesses are faced with unprecedented issues and pressures. As described by Professor Lein, the pandemic not only slowed down the judicial system, but also led to consideration of difficult legal issues pertaining to the allocation and assumption of risks in particular. In this regard, Singapore and the CIArb, among others which have offered innovative options for more effective dispute resolution mechanisms following the pandemic, were mentioned as examples of “*breathing spaces*” created. Professor Lien also urged commercial parties to take a step back and be mindful

of principles of solidarity and fairness in these times of crisis.

Along similar lines, Ms Dodd spoke of “*breathing space*” in the context of dispute resolution mechanisms as causing the “*least collateral damage to the fragile environment*” especially as economic recovery could take at least a few years, and recommended in this regard the [practical guidelines](#) prepared by BIICL which consider how the legal and business communities may cope with the pandemic in order to promote economic recovery. Further, Ms Dodd encouraged commercial parties to “*think beyond formal parameters*”, and pause and reflect on the different paths to dispute resolution, including further negotiations, other alternative dispute resolution means, and narrowing of issues.

Asynchronous forms of arbitration

Finally, Professor Scherer introduced the concept of “*asynchronous*” forms of arbitration, where things do not occur at the same time (see also discussion in previous [post](#)). Professor Scherer invited parties to consider whether asynchronism can be taken further, for example, by pre-recording opening statements to be made available in advance of the evidentiary hearing. Professor Scherer outlined the efficiency benefits brought by asynchronism as well as challenges in its implementation, e.g., counsel may feel that it is less effective and engaging while arbitrators may not be able to clarify questions contemporaneously. Professor Scherer finally remarked that the degree of asynchronism is ultimately a matter for parties to decide based on actual circumstances of each case.

Concluding remarks

The workshop very comprehensively addressed the two forces that have re-shaped, and will no doubt continue to re-shape, the arbitration landscape. Technological developments are very much welcomed and embraced in the context of dispute resolution where there is much room for further advances in the areas explored. As for the pandemic, long-lasting impact on our society, economy and our collective memory is expected. Having said that, it is up to us to emerge from the crisis elegantly by leaving breathing spaces both for ourselves and our neighbours.

More coverage from Hong Kong Arbitration Week is available [here](#).

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