European Institute for Asian Studies

Event Report

International Arbitration: European and Asian Perspectives

EIAS Briefing Seminar

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The 21st century is witnessing an expansion of initiatives that are to enhance global connectivity. The European Fund for Strategic Investment in Europe, and the Belt and Road Initiative in China are exemplary and aim to tackle unemployment and infrastructure needs whilst enhancing trade and investment flows between various parts of the world. Likewise, we are now witnessing a proliferation of attempts to sign gargantuan trade deals that resonate through their euphonious acronyms.

The naked truth is that increased trade and investment flows are likely to lead to a higher number of trade and investment disputes. However, in an age where time is money – and money is time, there is an inexorable need to solve disputes in a faster and more efficient manner, compared to the traditional, but often time-consuming method of going to court. More and more parties are therefore looking into arbitration as a means of dispute resolution. It has now become the predominant method of international dispute resolution, both in a private commercial context and in matters involving private entities and states.

This seminar showcased the different approaches on arbitration in Asia and Europe while simultaneously discussing the advantages of arbitration over the more traditional recipes of solving disputes. The European Institute for Asian Studies (EIAS) welcomed Prof. Em. Dr. Jacques Herbots to deliver a keynote speech illuminating on the differences between Asian and European arbitration procedures. In addition, various stakeholders from the business community and legal corridors of Brussels complemented this seminar in an attempt to highlight issues of pertinence to international arbitration.

Introduction

In his opening statement, Mr Axel Goethals, CEO of the European Institute for Asian Studies, underlined the notion that, in addition to being the capital of European Union, Brussels is also becoming an important hub for arbitration. The city enjoys a great number of legal experts, associations and organisations specialising in arbitration. He remarked that this technique is an interesting facilitating instrument for resolving complex trade disputes. After the introduction of speakers by the Chair, Prof. Em. Sylvain Plasschaert, the keynote address focusing on specific features of commercial arbitration and Chinese arbitration law was delivered by Prof. Em. Jacques Herbots.

History of Arbitration in China

The history of arbitration in China is very recent. Not long ago, mediation played a primordial role in alternative dispute resolutions. The main distinction between these two methods lies in a fact that an arbitrator acts as a judge while a mediator helps parties to find an amiable settlement. The very term *arbitration* was first used after the establishment of a Chamber of Commerce in Beijing in 1904, even though the use of this technique starts several decades later in 1950s. At first, an administrative model of arbitration prevailed, which is characteristic by the attachment of arbitration institutes to administrative bodies, lack of arbitration agreements, free choice of arbitrators or a binding decision.

Regarding foreign-related arbitration, the Foreign Trade Arbitration Commission (FTAC) was created in 1956. Since the establishment of this institution, there is a strict separation between the domestic and foreign-related arbitration that does not exist in Western countries. The development of the latter advanced after the opening up of the economy under Deng Xiaoping. In 1988, FTAC transformed into the China International Economic and Trade Arbitration Commission (CIETAC). Furthermore, the Civil Procedure Law of 1991 also included a chapter on foreign-related arbitration. However, the real turning point came four years later with the adoption of the Arbitration Law. The number of arbitration institutions —permanent organisations that can appoint a requested arbitral tribunal and administer the procedure of the arbitration process— was reduced from 3,640 to 202. Prof. Em. Herbots emphasised the importance of this Act as it transformed the administrative arbitration into an independent institution of private nature.

The accession of China to the World Trade Organization in 2001 meant that Beijing became increasingly interested in foreign investment and, consequently, in international arbitration. Additionally, CIETAC revised its foreign-related arbitration rules in response to critiques raised by western practitioners, while the country's pro-arbitration stance grew stronger. This administrative body dealing with dispute settlement developed into a worldwide known institution with a credible reputation and heavy workload. Among its main advantages, when compared to other institutions such as the International Chamber of Commerce in Paris, are modest administration costs and fees.

