Kluwer Arbitration Blog

New Terrain for International Arbitration: The International Dispute Resolution Track at the 99th Annual International Law Weekend

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The 99th Annual Meeting of the American Branch of the International Law Association ("ILA (American Branch)"), known as International Law Weekend ("ILW"), took place virtually this year in New York City on 22-24 October 2020. This year's conference included 27 panels, as well as an Opening Plenary Panel, a United Nations 75th Anniversary Plenary Panel, and numerous virtual networking sessions hosted by ILA (American Branch)'s committees. The conference continued to include a dedicated International Dispute Resolution track with a specific slate of panels in that area.

The keynote address was delivered by Catherine Amirfar (Co-Chair of the Public International Law Group, Debevoise and Plimpton LLP; President, American Society of International Law) and moderated by Chiara Giorgetti (University of Richmond School of Law). Ms. Amirfar's remarks were framed against the backdrop of the United States standing at a crossroads for the international rule of law. She recalled that international lawyers have a commitment to the progressive ideal that international affairs should be governed by law, not merely power. As she explained, it is the duty of international lawyers and institutions to ensure this ideal continues to advance even when backward steps are taken in the international sphere.

Ms. Amirfar observed that such backward steps do not constitute a failure of the entire enterprise, but instead allow international lawyers to take a hard look at what is not working and figure out ways to improve so we may move forward. In her view, there are no inevitabilities in the story of international law; history is replete with examples of how institutions and individuals have made a difference. At this important juncture in the history of international law, she left the audience with a powerful reminder: across party lines and political divides lies a set of shared norms and common interests that can unite us and allow us to progress slowly but steadily.

The panels forming part of ILW's International Dispute Resolution track echoed these themes as they considered whether international legal mechanisms for dispute resolution should be extended to address new areas of conflict. One overarching issue raised during these discussions is how to determine if a particular conflict calls for an international dispute resolution mechanism. Key questions for this determination included:

- Is there a need for any additional dispute resolution mechanism to resolve this type of conflict?
- Is the proposed international mechanism an appropriate means to resolve the conflicts that arise

in that area?
- Can the proposed international mechanism be made accessible enough to contribute meaningfully to the resolution of conflicts in this area?

Two panels stood out as particularly illustrative of these questions and the debates that they engender: one on investor-state dispute resolution as a means to resolve disputes in the global banking and finance sector, and another on international arbitration as a means to resolve disputes over human rights abuses at sea.

The Role of Investor-State Arbitration in Regulation of Global Banking and Finance

"Investor-State Disputes, International Finance, and Economic Crisis," was moderated by Virág Ilona Blazsek (Associate Legal Officer, United Nations Joint Staff Pension Fund). This panel considered whether investor-state dispute settlement may contribute to the resolution of banking- and finance-sector disputes in times of economic crisis—particularly in light of the emergency measures that States often take to combat such crises.

The answer—as the panel developed it—boiled down to two separate issues: whether investor-state tribunals should address the substance of those disputes, and whether there is sufficient access to these types of tribunals for them to matter.

The panel's initial discussion centered on the degree to which an investor-state tribunal should second-guess state regulatory measures taken in the face of economic crisis—when many, or even most, state regulatory actions are legitimate and essential. Anna de Luca (Of Counsel, Macchi di Cellere Gangemi) took the view that tribunals should not evaluate state regulations in the banking and finance sector merely on the basis of their objective correctness. Prof. Michael Waibel (University of Vienna) later added that because of the uncertainty surrounding which regulatory action is correct, the State should be afforded a margin of appreciation.

Nevertheless, the panel only scratched the surface, leaving unaddressed how, exactly, the standard of review should be calibrated—between the two extremes of review for absolute correctness and no review at all.

Next, the panel turned to whether banking and finance investors have broad enough access to investor-state arbitration for it to play an important role in regulating state crisis measures. Prof. Waibel argued investor-state arbitration has a fairly limited role simply because any State measure taken during a crisis will affect domestic investors more than international investors. Indeed, both he and Ms. de Luca underscored that investor-state arbitration may be further curtailed within the European Union, following the Court of Justice of the European Union's *Achmea* judgment and subsequent termination of multiple intra-EU bilateral investment treaties.

