

2017 Taipei Symposium on International Arbitration Rules

On March 31, 2017, seven renowned arbitral institutions, the Hong Kong International Arbitration Center (HKIAC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the Kuala Lumpur Regional Centre for Arbitration (KLRC), ICC Arbitration & ADR, North Asia, China International Economic and Trade Arbitration Commission (CIETAC) and CIETAC Hong Kong, attended the Taipei Symposium which was hosted by CAA.



Group photo of the Symposium.



Dr. Fuldien Li, CAA Chairman, delivered opening remarks in the Symposium.

This Symposium aimed to provide a forum for each institution to present the latest development of its arbitration rules. Dr. Winnie Ma, CAA Deputy Secretary-General, also presented the 2017 CAA International Arbitration Rules to the participants. The CAA International Arbitration Rules have been drafted for the proposed CAA Hong Kong Arbitration Center.

CAA Is Granted IFAWPCA Associate Membership

CAA's application for associate membership of International Federation of Asian and Western Pacific Contractors (IFAWPCA) was approved by the Executive Board during IFAWPCA's 43rd Convention which was held in Seoul, Korea from May 30 to June 2, 2017. This approval provides a necessary connection so that the two organizations from different sectors can better explore possible collaborations for mutual benefit.

Accompanied by Arbitrator Dr. Anna Yen and CAA Deputy Secretary-General Dr. Jeffrey S. J. Chen, Dr. Fuldien Li, CAA Chairman, attended IFAWPCA 2017 and exchanged ideas with other delegation leaders and participants. At the Condition of Contract Committee



IFAWPCA's 43rd Convention on May 31, 2017.

Meeting, Deputy Secretary-General Chen also presented a proposal to establish IFAWPCA Arbitration Center to be administered by CAA. Although no consensus was reached on the establishment of such IFAWPCA Arbitration Center, representatives from some member institutions expressed interest in the proposal and the chair decided to leave it open for further discussions.



Group photo of the Convention.

CAA Ethics Rules for Arbitrators Amended

In order to ensure procedural justice and maintain credibility and integrity of arbitration, CAA has amended several articles of its Ethics Rules for Arbitrators. The amendments include increased size

of the Ethics Committee, party's withdrawal of its application before a decision is made, and the effect on the arbitrator who has allegedly violated the Rules and the retrial mechanism.

The CAA Letter of Appointment and Acceptance of Arbitrator Revised

CAA's Letter of Appointment of Arbitrator and Letter of Acceptance of Appointment were originally combined in the same form. In order to enhance compatibility with international arbitral practice and trends, CAA has modified and adopted two separate forms: Letter of Appointment of Arbitrator and Arbitrator Statement.

The new Arbitrator Statement requires the arbitrator to disclose to the party under certain circumstances as specified in the IBA Guidelines on Conflicts of Interest in International Arbitration. The purpose of such requirement is to ensure impartiality and independence of arbitrators.



Dr. Winne Ma, New
Deputy Secretary-General of CAA

New Deputy Secretary-General of CAA

Dr. Winnie Jo-Mei Ma took office as CAA Deputy Secretary-General in charge of international affairs on March 1, 2017.

Dr. Ma holds LLB and SJD degrees from Bond University of Australia, and remains Honorary Assistant Professor of Law at Bond University. She is also the convener of the drafting committee for the new CAA International Arbitration Rules.

Publication: CAA Journal 2017, Vol.10, No.1

The newly published Contemporary Asia Arbitration Journal contains four outstanding articles and a book review. One of the articles was written by Prof. Tsai-yu Lin of National Taiwan University College of Law, Taiwan. In this article, Professor Lin discusses the systemic problems of using investment arbitration to handle investment disputes relating to matters governed

by other chapters in an FTA. The other articles were contributed by Prof. Julien Chaisse, Ms. Janice Lee, Ms. Sherlin Tung and Mr. Federico Luop-Pasini. For subscription, please email service@aribtration.org.tw.



