Kluwer Arbitration Blog

LIDW 2024: Uniting for Global Challenge and Opportunity

Crina Baltag (Managing Editor) (Stockholm University) · Wednesday, June 5th, 2024

The centerpiece of the 2024 London International Disputes Week was the full day main Conference on Tuesday, 4 June, bringing together leaders from across the dispute resolution world to discuss the topical issues of the moment under the theme of Uniting for Global Challenge and Opportunity.

The Conference was opened by Luke Harrison, partner with Keidan Harrison and co-chair of the LIDW Strategy Group. Noting the record attendance of the Conference, with delegates from over 45 jurisdictions, Harrisson stressed that collaboration is at the heart of LIDW. Harrison further emphasized that London continues to play an important part in creating and preserving unity in dispute resolution, in particular. Harrison also drew attention to the essential importance of human endeavour in dispute resolution, even in light of the increasing importance of artificial intelligence – AI.

The keynote speech by The Rt Hon. the Baroness Carr of Walton-on-the-Hill, Lady Chief Justice of England and Wales, began with paraphrasing Lord Denning, that, when it comes to dispute resolution, London is a good place to shop in. Focusing on unity and dispute resolution, Baroness Carr addressed two aspects. First, how one may combine different forms of dispute resolution more effectively, in particular negotiation/mediation, arbitration and litigation, given that London has the wealth of expertise in all three. Baroness Carr mentioned the role of CEDR in promoting mediation, and also the importance of early neutral evaluation as an alternative dispute resolution mechanism – ADR – which is often mandated by the English courts. Baroness Carr also referred, among others, to the relevance of LCIA in international arbitration, and of the Commercial Court, familiar with international arbitration and with the relevant powers of courts under the 1996 English Arbitration Act. Underpinning the three types of dispute resolution mechanisms, Baroness Carr mentioned the crucial role of the expertise of the legal profession in ensuring that these mechanisms maintain their legitimacy. With an eye on the future, Baroness Carr suggested that changes are likely to occur, with more focus on the use of ADR and the further development of multitiered dispute resolution clauses. Furthermore, judges will likely be called upon considering whether to mandate specific ADR mechanisms beyond the ones mentioned above. Second, Baroness Carr referred to the role of judiciary, locally, as well as internationally, to familiarize itself even more with ADR and to seek actively to share best practices and advance better

approaches to ADR.

The first session of the Conference addressed *Risk & reputation in a values-driven world*, exploring the challenges faced by organizations balancing the need to advance their sustainability and ESG objectives, and to meet associated reporting and due diligence obligations, while also protecting their position in the resolution of related disputes. Moderated by Moira Thompson Oliver, Slaughter and May, the panel consisting of Nicola Cobb, FTI Consulting; Shaheed Fatima KC, Blackstone Chambers; and Simon Mundy, Financial Times, offered a 360^{0} perspective on these topics, with an eye on the future of disputes in light of tight climate change goals. Nicola Cobb emphasized the exponential increase of reporting obligations for companies, which comes with increased transparency and access to what businesses do in terms of climate reporting. However, as indicated by Cobb, the fact that more and more companies have a global presence, determining what reporting obligations apply becomes increasingly difficult and this may have a direct impact on the correct and accurate reporting. Shaheed Fatima underlined the need to approach this as a paradigm shift, illustrated in two essential aspects. First, to understand the impact on the reporting obligations as a multifaceted issue, impacting not only the hard law, but also the financial and corporate agendas and policies. Second, to acknowledge the reach and scope of these reporting obligations, in light of ESG compliance, in affecting both public and private sectors equally, and globally. These aspects have a direct impact on increased litigation related to ESG commitments, in national jurisdictions and supranational courts. In fact, highlights Fatima, ESG litigation should be understood broadly, as litigation concerning how businesses are conducted, which now include derivative actions by shareholders against companies in complying with their ESG obligations. Simon Mundy brought to attention the growing media interest in the topic, and also the need for businesses to reflect upon the best manner to communicate with the media. Mundy referred to the distinction between ‘cheap PR’ and genuinely conveying the concerns with ESG challenges and opportunities.

