Kluwer Arbitration Blog

2023 Year in Review: Trends and Developments in East and Central Asia

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Introduction

East and Central Asia sees further efforts to promote arbitration through legislative and regulatory developments. Domestic courts clarified issues fundamental to arbitration and the judicial enforcement of arbitral awards. Domestic legislative and judicial bodies and arbitral institutions continue to grapple with recent trends and come up with innovative solutions that reflect the unique experience of this region. On the user side, East and Central Asian parties continued to be active in both commercial arbitrations and investment treaty disputes.

Developments in Arbitration-Related Law and Institutions

In 2023, our Blog covered shifts within arbitration-related laws and examined novelties in institutional rules, offering insights into the evolving landscape of international arbitration in East and Central Asia.

In September 2023, the People's Republic of China promulgated its Foreign State Immunity Law, which signaled a departure from an absolute to a restrictive theory of state immunity in terms of PRC courts' scope of judicial review of arbitral awards. Our contributors note the uncertainties that persist regarding the application of these rules to the recognition and enforcement of investor-state arbitration awards, particularly given the PRC's commercial reservation under the New York Convention.

Kyrgyzstan made headway by rendering tax disputes arbitrable. This reform, effective January 1, 2023, aimed to address judicial inadequacies by introducing arbitration as a means to tackle tax-related conflicts. Our contributors discussed concerns over the ability of arbitral tribunals to deal with the complexities of tax law and potential biases within the judicial system.

In April 2023, Japan's Diet approved amendments to the Arbitration Act, marking the first major change to Japan's arbitration laws in two decades. The focus is to ease access to Japanese courts for enforcing arbitration awards. The amendments will become effective in April 2024.

Our contributor also examined the Japan Commercial Arbitration Association's ("JCAA") Interactive Arbitration Rules. Influenced by civil law practice, these rules stand out for its requirements of tribunals to offer preliminary opinions on factual and legal issues, thus facilitating settlement discussions based on case strength and enhancing arbitration efficiency. Our contributor also discussed potential challenges include varied application by arbitrators, reliance on tribunal expertise, and potential due process concerns.

As for Hong Kong, our contributor looked at the four years in practice of the Interim Measures Arrangement, which, since coming into effect in October 2019, has emerged as a preferred method for interim measures between Mainland China and Hong Kong in arbitrations.

Our contributor also discussed HKIAC's technological advancements that have improved case management for 34 arbitral tribunals and 80 parties, showcasing a commitment to efficiency. These technological advancements, and in particular HKIAC's Case Digest Tool, were also the focus of one International Law Talk podcast that the Blog covered.

Domestic Court Cases

Our contributors reflected on national court decisions in 2023 and recent years that addressed fundamental questions and emerging issues in arbitration.

Korea: Our contributor offered a Korean perspective on the issue of the applicable law of an arbitration agreement when the parties had failed to specify that in the agreement. Practitioners have been taking a fresh look into this issue given the English and French courts' conflicting decisions in *Kabab-Ji*, where the former applied the law governing the underlying contract, while the latter applied the law of the seat. Given the Korean Supreme Court's prior practice of trying to find an "*implicit*" agreement, our contributor observed that uncertainty remains about how Korean courts would decide when there is no explicit agreement and the governing law of the main contract and the *lex arbitri* are different.

Another post highlighted the evolving jurisprudence in Korea on the legal nature of cryptocurrency, with some courts considering it as "*intangible assets with property values*" and others identifying it as digital information rather than a "*thing*". Our contributors noted the implication of the uncertain nature of crypto assets on the structuring of enforcement measures before Korean courts.

PRC: Our contributor analyzed three PRC court decisions relating to the validity of third-party funding agreements. A Shanghai court denied the validity of a third-party funding agreement in litigation; whereas a Beijing court and a Wuxi court both confirmed the legality of a third-party funding agreement in a CIETAC arbitration. Our contributor observed that the difference between litigation and arbitration may account for the divergent results.

In another post (Part I and Part II), our contributors reviewed hundreds of cases concerning PRC courts' enforcement of foreign arbitral awards between 2012 and 2022 and found that PRC courts fully enforced 91% of the foreign awards—with the most common ground for denial being Article V(1)(a) of the New York Convention—and handed down rulings on nearly half of the applications within 180 days.

Our contributors also covered the PRC Supreme Court's 36th batch of six Guiding Cases, all of which concern judicial review of arbitration, and observed here and here that these Guiding Cases clarified significant issues, such as the doctrine of separability of the arbitration agreement, public interest related to cryptocurrency, and *ad hoc* arbitration seated outside of China conducted in accordance with expedited procedure.

Hong Kong: Our contributor discussed Hong Kong Court of Final Appeal ("CFA")'s landmark decision in the case of C v D [2023] HKCFA 16, which held that pre-conditions to arbitrations set out in multi-tiered dispute resolution clauses, such as the requirement to conduct negotiation or mediation prior to commencement of an arbitration, are to be treated as matters concerning "admissibility" rather than "jurisdiction." Our contributor noted that this is the first time the distinction between "admissibility" and "jurisdiction" was clarified at the CFA level in Hong Kong.

