Kluwer Arbitration Blog

2022 Balkan Arbitration Conference Recap: Balkan-Related Panels

James Hayton (LK Law), Klentiana Mahmutaj (Red Lion Chambers), Korab Sejdiu (Sejdiu & Qerkini), and Jola Gjuzi (Kalo & Associates) · Sunday, November 13th, 2022

On 29-30 September 2022, the second annual Balkan Arbitration Conference ("BAC 22") – was held in Tirana, Albania. The Conference is the first arbitration conference for the Balkan region as a whole. Its purpose is to provide a forum to help build cooperation and develop the use and practice of arbitration in the Balkan region. In addition, it aims to help create closer links between practitioners and arbitration users within the region. A thread running through a number of the panels at the Conference was the unique perspectives and insights brought by practitioners from the Balkans to key issues in international arbitration. This post highlights this cross-cutting theme, to highlight Balkan perspectives on the assessment of damages, enforcement, and investment treaty arbitration.

The organising committee consisted of **James Hayton** (LK Law, London) (Chair), **Klentiana Mahmutaj** (Red Lion Chambers, London), **Korab Sejdiu** (Sejdiu & Qerkini, Prishtina) and **Dr. Jola Gjuzi** (Kalo & Associates, Tirana). Having been forced to hold the first iteration online because of COVID back in July 2021, the organisers were delighted this year to be able to hold the Conference in-person, in the Balkan region. The location of this year's Conference inspired many of the focussed presentations, which as noted above drew on the unique contributions to be made to the field of arbitration by perspectives of those working on these issues in the Balkans. The Conference more broadly also developed these themes. For instance, **Franz Schwarz** (WilmerHale) gave the keynote speech at BAC 22, on the "Promise of Arbitration", providing some thought-provoking insights into the problems with local courts in the Balkans, such as delay and actual or perceived corruption, and how arbitration can, albeit not always perfectly, help to solve some of these problems.

A Balkan Perspective on the Assessment of Damages

The panel moderated by **Korab Sejdiu** (Sejdiu & Qerkini) discussed *'Assessment of Damages in International Arbitration: a Balkan Perspective'***.** The panellists were **Adam Markiewicz** (Quantuma), **Ermelinda Beqiraj** (PwC), **Nikola Stamboli?** (Berkeley Research Group) and **Antolín Fernández Antuña** (Antuña & Partners). The session was organised as an accessible session for those relatively new to the quantification of damages.

Ermelinda Beqiraj provided a general introduction to the role of quantum experts in international arbitration, including providing statistics to show that there is at least a correlation (even if not a

demonstrable causal link) between retaining an expert and succeeding in your damages case, with 69% of claim values awarded where the claimant has an expert but the respondent does not, versus 41% where the respondent also instructed an expert. Ms Beqiraj also demonstrated, with the aid of statistics, the common failings of parties' approaches on quantum. She noted, for instance, that in over half of all cases tribunals had criticised one or more of the parties for a lack of evidence and substantiation vis-à-vis the damages claims – including noting their incorrect or unconvincing underlying assumptions or speculative claims. Such findings correlated with an average reduction in compensation from 53% of the amount claimed to between 30%-40%. Ms Beqiraj also noted that although tribunals are often accused of 'splitting the baby', and the figure of 53% average awards might superficially be viewed to support that, in reality the distribution of awards was far wider than that figure might suggest.

Adam Markiewicz discussed the main approaches to damages, being the cost approach, market approach and income approach. He also discussed the merits of using a range of approaches, rather than just one single approach, and the utility of a Monte Carlo simulation for future cash flows. Nikola Stamboli? emphasised above all the importance of experts maintaining their independence and impartiality in order to avoid appearing to become a 'hired gun', if they are to be taken seriously by the tribunal and positively contribute to the outcome.

Antolín Fernández Antuña's presentation focused on the legal framework for damages in international investment law, and the principle of 'full reparation' under customary international law, including the provisions on compensation in the ILC Draft Articles on State Responsibility. He demonstrated through examples the enormous difference which can be made to the size of awards by the choice of the date of valuation and by the methodology in calculating interest (e.g. respondent's cost of borrowing vs. US Prime Rate).

Enforcement in the Balkans

The panel moderated by **Andrew Wordsworth** (Raedas) discussed *'Balkan Enforcement: Lost Cause or Surprisingly Friendly?'*, with **Dalibor Valin?i?** (WolfTheiss), **Milica Savi?** (Karanovic & Partners), **David Premel?** (Rojs, Peljhan, Prelesnik & Partners) and **Zoe O'Sullivan KC** (Serle Court Chambers) as speakers.

