Kluwer Arbitration Blog

New Opportunities for Arbitration Lawyers: Climate Change, Outer Space and Human Rights

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International arbitration is changing at a fast pace, and opportunities arise every day in this field. In this context, on May 25, 2021, Young Arbitral Women Practitioners, Holland & Knight, and Rising Arbitrators Initiative co-hosted a webinar to discuss emerging fields of practice for arbitration lawyers. This post offers an overview of the variety of novel opportunities in international arbitration regarding outer space, human rights, and environmental protection.

The Role of International Arbitration in Developing a New Space Economy

One theme emerging from the discussion was the role of arbitration as an efficient dispute resolution method in developing a new outer space economy. As Laura Zielinski explained, the current legal framework governing outer space limits space law to government action and is silent regarding states' sovereign rights and private actors' property rights. However, recent technological developments have reduced the costs of going to space, prompting the privatization of satellite operations, which in turn, has opened the field to commercial actors. Here, arbitration serves the emerging space economy as a crucial tool by providing actors with a flexible, yet certain, dispute resolution method that guarantees the protection of their investments in outer space.

In this regard, to adapt to the needs of the emerging outer space economy, the PCA issued the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities in 2011. These rules provide flexibility to appoint experts in outer space law as arbitrators, guaranteeing that tribunals can have access to highly specialized and technical knowledge related to outer space activities. The rules also allow parties to present to the tribunal a "non-technical document" in which they explain the technical concepts necessary for the tribunal to fully understand the matters in dispute. Finally, the confidentiality provisions of the rules are highly relevant to protecting intellectual property rights and national security matters frequently involved in the field. However, as Zielinski noted, there have been no known cases in which the PCA rules have been applied. Arbitration proceedings regarding outer space actors have nevertheless been conducted under ICC, LCIA, UNCITRAL, and ICSID rules.

By way of illustration, cases such as *Deutsche Telekom v. India*, *Eutelsat v. Mexico* and *Devas v.*

India highlight the crucial role of arbitration in the development of the new economies. In particular, in *Devas v. India*, the Tribunal ruled that India had expropriated the investor's spectrum and that the territorial nexus of investments does not necessarily require the physical presence of an investment within a state, but, that frequencies are also part of a state's sovereign interests and thus, can be licensed or expropriated. This broad interpretation by the tribunal of the term "investment" acknowledges the value of intangible assets in unregulated conferred rights such as frequencies, aerial space, oxygen, and outer space property rights. At the same time, this interpretation could also open the floodgates for future investor-state proceedings, in which many regulatory activities related to intangible assets in unregulated conferred rights could potentially be considered as regulatory expropriations.

The Role of International Arbitration in Settling Business and Human Rights Disputes

Another interesting topic emerging from the discussion was the role of international arbitration in settling business and human rights disputes. As Juan Ignacio Massun explained, private actors often find themselves carrying out economic activities that can have an impact on individuals' human rights. In this respect, international arbitration can build a bridge between these opposing, yet highly interrelated topics. It can also serve as a neutral ground to settle disputes, providing a forum where public interests are adequately valued, and the principles of transparency, legitimacy, and predictability are at the core of the dispute settlement process, as outlined in Article 31 of the UN Guiding Principles on Business and Human Rights. While not binding, the UN principles set guidelines for administering public interest disputes and therefore influence the interpretation of the parties' rights and obligations.

Similarly, the Hague Rules on Business and Human Rights Arbitration develop and fill the gaps of UN principles and allow for greater party autonomy and flexibility, with parties being able to modify procedural rules if they agree in writing. To facilitate the enforcement of awards under the New York Convention, the rules clarify that any dispute submitted to arbitration under the Hague Rules is deemed to have arisen from a commercial relationship or transaction.

