

# Kluwer Arbitration Blog

## Hong Kong Arbitration Week Recap: ADR in Asia Conference – Beyond Mere Greenwashing? The Impact of ESG on International Arbitration

Christopher Tung, Cindy Ha (K&L Gates) · Thursday, October 27th, 2022

On the third day of Hong Kong Arbitration Week 2022, HKIAC hosted a panel as part of the ADR in Asia Conference entitled “*Beyond Mere Greenwashing? The Impact of ESG on International Arbitration*”. This panel brought together a group of specialists who discussed what environmental, social, and governance (“ESG”) is, how it impacts dispute resolution, how it affects the way in which clients conduct their business and make investments, how arbitral proceedings can become more sustainable, and the growing trend of disputes arising out of ESG issues.

The panel was comprised of Mr. Christopher Tung (Partner, K&L Gates), Mr. Leiming Chen (Senior Vice President, Ant Group), and Ms. Wendy Miles KC (Barrister, Twenty Essex). The panel discussion was moderated by Ms. Denise Fung (Partner, Linklaters).

### What is ESG?

#### *Historical & Theoretical Perspective*

Mr. Tung kicked off the panel by responding to the question of whether ESG still has meaning despite the recent concerns over “greenwashing”. Greater scrutiny and reporting (positive or negative) tended to suggest that ESG is gaining increasing traction worldwide.

Emphasizing the importance of conceptual accuracy and the need for clear terminology in sustainability and ESG matters, Mr. Tung made the point that ESG should always be theoretically underpinned by the sustainable development principles which encompass “economic”, “social” and “environmental” spheres or pillars of sustainability. For ESG to be fully effective, all three spheres of sustainability must be considered to achieve a balanced and sustainable result. Sustainability concepts, principles and laws sit above ESG concepts, principles and laws, and should not be used interchangeably, especially if the ESG rules, criteria, disclosure and reporting have a narrower and selective scope (in other words, a smaller number of environmental, social and governance factors are chosen or required). By contrast, optimal sustainability practice should address all relevant economic, environmental and social issues and not “cherry pick” issues.

Mr. Tung referred to various sources of sustainable development laws, principles, and goals, as

well as specific ESG regulations and stock exchange rules, such as the Hong Kong Stock Exchange Listing Rules ESG Guide, which has mandated ESG disclosure and reporting by listed companies in Hong Kong since 2020. A considerable number of Hong Kong-listed companies reporting under these rules are opting for full sustainability disclosure and reports, rather than narrower ESG disclosure and reports.

### *Private Sector's Perspective*

Mr. Chen highlighted the drivers behind Ant Group's ESG strategy, shedding light on how ESG considerations and obligations influence the way in which Ant Group conducts business. Ant Group, a technology provider that operates Alipay, believes that commercial value creation is integrated with social value. This is because the social value created can in turn add to the momentum of the commercial value growth and make it truly sustainable as a business. Mr. Chen made the point that commercial entities must keep up with the times in order to offer their services to end users. As the users of its financial services become more aware of ESG issues, Ant Group's "customer first" approach means its ESG strategy is now a necessary driver in how it seeks to reach consumers and small and micro-sized enterprises, and to ultimately become a long-lasting company itself. This echoed Mr. Tung's point on the importance of considering all three aspects of sustainability.

Mr. Chen also demonstrated how Ant Group's business policies and initiatives seek to adopt the best practice in pushing for a greener future. For example, Alipay launched a green initiative within the Alipay app in 2016 called "Ant Forest" that encourages low-carbon lifestyle choices by awarding users with green energy points. This Green Energy Points Initiative included more than 100 brands to promote moderate consumption, low carbon and eco-friendly lifestyle.

Ant Group has also established an ESG Sustainable Development Committee and ESG Sustainable Development Advisory Committee. The Chief Sustainability Development Officer works closely with the CEO and various working groups to integrate new ESG initiatives in the business of Ant Group.

### *Legal Practitioner's Perspective*

Ms. Miles KC shared her insights on how ESG considerations impacted the legal sector and how ESG featured as an element of professional competence. Referring to the codes of conduct for solicitors and barristers practicing in Hong Kong as well as the United Kingdom, Ms. Miles KC tied the idea of ESG back to the fundamental duty of care of legal counsel. The codes of conduct require all legal counsel to advise their client to a reasonable standard. With the increasingly comprehensive global regulations, ESG and sustainability issues will inevitably become more prevalent in the commercial world and the daily lives of our clients. The same should become a brick in the brain of all competent lawyers in their advice to clients. Ms. Miles KC demonstrated this point with the example of a conveyancing lawyer needing to advise their clients on climate risks involved in relation to real property.

## **How does ESG Impact Disputes?**

### *International Arbitration*

The panelists agreed that international arbitration will also become more sustainable over time as the arbitration industry continues to look for ways to reduce its own carbon footprint.

Given the cross-border nature of international arbitration, practitioners who were used to travelling to places for conferences and hearings were forced to switch to online virtual meetings. Ms. Miles KC said she hopes that the arbitration community will hang on to some of the better and greener habits that grew out of the pandemic. As the world opens up again, not everything should revert back to the old norm. While there is no one size that fits all, and face-to-face meetings and in person hearings may well be preferred for certain substantive hearings, legal counsel and arbitrators should give more thought to the possible alternatives, especially when dealing with procedural matters that do not involve witnesses.

### *Climate Disputes*

The energy transition has and will continue to be fraught with obstacles and challenges, creating fertile ground for disputes in times of uncertainty and change. Mr. Tung highlighted key trends and developments that are on the rise with respect to ESG disputes.

While ESG liability and disputes arose across a broad range of subject matters and issues, Mr. Tung noted that climate and environment claims were two of the more prominent types of claims being pursued, with ESG also quickly broadening the legal risk exposure of organizations of all types and sizes. These increasing legal risks included potential breach of contract, duty of care/negligence, misrepresentation, misleading/false descriptions and advertising, non-compliance with ESG regulations and stock exchange disclosure and reporting rules. Potential breaches of fiduciary duties by directors, companies and asset managers would be another source of claims from disappointed shareholders and investors. In addition to the above bases of claim, climate claims could also be made against states under multilateral or bilateral investment treaties for unfair treatment or expropriation of traditional fossil fuel investments. Claims in tort for harm caused by greenhouse gas (“GHG”) emissions would continue to be challenging in common law jurisdictions due to difficulties in establishing causation between harm done and the GHG emissions attributable to the respondent.

### **Conclusion**

As the business world becomes more conscious of ESG, its underlying sustainability concepts and principles, and mandatory ESG requirements in finance and other industries, arbitration lawyers are expected to play an important part in advising on ESG liability and disputes and in striving to make international arbitration itself more sustainable.

*This concludes our coverage of Hong Kong Arbitration Week 2022. More coverage from Hong Kong Arbitration Week is available [here](#).*

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