Kluwer Arbitration Blog

California International Arbitration Week 2023: Discussion on Opportunities and New Trends in the US to Asia-Pacific Practice

Pragya Sharma (Miles Mediation & Arbitration) · Sunday, March 26th, 2023

On 15 March 2023, as part of California International Arbitration Week, California Arbitration and California Lawyers Association ADR Subcommittee organized an interactive event titled 'Opportunities and New Trends in the US to Asia-Pacific Practice,' hosted by King & Spalding. The session was moderated by Cedric Chao (Principal, Chao ADR, PC), and featured as speakers Gloria Lim (Chief Executive Officer, Singapore International Arbitration Centre), Hiroyuki Tezuka (Head, International Dispute Resolution Practice, Nishimura Asahi), K. Luan Tran (Partner, International Arbitration Practice, King & Spalding), Mariel Dimsey (Secretary General, Hong Kong International Arbitration Centre), Sae Youn Kim (Partner, International Arbitration & Cross-Border Litigation, Kim & Chang), and Sally Harpole (Independent Arbitrator and Mediator, Independent Arbitrator & Mediator).

As discussed below, the event primarily focused on the mindset of Japanese, Korean, and Southeast Asian companies when facing international contract disputes; the use of international mediation following the Singapore Convention; and the repercussions of US-China geopolitical tensions on disputes and international arbitration.

Mindset of Southeast Asian Countries When Faced with International Disputes

Kickstarting the discussion, Ms. Dimsey offered valuable insight from an institutional perspective, and more specifically about the initiatives undertaken by the Hong Kong International Arbitration Center ("**HKIAC**") in dealing with international disputes. Ms. Dimsey stated that by incorporating accomplished practitioners in its Secretariat and recruiting experienced arbitrators, HKIAC is able to offer consistent service in the administration of disputes arising from and pertaining to Southeast Asian countries, and specifically the Republic of China. While emphasizing Hong Kong as a favored seat for international arbitration, Ms. Dimsey also underlined its common law legal system, international non-permanent judges in courts of appeal, and its independence from the Republic of China.

Adding another arbitral institution's outlook, Ms. Lim explained that the Singapore International Arbitration Center ("**SIAC**") ensures a trusted environment by providing certainty, range of services and choices to the parties, and structure in hearings, while also catering to a judiciary that

favors arbitration. Ms. Lim further noted that over ninety percent of SIAC's caseload comprises international disputes concerning the United States, India, and the Republic of China. Mr. Tran briefly commented that the establishment of arbitration centers in Southeast Asia is an example of and a contributing factor in increasing relations in international arbitration with such southeast Asian countries.

Ms. Kim then educated the audience on two specific phases that Korean companies experienced and how those phases affected Korean companies' mindset towards international arbitration. The first was in the 1970s and 1980s, when Korean construction companies initiated business overseas with MENA and European countries and consequently had to accept submitting potential disputes to arbitration. The second was in the late 1990s and early 2000s, when South Korea opened its market during crisis to investments from foreign companies and such investments were accompanied by arbitration clauses. Both time periods facilitated acceptance and incorporation of arbitration clauses in cross-border agreements involving Korean companies in an economy which had traditionally followed a non-litigious culture. On choosing seats, Ms. Kim stated that due to sample clauses in contracts, Korean companies initially found themselves choosing New York, Paris, or London; however, with the recent success of SIAC and HKIAC, Korean companies are increasingly opting for Singapore and Hong Kong.

While shedding light on the situation in Japan, Mr. Tezuka stated that with the increase in trade between Japan and other countries, the need for arbitration-centric legislation became more significant in order to make Japan into a favored seat. On being further questioned by Mr. Chao on possible arbitration centers in Japan, Mr. Tezuka mentioned that (i) there have been recent legislative efforts to amend Japan's arbitration law to align with the UNCITRAL Model Law and to allow foreign lawyers to practice international arbitration in Japan, (ii) arbitral tribunals have recently been empowered to punish for contempt, (iii) the city of Tokyo has designated special courts to preside over arbitration-specific matters, and (iv) courts are increasingly facilitating translation of documents to English and recruiting English-speaking judges.

