Kluwer Arbitration Blog

LIDW 2023: Arbitration in the MENA and Asia Regions

Mustafa Mert Dicle, Ayça Çitil · Friday, May 19th, 2023

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 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 two region-focused events from Day 1: the panel "Arbitration in the MENA Region: Transition and Growth" held by Mayer Brown, and the discussion organized by Herbert Smith Freehills on "Asia: The UK's finest export: English Law".

Arbitration in the MENA Region: Transition and Growth

Following the keynote speech delivered by Professor Loukas Mistelis, this panel consisted of Christian Alberti (SCCA), Karim Ghaly KC (39 Essex Chambers), Sara Koleilat-Aranjo (Al Tamimi & Company), and Dr. Aseel Zimmo (Bahrain Ministry of Justice). The session was moderated by Raid-Abu Manneh (Mayer Brown).

Economic Growth and Purposes

Several of the panellists focussed on economic growth in the region. From the outset, Christian Alberti explained that nothing is business as usual in Saudi Arabia since it is indeed going through a transformation. The government is trying to move away from oil dependency and hence, other sectors such as health and infrastructure are being supported. Mr Alberti also referred to the Nyon project and stressed that "mega" as a word is no longer enough to reflect the scope of the project. Still, he put forward that these projects come with challenges such as human resources and supply-chain issues. So, he projected that there are a lot of construction disputes on the horizon.Karim Ghaly added that 10 years ago no one would imagine that people would be talking about Saudi Arabia as an exciting jurisdiction. He predicted that Saudi Arabia will go through a similar transition to Dubai, due to the unprecedented level of renewable energy and infrastructure projects. Mr Ghaly also made the prediction that disputes are on the horizon since too many projects are going on in parallel.

Energy Transition Efforts in the Region

Sara Koleilat-Aranjo emphasized that the misfortunes of some can become the fortune of others. She mentioned that the UAE will be hosting COP28, reflecting the growing impact of the MENA region. She also added that energy transition efforts in the region are mainly led by Saudi Arabia and UAE and both economies pledged the net zero objective. Finally, Dr. Aseel Zimmo elaborated on Bahrain Renewable Energy Action Plan and mentioned that the whole region is focused on renewable energy and climate change. She also explained that FDI is very important to Bahrain since it has many projects even though these are smaller in scope compared to Saudi Arabia. She added that Egypt is also undergoing some change and gave the example of New Cairo. Even the fact that 14 new cities are being built in Egypt is enough to demonstrate this change.

Attitude of Jurisdictions Towards Arbitration

As for the next part of the panel, Christian Alberti underlined the fact that Saudi Arabia is a party to the major international treaties including the New York Convention and the Singapore Convention. He also added that model contracts, and especially the model contracts by the Ministry of Economy, include arbitration clauses. Next, he reflected on the judicial support by sharing the data that 92% of the set-aside motions were denied and only less than 10% of the grounds are Sharia-based. Finally, he concluded his speech by stating that the caseload of the SCCA is increasing where there is an involvement from 21 different nationalities but noted that the interest issue is still a red flag for Saudi Arabia.

Next Karim Ghaly also expressed that Dubai had its flaws such as the criminal penalties imposed on arbitrators and the interpretation of DIAC rules. However, he stated that all of these are being recognized and handled. He also, emphasized that the competition across the Gulf is the biggest ever including the jurisdictions of Saudi Arabia, Bahrain, and Egypt.

Sara Koleilat-Aranjo backed up this with data showing that there were only 3 arbitral institutions in the region back in the early 90s; whereas, in 2016, there were over 45 arbitral institutions. She explained this phenomenon as an uncontrolled and exponential growth where a lot of processes is actually learned through experience. She also added that the fact that the judiciary in Dubai is actually coming from different legal backgrounds creates different interpretations and since there is no specialized circuit in the UAE there are some outlier decisions as well. She also mentioned that UAE has signed many BITs since they need protection for their investors as well. So the policy behind this is to attract more FDI together with the strategy to protect their own investors. Finally, Dr. Aseel Zimmo elaborated on the Bahrain Chamber for Dispute Resolution and mentioned the joint effort of Bahrain and Singapour in strengthening the bilateral ties by establishing the Bahrain International Commercial Court. She anticipated that in 10 years we will be even more and more talking about the MENA region.

Asia: The UK’s Finest Export: English law

The panel for the discussion on Asia: “The UK’s finest export: English Law” started with a Keynote speech on “Challenging Arbitral Awards Through the Backdoor: Mitigating the Increasing Trend of Claims Against Arbitrators” from Paula Hodges KC (Herbert Smith Freehills).

