Kluwer Arbitration Blog

LIDW 2024: Rule of Law, Regulated Markets and Arbitration

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The fourth day (06 June) of 2024 London International Disputes Week ("LIDW") tackled several complex issues in arbitration. This post will provide a brief overview of two such sessions, focusing on the rule of law in arbitration and on arbitration and regulations. These sessions provide a rather useful snippet into the complex challenges faced by the field of arbitration.

Upholding the Rule of Law in International Claims

The event featured a keynote address by Professor Loukas Mistelis (Clyde & Co / QMUL) and a panel discussion attended by Alexander Dzhumaev (BT), Paschalis Paschalidis (Arendt), Mark Wassouf (3VB), and Agnieszka Zarówna (White & Case). The panel explored the nuances of the rule of law in arbitration, focusing on fraud, sanctions, and the enforcement of awards.

Loukas Mistelis' keynote address provided insight into the historical inception and global adaptation of the rule of law. Tracing the concept's origins back to the German concept of *Rechtsstaat*, he noted how this principle has been adopted globally today. Lord Bingham's famous exposition on the rule of law was based on civil law principles. This concept was even recognised in both Russia's and Ukraine's constitutions by using the term "legal state". Even though the rule of law has existed in the traditional legal order for quite some time, its application in arbitration is recent. According to Mistelis a significant milestone in this discussion was the speech given by Lord Hoffman on the rule of law in arbitration at Hong Kong. Mistelles also explained the rule of law as "patrols of the arbitral perimeter". Simply put, this requires disputes to be resolved without prohibitive costs and inordinate delays.

Mark Wassouf opened the discussion regarding fraud as a threat to the rule of law by revisiting the notorious *P&ID case*. He identified the case as an extreme example of fraud within arbitration. The case stressed the importance of disclosures in arbitration which enable tribunals to better uphold the rule of law. Another point of discussion was whether tribunals should adopt a more inquisitorial approach when dealing with a dispute of this nature.

Paschalis Paschalidis then addressed the challenges posed by sanctions to the rule of law, starting with post-9/11 UN Security Council ("UNSC") sanctions. These sanctions threatened the rule of law as there was no mechanism to review these sanctions. However, the EU's implementation of these sanctions was challenged in the European Court of Human Rights. The EU courts ruled against the sanctions as they violated human rights law. EU courts also asserted the supremacy of

EU law over international law, indirectly overriding a UNSC resolution.

Paschalis Paschalidis also spoke about recent unilateral sanctions against Russia imposed by the EU, the US and other countries. He questioned whether these sanctions, viewed as "temporary measures" – could be considered as expropriation. The cases that deal with these sanctions may even have to engage in a discussion regarding the legitimacy of the Russia-Ukraine war. This will come about as EU Member States will most likely use Russia's wrongful acts as a justification for breaching international investment obligations.

Following this discussion, Agnieszka Zarówna provided insight into whether the refusal to enforce awards is a threat to the rule of law. This is an issue as States have become less and less willing to voluntarily enforce awards post-year 2000. She argued that the lack of enforcement does not amount to a violation of the rule of law. She noted that the ICSID Convention allows grounds to challenge awards, and sometimes, States refuse enforcement due to conflicts with other international obligations. Intra-EU awards are a prime example of this. Spain has to either abide by international law and enforce the award or abide by EU law and refuse enforcement. Therefore, mere non-compliance with enforcement does not amount to a failure of the rule of law. She compared this with investors who fail to comply with cost awards. These investors are not accused of breaching the rule of law, it is considered as ordinary behaviour by the investors. In such a situation, States should not be treated in a vastly different manner.

The panel also touched on the topics of adjudication immunity and enforcement immunity waivers in arbitration. The issue was whether the double waiver prevents States from refusing to enforce awards, as highlighted in the *General Dynamics v Libya* case.

Lastly, Alexander Dzhumaev shared his experiences dealing with multi-jurisdictional legal issues by foreign investors, especially the challenges multinational corporations face in navigating sanctions and regulations across different jurisdictions. Particularly in Russia, the non-recognition of arbitral awards and the national prohibition against recognising foreign sanctions create significant hurdles for businesses operating in Russia.

International Arbitration and Regulation

The event on international arbitration and regulation focused on complex issues surrounding the arbitrability of regulated markets, from navigating the highly controversial arbitrability of competition matters, passing through the complex and technical issues of banking and financial services disputes, and finally arriving at discussions involving the trending topic of sports arbitration.

