Kluwer Arbitration Blog

LIDW 2023: Opening with Three Keynote Speeches

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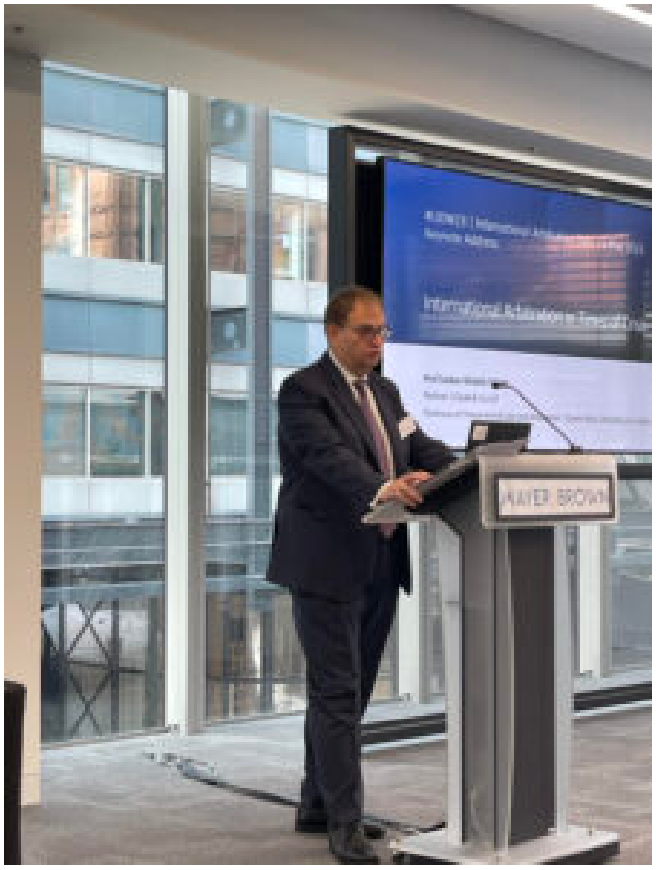
London International Disputes Week 2023 ("**LIDW 2023**") kicked off on 15 May 2023. This year's theme explores how the disputes community, is and should be, adapting to a changing world. The first day – International Arbitration Day (hosted by Mayer Brown, Allen & Overy, and Herbert Smith Freehills) – followed the "arbitration disputes sun" across key regions and jurisdictions exploring recent developments and connections of those regions to English law and London as a seat. This blog post covers three keynote speakers of the day.

"The Role of Arbitration in Times of Crises"

Professor Loukas Mistelis focused on the lessons learned or not learned from the use of arbitral mechanisms in times of crises, eg in investor-state arbitration arising from the Argentine economic crisis or more recently the COVID pandemic and the Russian war in Ukraine. He addressed several questions: "Can international arbitration embrace the fluidity of time and successfully manage change?"; "What lessons can be learned from these mechanisms in terms of dealing with mass claims arising out of a crisis?"; "How did these institutions manage a large number and variety of claims, the consistency and coherence of awards, and funding and enforcement mechanisms?"



Professor Mistelis noted that, for commercial arbitration, a recent Queen Mary University of London survey gathered evidence on the role of arbitration after crises and the impact of a crisis on arbitration. He highlighted that arbitration has proved adaptable and flexible to deal with any issues, whether purely legal, technical, financial, or mixed. COVID and sanctions, for instance, forced arbitral institutions to work together, share expertise, and develop solutions that encourage parties to continue using arbitration. Overall, his conclusion was that arbitration is a useful mechanism in times of crisis and crises do not present a challenge but an opportunity. For investment arbitration, the interaction with crises is different. For instance, the Ukraine crisis and climate change discussions are driven by arbitration lawyers and some sort of arbitration is always on the table.

Professor Mistelis stressed that arbitration thrives or at the very least is useful in times of crises when two conditions are met: (i) when the party autonomy is not unduly constrained by regulation and (ii) when arbitration is used in its primary basic form. A back-to-the-basics approach allows arbitrators and parties to build a procedural framework that addresses their needs rather than an inflexible process with built-in milestones that may impact efficiency and effectiveness of arbitration. His conclusion was that arbitration is a service and a collaborative flexible process with proper regard of due process and party autonomy, in other words going back to the roots would help international arbitration help parties in times of crisis.

“The Arbitration Act: To Reform, or Not to Reform?”

Rt. Hon. Dame Elizabeth Gloster DBE, PC spoke about the reform of the English Arbitration Act 1996 (“**the Act**”) – a topical issue that had garnered a lot of attention in the United Kingdom. In September 2022, the Law Commission published its second consultation paper, highlighting the need to review the Act and determine if any amendments were necessary to promote the UK as a leading seat, inter alia, the provisions on confidentiality, the proper law of the arbitration agreement, and challenges of awards based on the lack of tribunal’s substantive jurisdiction.

While the Law Commission sought to leave the Act as is on confidentiality (to not include any explicit provisions on the matter), Dame Gloster disagreed. She argued that including specific provisions on confidentiality would make English law more accessible and provide reassurance to the parties. She also noted that the current wording raised questions on who was bound by confidentiality, including whether it applied to witnesses, which would benefit from more clarity.

