

Kluwer Arbitration Blog

SIAC Symposium 2023 Part 2: Charting the Future of International Arbitration – Insights into Regional and Topical Developments and Trends

Ashish Kabra, Gai Matsushita, Cunyuan Zhang · Sunday, October 1st, 2023 · YSIAC

Following the morning session which explored the geopolitics of international arbitration, the next generation of dispute resolution and the freshly-minted draft SIAC Rules (see [Part 1](#)), the afternoon session probed into regional and topical dimensions of international arbitration through six technologically-driven and interactive panel discussions.

I. Regional Developments, Trends & Forecasts

Illuminating Top Trends in South Asia, Africa, and the Middle East

The first regional panel discussion, moderated by Ms Shwetha Bidhuri (SIAC), delved into key developments in arbitration across South Asia, Africa, and the Middle East.

Sharing the African perspective, Mr Karim Anjarwalla (ALN Kenya) highlighted the launch of the new bilateral investment treaty for African States and competition amongst various African states to be the preferred seat of arbitration. Mr Tejas Karia (Shardul Amarchand Mangaldas & Co) canvassed the pro-arbitration developments in India, including the relevant legislative amendments. He also explained that the government-appointed expert committee would likely make further recommendations, such as express recognition of emergency arbitration and third-party funding. Mr Thomas R. Snider (Charles Russel Speechlys LLP) discussed the unexpected abolition of the DIFC-LCIA Arbitration Centre through Decree 34 of 2021 and the overall growth trajectory of the DIAC. Mr Jim Morrison (Peter & Kim) highlighted the increase in disputes arising from the critical minerals industry.

The panellists then discussed the evolution of disputes in these regions. They noted that as countries try to achieve their climate targets, disputes related to the critical mineral industry are becoming increasingly common. They further predicted an uptick in construction, ESG, and technology disputes across these regions.

The conversation further covered trends in international arbitration agreements, emphasizing

choices in arbitral institutions, governing laws, and seats. Factors influencing these choices include the backing of a robust and pro-arbitration judiciary, comprehensive legislative frameworks, and legal predictability.

The panel finally explored the growing incorporation of cutting-edge technology, like AI-generated real-time transcription, to better suit the needs of arbitration users. The need for such advancements to be integrated into institutional rules was underscored, acknowledging that technology is an enabler for more efficient arbitration.

Exploring Arbitration and Trade Trends between Asia and the Americas

The second regional panel, moderated by Ms Adriana Uson (SIAC), comprised Mr Gary L. Benton (Silicon Valley Arbitration & Mediation Center), Dr Deborah Elms (Asian Trade Centre), Ms Karina Goldberg (Ferro, Castro Neves, Daltro & Gomide Advogados), Mr Ramiro Rodriguez (Latin American Chamber of Commerce), and Ms Angela Torres-Andresen (Latin American Chamber of Commerce).

The panel began by addressing the growth in trade flows, especially in services and software, between Latin America and Asia. It highlighted the significance of traditional trade inputs in Latin America and how innovation in Asia has enhanced productivity.

The panel then addressed challenges and opportunities, with a focus on US-China tensions and their impact on global trade dynamics. Firms diversifying their supply chains to regions like Mexico and Southeast Asia were identified as potential sources of disputes. Moreover, along with the shift from traditional trade disputes to tech-related disputes, arbitrations relating to cryptocurrency and cybersecurity are of increasing importance.

The discussion underscored the complexity of trade agreements and their impact on sectors like infrastructure and sustainability in both Asia and Latin America. Looking ahead, the panel discussed upcoming trade trends, such as the growing role of sustainability and carbon credits, Latin American companies expanding into Asia, opportunities arising from US-China tensions, India's potential in services, and the importance of adaptability and risk management in international trade.

The panel finally stressed the importance of equipping individuals interested in America-Asia trade with the necessary knowledge and skills. This includes cultural understanding, familiarity with legal systems, language proficiency, and expertise in effective arbitration practices. They recognized the globalized nature of trade and the diversity among regions, advocating for a nuanced approach to navigate the complexities.

