Kluwer Arbitration Blog

In Recap: ICC Asia-Pacific Conference on International Arbitration 2022 (Part I)

Irene Mira (Assistant Editor for Southeast Asia), Sunita Advani · Thursday, June 30th, 2022

At the recent hybrid 7th ICC Asia-Pacific Conference on International Arbitration (the "Conference"), a palpable sense of happiness and community resonated throughout the day. Mr Justin D'Agostino (Global CEO, Herbert Smith Freehills, Hong Kong) moderated the first panel discussion in a quick fire manner on recent arbitration developments in the Asia-Pacific region with leading practitioners Mr Sanjeev K. Kapoor (Partner, Khaitan & Co, India and Vice-President, ICC International Court of Arbitration), Ms Edwina Kwan (Partner, King & Wood Mallesons, Australia), Mr Jay Patrick Santiago (Trustee & Senior VP, Philippine Institute of Arbitrators, Philippines) and Ms Helen Shi (Partner, Fangda Law Firm, China and Vice President, ICC International Court of Arbitration).

Mr Justin D'Agostino started off by observing that diversity and inclusion are currently the dominant forces in international arbitration and invited the panellists to address the audience on recent domestic court decisions as well as changes to arbitral rules, decisions and laws, together with the impact of these on international arbitration practice today.

With a focus on the users' demand for transparency, and time and cost efficiencies, Mr Santiago provided an overview of the revisions of the arbitral rules of various arbitration institutions in the region (namely, the ACICA, AIAC, JCAA and PDRCI) following the release of the 2021 ICC Rules. He then went on to address a recent Hong Kong Court of Appeal judgment (namely C v. D [2022] HKCA 729), and contrasted it with a recent decision of the Supreme Court of the Philippines (Mabuhay Holdings Corporation v Sembcorp Logistics Limited, G.R. No. 212734), both of which speak to enforcement of an arbitral award vis-à-vis interpretation of arbitration clause.

Ms Shi then highlighted that the numbers of arbitrations administered by various arbitration institutions in China have seen remarkable strides over the last year. Another notable development is China's extension of mutual assistance regarding interim measures to Hong Kong which has similarly been extended to Macau in 2022. Given these progresses, she forecasted that the arbitration market in China will continue to experience rapid growth in many years to come.

India, too, has seen tremendous progress over the last year, with the Supreme Court of India moving in tandem with the international arbitration ecosystem. Mr Kapoor particularly highlighted the judgment of PASL Wind Solutions v. GE Power Conversion India, Civil Appeal No. 1647 of 2021 which clarifies that two Indian parties can choose a foreign arbitral seat and that parties to

such foreign seated arbitrations will be able to obtain interim relief from the Indian courts. He also discussed the landmark Amazon.com v. Future Retail Ltd judgment which recognises a key tool in arbitration, namely emergency arbitrations, and allows for the enforcement of emergency arbitration awards in India.

The recent surge of climate change disputes did not go unnoticed by the panellists, and Ms Kwan addressed this phenomenon. Ms Kwan remarked that there was no single cause of action in these climate change-related cases, and that she has seen human rights, constitutional, civil and private law claims. Looking to the future, she posited that contractual disputes with respect of energy transition in all sectors will increase, and such is one to watch in Asia-Pacific arbitration space given the growing business appetite in energy sectors and the challenges looming over it.

Another important topic that was discussed at the Conference is corruption in international arbitration, which expert moderator Mr Kabir Singh (Partner, Clifford Chance, Singapore) took it upon himself to propel the discussion on this within Asia-Pacific context. He was joined by eminent panellists: Hon'ble Mr Justice L. Nageswara Rao (Former Judge, Supreme Court of India), Prof Anselmo Reyes (International Judge, Singapore International Commercial Court, Singapore), Ms Sitpah Selvaratnam (Consultant, Tommy Thomas Advocates & Solicitors, Malaysia and Alternate Member, ICC International Court of Arbitration) and Prof Joongi Kim (Professor of Law, Yonsei Law School, Seoul, Alternative Member, ICC International Court of Arbitration and Council Member, ICC Institute of World Business Law).

The panel discussion centred around the definition of corruption in the different countries, the red flags that identify corruption as well as issues arising out of corruption in arbitration in its many forms.

