Kluwer Arbitration Blog

2024 PAW: Something New, Something Old, Something Borrowed

Krystal Lee (Assistant Editor for Europe) (Lalive) · Saturday, March 23rd, 2024

As part of Day 4 of Paris Arbitration Week, Fieldfisher and the European Chinese Arbitrators Association joined forces in organising a tour around the world on recent developments in arbitration laws and recently adopted amendments in different jurisdictions. The discussion was moderated by Alice Meissner (Fieldfisher), and panellists included Antje Baumann (Baumann Disputes), Ania Farren (Fieldfisher), Tim Meng (Golden Gate), Marily Paralika (Fieldfisher) and Avi Zamir (A. Gabrieli & Co), bringing perspectives from Germany, England and Wales, China, Greece, and Israel.

Ms Meissner commenced the session by introducing the panellists, including their views on an what their careers would have been like if they had not chosen to be lawyers. The answers, ranging from ski instructor to football player, were testament to the multi-faceted talents of the arbitration community. The introductions were followed by a presentation by each speaker on something new, something old and something borrowed by their respective jurisdictions in recent arbitration legislative developments.

Germany

Ms Baumann first discussed the draft arbitration bill presented in February 2024 by the German Federal Ministry of Justice. While not yet enacted, the draft bill had been released for comments by various stakeholders in the past weeks.

As regards "something new" in the draft bill, Ms Baumann discussed the provision providing express permission for arbitrators to prepare concurring and dissenting opinion in awards. Ms Baumann explained that the proposal stemmed from serious concerns arising from a 2020 judgment by the Higher Regional Court of Frankfurt (for previous coverage, see here) where the court expressed, albeit in *obiter*, that arbitrators' dissenting opinions may be in breach of the secrecy of deliberations such that it could potentially violate German public policy. As for "something old," the draft bill provides that oral arbitration agreements may be valid and enforceable. Ms Baumann shared the concerns of other practitioners of this proposed provision given the legal uncertainty that could result and the potential for mischief as it could be used by recalcitrant parties as a tool to obstruct the arbitration process.

England and Wales

Ms Baumann passed the baton on to Ms Farren, who provided the perspective of England and Wales, where the Ministry of Justice asked the Law Commission to conduct a full review of the 1996 English Arbitration Act in March 2021 (for previous coverage, see here). This has resulted in two consultation papers being published in 2022 and 2023 involving significant input from various stakeholders and the bill has now been presented before the House of Lords.

In terms of "something new" in the proposed bill, the two major proposals that have garnered significant attention according to Ms Farren were (i) the rule on applicable law to the arbitration agreement; and (ii) jurisdictional challenges to awards under section 67 of the 1996 English Arbitration Act (for previous coverage, see here and here). As for "something borrowed", Ms Farren mentioned the bill's proposal to codify a tribunal's power to make awards on a summary basis (for previous coverage, see here), as well as the codification of common law regarding an arbitrators' duty of disclosure.

China

Mr Meng then took the discussion to the Far East with a summary of recent developments in China, including the changes proposed in the Draft Amended Arbitration Law issued in July 2021 (for previous coverage, see here). He explained that the primary reason for the proposal was not to directly align Chinese arbitration law with those of other leading jurisdictions. Instead, it was to resolve concerns that have arisen in the years since 1994 when the first arbitration law was enacted in China.

As an example, Mr Meng shared that there are some 270 arbitral institutions within China, which has resulted in challenges relating to their organisation. This is one of the issues that is addressed in the Draft Amended Arbitration Law. He also highlighted "something new" in the proposed law, which is the express power of tribunals to decide on their own jurisdiction, a change which, if enacted, not just reduces the caseload of the Chinese judiciary but also brings China's position in line with that of many other arbitration-friendly jurisdictions.

Mr Meng also explained that the Draft Amended Arbitration Law, like other laws in China, set out the guiding principles of the legislation. In this case, the three key principles are good faith, efficiency and due process. In addition, and similar to other jurisdictions, Mr Meng also discussed the proposal in the Draft Amended Arbitration Law to codify the disclosure duties of arbitrators.

Greece

Taking the discussion away from drafts to enacted changes, Ms Paralika brought the discussion back to Europe with insights on the new arbitration law enacted in Greece in 2023 (for previous coverage, see here) (unofficial English translation here). Based on the 2006 UNCITRAL Model Law ("Model Law"), the law brings "something new" that goes beyond the Model Law provisions. For example, it has provisions dealing with multi-party arbitrations, permitting joinder

of third parties and encouraging respondents in proceedings to identify third parties as soon as possible with their answer to a notice of arbitration. It also provides for the possibility of consolidation of arbitrations, including consolidation without the consent of parties where there are two (or more) pending arbitrations between the same parties and before the same tribunal.

In addition, Ms Paralika also provided insights on the new law's approach towards interim measures, which gives a tribunal liberty to decide on the appropriate course of action in each case without prescribing a list of possible measures. Importantly and in deterrence of mischief by parties, the law provides for cost consequences requiring compensation for the other party where interim measure applications are subsequently determined by the tribunal to have been made without justification or contrary to good faith.

Ms Paralika also drew attention to the possibility of supplementary awards under the new law, "something borrowed" from other jurisdictions. Under the new provision, parties can apply within 30 days for the tribunal to issue a supplementary award.

Israel

To round up the whirlwind tour of arbitration legislative developments, Mr Zamir provided his thoughts on the international commercial arbitration law enacted in Israel earlier this year in February 2024 after years of discussion (for previous coverage, see here).

Mr Zamir reminded the audience of the genesis of the previous arbitration act in Israel dating back to 1968 which in turn replaced a 1926 British mandate setting out provisions from the 1889 English Arbitration Act, which he thought certainly ticked the "something old" box.

As for "something new", Mr Zamir considered that the earlier arbitration legislation did not conform to international standards and thus was not fit for purpose. He further highlighted the extent to which judicial intervention was minimised under the new law. In addition, he also explained that the new law provided that arbitrators could be removed if there were justifiable doubts as to their impartiality and independence. However, it was important to bear in mind that the new law only applied to international commercial arbitrations, and not domestic arbitrations to which the old law would still apply.

Discussion: Drivers of Change, Future Developments and Creating Successful Arbitration Seats

Following Mr Zamir insightful remarks, a lively discussion ensued, with panellists providing views on the impetus of such legislative changes in their respective jurisdictions. The main reason for these changes according to the panellists was the desire to modernise laws in order to continue providing a robust framework for the promotion of arbitration. However, Mr Meng also thought that in the case of China, the goal for legislative change was not to create arbitration hubs that are competitive to places like London and Paris. Instead, he considered that changes were driven by the need to find solutions to issues that have arisen since the old law was introduced, as well as to address inconsistencies between applicable national and international laws such as the New York Convention.

The panellists also considered potential legislative developments that may be on the cards, including the regulation of the use of generative artificial intelligence. They thought that although it may be too soon for legislation to address this issue, soft law and other forms of guidance within the community may be useful to address questions such as the need for tribunals to disclose their use of such technology and how confidentiality of the arbitration may be guaranteed if such technology were used by either parties or the tribunal.

Finally, the panellists opined on the ingredients towards making a jurisdiction a successful place for arbitration, and the consensus was that although a robust legislative framework was important, it is only part of the recipe with an independent and experienced judiciary considered to be equally crucial.

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