

# Kluwer Arbitration Blog

## The 9th Asia Pacific ADR Virtual Conference Recap: 2020 and Beyond

Yeeun Park, Rinat Gareev · Sunday, November 29th, 2020 · KCAB Next

On 5-6 November 2020, reputable arbitration practitioners joined together for the 9<sup>th</sup> Asia Pacific ADR Conference and shared their experiences and insights on the latest developments in the arbitration landscape. Due to the ongoing COVID-19 pandemic, the annual conference took place virtually. It successfully attracted approximately 15,000 participants across 50 countries. The event was co-hosted by UNCITRAL, the Ministry of Justice of the Republic of Korea, KCAB INTERNATIONAL, the International Chamber of Commerce (“ICC”), and the Seoul International Dispute Resolution Center.

### Session 1: Year One of the New Normal: What Has Changed, What Must Change, and Are These Changes Here to Stay?

In the first session, speakers representing leading arbitral institutions reported on various measures the arbitral institutions have undertaken in coping with the challenges caused by the pandemic. Despite the global pandemic, arbitral institutions have continued to operate seamlessly by swiftly adapting their procedures and case management to the current challenges.

**Alexis Mourre** shared the ICC’s experience in ensuring the continuation of the services of the court and its secretariat and in implementing mitigating measures to avoid unnecessary delays. In response to the pandemic, the ICC also released a [Covid-19 Guidance Note](#) and made its pre-existing rule regarding tribunals’ power to hold virtual hearings more explicit.

**Annette Magnusson**, representing Stockholm Chamber of Commerce (“SCC”), acknowledged the importance of keeping close communication with users as well as other arbitral institutions. In response to the pandemic, leading arbitral institutions, including the KCAB INTERNATIONAL and SCC, joined in a truly cross-institutional initiative and released a [joint statement](#) to their end-users.

**Kevin Nash**, representing the Singapore International Arbitration Centre (“SIAC”), agreed on the importance of close connection with its users. To improve the accessibility to arbitration, SIAC added a chat function on its website to consult with users on SIAC procedural matters. Moreover, SIAC created a practical checklist for users to help them assess their circumstances.

The pandemic has also affected the preference of users and institutions in the arbitrator selection process. **Nils Eliasson** of Shearman & Sterling, speaking on the Hong Kong International Arbitration Centre experience, identified flexibility, adaptability, and proactiveness as preferred qualifications of arbitrators, all of which may indicate the arbitrator's ability to stay on top of the case.

**Fedelma Smith** of Permanent Court of Arbitration-Singapore agreed that being prompt, accurate, and flexible is desirable. She expected these qualifications would meet higher demand as time goes by, assuming that the virtual world would not end soon and that technology would stay in the arbitration community. Particularly, the benefits of the digitalization of arbitration proceedings with the enhanced cyber-security were echoed by other speakers.

**Meg Kinnear** of the International Centre for Settlement of Investment Disputes ("ICSID") shared ICSID's pioneering efforts in the digitalization of arbitration proceedings. Even before the pandemic, ICSID had embraced the digital future by encouraging parties to conduct electronic filings and use electronic hearing bundles instead of hard copies.

## Session 2: Time for a New Momentum in Commercial Arbitration?

The second session was driven by five speakers representing a user, counsel, institution, and tribunal. Panelists highlighted certain drawbacks of the old-fashioned approach to arbitration proceedings that led to inflexibility and high costs.

From the tribunal's perspective, **Chan Leng Sun SC** of Essex Court Chambers Duxton expressed the view that tribunals should be mindful of the different circumstances of each party in holding virtual conferences and should be proactive in case management.

**Robert Wachter** of Lee & Ko introduced ideas to enhance the efficiency of the arbitration process from the counsel's perspective. He expressed hopes that, as a result of the pandemic, the arbitration community can fundamentally restructure arbitral proceedings. For more efficient arbitration, he suggested having an oral hearing after the main submission and a limited document production period before the main submission. He further proposed to separate the opening statement from cross-examination to reduce the burden on counsels.

From the user's perspective, **Narae Kim** of Daewoo Shipbuilding & Marine Engineering Co., Ltd. explained that users will likely seek more cost-effective resolution methods as a result of their experience with the pandemic and the economic downturn. The proactiveness of tribunals, procedural flexibility, and increased access to arbitration indicate that arbitration is becoming faster and less expensive.

Following the discussion, the moderator **Sae Youn Kim** of Kim & Chang voiced concern about a possible risk that certain users might opt out of arbitration during the economic downturn. In response to such a risk, **Francesca Mazza** of the German Arbitration Institute (DIS) addressed that the pandemic can serve as an opportunity for "de-legalization" of the arbitration and that such "de-legalization" can mitigate the drawbacks caused by the arbitration's tendency to mimic litigation. **Jae Sung Lee** from UNCITRAL echoed Ms. Mazza's assertion and further proposed "de-arbitration" of disputes given the availability of other efficient dispute resolution tools, particularly mediation.