Prof Reyes noted that the definition of corruption varies across jurisdictions and called for these definitions, even those under the OECD Anti-Bribery Convention and the United Nations Convention against Corruption, to be clarified to address where includes situations where there is an intermediary as well as to distinguish between the liability of the briber and the bribee.

Dr Michael Hwang's analogy comparing the watch dog to a bloodhound was invoked, with Prof Kim commenting that in identifying red flags in corruption matters, many tribunals believe they should be more like a watch dog for red flags but not like a bloodhound. Similar to Prof Reyes' view, Prof Kim pointed out the factors to consider when attempting to identify corruption such as: distinction between paymaster and recipient as well as characterization and timeline of the alleged corruption.

Justice Rao carefully set out the dilemma faced by an arbitral tribunal when deciding on matters of corruption. On one hand, the arbitrator is bound by party autonomy and can only decide matters referred to the tribunal otherwise the award will be ultra petita. On the other hand, as a matter of public policy, the arbitrator is duty bound to take note of corruption as and when it comes to notice.

Ms Selvaratnam also expressed her view that when there is allegation of corruption, the arbitrator's duty goes beyond the parties' mandate to examine the matter and extends to rendering an enforceable award. She noted that party autonomy does not limit arbitrators and that the strong will of the world in this regard is demonstrated by the 189 countries which have adopted the United Nations Convention against Corruption.

Conditional fee arrangements ("CFAs") continue to gain momentum in key arbitration hubs in

Asia, with Singapore permitting such arrangements in May 2022 and Hong Kong having released a Bill on it in March 2022, adding to other jurisdictions which allow contingency fees.

The topic of CFAs was ripe for discussion at the and was addressed in the form of a lively debate between Mr Tom Glasgow (Managing Director and Chief Investment Officer (Asia), Omni Bridgeway, Singapore) and Ms Diana Rahman (Head of Legal, Gamuda Land, Malaysia, Arbitrator and Mediator) for the proposition and Ms Smitha Menon (Partner, Smitha Menon LLP, Singapore and Member, ICC International Court of Arbitration) and Mr Chelva R. Rajah SC (Partner, Tan Rajah & Cheah, Singapore) for the opposition.

The jury, consisting of Ms Chiann Bao (Independent Arbitrator, Arbitration Chambers, Singapore and Vice President, ICC International Court of Arbitration), Mr Abhinav Bhushan (Member, International Arbitrator and Chief Executive for Asia, 39 Essex Chambers, Singapore) and Ms Yoko Maeda (Partner, City-Yuwa Partners, Japan and Member, ICC International Court of Arbitration) opened the floor by asking the audience to vote on the motion "This House Believes that the No Win No Fee scheme is a welcome feature in strengthening international ADR practice". Ms Bao noted that the majority of the audience at 75% agreed with the motion and invited Ms Rahman to fire away with her arguments.

The thrust of Ms Rahman's argument for the proposition centred on the advantages that CFAs bring, namely that it promotes access to justice by allowing impecunious clients to proceed with meritorious claims (especially where third party funding is not an option). This argument was lucidly countered by Mr Rajah for the opposition who counter-argued that matters involving impecunious clients and class actions are not what typically arise in international arbitrations. He added that while there are small claims which appear before arbitral tribunals, this does not mean the party is impecunious.

Not only were granular details debated, but so was the bird's eye view of CFAs. Mr Glasgow took a broader view of the motion in stating that that CFAs allow for an alignment of interests from the users' perspective. He added that the lawyers' and users' interests are aligned because the lawyer has skin in the game as both parties rise and fall based on the outcome.

Ms Menon for the opposition, differed and questioned whether this is desirable to the legal services industry. She elucidated that the law firm's cash flow is not protected from the risk of insolvency as clients are the sole source of revenue and lawyers are the key service providers in the ADR ecosystem, and cannot be made vulnerable.

After the debate, it was clear that the opposition emerged as winners, with the second audience poll registering only 48.64% of the attendees remaining in favour of the motion. This, as Mr Rajah pointed out, may also have been a reflection of the larger number of practitioners in the room who identified with the consequences of CFAs on practitioners that were debated.

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