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# Kluwer Arbitration Blog

## Yonsei Arbitration Day: War and Arbitration

Hyewon Yoon, Hwan Kang (Yonsei Law School) · Friday, October 28th, 2022

The Third Annual Yonsei Arbitration Day (YAD) was held virtually on 26 August 2022. With the war raging in Ukraine, “War and Arbitration” was the event’s main topic, and the keynote speaker and headline session dealt with the present and future of international arbitration regarding armed conflicts. More than 140 participants from at least 24 countries joined this year’s webinar.<sup>1)</sup>

Started in 2020, YAD is the first student-led conference in Asia where practitioners, scholars, and students come together annually to reflect on issues in the international arbitration field. The conference aims to provide a platform for eminent scholars, practitioners, and students to convene and gain insight into fast-changing matters in the international arbitration community.

War causes complex entanglements between states, individuals, corporations, and other groups. The impacts range from human rights to investments. YAD 2022 demonstrated to the audience why and how arbitration could be an effective method to undo the knots, however complex they may be.

### **Keynote: The Need for Change in the International Arbitration System in the Face of War**

Keynote speaker Ms. Olena Perepelynska (President of the Ukrainian Arbitration Association; Partner, Integrites) suggested improving the current international arbitration system’s ability to deal with international law violations when it comes to war. The international arbitration system, alongside treaties such as bilateral investment treaties (BITs), exists on the premise that states follow the rule of law. Some clauses within these treaties concern war, but they do not properly address the situation where one state invades and occupies another. Therefore, if one state chooses to break the law by committing acts of aggression without fear of consequences, as Russia has been doing in Ukraine according to Perepelynska, there is no clear answer as to what the system can do in response.

As a Ukrainian practitioner specializing in international arbitration, Perepelynska asserted the need for the system and BITs to consider the harsh reality of armed conflicts between contracting states. Definitive answers are required to questions such as how to address the aggressors’ jurisdictional immunity, how awards are going to be enforced, and how to bring aggressors to the table so they can be held accountable for their violations. She went as far as to say that there should be an exception to jurisdictional immunity of the aggressor if one state invades another. According to

Perepelynska, if a new mechanism is not devised to solve these issues after the Ukraine War and the system fails to hold Russia accountable, the world will easily witness another war in the future.

## **The Relationship between War and Arbitration**

The keynote speech was followed by a panel moderated by Ms. Mimi Ahn (Associate Director, Focus Law Asia LLC), who engaged the panelists, Professor Chiara Giorgetti (Richmond Law School), Mr. Jeremy K. Sharpe (Senior Fellow, Columbia Law School), Ms. Carolyn Lamm (Partner, White & Case), along with the keynote speaker Perepelynska, in a discussion on the relationship between arbitration and war.

### *Arbitration After War*

Giorgetti discussed the aftermath and effects of war concerning the basis for a claim or enforcement. She opined that international arbitration could provide a necessary remedy for parties in conflict concerning a variety of claims. Past examples provide some indications that international arbitration can be helpful for Ukrainians, connected individuals, and corporations that have suffered a wide range of damages, including displacement, economic and personal harm, and damage to property.

She explained how history has proven that international arbitration is an effective mechanism for post-conflict dispute resolution. Arbitration was the dispute resolution mechanism used to resolve disputes between the U.S. and Great Britain after American independence (1794 [John Jay's Treaty](#)), to determine compensation for injuries (1872 [arbitration of the Alabama Claims](#)), and to settle boundary issues (1896 [arbitration after Venezuela Boundary Dispute between British Guiana and Venezuela](#)). It was also effective not only between states, but also between states and non-state actors (2008 [Abyei Arbitration](#)), and ad hoc agreements similar to the arbitration process have previously created a chance for individual victims to be included as claimants. Examples include the [Iran-US Claims Tribunal \(IUSCT\)](#) and the [Commission for Real Property Claims of Displaced Persons and Refugees for Bosnia and Herzegovina](#).

Giorgetti then expanded on how arbitration can provide for a variety of claims and actors. One useful example is the [Algiers Peace Agreement \(2000\)](#) between Ethiopia and Eritrea, where arbitration committees (the [Eritrea-Ethiopia Boundary Commission \(EEBC\)](#), and the [Eritrea-Ethiopia Claims Commission \(EECC\)](#)) were created to settle boundaries and claims for loss, damages, or injury. The committees were successful in ending the violence as both parties were able to agree on the boundary and no further conflicts ensued.

### *Arbitration and Economic Sanctions*

Sharpe delved into the implications of economic sanctions during the war and how to deal with them in the arbitration field. He first pointed out that economic sanctions add significant complexity to international arbitration due to the diversity of types, objects, and authorities of sanctions.