ISDS

Several countries in the region entered into new investment treaties. PRC and Japan each signed a BIT with Angola—in PRC's case, it was the first bilateral investment treaty signed in more than eight years. Japan's BIT with Bahrain that was signed in June 2022 entered into force in September 2023. Meanwhile, the Republic of Korea signed a BIT with Serbia in September 2023, and had a BIT with Uzbekistan signed in April 2019 come into force in April 2023. In this respect, our contributors reported on a conference in Washington, D.C. entitled "Hot Topics in Investor-State Disputes in Central Asia" that focused on Central Asian states' experience with and outlook on investment legislations, treaties, and arbitrations.

As in previous years, case activities by East and Central Asian claimants and respondents remained steady. Three new ICSID cases by claimants in the region were registered—including *Korean National Oil Corporation et al. v. Nigeria* (regarding oil and gas enterprise), *China Machinery Engineering Corporation v. Trinidad and Tobago* (regarding a steel industry project), and *PowerChina HuaDong v. Vietnam* (reportedly regarding rescission of a contract for the construction of a Vietnamese hydropower project).

2023 also saw significant developments in cases brought by East and Central Asian claimants, including three cases involving Japanese investors and Spain regarding renewable energy generation enterprise. The *Eurus Energy* award ordering Spain to pay EUR 106+ million (which our contributors analyzed in the broader context of ECT modernization) underwent a rectification procedure in 2023 and is currently undergoing annulment; the *JGC Holdings* award ordering Spain to pay EUR 23.5 million is pending decision on annulment; and the tribunal in the *Itochu Corporation* case issued an unpublished decision on jurisdiction, liability, and certain aspects of *quantum* that appears to be at least partially in favor of the Japanese claimant. And, in the intra-region case of *JSC Tashkent v. Kyrgyzstan*, the tribunal majority issued an award finding that Kyrgyzstan had unlawfully expropriated Soviet-era resorts.

Awards were also issued in cases brought against East and Central Asian respondents. The tribunal in *Mobile Telesystems (MTS) v. Turkmenistan* upheld jurisdiction but decided that Turkmenistan had not breached the BIT; whereas the tribunal in *Herzig v. Turkmenistan* reached an unpublished award that reportedly dismissed on the merits most claims save an non-impairment claim. An

undisclosed award was rendered in *Schönberger v. Tajikistan*—a case where Tajikistan reportedly declined to participate in the arbitration proceedings. Meanwhile, PRC prevailed in *AsiaPhos v. China*, where the tribunal majority declined jurisdiction on the basis that the relevant BIT only conferred jurisdiction to rule on "disputes regarding the amount of compensation". And, with respect to the award in *Lone Star v. Korea* rendered in August 2022, our contributor criticized the tribunal's reliance on an OECD Commentary as "partially incorrect (oversimplified)"—the case is currently undergoing annulment proceedings.

Current Trends in the Use of Arbitration

Our contributors discussed East and Central Asian experiences with broader trends of shifts in the use of arbitration.

Against the backdrop of the continuing energy transition and increased energy insecurity globally, energy-related arbitrations show no sign of abating—and countries in the region are no exception. Our contributors noted recent experiences of Japanese companies in this field, including the several arbitrations spawned by the Ichthys LNG project in Australia. Given Japan's substantial involvement in the energy sector—including its move towards renewable energy and its nuclear revival plans—disputes involving Japanese entities are likely to persist.

Our contributors also analyzed the Korean experience with the recent significant increase in IP cross-border disputes particularly in non-traditional sectors such as gaming, life sciences, healthcare, entertainment, and Web 3.0. This surge can be attributed to arbitration's suitability for IP disputes, Korea's conducive environment for developing IP businesses, and the confidentiality and enforceability of arbitration awards. Our contributors also discussed proposals for enhancing Korea's position as a global IP arbitration hub.

The Blog also covered several major arbitration events in the region, where practitioners discussed their perspectives on current trends. We continued our live coverage of the Hong Kong Arbitration Week for the sixth year, including a contribution from Dr. Ling Yang (HKIAC Deputy Secretary-General) about Hong Kong and HKIAC's continued, pro-arbitration innovations, including the Outcome Related Fee Structures for Arbitration (ORFSA) regime and the above-discussed Interim Measures Arrangement. We covered panels that discussed techniques to facilitate settlement in international arbitration, regulation of use of artificial intelligence in dispute resolution, Hong Kong's ORFSA, and the negotiation and enforcement of investors' information rights.

We also covered (1) the Seoul ADR Festival's panels on disputes involving digital asset and recovery and management of arbitration cost; (2) the Japan Commercial Arbitration Association's 70th anniversary event; and (3) Tashkent Law Spring Forum's and Uzbek Arbitration Week's discussions (*see* post, post, post) of exciting new developments and innovations in Uzbekistan and the broader Central Asia.

Conclusion

We appreciate the continued engagement of our contributors and readers, which allows this Blog to cover the numerous jurisdictions of East and Central Asia. We welcome submissions on timely

topics relating to recent legislative and judicial developments, especially for jurisdictions that have traditionally seen less coverage, and look forward to continuing and expanding our collaboration in the New Year.

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