Kluwer Arbitration Blog

Tel-Aviv Arbitration Week: ESG Arbitration, Tech and Construction, and Arbitrating in France

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Tel Aviv Arbitration Week 2023 had something for everyone! The jam-packed week included many different professional, social and networking events. This article highlights three important panel discussions that were held during the week.

ESG Arbitration: the Future?

This panel was moderated by Mr Shai Wade (RPC); and was composed of Deger Boden (Deger Law), Nuna Lerner, (Gornitzky & Co.), Anita Leviant (Center of Arbitration and Dispute Resolution), Erin Miller Rankin (Freshfields Bruckhaus Deringer), Kevin O'Gorman (Norton Rose Fulbright), and Samantha Rowe (Debevoise & Plimpton).

ESG, an acronym for "Environmental, Social, and Governance", has become a clarion call for stakeholders in the private market to view business and investing through the lenses of their impact on sustainability, labor rights, pay equality, human rights, and other related areas. As such, it is garnering growing interest from legal professionals who are advising companies in responding to these challenges.

On the one hand, as Erin Miller Rankin pointed out, ESG is creating new obligations, costs, and risks on major capital projects. These include concession agreements that are tied to ESG commitments, contractors that are being precluded due to past involvement in corruption, disputes that arise due to delays resulting from environmental regulations, the impact of climate events on force majeure clauses, and difficulties with developing standards of performance for first-in-kind ESG compliant projects.

On the other hand, the panelists focused on three aspects that make ESG important for clients:

- First, it has become an issue of high importance to clients' stakeholders. Nuna Lerner encapsulated the weight stakeholders give ESG by stating that: "The era where companies were primarily evaluated by their profits is long gone". By way of example, with respect to the environment, stakeholders are now looking at a range of factors, from "large" decisions pertaining to sustainability down to "small" issues including whether the printer default setup is double-sided, and making investment, employment, financing decisions accordingly.

- Second, it is a powerful management tool. Nuna Lerner noted that ESG provides companies with effective tools to better manage themselves. She reflected that clients are implementing ESG standards by mapping and identifying their ESG gaps and proactively developing plans to close them. To close those gaps, companies rely on lawyers' advice in creating, drafting and implementing effective compliance mechanisms.
- Third, ESG is increasingly present in clients' legal needs; Samantha Rowe noted that there are growing and emerging ESG legal enforcement mechanisms which deeply impact clients. She informed of a cutting edge EU Corporate Sustainability Due Diligence Directive which was recently adopted and will require corporations to identify, prevent, and mitigate adverse impacts on human rights and the environment.

In addition, the presence of ESG in litigation disputes is ever increasing. ESG regulations and benchmarks are impacting the performance of contracts. In investment-state arbitrations, ESG claims are frequently being asserted by claimants as well as in defenses and counterclaims by states, and *ad-hoc* arbitrations are being used to resolve human rights disputes.

Kevin O'Gorman noted that arbitration can play an important role in ESG as evidenced by an ICC Commission Report which determined that arbitration is well suited as a tool to resolve environmental disputes. He further stated that arbitration can be an effective means to address mass claims and cited the United Nations Compensation Committee which handled 2.7 million claims associated with the Iraq war.

However, despite these promising prospects, there are still important unresolved questions with respect to this tool. First, as a basis for the arbitral process there is a need to identify a clear set of private rights and responsibilities under ESG. Second, there is the question of whether parties–particularly those who are not part of a contract–would consent to arbitration. By way of example, in the US context, plaintiffs would have to be convinced that an arbitration would be more beneficial than a jury trial. Anita Leviant added that the interpretation of ESG language in arbitration clauses is still a law in-the-making.

Deger Boden provided an overview of how litigation and arbitration are enabling the enforcement of human rights standards and principles. She noted instances where environmental harms were addressed as human rights violations including the landmark decision of Urgenda Foundation v. State of the Netherlands which held that the Dutch Government had a duty of care under the European Convention on Human Rights which required it to reduce emissions, and the groundbreaking decision of the Philippine Commission on Human Rights which found that carbon emitters could be held liable for their impact on climate change.