Sharpe called attention to how economic sanctions can cut across international arbitration processes. Sanctions may present obstacles to the admissibility of a case to arbitration or may activate denial of benefits provisions of the investment treaties as was the case with the [Ukrainian Ministry of Foreign Affairs officially expressing denial of benefits to Russian investors via letter to the Energy Charter Secretariat](#). Sanctions are also likely to impact the arbitration process all around: the merits, defense, and up to the award recognition and enforcement stage.

Sharpe also discussed the impact on the participants, such as counsel and institutions. Uncoordinated sanctions regimes pose particular challenges to practitioners of international arbitration in that they require keeping up with the varying contexts and languages of the restrictions. Arbitrators may also sometimes decline appointments involving sanctioned entities. Arbitrators or arbitration institutions have difficulty navigating sanctions regimes, having to conduct due diligence on parties and sometimes unfamiliar subject matter.

The reach of economic sanctions may mean setting aside or non-enforcement of arbitral awards and may span from individual civil liability to criminal liability. Sharpe concluded that all the above contribute to the growing complexity of international arbitration when war and economic sanctions come into play.

### *Arbitration During War*

Concerning how arbitral procedures are impacted by war, Lamm emphasized the importance of preserving the rule of law and due process.

According to Lamm, adherence to the rule of law in international arbitration ensures a robust global legal regime for investors where there is predictability in commercial arrangements, along with fairness and integrity in business. In international arbitration, the rule of law is “a concept of universal validity” that “requires a system of certain and foreseeable law” and “opportunity to challenge decisions before independent and impartial courts through fair procedures ([Cairn Energy v. India, Award \(2020\)](#)).” This should not change in times of war. Quoting from the United Nations International Law Commission, Lamm reminded the audience that “the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties” between states in conflicts ([Article 3 of the draft articles on the effect of armed conflicts on treaties with commentaries](#)).

Above all, she stressed that due process of international arbitration should be protected especially in times of crisis. Arbitral tribunals can ensure the integrity of proceedings by providing each party with reasonable opportunities to present their cases. Lamm also suggested that arbitrators must be active guardians of due process given its importance. Lamm stated that arbitral tribunals and arbitrators are empowered to protect the process and assure respect for the international arbitration system. As a fervent proponent of international arbitration, she emphasized that all parties should be ensured effective legal representation. Everyone is entitled to zealous and effective representation by counsel, even in arbitrations that are to follow the ongoing conflict in Ukraine.

### **Different Careers in Arbitration: from Private to Public Sector**

In Session 2, Mr. Jin Kyu Lee (Associate, Peter & Kim) moderated a discussion featuring Ms. Myung Ahn Kim (Partner, Yoon & Yang), Ms. Young Shin Um (Senior Deputy Director, International Dispute Settlement Division at the Ministry of Justice, Republic of Korea), and Mr. Tae Hee Ahn (Counsel at KCAB INTERNATIONAL). The panelists shared their experiences with the audience about the wide variety of careers in international arbitration.

While their tips were very useful for aspiring students or young practitioners, the theme was directly in line with the implications from Session 1. All three experts agreed that arbitration is a very practical and practice-driven area of law. Accordingly, a firm grasp of the facts of the case, the ability to understand different nuances of context, and being able to communicate clearly were all equal parts of an essential skillset. These basic skills become an even greater necessity in resolving disputes involving the turmoil of war.

For further discussion with these practitioners, please click [here](#).

### **Concluding Remarks**

The discussion at YAD 2022, above all, showed how important the international arbitration system is in the context of armed conflicts, such as the Ukraine War. Economic sanctions, which can be a substitute, forerunner, or part of a conflict, affect ordinary transactions, adding to difficulties already present in military conflict. The arbitration process has the potential to provide parties who find themselves in violent conflict a chance to work toward a binding resolution that contributes to the prevention of ongoing and future disputes. This is because the mechanism of arbitration, by its nature, provides all related parties with an opportunity to be heard, which is the key to resolving conflicts effectively. Respect for the rule of law and due process in the international arbitration field is, as always, integral in pursuing these goals.

However, amid ongoing crises and conflicts, which themselves take considerable time to deal with, changing the system in the near future in the way Peregelynska envisages will prove difficult. Nonetheless, international arbitration can effectively fill that crevasse. After all, in a world where economic ties cannot be extinguished by traditional inter-state conflicts, arbitration has proved to be one of the most viable mechanisms for managing relationships between any state and non-state actors.

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## References

The event was organized by the Yonsei International Arbitration Association (YIAA), based at Yonsei University in Seoul, Korea, under the guidance of Professor Joongi Kim. Hyewon Yoon, Hwan Kang, and Seyeob Kim were on this year's organizing committee. KCAB INTERNATIONAL participated as the partner institution, and Peter & Kim, Vienna International ?1 Arbitral Centre, and Hong Kong International Arbitration Centre sponsored the event. Started in 2020, YAD is the first student-led conference in Asia where practitioners, scholars, and students come together annually to reflect on issues in the international arbitration field. The conference aims to provide a platform for eminent scholars, practitioners, and students to convene and gain insight into fast-changing matters in the international arbitration community.

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