However, David Attanasio (Associate, Dechert LLP; co-author of this post) noted that, given the lack of alternative avenues of international recourse for banking and finance investors, some may seek to restructure their investments in order to obtain access to international investment protections and to investor-state arbitration.

Despite identifying key factors affecting the scope of access to investor-state arbitration, the panel left open a range of questions affecting investor-state arbitration's potential significance for

resolving conflicts over crisis measures in the banking and finance sector. These questions included whether international investors make up a meaningful portion of all investors in the banking and finance sector, and whether investors in that sector are able to secure access to international investment protection, including through investment structuring.

The Role of International Arbitration in Remedying Human Rights Abuses at Sea

"Arbitration of Human Rights at Sea: Giving International Law Teeth by Empowering Victims to Enforce It" was moderated by Dr. Anna Petrig (Professor and Chair of International Law and Public Law, University of Basel). This panel considered whether international arbitration can contribute meaningfully to accountability for human rights abuses committed at sea.

Resolving this issue—as the panel addressed it—requires answering two key questions: whether there is a need at all for accountability for human rights abuses committed at sea, and whether international arbitration, in particular, is the right mechanism to fill that need.

The panel first considered the need for accountability mechanisms for human rights violations at sea, addressing that need from both the supply and demand sides.

- Regarding the supply side, Dr. Irini Papanicolopulu (Associate Professor, Università degli Studi di Milano-Bicocca) reported that the existing international fora have limited jurisdiction and are therefore ill-equipped to resolve many potential human rights disputes. To her point, even the European Court of Human Rights and the Inter-American Court of Human Rights often do not have jurisdiction to resolve cases of human rights abuses, such as those that are allegedly committed by corporations.
- On the demand side, Elisabeth Mavropoulou (Lecturer in Law, University of Westminster; Trustee, Human Rights at Sea) set out basic statistics regarding maritime operations: There are 197 states included in this group, 1.6 million commercial seafarers, and at least 56 million people involved in fisheries and aquaculture. As she explained, the maritime sector, then, is a significant area of commercial and social activity that can generate a variety of human rights abuses.

Despite these key observations, the panelists did not delve into the nature and extent of actual human rights abuses occurring at sea, leaving unresolved the extent to which this is a problem calling for a solution.

The panel next took up whether and how arbitration can be made available to those who allege human rights abuses at sea. As Dr. Ursula Kriebaum (Professor of Public International Law, University of Vienna) noted, the Hague Rules on Business and Human Rights Arbitration were designed precisely to enable arbitration to provide an appropriate forum for human rights disputes.

However, Prof. Emmanuel Gaillard (Head of Shearman & Sterling's International Arbitration Practice; Visiting Professor of Law, Yale Law School, Harvard Law School) identified the root issue: consent. As he explained, if victims of human rights abuses committed at sea cannot obtain consent to arbitration in the first place, then these disputes cannot be resolved through arbitration. Without consent, international arbitral tribunals would lack jurisdiction to hear the disputes and to serve as an accountability mechanism for those human rights abuses.

In Prof. Gaillard's view, the need for consent would not necessarily be a barrier to resolving

disputes over human rights abuses at sea through arbitration. He noted that States and corporations could be incentivized to give advance consent through political pressure from international organizations or simply civil society itself, or alternatively through economic pressure applied by banks and other financial-service providers. If they gave such advanced consent with sufficient scope, then international arbitration might be able to play a meaningful role in the area.

That said, the panel did not hazard a guess about the degree to which consent would actually be forthcoming, even in a scenario where such incentives were used. So it remains an open question whether pressure alone can ensure arbitration becomes available widely enough to act as a real accountability mechanism for human rights abuses committed at sea.

The Path Ahead

These and other panels at the 99th International Law Weekend provided a clear reminder of the opportunities for expanding the role of international dispute resolution in novel directions. As the world looks ahead to possible changes in light of new American leadership, they may guide us toward further establishing an international community governed by law and not power.

See prior International Law Weekend coverage here.

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