Kluwer Arbitration Blog

Berlin Dispute Resolution Days 2022: ESG – Dawn of A New Era of Disputes in International Arbitration?

Laura Reichen (Gantenberg Dispute Experts) and Jacky Lui (Herbert Smith Freehills) · Wednesday, November 30th, 2022

On 14 September 2022, the DIS40 Autumn Conference was held in Berlin, Germany, as part of the first edition of Berlin Dispute Resolution Days – a near week-long series of conferences and events focused on dispute resolution. It also coincided with the 20th anniversary of the DIS40, making it a rather special gathering for dispute resolution practitioners in Germany and abroad.

The theme of this year's conference was captioned, "*ESG – Dawn of A New Era of Disputes in International Arbitration?*". The panels included a discussion on each letter of E (environment), S (social) and G (governance) (collectively, "ESG"). The conference encouraged dialogue and a lively debate based on practical experiences and academic perspectives. As such, the thoughts represented by each panel did not necessarily reflect a panel or a speaker's particular views towards a topic.

This post provides a brief recap and analysis of the relevant topics in discussion, concerning: the role of ESG principles in international arbitration, ESG as an often-discussed topic, arbitration and the environment, arbitration and business & human rights, and fraud and corruption in arbitration.

The Role of ESG Principles in International Arbitration

ESG aspects are now discussed as arguably significant drivers of corporate and investment activities globally. It is increasingly commonplace that investors (both individual and institutional) and corporations in general demand ethical business practices as part of their investment and business decisions. Global ESG assets have been cited to be on track to exceed $50 trillion by 2025, being over a third of the total $140.5 trillion in projected total global assets under management. The rise of ESG factors in investing can be described as a remarkable transition for corporate investors but should be approached with trepidation. The topic has its critics and has been described in the Economist as "*three letters that won't save the planet*". According to the Economist, 'green-washing' is a term that might shroud some ESG activities.

In the investment law context, increasingly, a shifting balance can be seen towards a host State's right to regulate. Newer trends in treaty negotiation practices and modernisation efforts have focused on including standalone provisions in that regard or entire chapters in trade agreements on the environment. This possibly sees an increasing focus towards a host State's sovereign powers to

regulate in the public interest.

ESG – Three Letters and a Big Question Mark

In a conversation between Katrine R. Tvede (Ashurst) and Marc Jacob (DLA Piper), a critical view towards ESG was taken.

It is not clear yet whether ESG initiatives move business activities towards its stated purposes, or whether this goal is still utopic. Arbitrators are decision-makers, who resolve questions put to them by counsels. In this context, in an investment case encompassing ESG activities, the tribunal might be tasked with evaluating those activities. Outside of this scope, tribunals would be reluctant taking decisions concerning ESG if not explicitly asked to. In commercial arbitration, cases where ESG factors form a part of the contract may give tribunals more room for consideration.

The question whether companies were actually pursuing ESG targets remained open.

Arbitration and Environment

This topic was discussed by a panel consisting of Amanda Neil (HEAD), Viktoria Schneider (Noerr), Alicja Zieli?ska-Eisen (Humboldt University of Berlin and Queritius) and Jan Heiko Köhlbrandt (ADM) and moderated by Johanna Büstgens (Hanefeld).

Arbitral proceedings, investment treaties and arbitral decision-making have, to varying degrees, been influenced by environmental considerations. At a treaty-reform level, efforts to modernise the Energy Charter Treaty appear to facilitate sustainable investment in the energy sector. This would reflect clean energy transition goals and contribute to the objectives of the Paris Agreement.

From an in-house perspective, ensuring ESG compliance of suppliers is increasingly an area of focus. It affects business from suppliers on-boarding to auditing for compliance and monitoring of ESG amongst all suppliers. Further, ESG regulatory initiatives in the EU build pressure on businesses to carry out compliance checks.

In the context of international arbitration, introduction of ESG factors into arbitral procedure (*e.g.* an ESG-compliant arbitration) could present a novel approach to greener arbitrations. In a similar conclusion to the earlier discussion, arbitral tribunals will likely not deal directly with ESG issues, unless confronted with them. A suitable mechanism to incorporate ESG considerations into arbitral proceedings (*e.g.* amicus curiae briefs) is still missing. In an investment law context, newer model BITs and trade agreements are beginning to incorporate ESG considerations, or at least to rebalance in favour of a host States right to regulate.

Arbitration and Business & Human Rights

Emanuel Ghebregergis (Covington & Burlington), Laura Halonen (Wagner Arbitration), Simona Scipioni (Webuild), Jan Erik Spangenberg (Manner Spangenberg) discussed disputes involving business and human rights. This session was moderated by Alessandro Covi (Herbert Smith

Freehills).

Although arbitration involving business and human rights issues might emerge, it could remain subject to its own limitations. In August 2017, a Working Group on International Arbitration of Business and Human Rights published a proposal suggesting arbitration being used as a mechanism for resolving disputes arising out of business-related human rights abuses, after identifying that there is a growing need to protect victims. This is an effective component of the United Nations Guiding Principles on Business and Human Rights (2011).

The Bangladesh Accord is another example of this need, being a legally binding agreement between brands and trade unions aiming a safer and healthier garment and textile industry in Bangladesh. International commercial arbitration, however, has been built primarily for commercial application. Commercial parties might also be seen as repeated users of arbitration, whereas victims might only be one-shot players in any such system. In general, human rights issues have formed parts of disputes in which tribunals have been called to consider them.

In this respect, supply chain due diligence only becomes more important for businesses. Globally, many jurisdictions have passed or are beginning to pass supply chain due diligence legislation, which provides a legal foundation for an obligation on companies to respect human rights in global supply chains.

From a counsel perspective, litigation and representing victims of corporate negligence is also a topic that connects to business and human rights issues. Such cases often involve greater personal connections with victims of disasters and their families.

Fraud and Corruption in Arbitration – A Debate

The final panel was a debate between Iuliana Iancu (Hanotiau & van den Berg) and Sebastian Wuschka (Luther), moderated by Adilbek Tussupov (Herbert Smith Freehills).

Fraud and corruption are emergent topics in international arbitration. In both contexts of commercial and investment arbitration, fraud and corruption allegations have the potential to affect the enforceability or the setting aside of an arbitral award on public policy grounds.

Tribunals are increasingly faced with allegations of investment illegality. In certain cases, it might be necessary to consider whether an investment was made "*in accordance with the host state law*". (See Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 3rd ed, 2022), p. 106 *et seq.*). This might form part of a jurisdictional objection, an issue on the merits or in relation to quantum. Further, illegality may occur during the concurrence of a proceeding, which could then affect the procedural conduct of the arbitration. This would influence the rendering of an arbitral award, in which issues of enforcement or setting aside ought to be considered. Finally, they also debated whether to shift the burden of proof to the investor, where a host State could present *prima facie* evidence of corruption. The burden of proof itself is founded in due process, which is a fundamental requirement of all arbitral proceedings. Fraud and corruption are increasingly topics being dealt with by tribunals and courts. It has the potential to affect the substantive and procedural components of an arbitral proceeding.

Conclusion

It is the dawn of a new era where ESG factors become a key consideration for businesses and States. This is unlikely to change in a future where such considerations play an increasing role in business decisions. International arbitration continues to demonstrate flexibility. Decision-makers on that front might be called upon to consider disputes containing an environmental or human rights element. It therefore remains important for practitioners and decision-makers alike to be informed of ESG factors as they evolve.

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