Experiences from North East Asia, South East Asia, and Asia Pacific

The third regional panel, moderated by Cunyuan Zhang (SIAC), navigated international arbitration practice in North East Asia, South East Asia, and Asia Pacific, with a special focus on prevailing challenges.

Ms Samantha Tan (Freshfields Bruckhaus Deringer) discussed court intervention, highlighting the recent decision, *BZW v BZV*, where the Singapore court set aside an award for “*manifest incoherence*”. She also commented on the tension between the policy of minimal curial intervention and the increasing variety of cases brought before the courts.

Mr Minh Dang (YKVN) introduced two recent decisions by the Vietnamese courts in Hanoi: (i) Judgement No. 09/2023/HS-PT dated 17 January 2023, where the recognition and enforcement of an award was refused because, among others, the tribunal did not apply Vietnamese law to a non-contractual claim; and (ii) Judgement No. 12/2023/QD-PQTT dated 4 July 2023, where a domestic award was set aside because the party failed to obtain consular authentication of the relevant resolutions and power-of-attorney (POA). He noted that these decisions are controversial and not legally binding on other Vietnamese courts.

Mr Lijun Cao (Zhong Lun) addressed challenges faced by foreign arbitration institutions in China. He revisited the disputed issue of the validity of the “*SIAC in Shanghai*” clause and other similar clauses involving foreign institutions and Chinese seats. He observed that recent Chinese court decisions have upheld the validity of such clauses.

Mr Eri Hertiawan (Assegaf Hamzah & Partners) commented on other challenges, such as frivolous claims and the enforcement of interim awards. He mentioned that Indonesian courts used to rely on public order and other legal grounds to set aside or refuse enforcement of arbitral awards. In recent times, Indonesian courts are more cautious in making such negative rulings. He also introduced other Indonesian breakthroughs, such as parties being able to arbitrate sports disputes in Jakarta instead of having to go to Lausanne, and the Indonesian Supreme Court’s efforts to correct lower courts’ decisions, to support arbitration.

The panellists also discussed how ADR can evolve to grapple with these changes and developments. They noted the courts’ efforts to enhance clarity and certainty by issuing more “guiding cases” in China, Vietnam, and other civil law jurisdictions.

II. Topical Developments, Trends, and Forecasts

Trends, Issues, and Opportunities in Project, Infrastructure, and Energy Disputes

The first topical discussion, moderated by Ms Sherly Gunawan (SIAC), began by discussing the major cost drivers in project, infrastructure and energy disputes. Mr Kelvin Ng (J.S. Held) introduced challenges in renewable energy projects, emphasizing the need for early involvement of engineering experts. He also highlighted a shortage of specialized vessels for offshore wind projects and mentioned regulatory and policy obstacles. Mr Krishnan Nadarajah (ExxonMobil Asia Pacific) noted that the energy sector faced significant challenges during the COVID-19 pandemic, primarily due to extreme price volatility. He also mentioned the complexities of navigating Russian sanctions.

The panel then delved into the key considerations when assessing the suitability of arbitration. Mr Gavin Margetson (Mischon de Reya LLP) emphasized two key factors: neutrality and enforceability. Dr Eun Young Park (Park Arbitration Chambers) emphasized the practicable

significance of choosing a stable seat as well as proper arbitration rules and governing laws. He further highlighted the differences in contract interpretation between civil and common law jurisdictions.

The panellists also discussed strategies and techniques for the efficient management of arbitration and to save time and costs, including bifurcation, tailored procedures, early examination of expert reports, and preliminary determinations. Some highlighted the importance of setting clear timeframes for escalation clauses, recommended mediation before arbitration, and emphasized the role of counsel as gatekeepers for information flow between experts and parties.

