Kluwer Arbitration Blog

Europe Embraces a New Dawn of Arbitration in Asia

Alice Meissner (European Chinese Arbitrators Association & Fieldfisher) · Sunday, March 10th, 2024

On 29 November 2023, speakers from various jurisdictions met at a conference at Heuking in Düsseldorf, organised by the European Chinese Arbitrators Association (ECAA) and the Asian European Arbitration Centre (ASEAC), to discuss whether we are currently experiencing "A New Dawn of Arbitration in Asia".

Professor Sundra Rajoo, Director of the Asian International Arbitration Centre, gave an inspiring keynote speech, sharing insights into how best to navigate opportunities in the modern Asian arbitration landscape. He considered the concept of the "Asian Century" which "*paints a dynamic portrait of Asia poised for dominance in business, government and culture sectors*" and is being driven by transformative economic growth. While there is progress to be made in the thought leadership space and in ensuring greater independence from governments, Professor Rajoo considered the conference as an important opportunity "*to contribute to the collective momentum propelling us towards groundbreaking advancements in the field of arbitration*" in Asia.

Enforcement of Arbitral Awards in Asia

The first panel centred on the enforcement of awards across Asia. While several jurisdictions distinguish between foreign and domestic awards, the panel focused on the enforcement of foreign awards. This was useful for understanding the varying legal frameworks, as country-specific nuances were highlighted for European practitioners to consider.

In Singapore, for example, the courts apply the principle of minimal curial intervention which dictates that courts should not, without good reason, interfere with the arbitral process. Dr. Hermann J. Knott LL.M. (Kunz Rechtsanwälte) noted that the Singapore courts tend to adopt a pro-arbitration stance, respecting the autonomy of the arbitral process. Key cases around enforcement include *CEF and CEG v CEH [2022] SGCA 54*, *CVG v CVH [2022] SGHC 249* (as covered in a previous blog post) and *CZD v CZE [2023] SGHC 86*.

Dr. Björn Etgen (GvW Graf von Westphalen) discussed how the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules 2024 mark a significant step towards the modernisation of arbitration in China. Dr. Etgen provided some interesting statistics on enforcement, noting that a 2016 empirical investigation over a period of more than 20 years showed that the enforcement rate of foreign awards in China was just under 70%. It is noteworthy that more recent analysis in this 2023 blog post showed that the enforcement rate for applications

made between 2012 and 2022 had reached 91%.

Shivani Sanghi (Fieldfisher) focussed on the discussion around the public policy challenge in India. This discussion resulted in the Arbitration and Conciliation Act being amended in 2015 to clarify that foreign awards would only be considered contrary to public policy if, for example, the award was affected by fraud or corruption or contravened the fundamental policy of Indian law. Ms Sanghi went into detail about how these clarifications have been considered extensively through case law, including in *Ssangyong Engineering & Construction Co. Ltd. v National Highways Authority of India, 2019 SCC OnLine SC 677* (see this previous blog post) and *NTT Docomo v Tata Sons 2017 (4) ArbLR 127*.

There have been significant developments in legislation in Japan. Aiko Hosokawa (Oh-Ebashi LPC & Partners) explained that in April 2023, the Japanese Diet approved amendments to the Japanese Arbitration Act for the first time in two decades to follow the 2006 UNCITRAL Model Law on International Commercial Arbitration. These amendments will allow for (i) enforcement of interim or provisional measures obtained in arbitration; and (ii) waiver, at the courts' discretion, of the requirement that the arbitral award or interim measure must be translated into Japanese for the enforcement decision.

Alexander Lemnitzer (MOOG Partnerschaftsgesellschaft) explained that the enforcement of foreign awards in Vietnam is, in comparison to other Asian countries, very time consuming and can take up to two years. Foreign awards must first be recognised by the competent local court or the Ministry of Justice prior to enforcement. In contrast, domestic awards do not need to be recognised before enforcement.

Dos and Don'ts when Contracting with Asian Parties – User and Third-Party Funder Perspectives

The second panel provided advice for European practitioners seeking to arbitrate in Asia and then explored the growing popularity of third-party funding (TPF) in Asia, even drawing comparisons with the United Kingdom (UK).