The second session of the Conference focused on *How to think about Artificial Intelligence in law*, and began with a recorded address by Professor Richard Susskind OBE KC (Hon) on how AI is transforming dispute resolution. Susskind urged the audience not to think about AI as a form of technology, but as a tool which will prompt the development of future technologies. Furthermore, Susskind invited the audience to think about the fundamental value counsel brings to

the clients and not about the means to bring this value. This shift in approach will enable counsel to appreciate the role of technology in optimizing the delivery of this fundamental value. Susskind further noted that the pace of AI development continues to be impressive, with many more developments to come. The issues raised by Susskind triggered further debate from the panel moderated by Minesh Tanna, Simmons & Simmons LLP, with Stephen Dowling, TrialView; Racheal Muldoon, Maitland Chambers; and Jonathan White, Epiq. Racheal Muldoon explained that clients expect counsel to employ AI in their work, and to deliver efficient value. However, Muldoon highlighted that this is not possible in the absence of a regulatory framework for AI. In this context, Muldoon referred to the newly adopted European Union AI Act, which will be fully applicable starting with 2026, and which adopts a risk-based system, predicated on what is the intended purpose of the AI system, as well as the foreseeable misuse of it. In contrast, mentioned Muldoon, the UK has adopted a pro-innovation approach to AI, as expressed in a policy paper, rather than in a statute. Stephen Dowling underscored that the EU AI Act is likely to have considerable implications on international arbitration and international dispute resolution, in general. Both Dowling and White explained that while the discussion nowadays is centred on the use of generative AI, extractive AI tools, and in particular those focused on case management, are likely to continue growing in relevance, with the full digitization of the courts' dockets and the increasing use of predictive tools. All three panelists predicted that AI is likely to enable the increase resort to automated mediation, the increase of smart contracts coupled with dispute prevention, the use of predictive analytics, and, probably, a greater access to justice.

After a brief interview of Josh Bayliss, CEO of Virgin Group, by Smriti Sriram, member of the LIDW Strategy Group, the 3rd session of the Conference addressed the *Global landscape for enforcement of judgments and awards*. The panel comprising James E. Berger, DLA Piper; Jennifer Craven, Pinsent Masons LLP; Ali Al Hashimi, Global Advocacy and Legal Counsel; and moderated by Justice Henshaw, English Commercial Court, addressed the current cross-border judgment and award enforcement issues, trends and obstacles.

The panelists emphasized the importance of addressing enforcement concerns at the drafting stage of a contract, but, in any case, not later than the rise of the dispute. In doing so, counsel and parties should consider not only the availability of assets, by engaging forensic support, but also the nuances of applicable law, in particular in jurisdictions in which the black letter law may appear to be straightforward, but its application is slow or even obscure. The panelists also emphasized the need to understand the local law and the court structure and competences, in particular in jurisdictions like the UAE, where the national, federal and International Financial Centers' courts may have competing jurisdictions. Furthermore, the panelists have also directed the audience to consider multi-jurisdictional enforcement proceedings, for instance, by resorting first to those allowing for post-judgment discovery, such as the US, in order to identify the available assets of the judgment debtor, and

commence enforcement in the courts where such assets are located.

Following this session, Ben Giaretta, chair of the LIDW Board, moderated the 'fireside chat' between The Hon Julia Gillard AC, Former Prime Minister of Australia and Partner, Datrys Mediation +, and Lord Peter Goldsmith KC, PC, Debevoise & Plimpton, and former UK Attorney General, on *Resolving disputes involving States and State entities*. While bringing into attention the relevance of State's right to regulate in the context of Australia's policy on the tobacco plain packaging and the subsequent arbitration in Philip Morris Asia Limited v. The Commonwealth of Australia, PCA Case No. 2012-12, both panelists explained that investor-State dispute settlement – ISDS – continues to be of important relevance. In particular, Lord Goldsmith pointed out that ISDS enables disputes to be settled through a legal process, rather than by governments 'flexing their muscles' as it was the case of gunboat diplomacy. While some concerns are, indeed raised with ISDS, both panelists noted that this is indeed the right process, but, in some instances, the manner in which it is done might not always be the appropriate one, sometimes in the context of geopolitical transformations.