After Paula Hodges KC's insightful speech, moderator Matthew Hodgson (Allen&Overy) presented the panellists: Jonathan Lim (Wilmer Hale), Sara Masters KC (Twenty Essex) and Mike McClure KC (Herbert Smith Freehills).

Jonathan Lim first shared his thoughts on the law governing the arbitration agreement in England and Wales, Hong Kong and Singapore. He shared that the law governing the arbitration agreement is likely to govern issues central to jurisdictional disputes between the parties, including (i) the formation or existence of an arbitration agreement; (ii) its substantive validity, or (iii) its extension to non-signatories. These issues can be hotly contested and go to jurisdiction, meaning also that multiple courts and arbitrators may be looking at the same question concurrently. There is therefore a risk of application of inconsistent laws to the same issue. There are clearly benefits to certainty and consistency on the law governing the arbitration agreement.

He mentioned that UK Supreme Court approaches this issue in accordance with *Enka Insaat ve Sanayi A.S. v. OOO Insurance Company Chubb* ("***Enka***"), which affirmed a three staged test for determining the law governing the arbitration agreement: Looking first to see if there is an express choice of law governing the arbitration agreement, then an implied choice and, in the absence of any express or implied choice, the law the arbitration agreement is most closely connected to. *Enka* also decisively affirmed that the law chosen for the contract is generally and presumptively the law chosen for the arbitration agreement.

Turning to Asia, Jonathan Lim shared that the UK approach has been very influential in leading seats. In Hong-Kong the *China Railway (Hong Kong) Holdings Limited v Chung Kin Holdings Company Limited*, it appears that first instance courts of Hong-Kong are in favour of adopting *Enka*. However, this case concerned the question of whether a dispute resolution clause was an exclusive jurisdiction clause, and not questions of the validity of the arbitration agreement. There is not yet an indication of how higher courts in Hong-Kong would approach these issues.

In Singapore, the position was for some time unsettled, but appears to have been resolved now in *BCY v BCZ*, which followed the English Court of Appeal's approach in the *Sulamérica* case, which was also followed by the majority in *Enka*. Subsequnet Singapore Court of Appeal authority has confirmed this approach, although *Enka* has not been expressly cited.

The Singapore approach appears compatible with *Enka* although there is a difference with respect to the circumstances in which the initial presumption in favour of the law governing the contract would be displaced. The SIngapore courts appear to prefer the use of the effective interpretative principle rather than the application of the validation principle.

Finally, he noted the reform of Arbitration Act 1996, which would statutorily overturn *Enka* and establish that a presumption in favour of the application of the law of the seat to the arbitration agreement. He expressed support for this reform from the perspective of principle and policy, and observed that this will likely affect the position taken by courts in Asia.

In turn, Sara Masters addressed the topic of the UK position on Russian sanctions.

Sara Masters stated that both the EU and UK regimes regarding Russian sanctions are similar, noting that though this could change due to Brexit. She pointed out that the most typical situation is when making and receiving payments due to the sanctions opposed to the banks. Due to the sanctions, performance of the contract may become more expensive, and since this is not a valid reason for contract to become frustrated under English law, this may raise undesired situations.

After pointing out the problems can be encountered, Sara Masters raised two concepts to deal with these issues: Adding sanction clauses to the contracts between parties and common law doctrine of frustration. Under English law, illegality can be used as a defence in accordance with the *Ralli Brothers v Compania Naviera Sota y Aznar* case stating that the place of the payment is to be considered when relying on this defence because payment should be in the place of sanctions imposed. She also stated that although the *Ryder Industries Ltd v Chan Shui Woo* case states that even if there is illegality, the seriousness of the illegality should still be considered, and finished her speech pointing out illegality defence is rarely successful.

Matthew Hodgson stated that Turkish companies who work joint projects with Russian companies have doubts about how to proceed if the company worked with become sanctioned. Sara Masters stated that easiest and practical way to avoid unwanted situations is to put a clause to the contract between parties regarding sanctions.

Mike McClure KC noted that some “no oral modification clauses” provide that no variations can be added at all. However, effectiveness of such clauses are based on the freedom of the contract. He stressed that the same issue on *Rock Advertising Limited v MWB Business Exchange Centres Limited* came before the courts of Singapore, in which the court noted while there are couple of commercial reasons for parties to add these clauses in the contract, it took a different approach than the UK Supreme Court’s approach. Regarding the guarantees and on demand bonds, and the difference between them, Mr. McClure stated that first thing that should be pointed out is that the guarantees create a secondary obligation, whereas the bonds create a primary obligation. Even though clauses on liquidated damages clause fall away by the termination in civil law countries, the UK approaches this topic within the commercial reality.

This entry was posted on Friday, May 19th, 2023 at 8:55 am and is filed under Asia, LIDW 2023, MENA
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.