Kluwer Arbitration Blog

Seoul ADR Festival Recap: Procedural Innovations in International Arbitration

Sue Hyun Lim, Ashwin Murthy (Kim & Chang) · Monday, November 14th, 2022

The Seoul ADR Festival ("SAF") 2022, conducted by the Korean Commercial Arbitration Board, was held between 7-11 November 2022. The 11th Asia-Pacific ADR Virtual Conference, the flagship conference of SAF 2022, took place on 9-10 November 2022 and was attended by more than 400 participants. It covered a broad range of topics over four sessions. The second session of the first day, entitled "Innovation Updates," brought together experienced arbitration professionals from various jurisdictions to discuss an array of recent international arbitration.

The panel was moderated by Sue Hyun Lim (Partner, Kim & Chang) and its discussants comprised of Alastair Henderson (Partner, Herbert Smith Freehills), Jeonghye Sophie Ahn (Partner, Yulchon LLC), Andrés Jana Linetzky (Founding Partner, Jana & Gil Dispute Resolution), Swee Yen Koh (Partner, WongPartnership), Eva Kalnina (Independent Arbitrator, Arbitration Chambers) and Yoshimi Ohara (Partner, Nagashima Ohno & Tsunematsu).

Ms. Lim opened the session by introducing the relevance of the session topic, explaining it in the context of a possible decline in innovation for procedural issues, given that the use of technology has become the focal point of arbitration.

Resistance to Due Process Paranoia and Adoption of Expedited Procedures and Virtual Procedural Conferences

Mr. Henderson noted that, unlike before, with major headline innovations in emergency arbitration, expedited cases and summary case disposals, currently the focus is on incremental improvement of online case resolution. Mr. Henderson opined that the most important recent procedural innovation is the pushback to arbitral due process paranoia that has been taking place, especially with backing from courts and institutions.

Mr. Jana made reference to the UNCITRAL Expedited Arbitration Rules (2021), remarking that UNCITRAL had created expedited arbitration rules that will potentially become globally accepted standards of efficiency. Taking a step further, he suggested that expedited arbitration could even become the default procedure in arbitration.

Ms. Koh noted that investment arbitration was now also following expedited rules. She explained that other measures of efficiency have recently been taken up by some institutions, such as the rule

on summary dismissal of both claims and defenses in Article 22.1(viii) of the LCIA Rules 2020.

Ms. Kalnina focused the discussion on improvements in virtual hearing technology and observed that there has been a general change of mindset with regard to the utility and acceptability of video calls to resolve procedural issues. She also touched upon other major innovations such as the ICC reports on cybersecurity and the new ICSID rules of 2022.

Along the same lines, Ms. Ohara detailed the recent progress that has been made in establishing protocols for virtual hearings. She noted that such protocols would enable arbitration to meet the requirements of the business community in a way that judicial proceedings cannot. In particular, she made reference to the ICC protocols on virtual hearings that were developed during the global pandemic.

Alternatives to Multi-Tiered Dispute Resolution

Mr. Henderson questioned the efficacy of multi-tiered dispute clauses. On the one hand, he argued that it is a good idea in principle to have a tiered arrangement that allows the senior management to meet and negotiate. On the other hand, he pointed out that in practice cases rarely were resolved at the early stages of a dispute. This is because the senior management of the parties to a dispute have often already talked prior to instructing lawyers, making the multi-tiers redundant or even increasing time and costs. Mr. Henderson argued that mediation should not be formally required as part of a multi-tiered dispute clause and should instead be a natural part of the process, wherein the tribunal offers at all stages an off-ramp to mediate without the necessary binary outcome of arbitration, making it a multi-pronged dispute resolution instead of a multi-tiered one. Mr. Henderson also noted that, in his view, the other measures of multi-tiered dispute resolution, such as reference to Dispute Boards, were often without benefit.

Ms. Koh agreed, noting that it depends on the counsel and parties and whether they have engaged the multi-tiered dispute resolution process in good faith. She noted that the timelines for negotiation and mediation should be kept short, and she agreed with Mr. Henderson that mediation should be offered over the course of arbitration proceedings instead. She also agreed that dispute adjudication boards are ineffective and add to costs and noted that expert determination is more effective to resolve specific issues, so long as the determination is considered final and will not be further litigated unless there is manifest error.

Mr. Jana observed that there is now a tendency for parties to skip arbitration altogether. In particular, he noted that the trend is visible in investment arbitration, where mediation is gaining steam.

The Role of Institutions in Making Arbitration More Efficient

Ms. Ohara argued that institutions could incentivize efficient conduct of arbitration and penalize parties for their use of delay tactics. She added that institutions could publish examples of best practice of expeditious conduct to encourage parties to borrow from them. Ms. Ahn further noted that institutions can influence parties via passing new rules on expeditious conduct.

Ms. Kalnina remarked that institutions have been critical in improving efficiency of arbitration, wherein procedures are much faster. Institutions have also been quick to respond to the pandemic, and in terms of procedural efficiency.

Arbitrator Challenges

Ms. Kalnina pointed out what she considered to be some of the primary issues with arbitrator challenge and disclosure. She highlighted the gaps in the IBA Guidelines on Conflicts of Interest and observed that there are no clear standards to apply (i.e. whether to apply objective standards of the parties or of a reasonable woman). She further pointed to different institutions applying different practices behind closed doors, and to certain inefficiencies, such as the rule regarding the key issue of repeat appointments, and abuse by parties on challenges for irrelevant issues, such as appearing on panel discussions. Ms. Kalnina stated that as a starting point, to solve the issues with arbitrator challenge and disclosure, there needs to be an innovative cross-border guidance on disclosure and challenges beyond the IBA Guidelines, which tribunals and parties would adopt more uniformly.

Ms. Ohara agreed that there are limits on what should be disclosed, but the rule of thumb had to be that of disclosure. She said she believed the LCIA could produce sanitised decisions as to reasonable grounds of challenge. Mr. Henderson said he believed that the focus should be on arbitral independence and impartiality, and if these are questioned, then to disclose.

Costs

Ms. Ahn and Ms. Koh discussed the Singapore law on conditional fees. They noted that it was a positive move towards reworking costs arrangements. Ms. Koh explained that it provides more options to parties and allows firms to take up good cases where the clients may not have the funding to afford premium legal services otherwise. She also noted that third party funding is critical given the current issues of cash flow. Ms. Ahn observed that hybrid and damages-based agreements were also worth considering as possible avenues.

Concluding Thoughts on Innovation

The panelists ended with their brief thoughts on what should be the focus of innovation moving forward. Ms. Ohara wished for more active communication and commitment of the arbitrator at the earlier stages of proceedings, where questions can be asked. Ms. Koh urged for a focus on good and equal conduct of the parties, referring to LCIA Rules 18.5 and 18.6. Ms. Kalnina hoped for more efficiency and less procedural complexity, with quicker arbitrations and awards. Mr. Jana looked to further taxonomical and legislative work, particularly in technology and dispute resolution. Mr. Henderson suggested a reframing of how we look at resolving disputes, in terms of mediation and otherwise. Ms. Ahn concluded that we should focus on making arbitration cheaper, via shorter submissions and less bifurcation. She further advocated the use of tribunal-appointed experts instead of party-appointed “hired guns” and the use of virtual hearings to replace in-person hearings altogether. The panel was in agreement that the focus of innovation should be on

efficiency of arbitration.

More coverage from Seoul ADR Festival is available here.

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