Upcoming Events Mediation Training Courses

CAA will offer elementary mediation training courses in 2017 in Taipei on August 11-12, and in Kaohsiung on September 15-16. These courses include introduction to the mediation mechanism and

procedure, bilateral negotiation and mock mediation etc. For further information, please visit CAA website at www.arbitration.org.tw.

2017 Taipei International Conference on Arbitration and Mediation

The 2017 Taipei International Conference on Arbitration and Mediation will be held on August 28-

29, 2017. This Conference is co-hosted by CAA and the Asian Center for WTO & International Health Law

and Policy, National Taiwan University College of Law (ACWH). The topics for this Conference include *ad hoc* versus institutional arbitration or mediation, investment arbitration, other fundamental issues and recent development in international commercial arbitration

or mediation. Well-known experts and scholars from different countries have been invited as guest speakers. For more information, please visit CAA website www.arbitration.org.tw.

2017 CAA Gong Duan Cup Arbitration Moot

The First Annual Gong Duan Cup (公斷盃) Arbitration Moot for young lawyers is organized by CAA and will be held on November 4-5, 2017. This Moot intends to promote domestic arbitration as an alternative dispute resolution mechanism through its application to a concrete case. The Moot participants will be trained to write submissions for both parties and present their

oral arguments in the hearing. They will learn more about the Arbitration Law of the Republic of China, CAA Arbitration Rules, as well as the conduct of arbitral proceedings. There are no registration fees but great prizes to win!

For more information, please contact Ms. Felice Lu: lufuan@adr.org.tw or service@arbitration.org.tw

Visits



Mr. Horia Ciurtin (second from left), managing editor of European Federation for Investment Law and Arbitration, visited CAA on May 18, 2017. CAA Chairman Dr. Fuldien Li (left) and Deputy Secretary-General Dr. Winnie Ma (second from right) greeted the guest.



CAA delegation visited Fuzhou Arbitration Commission on March 14, 2017.



CAA Chairman Dr. Fuldien Li (left) met with Mr. Fang Qiuchen (in the middle), Chairman of China International Contractors Association on June 1, 2017.

Parting Ways with (Classical) Investment Arbitration? Three Critiques of ISDS in the European Union

by *Horia Ciurtin*, Research Fellow – EFILA *

Prolegomena

Given the recent negotiation of ambitious FTAs (which include generous investment chapters) by the European Union itself, many interest groups started to ask themselves whether the classical manner of conducting dispute resolution might still be the proper solution to our postmodern dilemmas. In this regard, challengers of the classical system primarily argued that: (1) between entities where rule of law reigns supreme, there is no need of ‘isolation’ from either national courts or diplomatic mechanisms; (2) the strategic interests should not override the need for public accountability on both sides; and – not the last concern – that (3) such treaties should not offer a ‘preferential’ procedural regime for a specific category of economic actors, based on their origin.

As we have learned during these debates in Europe, most of the time the critique starts from ideologically intransigent positions only to lose steam and to – finally – temper into moderate technical discussions. Thus, on one hand we have those challengers that consider the whole system as illegitimate and wish to entirely obliterate it, while – on the other hand – we have those

that wish the reform of some specific points in the ISDS functioning, without seeking its abolition.

Transparency

Therefore, one of the main issues on the agenda of ISDS critics is the alleged ‘general lack of transparency’. Even though there might be some pressing concerns in this regard, what most challengers treat as a problem of transparency is rather an embodiment of the principle of ‘confidentiality’. The general reproach argues that the procedures are secret and that no one beside the parties has access to the casefile, although the litigated problems are of public interest.

In reality, confidentiality of proceedings is a desirable feature of the system for both the investor and the state. Thus, the first of them wishes that detailed financial data used in the litigation not to get into the sight of (adverse) competitors or stock-exchange speculators. At the same time, the states have an interest in not being

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advertised publicly as having taken certain measures that affect investors.