Arbitration in Tech and Construction: the View from Hong Kong and Beyond

This panel was hosted by Stephen Barak Rozen (APM & Co.) and featured panelists Sarah B. Biser (Fox Rothschild LLP), Clarissa Coleman (DAC Beachcroft) and Mariel Dimsey (Hong Kong International Arbitration Centre).

This intriguing panel provided the audience with an overview of the Hong Kong International Arbitration Centre ("HKIAC") and its activities. Established in 1985, the HKIAC was created with the objective of offering solutions to the growing need for dispute resolution services in Asia. Ms. Dimsey relayed that today the HKIAC is completely self-sufficient and independent from influence

and external control, providing dispute resolution tools through arbitration, mediation and adjudication. The HKIAC is divided into two major committees, one dealing with appointments and the other with proceedings. The HKIAC endeavors to be as diverse and inclusive as possible. Its success is apparent as it currently has an extremely busy caseload, which includes many cases from within Asia, as well as, western countries.

One of HKIA's important contributions can be perceived in its procedural innovation, specifically relating to interim measure arrangements between Hong Kong and Mainland China. HKIAC as a dispute resolution platform assists in the navigation of the "one country, two systems" principle, allowing for the use of its interim measures through the Mainland China as well as assisting in the streamlining of enforcement proceedings in lieu of the arrangement between the HKIAC, Mainland China and Hong Kong. This allows for smooth sailing regarding the majority of cases. Though, being that this is a fragile situation, there are a few exceptions, as this system is an unprecedented political experiment in China for how it formulates a semi-autonomous jurisdiction within a unitary, single-party state. While the formula has remained constitutionally valid two decades after implementation, it has been trapped in an understandably tense relationship in actual practice. In lieu of the factors above, the HKIAC presents a wonderful opportunity and tool to be aware of when negotiating and/or drafting an agreement.

Doing Business and Arbitrating in France

Sponsored by Clifford Chance and Teynier Pic, this panel featured Jean-Sébastien Borghetti (Université Paris Panthéon-Assas), Janice Feigher (Feigher Disputes Resolution), Maximin de Fontmichel (Geneva Center for International Dispute Settlement), Pierrick le Goff (De Gaulle Fleurance), Karen Laik (Clifford Chance), Claire Pauly (Jones Day), Julien Maire du Poset (Lead-Up), and Benjamin Siino (Gaillard Banifatemi Shelbaya Disputes).

The panel was a successful pitch for France as an arbitration place of choice and the panelists certainly gave the audience much food for thought. The event covered two questions: why do business under French law, where the panelists covered principle of French contractual law, and a second panel which addressed Paris as a preferred seat of arbitration.

The first panel on arbitrating under French law presented the main principles of French contract law: (i) contractual freedom; (ii) the binding nature of the contract and; (iii) the good faith principle, especially significant since the 2016 reform. The panel took the audience through the life cycle of a contract by comparison with Israeli law – and found several similarities.

While the stereotype is that French people get offended when foreigners assume there is nothing beyond Paris, it has actually come in handy for international arbitration, as the system has been centralized through the capital, especially with the creation of the international chamber of the Paris Court of Appeal, as was discussed during the second panel.

The panelists confirmed that French judges speak English and presented a few of the innovative features of the international chamber: proceedings can be conducted in English; foreign registered lawyers can appear under certain conditions; a binding procedural timetable; and evidence can be submitted in English (and experts and witnesses can testify in English and submit their documents in English), though written submissions have to be in French. They also stressed how easy it was in France to obtain money stemming from an award because a party can ask for conservatory

attachment measures even without a court enforcement order and the tariff is, once again, quite low (200 Euros to the bailiff). However, the party does need to file for recognition of the award within a month.

Tel Aviv Arbitration Week 2023 was a huge success and we hope to see you all next year at the 5th annual Tel Aviv Arbitration Week!

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