Kluwer Arbitration Blog

2022 Taipei International Conference: Past, Present and Future of International Dispute Resolution – Part 1

Winnie Jo-Mei Ma (The Arbitration Chambers and Bond University) and Emily Hay (Hanotiau & van den Berg) · Thursday, December 1st, 2022

The Chinese Arbitration Association, Taipei and Asian Center for WTO & International Health Law and Policy co-hosted the annual Taipei International Conference on Arbitration and Mediation during the Taiwan Arbitration Week on 5 October 2022. With onsite and online moderators and speakers, three sessions of the Conference explored how the pandemic, digital economy and ESG (environment, society and governance) affect the evolution and adaptation of international dispute resolution in the past, present and future. This Part reports on Sessions I and III, while Part 2 pertains to Session II.

Session I: Pandemic

Moderators: Pijan Wu (LCS & Partners) and Dr. Yueh-Ping (Alex) Yang (National Taiwan University College of Law)

Zachary Sharpe (Jones Day) focused on two questions in his presentation entitled "Dispute Resolution and Due Process Amidst Global Pandemics". The first was whether the right to be heard entails the right to a physical hearing in arbitration. According to the ICCA Project, none of the surveyed national laws expressly provides for the right to a physical hearing, although such a right may be inferred from the law of the seat in a handful of jurisdictions. This led to the second and more difficult question of whether, absent the right to a physical hearing, due process nevertheless requires a physical hearing. Due process requires the arbitral tribunal to balance competing interests, including equality between parties, expediency, efficacy, enforceability and procedural flexibility. This balancing act is both fact-intensive and normative (i.e., rooted in domestic legal traditions that may not transcend borders). However, the ICCA Project did not find any reported cases in which the denial of a physical hearing was a ground for annulling an award or disqualifying an arbitrator.

The presentation of Leng Sun Chan (Duxton Hill Chambers) entitled "Will Virtual Hearings Remain After the Pandemic?" confirmed that the arbitral tribunal's main concerns remain compliance with the applicable arbitration rules and laws together with due process. Responses to the challenges for virtual hearings during and after the pandemic include: access to technology, connectivity and facilities for equal opportunity to participate; tighter time management to

accommodate time zones and screen fatigue; professional platforms for hearings and document management to alleviate security concerns; pre-hearing conferences and virtual breakout rooms for integrity of witness testimony; procedural orders and virtual hearing protocols after consultation with all stakeholders. In Singapore, a hybrid of virtual and in-person court hearings has continued because of perceived convenience and cost-time efficiency.

Prof. Janet Walker, CM (Osgoode Hall Law School York University) advocated in her presentation entitled “The Future of Arbitration is Hybrid” that, in the coming years, in-person arbitrations will regularly include remote participants. This will considerably benefit party representatives who wish to observe the proceedings remotely with minimal disruption to their business and provide them with ready access to real-time explanation of the proceedings by counsel who are also offsite; it will facilitate the presentation of evidence by witnesses for whom the forensic benefit of in-person attendance does not justify the expense; and it will increase the capacity of counsel to collaborate during the hearing with team members offsite. Hybrid hearings will, however, create new criteria for counsel in weighing and adjusting the composition of their case presentations in terms of impact, e.g., which witnesses do we wish to cross-examine – and which of them do we wish to have there in-person? And, with the bewildering array of screens and other forms of media in the hearing room, hybrid hearings will challenge our traditional understanding of the oral hearing as an occasion in which all those present share the same observations and perceptions at the same time. Thus, despite the return to the rich immersive experience of hybrid hearings, the next new normal will present fresh challenges for us to the taking of evidence in the arbitral process.

As a bridge between Sessions I and III, the presentation of Dr. Helena Chen (Chen & Chang) entitled “The Pandemic as a Push Toward Greener Arbitration” reminded us that virtual hearings can and should become part of our pursuit of ‘net zero arbitration’, along with other institutional endeavours, including electronic submissions and electronically stored information.

Presenting on “The Covid Pandemic’s Lasting Impact on Arbitral Authority”, Dr. Joshua Karton (Queen’s University Faculty of Law and National Taiwan University) explained his sociolegal perspective on arbitral authority: that arbitration is recognised and accepted by parties and states not because of any inherent legality, but because of its practicality and utility, just like money. Nothing actually empowers arbitrators beyond the broad social acceptance of their authority to bind the parties. Exploring the impact of the pandemic beyond the hearing room, he noted the shift from a Western conception of due process towards a true blending of processes and perspectives, traditions and techniques. International arbitration’s centre of gravity is also shifting from the West towards the East, with less need for physical access and evolution away from any one geographical centre of gravity. The social model of arbitral authority suggests that the pandemic will make arbitration ‘more international but less global’, as globalisation will no longer be equated with harmonisation or unification, while localisation and regionalisation will no longer be equated with old-fashioned or dogmatic practices. Instead, localisation and globalisation can coexist, with increasing diversity of procedures, arbitrators and linguistics.