Moreover, the latest evolutions in the field – seen as minor reforms of ISDS itself – tend to reduce the level of confidentiality. Thus, the new ICSID rules from 2006 allow interested third-parties to intervene during the written and oral proceedings, granting them – sometimes – access to the entire casefile. Not only agents of international organizations (such as the European Commission or World Health Organization) have so far intervened as *amicus curiae*, but also members of the civil society (such as NGOs or labor unions). In addition, in 2014, the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration were introduced, rising to a status of soft law provisions that are accepted by the entire professional community.

Private and Parallel Justice

Another very common critique regards the alleged private character of the entire arbitral process. In reality, the issue tends to be a misunderstanding of the profound nature of the ISDS system, which is a hybrid model for dispute settlement. More precisely, it is configured to deal a party that is a sovereign entity and a party that is a private investor. The resemblance with commercial arbitration is only formal and technical, as ISDS is actually a *sui generis* system with specific characters that draw it apart from other private forms of arbitral justice.

In this sense, I have to emphasize that a large majority of investment cases is administered by ICSID, while the rest are judged on the basis of UNCITRAL rules, administered almost unanimously by the Permanent Court of Arbitration or the Stockholm SCC, all of them fora of respectable tradition.

As regards the ‘parallel justice’ argument invoked by the ISDS critics, that is truly so. Such a mechanism is, indeed, autonomous and autarchic, isolated from any other national and supranational judicial system. However, this features were deliberately designed to gain it additional legitimacy, being regarded as an advantage and not as shortcoming. The ISDS architects

saw the necessity of having a forum that is separated from the influence of any state, as no sovereign wished its investors’ rights to be at the whim of another state and its judiciary. Thus, the parallel reality of the ISDS system guarantees the direct – and quite facile – access of an investor to a litigation mechanism that has untouchable and objective rules.

The Lack of Appeal Forums

Not last, it is often shown as a critique the final character of arbitral decisions and the impossibility to review them in case of a tribunal’s error. Indeed, this element of commercial (and inter-state) arbitration was maintained in the ISDS system, from purely practical reasons. For both the investor and the state, certainty is the most important aspect. That is, the certainty to invest further and the certainty to be able to attract further investors.

However, such a finality is not absolute. For the ICSID cases there are annulment procedures in place, while for the other cases there exists the possibility to seek the set-aside of the award in front of national courts. The verification of the decision is – nonetheless – extremely limited, offering only a review based on technical and procedural grounds.

Conclusion

Therefore, when taking a closer look at the critiques expressed within the European Union, one might wonder whether they are truly grounded in structural deficiencies of the current investment arbitration system or they solely represent an easy way out of the more political debates that surround the signing of such ambitious treaties. Thus, the alleged shortcomings of classical ISDS should be taken *cum grano salis* before any radical transformation is induced. Arbitration itself is but a tool. A very useful and efficient tool, but which can take any shape in the hands of an assertive polity. It is better to deploy technical reforms to mechanisms that had proven their procedural quality than to reinvent the wheel entirely.

Model Arbitration Clause

Any dispute, controversy, difference or claim arising out of, relating to or in connection with this contract, or the breach, termination or invalidity thereof, shall be finally settled by arbitration referred to the Chinese Arbitration Association, Taipei in accordance with the Association’s arbitration rules. The place of arbitration shall be in Taipei, Taiwan. The language of arbitration shall be _____. The arbitral award shall be final and binding upon both parties.

The Chinese Arbitration Association, Taipei (“CAA”) is a not-for-profit organization based in Taipei, Taiwan, providing wide-range of dispute settlement administration services, including arbitration, mediation and other alternative dispute resolution proceedings. The Association is the leading arbitration institution in Taiwan and one of the important arbitration centers in Asia-Pacific, handling more than 200 domestic and international cases per year.

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