Impact of Increasing Participating of Asian-Origin Companies in International Arbitration

Mr. Chao then solicited the speakers' opinions on the impact of the increasing participation of Asian countries in international arbitration. Ms. Harpole responded that there are differences between legal systems in the United States, on the one hand, and Singapore, Hong Kong, and China, on the other, even in the practice of international arbitration. To illustrate this point, Ms. Harpole gave the example of hearings, where parties from the United States often rely on extensive participation of witnesses, while parties from Asian countries tend to expect shorter hearings with heavier emphasis on documents and lesser participation of witnesses. Ms. Harpole noted in summary that since the 1980s, international arbitration practitioners have put efforts into creating initiatives to harmonize approaches of common law and civil law systems by enacting the UNCITRAL Model Law and the International Bar Association's soft law rules on procedures catering to the different stages of an arbitration hearing. In addition to the rules provided by the International Bar Association, Ms. Kim also pointed out the role of the Inter-Pacific Bar Association and its guidelines on privilege and attorney secrecy in international arbitration.

Turning to the topic of reducing extensive discovery practices in international arbitration, Mr. Tezuka stated that arbitral tribunals can utilize the first procedural order and pre-hearing

conference to curb fishing expeditions by the parties and streamline pertinent issues involved in an arbitration. Mr. Tezuka also noted that incorporating mediation in arbitral proceedings may assist the parties in resolving disputes pertaining to discovery and help the arbitral tribunal to effectively manage the matter.

From a practitioner's perspective, Mr. Tran mentioned that since California is being increasingly chosen as a seat for international arbitrations by Southeast Asian entities, attorneys in the United States may be required to conduct limited discovery of facts and documents in these proceedings. Mr. Tran further stated that such increasing participation of Southeast Asian companies from civil law systems may help arbitration practitioners in the United States to specifically focus on documents presented to them by their clients, change their presentation of evidence before the arbitral tribunal, and perhaps their writing style.

Opportunities to Leverage the Singapore Mediation Convention in International Arbitration

With the recent signature and ratification by countries of the United Nations Convention on International Settlement Agreements Resulting from Mediation ("**SCM**"), Mr. Chao enquired whether parties will be able to leverage the SCM in their international arbitrations. Ms. Lim commented that prior to the enactment of the SCM, there was reluctance towards mediation but that since the SCM came into effect, there has been an increase in hybrid proceedings involving mediation and arbitration. As further explained by Ms. Lim, the enforcement of the SCM has allowed parties to benefit from mediation and utilize the provisions thereof to make their settlement agreement into a consent award capable of being enforced under the New York Convention. Continuing the conversation, Ms. Harpole stated that the United States is giving serious consideration to ratifying the SCM, especially since its provisions allow for two desirable conditions: (i) allowing party autonomy where parties may choose to apply the SCM, and (ii) restricting the application of the SCM where settlement agreements concern governmental entities. On harmonization, Ms. Harpole further suggested that UNCITRAL Model Law on International Commercial Mediation can assist countries in harmonizing mediation procedures. Commenting further on Article 8 of the SCM, Mr. Tezuka stated that opt-in reservations have facilitated the government of Japan agreeing to sign and ratify the SCM.

Consequences of Geopolitical Tensions between the United States and Republic of China

In the context of recent developments in relations between the United States and the Republic of China, Mr. Chao asked the speakers if geopolitics will have an impact on Hong Kong as a favored seat for international arbitration. In response, Ms. Dimsey stated that HKIAC has emerged has the primary institution for dispute resolution in Hong Kong especially since it is well equipped to service arbitrations arising from most of the surrounding countries. In addition, Ms. Dimsey stated that the Arrangement Concerning Mutual Assistance in Court-Ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and the Hong Kong Special Administrative Region allows a party to an arbitration seated in Hong Kong to apply for interim measures in the Republic of China. The application can be made in a court of competent jurisdiction where either the party against whom such measures are sought resides or the property is situated, provided the arbitration is administered by a qualifying arbitral institution, which includes HKIAC. Ms. Dimsey

further pointed that HKIAC studies enforcement of its awards in various courts and has thus far noted that over the last decade, only three awards have not been enforced as being “arbitrary”, and that the Republic of China has specified that Hong Kong should remain a hub for arbitration between the east and west.

Affirming Ms. Dimsey’s comments, Ms. Harpole stated that special provisions hammered out between the Republic of China and Hong Kong to protect parties and track enforcement of arbitral awards will ensure that Hong Kong remains a favored seat.

Concluding Remarks

Overall, the event focused presented interesting insights into the Southeast Asian industry and its outlook on international arbitration. Particularly, it shed light on an increase in nomination of Southeast Asian seats for international arbitration and introduction of aspects of civil law system into international arbitration in California. Harmonization of international arbitration is a much-needed avenue and can assist both the United States and Southeast Asian countries to develop a uniform practice, preferably devoid of extensive discovery processes.

More coverage of California International Arbitration Week is available here.

This entry was posted on Sunday, March 26th, 2023 at 7:44 am and is filed under Asia, Asia-Pacific, California, California International Arbitration Week, HKIAC, SIAC
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