The Hague Rules also recognize the urgency of a timely decision to prevent greater impacts on human rights. Consequently, the rules create an interim measures system, whereby an emergency arbitrator can grant interim measures where violation of human rights is plausible. The key difference between the Hague Rules with the current system set out in the UNCITRAL Rules is that the former allows the tribunal to grant interim measures even in the cases where there may be an affectation of human rights. Thus, yielding the tribunal broader power to prevent imminent human rights violations and not only prevent the aggravation of the status quo. The Hague rules aim to balance the interests of businesses, individuals, and third parties that might have an interest in the matter. For instance, while Article 19 allows parties to consolidate claims and join mass claims of human rights violations, Article 25 grants the tribunal power to disregard meritless claims. Additionally, Article 28 encourages third-party amicus curiae submissions, thus, rendering the process more transparent and efficient.

The Hague Rules are aligned with the above-cited UN Principles, in the sense that they encourage parties to settle disputes amicably and to resort to contentious proceedings only as a means of last resort. By way of example, the rules proved to be efficient in solving the 2013 Rana Plaza disaster, in which an eight-story commercial building collapsed, leading to more than a thousand deaths.

Initially, there was an institutional arbitration proceeding established under the Hague Rules; however, the parties ended the dispute with a settlement, from which the Bangladesh Accord on Fire and Building Safety derive. The case eventually settled; however, the rules proved to be capable of attaining a desirable outcome by granting the parties a dispute resolution method that promoted both the business' affairs and the victim's interests and placed efficiency and transparency at the center of the proceeding. As Massun and the moderator, Kristle Baptista, agreed: "A bad settlement is always better than a good arbitration."

Climate Change, Environmental Protection, and Investment Arbitration

ISDS has been strongly criticized for not addressing environmental protection. Indeed, the third speaker Gretta Walters, noted that there are limited, if any, references to climate change and the environment in investment treaties. Regardless of this perception, arbitration is slowly moving towards a sustainable system where environmental protection is fundamental.

In this regard, the Netherlands Model BIT is the first to include provisions on environmental protection. Among the key elements of the treaty, the Model BIT reaffirms the investors' duty to comply with domestic laws, including environmental laws, as well as highlights the importance of having members of arbitral tribunals with expertise on public international law, environmental law, and human rights.

Another advance in the protection of the environment is the inclusion of carve-out provisions in BITs, which are a clear response to huge arbitral awards punishing states for policing environment matters. Under these provisions, states reaffirm their right to regulate in relation to the environment, and as such, regulation of these issues is not considered a treaty violation. By way of illustration, in the 2021 Singapore-Indonesian BIT, Article 11 expressly provides for the state's right to regulate to achieve environmental protection without this constituting a treaty breach, including the modification of laws that might adversely affect an investor.

On the other hand, Walters noted that states also have their own environmental obligations that might trigger ISDS proceedings. In this regard, the source of a state's environmental obligations is twofold: state action and state inaction. Concerning state action, a clear example is the saga of Spanish renewable energy cases, in which Spain implemented regulatory measures in 2007 to incentivize clean energy, which they later retracted in 2010. This prompted numerous investment claims under the European Charter Treaty. On the contrary, states inactions to target climate change can also give rise to investment claims. For example, in *Peter A. Allard v. Barbados*, the claimant sued the state of Barbados due to its failure to comply with environmental laws and climate change obligations, which in turn damaged the claimant's property and its ecotourism business. While the claimant was unsuccessful, the Tribunal acknowledged that a host State's international obligations may be relevant in the application of environmental standards to particular circumstances.

Conclusion

As the world evolves, arbitration adapts to the needs and developments of emerging markets, and this is the reason for opportunities to arise every day in this area. Arbitration serves as an

alternative dispute resolution method that bridges opposite concepts and helps develop new industries. While arbitral tribunals cannot compel governments or market actors to act in a particular way, they can exercise substantial pressure by holding actors financially accountable when they do not comply with their obligations; hence, giving arbitration a privileged position to advance legitimate interests such as human rights protection, climate change mitigation, and outer space development.

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