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Handling International Disputes: Three Current and Eternal Challenges

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Handling International Disputes: Three Current and Eternal Challenges

1. Losing a case on procedure: Facing requests for producing evidence is a specific challenge when it is alien to your own legal culture. How should you prepare for international disputes in this regard? How should you react when it comes up and how can you potentially overcome these cultural gaps?

2. David vs. Goliath: What should you consider when companies have to fight against state (entities)? Companies investing in (foremost) emerging markets do have to deal with governmental interference as an additional hurdle. Today's regime on Foreign Investment protection offers additional remedies in such cases. This section creates an awareness for these remedies and demonstrates how often foreign companies as investors might rely on these mechanisms.

3. Handling disputes in Asia: Is it the same, but also (very) different? What are special features, challenges, and chances when facing a dispute in Asia?

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1. Losing a case on procedure: Facing requests for producing evidence is a specific challenge when it is alien to your own legal culture. How should you prepare for international disputes in this regard? How should you react when it comes up and how can you potentially overcome these cultural gaps?

Virginie Colaiuta, LMS Legal LLP, London, England

- Relevance of documentary and witness evidence in Common Law and Civil Law jurisdictions;
- Disclosure of documents and other evidence by the parties during proceedings;
- Deontological rules and evidence disclosure in Common Law and Civil Law jurisdictions;
- Possibility of requesting production of evidence before the start of the proceedings;
- Obtaining documents from a non-party to the proceedings;

- Expert and fact witness evidence;
- Prague Rules and solution to the suggestion that international arbitration has a common law bent;
- Practical tips to ensure that a company is ready for document production;
- International standard in arbitration nowadays regarding document production;
- When a company refuses to provide a document;

2. David vs. Goliath: What should you consider when companies have to fight against state (entities)? Companies investing in (foremost) emerging markets do have to deal with governmental interference as an additional hurdle. Today's regime on Foreign Investment protection offers additional remedies in such cases. This section creates an awareness for these remedies and demonstrates how often foreign companies as investors might rely on these mechanisms.

Nadia Darwazeh, Clyde & Co, Paris, France

- Potential basis for bringing claims against a State;
- Types of claims that may brought against a State in an investor-state arbitration;
- Where to bring a claim against a State;
- Success of investors in claims against States;
- Strategic and practical considerations when launching an investment arbitration against a State;

- Dealing with the public criticisms of the current forms of investment protection;
- Termination of investment treaties by emerging market nations for fear of action against them;
- Possibility – or not - for a foreign investor to define protections in a contract with a State, similar to those included in investment treaties;
- Success rate of investors in enforcing arbitral awards against States;
- Achmea case and the capacity of European companies to structure their investments in Europe by means of intermediate corporate vehicles incorporated outside of Europe;

3. Handling disputes in Asia: Is it the same, but also (very) different? What are special features, challenges, and chances when facing a dispute in Asia?

Nish Shetty, Clifford Chance, Singapore

- Asia: common set of concerns that affects the region as a whole or more nuanced situations;
- Highly diverse dispute resolution landscape:
  - Developed economies – Japan, Korea
  - High population / global top 20 economies – China, India, Indonesia
  - City states – Singapore, Hong Kong
  - Emerging economies – Thailand, Philippines, Vietnam, Malaysia
  - Developing low-income economies – Myanmar, Cambodia, Laos

- Mix of common and civil law jurisdictions with different legal and cultural approaches to dispute resolution and varying levels of sophistication;
- Real challenges for business operating across Asia;
- Asian Business Law Institute (ABLI) and similar initiatives;
- Key material differences:
  - Common law vs. civil law systems;
  - Different levels of sophistication of national courts;
  - Varying degrees of familiarity with arbitration/ADR;
  - Different business attitudes to dispute resolution process;
  - Varying standards of dispute resolution infrastructure/access to technology;

Examples of good & bad: where dispute resolution is effective in Asia and what that means and where dispute resolution is less effective and why?