Session III: Environment, Society and Governance

Moderators: Dr. Tsai-fang Chen (National Yang Ming Chiao Tung University (NYCU) School of Law) and Dr. Ana María Daza Vargas (Edinburgh Law School)

In her presentation entitled “Investment Arbitration and Human Rights: Workable Arrangement”, Dr. Crina Baltag (Stockholm University Department of Law) focused on the intersection between investment law, investor-State dispute settlement (ISDS) and environmental protection and, relatedly, the right to a clean, healthy and sustainable environment as a human right. Drawing on the United Nations General Assembly Resolution of 28 July 2022 on this subject, she argued that there is a solid basis for a workable agreement between investment law and dispute settlement on the one hand, and human rights law, including environmental law, on the other. This means having adequate, detailed treaty provisions in place that allow arbitral tribunals to give due consideration to environmental concerns raised in arbitration proceedings. In this respect, it makes a difference for interpretation purposes whether such provisions are part of the preamble or mentioned explicitly in relation to the right to regulate. While arbitral tribunals have tools available in the form of treaty provisions and interpretation, there is still work to be done to solidify a framework in which human rights and environmental issues may be addressed in ISDS proceedings.

Dr. Stephan Wilske (Gleiss Lutz) and Annemie Heubach (IE University and the University of Law) jointly delivered a presentation on “The Global Goals of ESG (Environmental, Social and Governance) – Are Arbitral Institutions Doing their Part?” Zooming in on the environmental pillar of ESG, they considered the increasing importance of climate change and the need to limit adverse impacts on the environment. With this in mind, they asked why should ESG goals not apply to arbitral institutions? Dr. Wilske and Ms. Heubach surveyed current measures taken by arbitral institutions in pursuit of ESG goals and identified additional measures that can be adopted to limit adverse environmental impacts. These include: (i) amending their rules to make electronic filing the default rule, to limit document production, and to provide cost consequences for environmentally relevant behaviour; (ii) providing encouragement such as guidelines for arbitral tribunals to reduce superfluous long-haul flights, and cost incentives for conducting arbitration in a more environmentally friendly manner; and (iii) creating a ‘green ambassador’ for arbitral institutions to implement small day-to-day changes.

Emily Hay (Hanotiau & van den Berg) presented a paper entitled “Under my Umbrella: Seeking Shelter under an ESG Clause”. Looking at increasing regulation in the ESG space beyond corporate disclosures and reporting requirements, she highlighted the EU’s Proposal for a Directive on Corporate Sustainability Due Diligence which may soon impose concrete ESG due diligence obligations on companies for environmental and social matters. These and other ESG regulations increasingly influence or require companies to put in place ESG clauses with their contractual partners which contain assurances or targets on ESG issues. The relative novelty of ESG clauses and challenges associated with their drafting are likely to lead to future disputes over issues such as interpretation of broad and imprecise language, determination of applicable laws, the measurability of ESG metrics, challenges associated with responsibility over supply chains and value chains, and new impacts upon contractual remedies.

Yun-Ru Leu (National Taiwan University College of Law) spoke on “Exploring the Possible Role of Investor-State Arbitration for Climate-related Disputes”. She explored the gap between expectation and reality in climate-related investment disputes. In this respect, climate change might be considered a ‘community interest’, and ISDS could evolve into a dispute settlement regime with a better capability to address community interests such as climate change. Specifically, she argued that to incorporate competing community interests in an investment treaty dispute, we can adopt new climate clauses or interpretative tools. In addition, procedural measures that may be of assistance include transparency, amicus curiae participation in the proceedings and recognising the use of counterclaims.

Prof. Chang-Fa Lo (Permanent Representative of Taiwan, World Trade Organization) presented on "War-Related International Commercial Disputes and Arbitration's Peace Facilitating Role". He emphasised that human life and health should be considered as the human values of the highest degree in all legal contexts, including in the management of international arbitration cases by institutions and tribunals. The aggressive military action by Russia against Ukraine was raised as a concrete example of a war without moral justification. In this context, giving priority to the value of human life and health in arbitral proceedings may have implications for the selection of arbitrators (e.g., to avoid a national of the invading country in certain circumstances), the selection of a legal seat (e.g., to avoid selecting the invading country), and the procedural rules (e.g., to be interpreted flexibly to accommodate needs related to a war). Support for human life and health is not inconsistent with independent and impartial decision-making, but it requires objective interpretations of concepts such as force majeure which incorporate these fundamental values.

Conclusion

The pandemic and ESG have challenged and enabled arbitration to be more diverse, efficient and environmentally friendly. Digital economy is another accelerator for evolution and innovation (see Part 2). Our past and present discussions continue to contribute to future development and improvement in international dispute resolution.[1)]

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References

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