Before the closing keynote speech by Meg Kinnear, Secretary-General of ICSID and Vice-President, World Bank, session four of the Conference included two discussions relevant for international dispute resolution. The first one, focused on *Disputes funding: predictions for the future* chaired by Julian Chamberlayne, Stewarts, featured Justice Cockerill, English Commercial Court; Helen Fairhead, Norton Rose Fulbright; and Tom Goodhead, Pogust Goodhead. The focus was on whether the Litigation Funding Agreements (Enforceability) Bill is the proper answer to the PACCAR judgment, but also on the benefits of litigation funding and on the fact that more litigation funding will trigger related litigation.

Panelists also acknowledged that litigation funding enables access to justice, in particular in mass claims, but that settlements may be prevented in funded claims. On the side of the courts, the existence of funders may impact the judicial resources, as costs with a case are likely to raise in the presence of a funder, as well as that the interest of the law may not always be

aligned with litigation funding, as small and medium enterprises may not afford to litigate anymore without funding, while interesting cases for funders may not necessarily be also important for the development of the law. To the question whether funding should be subject to statutory caps, the answer of the panel was that this is not feasible, because while one particular figure may be suitable for a type of dispute, it might not be so for others, on one side, but also because such caps may prevent the development of the funding market overall. The second panel of the final session addressed, under the Chatham House Rules the question whether the *current dispute resolution methods achieve to solve client's problems.* The discussion, moderated by Campbell Jackson, EY, and including Suber Akther, Siemens Energy Limited; David Connolly, IHG Hotels & Resorts; Sapfo Constantatos, Standard Chartered Bank, started from Sir Geoffrey Vos's statement during the hearing in Churchill v. Merthyr Tydfil (Court of Appeal of England & Wales, November 2023): "Dispute resolution cannot be about paying lawyers.? Dispute resolution is about solving people's problems…". The panel focused on the available dispute resolution tools and practices enabling clients to achieve their needs in today's challenging, international business environment.

Concluding a prolific day of discussions, the keynote of Meg Kinnear reminded the audience of the stereotypes and misconceptions tainting ISDS, including the fact that investors prevail in most of the ICSID arbitrations against States – in fact, there is somewhat an equilibrium in the investors' vs. States' wins -, and the fact that States are fleeing ISDS – in fact, fifteen States have joined the ICSID Convention in the past 15 years, while the ICSID's caseload increased from about 200 arbitrations to over 1,000 in the same time span. While pointing out the misconceptions, Meg Kinnear explained that this does not mean that the ISDS system is perfect; however, the ICSID establishment confirmed that States' accountability is important for the rule of law, and that no right can stand without a remedy. Meg Kinnear further referred to the enactment of the 2022 ICSID Arbitration Rules, which addressed various concerns with investment arbitration within the ICSID framework, including the timeliness of the proceedings, transparency, as well as the opportunities for the settlement of disputes by mediation. Meg Kinnear also emphasized that ISDS is capable of complementing economic growth, while continuing to improve and to adapt, to be fit for purpose. Concluding, Meg Kinnear reminded that counsel and States bear equal responsibilities in this endeavor: counsel should ensure the efficiency of the proceedings, while States, as rule makers, should, among others, enact well informed investment agreements, aware of how these work in practice.

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 Wednesday, June 5th, 2024 at 12:49 pm and is filed under Enforcement, ISDS, LIDW 2024, London, Mediation, Third party funding
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.