Denning Jin (Han Kun Law Offices), Deputy Chair of ECAA, and Jeremy Bartlett SC (Prince's Chambers) provided their perspectives on contracting and arbitrating in Asia.
Five key points were addressed by Mr Jin:

1. Use English as the sole language of arbitration to avoid any misunderstandings from arising and to keep costs down instead of producing bilingual copies of documentation;
2. Choose arbitration institutions in major cities for access to arbitrators with international backgrounds and/or with experience in international arbitration, as well as the use of governing rules which are typically more internationally-oriented;
3. Be strategic when selecting a presiding arbitrator as arbitrators with international backgrounds tend to administer cases in a way that aligns with international standards;
4. Consider the most strategic rules of evidence – CIETAC and Shanghai International Arbitration Center Rules, for example, give tribunals authority to determine the rules of evidence so parties can negotiate which rules they might want to use; and
5. Ensure force majeure clauses are drafted comprehensively, explicitly outlining circumstances and notification methods, as arbitrators will apply local law to those aspects not agreed between the

parties and any loopholes in the clause may result in adverse consequences.

Mr Bartlett SC focussed on “big picture” aspects which should be considered when contracting with parties from an unfamiliar state (i.e., in Asia) to avoid future disputes. He discussed recent legislative developments in Hong Kong which have helped to make it an attractive hub for arbitration – most significantly, the Outcome Related Fee Structures for Arbitration regime. The regime permits fee agreements of three forms, being Conditional Fee Agreements, Damages-Based Agreements and Hybrid Damages-Based Agreements, which all enhance access to justice and give disputants greater flexibility in tailoring financial arrangements to suit their needs.

On the topic of financing arbitration, Patrick Rode (Deminor) provided an insightful overview of the TPF position in China. He explained that the Chinese courts show a growing willingness to embrace TPF for equitable dispute resolution and that while legal precedents are still rare, local courts are becoming more receptive to TPF in arbitration than in litigation. Mr Rode was hopeful for TPF in China but emphasised the challenges such as legal ambiguities, financial complexities and ethical considerations. He recommended ongoing education, adaptation and ethical vigilance for the development and acceptance of TPF in the region.

Dr Alice Meissner (Fieldfisher), Acting Chair of ECAA, went into further detail on TPF in China and discussed some recent judgments. One key decision was *Case No. (2022) Su 02 Zhi Yi 14* decided by the Jiangsu Province Wuxi Intermediate People’s Court regarding the refusal to set aside a CIETAC award rendered in proceedings funded by IMF Bentham Limited. The court concluded that the funding of an arbitration by a third-party funder does not breach Chinese law. Hence, Chinese law does not prohibit TPF for arbitration and parties are entitled to TPF. On the other hand, the Shanghai Second Intermediate People’s Court in *Case No. (2021) Hu 02 Min Zhong 10224* confirmed a first instance decision which declared TPF to be contrary to public policy in the context of litigation. Dr Meissner described this case as a step back for the TPF industry in China. Although there have been other decisions accepting the legality of litigation funding agreements, there are still concerns among funders around the enforcement of their rights should they enter into a litigation funding agreement in China.

Adding to the discussion around TPF, Camilla Godman (Omni Bridgeway) compared the position in Asia with the UK. Both Singapore and Hong Kong have introduced legislation expressly permitting TPF of arbitrations and guidance for funders to control the growth of the funding industry and protect users within their borders before opening up the market to a wider group of investors. On the other hand, the UK funding industry is self-regulated through a voluntary code of conduct, published by the Civil Justice Council and administered by the Association of Litigation Funders of England and Wales. Though not covered during the conference, the ruling in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and Others [2023] UKSC 28* will have significant ramifications for UK litigation funders as certain litigation funding agreements could be deemed unenforceable.

Closing Remarks and Reflections

Dr Elke Umbeck (Heuking), Chair of ASEAC, concluded the conference by stressing the importance of the Asian arbitration landscape and of collaboration, not only between counsel and arbitrators but also between arbitration institutions.

The conference provided an excellent overview of the diverse regimes developing across Asia and highlighted the progress that has already been made by prominent international hubs, making them attractive to the European market. As Asia and Europe become increasingly integrated through cross-border transactions and investments, an understanding of legal frameworks and practical differences are invaluable to ensure smooth and successful arbitration.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Sunday, March 10th, 2024 at 8:05 am and is filed under Arbitration, Asia, China, Enforcement, Hong Kong, India, Japan, Singapore, Third party funding, UK, Vietnam
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.