The panellists further commented on possible reforms to make arbitration more suitable for resolving energy projects and infrastructure disputes. They discussed potential trends and improvements in the field, including hybrid dispute resolution processes, expertise of specialized courts, and the role of party-appointed experts in ensuring efficiency. They also addressed concerns about arbitration confidentiality in the context of emerging themes like ESG considerations, emphasizing the need for transparency while preserving party autonomy.

Technology, Artificial Intelligence, and Intellectual Property

The second topical discussion was moderated by Ms Snigdha Bhatta (SIAC). The panel consisted of Ms. Yi-Jun Kang (Morrison & Foerster LLP), Mr Shaun Leong (Withers KhattarWong LLP), Mr Montek Mayal (Osbourne Partners), and Mr Alexandre Vagenheim (JusMundi).

The panel delved into the complexities of disputes involving unique digital assets, such as NFTs and cryptocurrencies, raising questions about their classification as proprietary assets and shedding light on the associated enforcement challenges. The varied approaches taken by different countries towards these assets could significantly impact the recognition and enforcement of arbitral awards dealing with such assets.

The conversation further emphasized the pivotal role played by specialized arbitrators with a deep understanding of IP and IT intricacies. The panellists highlighted the distinct challenges in valuing digital assets, underscoring the importance of considering factors like uncertainty and the contributions of various assets when assessing damages in such cases. The discussion also explored strategies for legal professionals to enhance their profiles within the legal field, with a focus on effectively using AI tools, while acknowledging concerns about AI model biases in arbitrator selection.

The panel carefully examined how the choice of the seat for arbitration can profoundly affect the outcomes and enforceability of IP and AI-related disputes. It highlighted variations in AI regulation and IP arbitrability across different regions.

Finally, the panel explored various ways AI can enhance arbitration processes, extending beyond administrative tasks. These applications include accelerating award accessibility, document analysis, relationship mapping, and AI-generated summaries. These examples showcase the versatility of AI's application in arbitration.

The panel reached a conclusive consensus to emphasize the need for ethical, fair, and transparent deployment of AI in arbitration. A thoughtful and well-considered approach to AI adoption is

essential to effectively address the multifaceted challenges that AI poses in international arbitration.

Cross-Border Insolvency and Commercial Disputes

The third topical panel, moderated by Mr. Pranav Budihal (SIAC), consisted of Judge Robert D. Drain (Skadden, Arps, Slate, Meagher & Flom LLP), Judge James M. Peck (Morrison & Foerster LLP), Mr Quentin Pak (Burford Capital), and Ms Natalie Yap (Nishimura & Asahi).

In the discussion, the panellists considered the viability of using arbitration as a mechanism for resolving insolvency disputes, emphasizing arbitration's suitability for conflicts between private parties across different jurisdictions, and outlining how arbitration may alleviate the burden on already overtaxed bankruptcy judges and offering transnational finality to issues. The panel also addressed the existing challenges faced by insolvency arbitration, such as the requirement for upfront deposits that may press already cash-strapped parties into settlements, as well as the enforceability of final awards. To navigate these complexities, the panellists recommended mediation as a complementary or alternative dispute resolution method.

The dialogue then transitioned to potential ways to modify the current arbitration system to better accommodate insolvency disputes. Legislative and policy modifications were deemed crucial, along with a change in judicial attitudes toward arbitration. The adoption of the JIN Guidelines and the appointment of specialized arbitrators could also significantly facilitate such arbitrations. The consensus was that with certain framework modifications, arbitration can be developed into a tool for resolving insolvency-related disputes.

Conclusion

The afternoon session of the 2023 SIAC Symposium underscored the need for reflection on the latest developments, challenges and trends in arbitration across Asia-Pacific, the Americas, Africa and Middle East. It betokened the SIAC's commitment to improving dispute resolution in projects, infrastructure and energy, exploring the capacity of arbitration to address cross-border insolvency disputes, and fostering the interplay between arbitration and technology, AI, and intellectual property.


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