The discussions kicked off with Christopher Vajda KC (Monckton Chambers) providing an overview of the five existing categories of arbitration, including arbitration between private parties (B2B), proceedings involving a private party and a State, agreements where parties did not have the possibility to consent with the clause, such as those arising from an adhesion to certain institution, arbitrations arising out of state treaties, as well as national legislations that provides for mandatory arbitration.

Richard Power (Clyde & Co) stated that arbitration relating to regulatory disputes remains a highly complex issue. A reason for that is that regulated markets by nature involve matters of public

policy, in a way that States when developing a legislative framework for such markets want to keep a certain level of supervisory power over how the regulations are being implemented. Such supervision is naturally performed by the courts, meaning that arbitrating such disputes would represent taking this power away from the State.

As an introduction to the subsequent regulated markets discussed in the panel, Richard Power touched upon the current investment arbitration scenario involving parties of the EU, providing an overview of landmark cases such as *Slovak Republic v Achmea* and *Republic of Moldova v Komstroy* (see previous coverage on the Blog here).

Richard Power then concluded his presentation by making a clear segregation of issues relating to investment arbitration and commercial arbitration, stating that although limitation of arbitrability of regulatory issues should be effectively limited, there are other issues arising of arbitrating matters under a certain regulatory regime, namely confidentiality and protection of weaker parties such as consumers.

The discussion was followed by considerations made by Kassie Smith KC (Monckton Chambers) on arbitrability of competition law. Kassie Smith started her speech discussing *Achmea* and *Komstroy*, reminding that tribunals highlighted the key difference of commercial and investment arbitrations: while in the former, a tribunal's powers derive from party autonomy, in the latter the tribunal's powers arise from international treaties.

Kassie Smith then discussed the arbitrability of competition matters, emphasising that although party autonomy is a key principle of commercial arbitration, arbitral awards must comply with EU law, including the EU's competition regulatory framework. To sustain such considerations, she referred to relevant caselaw on arbitrability of competition disputes, such as *Mitsubishi Motors v Soler Chrysler-Plymouth* and *Eco Swiss China v Benetton*, where Articles 101 and 102 of the Treaty on the Functioning of the European Union were deemed matters of public policy under the New York Convention. Kassie Smith concluded her presentation stating that:

> "competition law in arbitration can be used either as a shield or as a sword (although it is most commonly used as a shield)."

The panel then shifted to the complex issues of banking and financial services disputes, with Camilla Macpherson (P.R.I.M.E. Finance) discussing the importance of the creation of an institution such as P.R.I.M.E. Finance (right after the 2008 global financial crisis), to help resolving issues concerning complex financial products.

Camilla Macpherson noted three main peculiarities of finance disputes, namely their complexity, systematic risk, and the consequential elevated regulations to protect the system from collapsing in case of a crisis. She also brought in considerations on the reluctance of parties to arbitrate, mentioning confidentiality and costs that may increase due to delay tactics eventually adopted in the disputes.

The Head of Secretariat of P.R.I.M.E. Finance concluded her presentation by highlighting several advantages of arbitrating under P.R.I.M.E. rules, such as its suitability for a wide range of finance disputes, its unique experience, its enhanced role for the Permanent Court of Arbitration and focus on transparency, with provisions on third-party funding, *amicus curiae* and the possibility of

publication of awards.

To close the panel, Camilla Macpherson passed the ball to Richard Harry (Sport Resolutions), who just like her began his speech with an "elevator pitch" of Sport Resolutions. Richard Harry mentioned the several services relating to the UK sports environment offered by Sport Resolutions, such as arbitration, mediation, safeguarding, among others. He also highlighted the technical diversity of the institution, which comprehends over 320 professionals, among which there are solicitors, barristers, doctors, finance professionals, scientists, and others.

Richard Harry discussed that normally sports federations provide for arbitration as a standard method to resolve disputes. He stressed the importance of independence and impartiality of panels, making reference to cases such as *Porter v Magill, Halliburton v Chubb* and *Manchester City v Premier League*.

The Chief Executive of Sport Resolutions then mentioned that the complex topic of independence and impartiality is dealt with in a different way in Sport Resolutions. He explained that the institution nominates the arbitrators and invite parties to consider the nominated names. Once parties approve, the arbitrators are appointed.

Richard Harry concluded by making a relevant statement on the sensibility of disputes relating to sports, which is the fact that tribunals are dealing with people when handling such disputes. But he then added on the importance of public hearings and celerity in connection to sports proceedings.

This entry was posted on Saturday, June 8th, 2024 at 10:05 am and is filed under International arbitration, LIDW 2024, Rule of Law
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