Arbitration Rules in Europe and China

Even though essential rules of private law arbitration are similar in Europe and China, there are still several major differences between the two. First of all, the autonomy of the parties is restricted in China as actors are not free to choose an arbitrator. On the contrary, they have to select a settler out of the panel of arbitrators of each institution. Furthermore, ad hoc arbitration where parties appoint an arbitrator without making use of the institution is not allowed in China. Secondly, a combination between mediation and arbitration is common in the People's Republic. There is an idea that mediation should be the preferred course of action and only if this technique does not work, parties continue with arbitration. Thirdly, in China a decision is not automatically based on a strict application of the law but on equitable principles instead. This is also possible in Europe, however, parties need to instruct the arbitrator to base an award on equitable principles beforehand. Lastly, there is a great emphasis put on institutions in China. The importance of courts is stressed by the fact that in an arbitral clause in the contract, the institution must be designated very clearly and without any ambiguity, otherwise the arbitration agreement is considered as void. Moreover, while in the West the arbitral tribunal decides if the arbitrators have jurisdiction, in China it is the institution that decides. When an interim measures have to be taken to preserve evidence or property, the People's Court is in charge in China, whereas elsewhere it is done by arbitral tribunal.

Types of Arbitration in China

Prof. Em. Herbots next explained three different types of arbitration existing in mainland China. When the dispute resolution takes place in mainland China and all of the elements of the case are Chinese, it is considered to be a domestic arbitration. Second one, which is governed by different laws, is a foreign-related arbitration that, similarly to the previous one, also takes place in China. However, there is also a foreign element present, whose definition was given by the Supreme People's Court. This could be either a domicile of the parties, location of the property in dispute, or the obligations of the parties being located and happening outside of mainland China. However, foreign capital is not considered to constitute a foreign element even if it is completely in hands of foreigners. Last type is foreign arbitration, which takes place in Hong Kong, Taiwan, Macau or abroad.

The United Nations' Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) from 1958 applies when a foreign award that has been determined by an arbitration tribunal needs to be enforced. This treaty was ratified by the People's Republic in 1986 and is very correctly applied by Chinese courts. In addition to domestic institutions, foreign entities also issue arbitrations in China. However, due to the complexity of the issue, there is no consensus among experts on the status and validity of the award. In the opinion of Prof. Em. Herbots, this method belongs in the category of foreign arbitration, therefore it is valid and foreign award.

After the award is rendered, in most cases it is performed voluntarily. However, the losing side that does not want to accept the arbitration has several options available in China. They can immediately start a procedure at the People's court to annul the award on limited grounds. This option is unavailable for foreign awards. The other choice is that the party that does not accept the award just waits until the winner acts and starts to

enforce it, as there is a two-year time limit for the victor to start an enforcement action. Even though the statistics show that the enforcement of arbitration awards is improving, courts can choose to decline to enforce it, if they decide that imposing the ruling goes against the social and public interest. Procedural fault can also serve as grounds for refusal for domestic arbitration, if given evidence is insufficient or the law is wrongfully applied.

Last but not least, the ambiguous notion of seat of arbitration was covered. The meaning is often mistakenly understood as a geographical location, where the arbitration hearings take place. However, in reality, it is meant to indicate a legal connection to a system of a country that will lead the arbitration. Prof. Em. Herbots concluded with the comparison of GO game and the chess as a parallel for resemblances and differences between Chinese and western arbitration procedures.

Panel Discussion

During the panel discussion, Mr Bernard Dewit emphasized the importance of looking at China with an open mind as was demonstrated by Prof. Em. Herbots, because sometimes people decline to acknowledge the existence of a rule of law in China. He mentioned that one of the obstacles resulting from cultural differences between China and Europe is the language used in writing of the arbitration clause. It is often not clear from the text which institution is competent to appoint the arbitrators, which law should be applied, or even what language version of a contract is to be employed. European lawyers should be careful and make sure that wording of Chinese version corresponds with the intended meaning in the other version. Mr Dewit furthermore emphasised the fact that CIETAC is a very active arbitration body. Even though parties in China do not have full choice in arbitration and cannot select their arbitrator outside of the list presented by the commission, this rule serves as a guarantee that people on the list have sufficient legal knowledge of what constitutes this method of dispute settlement.