- Good: Singapore/Hong Kong have effective, independent courts and governments which have invested and created a hub for dispute resolution:

  - Investment in dispute resolution infrastructure;
  - Independent judiciary;
  - Minimal intervention in arbitral process;
  - Mandatory stays of court proceedings in favour of arbitration;

- Good: Broadly speaking, there are increasing levels of sophistication in emerging jurisdictions and better enforcement of foreign arbitral awards. But…

- **Bad**: India is a case study of an Asian jurisdiction where the court system is vastly overburdened and consequently unreliable/slow. While India has significantly improved its position in the World Bank "Ease of Doing Business" rankings in recent years, its ranking for contract enforcement remains at 163. This is a reflection on the severe delays in the local court system and the difficulties in enforcing arbitral awards. This situation creates real investment risk for foreign parties doing business in India and often gives substantial leverage to domestic parties in a dispute scenario.

- **Bad**: In some Asian jurisdictions legislation is inconsistent with international norms. For example, the Vietnam arbitration statute provides that the court may refuse enforcement of an award if it is "contrary to the fundamental principles of Vietnam law". Correspondingly, Vietnam has a poor track record of enforcing foreign awards.

- **Bad**: In some other jurisdictions, legislation is broadly satisfactory (e.g. India – a Model Law jurisdiction) but poorly implemented. There is often a tendency of the courts to intervene in the arbitral process which can give rise to satellite litigation and encourage guerrilla tactics.

Investment protection – is that recognised as a concept – what has been the Asian experience?

- Large number of BITs signed by East Asian and Pacific countries in 1990s and 2000s.

- Recently backlash by some states – e.g. Indonesia announced a plan to terminate/renegotiate its BITs; India has terminated more than 60 treaties since 2017.

- Underrepresentation of Asian parties in treaty claims.

- Asia as the forefront of some of the next generation of multi-lateral treaties:

  • CPTPP signed on 8 March 2018 – Japan led negotiations following US withdrawal and the treaty is now in force for Australia, Canada, Japan, Mexico, New Zealand, Singapore and Vietnam;

  • RCEP – aims to create an economic partnership amongst ASEAN member states and ASEAN's FTA partners – negotiated by 16 APAC countries with aim of being finalised in 2019;

  • Recently negotiated EU-Singapore Investment Protection Agreement and EU-Vietnam FTA provide novel provisions for a permanent investment tribunal.

  • 2009 ASEAN Comprehensive Investment Agreement (amongst 10 ASEAN members). ASEAN is also a contracting party to 13 international investment agreements.

- Future: Investment treaties to protect overseas investment of their own nationals.

Recent developments in Asia – are steps being taken in the right direction?

Singapore: a hub for international dispute resolution – constant innovation

Hong Kong: new mutual assistance arrangement with Mainland China which will allow parties to apply to Mainland courts for interim measures in support of Hong Kong arbitral proceedings (and vice-versa).

India: In 2015 welcome amendments were introduced to the to the Indian Arbitration Act – in particular: (i) narrowing the scope of the public policy review in the enforcement of foreign awards; and (ii) providing the ability to apply for interim relief in respect of foreign seated arbitrations. However, progress in India is rarely straightforward and India's arbitration woes has been the tendency of the Indian courts to intervene in disputes involving Indian parties.

China: In June 2018 China launched two specialist courts for commercial disputes arising out of projects along the Belt and Road initiative, in Xian and Shenzhen. The establishment of these commercial courts (with English language website) is an innovation which has the potential to enhance the appeal and accessibility of Chinese courts to foreign parties.

Growth of regional arbitration centres: Success of SIAC and HKIAC has inspired the establishment of many regional arbitration centers. Asia is now home to 40+ arbitral institutions, for example, Mumbai Centre for International Arbitration, Asian International Arbitration Centre, Vietnam International Arbitration Centre, etc.

- Risks in agreeing to a Chinese seat of arbitration;
- Most favorable and more difficult Asian courts to enforce an award;
- Most important differences in document disclosure in judicial proceedings in Asian countries;
- Legal education: open to all social classes or the value of a social minority?
- Level of political and social control over lawyers and judges.