### Session 3: Current Status and Progress of Reforms in the Investor State Dispute Settlement and Its Impact on Investment Treaty Policies

Opening Day 2, session 3 was tailored to a discussion of investor-state dispute settlement (“ISDS”) reforms, particularly projects led by UNCITRAL Working Group III, and countries’ responses to such reform efforts.

**Anna Joubin-Bret** of UNCITRAL shared updates on the activities of UNCITRAL Working Group III in amending the ISDS procedures. In recent years, the foreign investment regime has been subject to an increasing amount of criticism. UNCITRAL has been, inter alia, exploring the feasibility of introducing an appeal mechanism as proposed by the EU.

**Patrick Pearsall** of Allen & Overy predicted the US government under the new administration would take a position of “Local Multilateralism” in response to ISDS. That is, the new administration would shift back to a multilateral approach but with local sensitivity. The new administration would first consider the impact of ISDS reform on local people in terms of various issues, such as labor and environment.

**Maria Malaguti** of UNIDROIT presented the EU’s policies on ISDS. She shared her view on far-reaching reform which introduces a proper appellate body mechanism within the EU. The goal of the reform is to protect and attract more foreign investors.

**Guiguo Wang** of Zhejiang University provided an overview of China’s policy on ISDS by categorizing its approach into five categories. He explained that China has become more tolerant and progressive in dealing with international legal standards.

Lastly, **Sae Rom Yoo** of the Republic of Korea’s Ministry of Justice explained Korean investment treaty practice and policy. Korea continues to negotiate investment treaties to strike the right balance between providing adequate investment protection for investors and preventing abusive use of ISDS. The Minister of Justice regularly holds a series of special training sessions for state agencies to prevent them from violating Korea’s obligations under Korea’s investment agreements. Korea also opened the Ombudsman office under the Korea Trade-Investment Promotion Agency (KOTRA) dedicated to investment support and has been providing additional legal protection by working with professionals from all sectors relevant to investment. Further, the general policy of the state is aimed at promoting dispute avoidance, therefore, most of the investment agreements signed by Korea contain alternative dispute resolution provisions.

### Session 4: Innovative Suggestions for Virtual and Remote Hearings

The final session focused on proposing creative ways to improve the efficiency of arbitration. **Sue Hyun Lim** from KCAB INTERNATIONAL started the discussion by giving a brief overview of the [Gangnam Principles](#) and [Seoul Protocol](#). The Gangnam Principles were proposed by **Kevin (Kap-You) Kim** of Peter & Kim, the moderator of this session, as a means of increasing the efficiency of arbitration.

Two distinctive features of the Gangnam Principles are having a first substantive oral argument

during the case management conference and having 1-3 intermediate hearings before the main hearing in the form of a group discussion. Both of these are intended to push for interactive communication between the tribunal and parties so that each party dedicates time to the issues that matter.

**Toby Landau QC** of Essex Court Chambers opened the discussion by identifying significant benefits associated with remote hearings, particularly avoidance of certain financial expenditures. He acknowledged that virtual hearings have challenged the Anglo-US approach to hearings in international arbitration and have forced tribunals to actively participate in managing their cases. However, an inevitable drawback of virtual hearings is that counsel may not be able to build good rapport with the tribunal.

Speakers entered into a discussion of creative ideas of how to maintain and augment the efficiency of virtual hearings. By focusing on various innovative projects, including Gangnam Principles and Prague Rules, **Yu Jin Tay** of Mayer Brown addressed the confluence of opinions voiced in the arbitration community in terms of what the future holds for international arbitration. **Ingloong Yang** of Latham Watkins stressed the use of technology in arbitration (electronic bundles, cloud-based data storage server) to think about how to redesign the process. **Lars Markert** of Nishimura & Asahi suggested scheduling an early hearing after the first round of submissions and disclosure of the tribunal's preliminary view at the end of such hearing, both of which emphasize more frequent and interactive communication. Similarly, **Chie Nakahara** of Nishimura & Asahi introduced the idea of short interactive sessions after main hearings and of an initial or preparatory hearing. Agreeing on the benefits of technology to arbitration, **SeungMin Lee** of Peter & Kim posed a question on whether setting virtual hearings as a default form would infringe the fundamental due process right to be heard.

Changes might feel frightening, but it is also extremely exciting to predict what the future holds for international arbitration. Looking to the future, the arbitration community will benefit from the advances in technology, whilst parties in international arbitration will likely be eager to use various electronic tools more prominently even in the post-COVID era. It is hoped that this pandemic will be the driving force to develop a more efficient system of international arbitration.

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