The second area of focus was the proper law of the arbitration agreement. The Law Commission

proposed a new rule to regulate that the law governing the arbitration agreement should be the law of the seat, unless otherwise specified. Dame Gloster mentioned the *Enka v Chubb* decision where the court held that a choice of law in the main contract would be an implied choice for the arbitration agreement. She noted that the decision received a mixed response from the arbitration community and opened a "can of worms". For instance, Dame Gloster noted that there would be a conflict between Rule 16.4 of the LCIA Rules (which provides that, absent a specific choice, the law of the arbitration agreement would be the law of the seat) and the decision in *Enka v Chubb*. Summing up, Dame Gloster deemed the proposed new rule to be necessary.

On the point of challenges to awards based on the lack of a tribunal's jurisdiction, Dame Gloster observed that courts rarely granted such challenges but noted that such challenges presented practical constraints and led to significant costs and delays. The Law Commission proposes certain reforms, including restricting new arguments and new evidence unless they could not have been known at the time, allowing oral evidence in exceptional circumstances and, allowing challenges where the decision of the tribunal was wrong. Dame Gloster was unconvinced that allowing for challenges when the tribunal's decision is wrong would be sufficient. She suggested that the burden of proof should be on the party bringing the challenge instead of following a "judicial review-type criteria".

In conclusion, Dame Gloster suggested that if we want things to stay the same, they will have to change and emphasized the need to be prepared for reform when necessary.

"Challenging Arbitral Awards Through the Backdoor: Mitigating the Increasing Trend of Claims Against Arbitrators"

Paula Hodges KC pointed out that the arbitration framework is designed to achieve finality and effective enforcement of awards. However, as a rising trend, dissatisfied parties are bringing civil actions against arbitrators in national courts – to challenge the awards through "the back door" and to stop enforcement of arbitral awards.

She gave an example of a recent instance where the losing party in an arbitration seated in Singapore commenced a court claim in Indonesia against the three arbitrators and the relevant institution based on the claim of conspiracy. She stressed that while this claim is still pending with the Supreme Court of Indonesia, a similar claim was brought against arbitrators based on allegations of gross negligence and bias in Thailand. However, the Court of Appeal in Thailand dismissed the claim. Lastly, Ms Hodges gave a recent example where the French Court of Cassation dismissed a claim against the ICC based on an alleged procedural breach when appointing arbitrators and stressed a distinction between the administrative function of the ICC and judicial or decision-making function of the arbitral tribunal.

Ms Hodges considered several issues that arise in the context of claims against arbitrators, eg the place where the breach happened and where the loss was suffered. This could be the place of the seat of arbitration, enforcement, where the losing party is located, or eg the home jurisdiction of the arbitrators. She pointed out that in the Indonesian case, the claim was brought in the country where the claimant was based and also the place of enforcement; however, the award arose from a Singapore-seated arbitration, and the laws of Singapore governed the dispute. Ms Hodges noted that the first instance court in Indonesia dismissed the claim on three bases: the arbitral institution

is outside of Indonesia, it is a Singapore-seated arbitration subject to the law of Singapore, and the claim should have been brought where the loss was suffered, namely Singapore.

Ms Hodges also flagged that one of the relevant questions is what law applies to arbitrator liability and that arbitration institutions failed to address this. Article 43 of the ICC Rules states that claims against the ICC about the administration of ICC proceedings are subject to French law but does not deal with arbitrator liability.

There were also several theories of how to deal with arbitrator liability. One school of thought was the jurisdictional theory, according to which arbitrators have judicial functions akin to those of judges resulting in full immunity. Another approach would be to say that there is a contractual relationship between the parties and the arbitrators where civil and contractual liability would be possible. Under the third, hybrid theory, arbitrators' rights originate from arbitration agreements and statutes, and the United Kingdom embraces this approach. Section 29 of the English Arbitration Act 1996, which is a mandatory provision, states that arbitrators have immunity from liability regarding the exercise of their functions, except for bad faith. Bad faith or dishonesty exception is a common feature of in other national arbitration laws, including in Australia, Indonesia, and Scotland. She stated that civil law counties have a more contractual approach, and in accordance with this approach, the arbitrators can be sued in case of a breach of contract. A case on point was a claim Puma brought against two arbitrators in Spain, and the Spanish court established recklessness.

The typical relief sought against the arbitrators would be the costs charged by the arbitrator. Also there is a question of cost liability for arbitration institutions. She referred to the Indonesian and Thai cases and stated that each party bore its own costs even if the arbitrators and the institution were successful.

To sum up, Ms Hodges asked what arbitration institutions and arbitrators can do about the issue. Because institutional rules are contractual in nature, any immunity provisions in the rules will be incorporated into the arbitration agreement. National courts will then interpret these rules according to the national law of the country. She mentioned that the ICC tried to issue a blanket immunity for itself and its arbitrators in 1998, but the French court opposed this, stating that mandatory provisions of French law cannot be excluded, and civil liability should still be considered. Regarding arbitrators, she suggested that they can raise the issue of liability at the outset of proceedings to clarify the matter with the parties. Moreover, she stressed that there are professional indemnity insurances provided by most institutions, including LCIA. She also mentioned that sometimes, in ad hoc arbitration, some arbitrators may try to exclude the liability completely. However, clients mostly resist this suggestion.

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