Discussion focussed on the prospects of enforcement across the Balkans region . The panel agreed that the war in Ukraine had not led to many enforcement cases in the region, despite, for example, superyachts owned by Russians having historically been a relatively common sight in the Adriatic.

Andrew Wordsworth invited the panel to consider a yacht, owned by a BVI trust, cruising the Adriatic with the (alleged) ultimate beneficial owner on board, and what prospects there might be for enforcement actions to be taken against the yacht. There was unanimous agreement that enforcement would be possible in theory but that the difficulties would lie in the evidence and the evidential thresholds adopted by the courts. Zoe O'Sullivan KC explained that it would be sufficient under English law, before an English court, to show a good arguable case, on an interim injunction application, that the asset belongs to the respondent, and that the standard of proof ultimately, for actual enforcement, would be on the balance of probabilities. Panellists noted that English law takes into account complex corporate or trust structures and, where appropriate, finds that the assets are held as nominee for the "real" owner without requiring direct proof of an ownership link.

Dalibor Valin?i? explained that in the Balkans, courts tended to be far more formalistic, so that circumstantial evidence such as, e.g. Instagram pictures of children of the alleged ultimate owner on the yacht, would probably not suffice. Milica Savi? also noted that getting an interim order urgently in some jurisdictions in the Balkans is virtually impossible and, even when it does happen, it takes far too long, destroying the whole point of getting the order.

Looking to the future, the panel agreed that the biggest change required is to make judicial enforcement proceedings faster. David Premel? noted that in Slovenia the judiciary are paid very poorly, which results in many talented lawyers not becoming judges at all but going into private practice. The panel agreed that while they had heard of judges in the region leaving the judiciary and becoming lawyers, with mixed success, they had never heard of lawyers from private practice becoming judges, in stark contrast to what Zoe O'Sullivan KC explained was the case in the English system.

A Balkan View on Investment Treaty Arbitration

The panel moderated by **Paul Key KC** (Essex Court Chambers) discussed *'Investment Treaty Arbitration: the View from the Balkans'*. The speakers were: **Prof. Hugo Barbier** (Barbier Mehtiyeva), **Dr. Jola Gjuzi** (Kalo & Associates), **Timothy J. Feighery** (ArentFox Schiff) and **Enea Karakaci** (Ministry of Infrastructure & Energy of Albania).

Enea Karakaci provided insight into how claims are administered by the Albanian State Advocate's Office, and how a response to them is coordinated between the various interested departments. He explained that Albania's Government institutions outside the State Advocate's office had not historically understood well the nature of the State's obligations to protect investments and how breaches of contract might result in investment treaty arbitrations and sizeable awards of compensation against the State. He said that this was a process of education in which the State Advocate's office was engaged. Mr Karakaci also explained that Government departments had not always cooperated fully with the State Advocate's office, though this was now changing. He also explained that an area for future improvement was the way in which claims are dealt with when they are raised, with better coordination being needed between the various interested organs of the State.

Tim Feighery spoke about his experience of handling investment treaty disputes for the United States of America as a lawyer in the State Department. He described how when a claim comes in it is as if 'an alarm goes off in the building' and it is 'a shock'. After the claim is distributed to interested departments and they are given time to consider it, the State Department calls in representatives of the various interested departments to coordinate the Government's position. Mr Feighery also spoke of the three principles on which a rational investment treaty policy should be based – balance, discipline and consistency – which the State Department also tried to adopt in its work on investment claims.

Prof. Hugo Barbier focused on UNCITRAL Working Group III, which is examining the ability of shareholders to recover in investment treaty arbitration for losses which, under many national laws, would be recoverable only by the company.

Dr Jola Gjuzi addressed the role of sustainable development in international investment law. Dr Gjuzi explained that the concept is increasingly present in the new generation of international investment agreements (IIAs) and highlighted how the international and domestic jurisprudence on

sustainable development illustrate the obligation to continuously integrate and balance three interdependent and potentially competing objectives of economic development, environmental protection and social welfare, and legally speaking, of norms addressing economic protection, environmental protection and social welfare (human rights). She stated that the private interests vs. public interests debate inherent in the fair and equitable (FET) standard of protection reflects a quest for integration and balance. Having reviewed investor-state arbitral awards on the interpretation of old generation and new generation IIAs, she identified cases where integration and balancing of competing objectives are successful to the extent that they are reached through the application of principles of law such as good faith, due process, non-discrimination and proportionality.

Conclusion

The 2022 Balkan Arbitration Conference proved to be the event that the region was missing, where professionals and businesses can meet up and align efforts in promoting arbitration. Overall, the regional interest in arbitration is on the rise and the region's dysfunctional and slow judicial systems tend to prove a ripe environment for arbitration to flourish.

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