Mr Dirk De Meulemeester further discussed the importance of efficient means for dispute resolution when it comes to international trade. Companies put a great emphasis on the arbitration clause in the contract and they should not overlook thoughtful selection of the seat of arbitration and clearly refer to appointed institution. This is significant in making sure that, in case of the dispute, if they get an award in their favour, they are able to actually get it enforced. Enterprises should put a seat of arbitration in an arbitration-friendly place, even though the New York Convention states that its signatories shall recognize the international arbitral award. China fully respects the agreement, however, problems can occur in other countries. Mr De Meulemeester concluded by referring back to remarks of Mr Goethals raised in the beginning, and backed the notion that Brussels is becoming an imperative hub for arbitration. Belgium is seen as very arbitration-friendly environment as country adopted a pro-arbitration law in 2013 that is based on flexibility, party autonomy and encompasses all the basic features that companies look for.

To offer different perspective, Ms Francoise Lefèvre focused on the practice of arbitration and its evolution in different countries in Asia besides China. The use of this conflict resolution method has been expanding for the past ten years in East Asia. Since 1985, Hong Kong has been regarded among of the best arbitration centres in the region. They modernised their rules and became more efficient and arbitration-friendly. The second

most important hub that profiles itself as an influential arbitration point is Singapore that approached arbitration as a product on their market. The Singapore International Arbitration Centre was set up as a dynamic and progressive competitor of Hong Kong. It works efficiently and employs extremely well educated judges and its courts render very elaborate decisions. Both of these institutions also opened offices abroad in India, South Korea, or mainland China, where their decisions are easily enforceable. Despite the fact that Myanmar accessed the New York Convention and South Korea and Malaysia also updated their rules, list of arbitrators and infrastructure, other countries in the region are lagging in their pro-arbitration stance. Courts in India face a major overhaul of judicial system and enforcement procedure is ineffective. Therefore, when choosing a seat of arbitration, companies need to make sure that the courts of the seat will be helpful as well.

Interestingly, arbitration in the financial sector has been developing recently in Asia. Traditionally in Europe, banks go to courts and they are uninterested in arbitration. This is different in Asia, where increasing number of contracts in financial sector refers to arbitration clauses. Companies understand the advantages, such as that it is safer to have an arbitrator they can choose themselves and that have extensive knowledge of products that are disputed.

Mr Steivan Defilla talked about The Energy Charter's role in protecting investors abroad once they have made an investment. Forty-seven states are signatories to their Treaty, with core constituencies being located in Central Asia and an active headquarters in Brussels. An observers' forum was created last year with Beijing being granted an observer status. The complex framework of the Energy Charter includes two political declarations and a legally binding Treaty of 1994. There are several differentiated instruments for dispute settlement. First, there is an organ for inter-state arbitration that applies to countries that are not yet members of the WTO. Additionally, there is a transit conciliator for transit disputes and a fall-back state-to-state arbitration, which applies to all cases except for trade and transit. The most important, however, is an investor-state arbitration.

There is no commercial arbitration in the Charter, with the focus being solely on investor-state arbitration. The members agreed to protect investments from exploitation and to apply non-discriminatory treatment, among others. Additionally, amicable settlement of disputes gets used more frequently, because of the lengthy procedure and expensive costs of arbitration. Therefore, The Energy Charter is currently setting up guidelines for mediation. All in all, they have 93 investment dispute settlement cases which have been opened. Many of them have not been settled yet, but one third from those that have been closed was in favour of a state, one third in favour of an investor, and the rest was a joint settlement. Countries that have been litigated against can be divided in two groups. One is Eastern transition countries, where most of the states have been sued by investors. On the contrary, in the West most of the members have no cases, except for Germany, Italy, and Spain.

Q&A

A member of the audience raised a concern regarding institutional arbitration taking place in China. He indicated that the problem is more fundamental and there is a

pressing need for an exact definition of what constitutes an arbitration commission and an institution. Prof. Em. Herbots explained that legal language in China is not precise. First, there is a problem of validity and distinction between domestic or foreign arbitration. Moreover, he agreed that there is a great ambiguity and consequent uncertainty that requires clear guidance of the Supreme Court.

The second question concerned the anti-dumping procedures and whether an anti-dumping case can be referred to arbitration resolution or it has to go to the panel of the World Trade Organization instead. Mr Defilla responded that it depends on what level the complaint is brought in. If it is a dispute between enterprises then it can be dealt with through arbitration. However, if a state is one of the parties, then it should be resolved through WTO.

Concluding on a positive note, Prof. Em. Plasschaert emphasised how encouraging it is that with increasing international interactions, the practice of arbitration is also spreading throughout the world and stressed the contribution and progress China has made in this field.

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