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CENTRE FOR ADVANCED RESEARCH & TRAINING IN ARBITRATION LAW

The 5th CARTAL Conference on International Arbitration

Riding New Tides: Arbitration in a Changing World

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Panel I

Entering a Data Driven World: The Way Forward for International Arbitration

The development of legal frameworks on data regulation and protection across jurisdictions has far-reaching consequences for the future of international arbitration. The enactment of laws such as Europe's General Data Protection Regulation ["GDPR"] has led to an increase in complex data related disputes. Thus, there are ongoing debates about their arbitrability, the suitability of international arbitration for their resolution, and the challenges associated with deciding this particular class of disputes. There has also been a rise in questions concerning applicability of data protection laws and the need for development of data protection rules in international arbitration, considering the huge amount of data processed during and after such proceedings. Moreover, in the absence of an international standard for data protection in arbitration proceedings, the norms for discovery, disclosure, and use of personal data remain ambiguous. The 2020 Public Consultation Draft of the ICCA-IBA Roadmap to Data Protection in Arbitration is a commendable step in this direction. It lists out the data protection principles applicable in arbitration and maps the flow of data in arbitration to lay down certain considerations for the parties and arbitral institutions, as data processors and controllers. This Panel will explore the relevance of international arbitration for the resolution of data disputes; best practices for compliance with data protection rules by participants in the arbitral process; the responsibilities of an arbitral tribunal to ensure informed consent about data processing and security for personal data, procedural rules of discovery and disclosure of sensitive data, and the role of arbitral institutions from the perspective of data protection laws.

Panellists

Prof. Dr. Jacomijn van Haersolte-van Hof
(Director-General, London Court of Arbitration)

Ms. Marily Paralika
(Partner and Head of the International Arbitration Practice, Fieldfisher, Paris)

Ms. Mélanie van Leeuwen
(Partner, Derains & Gharavis, Paris)

Moderator

Ms. Kristin Campbell-Wilson
(Deputy Secretary General, Stockholm Chamber of Commerce)

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Panel II

State-State Investment Arbitration: A Viable Alternative to ISDS?

With the increase in international investment disputes, concerns regarding the effectiveness and legitimacy of Investor-State Dispute Settlement ["ISDS"] have also been growing. Over the last decade, ISDS has also suffered from uncertainty caused by political shocks such as Brexit, the NAFTA renegotiations and the recent outbreak of Coronavirus. Considering this, the United Nations Commission on International Trade Law ["UNCITRAL"] has constituted a Working Group to attempt a revamp of the system. Amidst calls for reform, the proposal to replace ISDS with State-State Investment Arbitration ["SSIA"] is gaining renewed attention. Under the SSIA mechanism, it is the Home State, on behalf of an investor, and not the investor directly, that initiates investment-treaty related claims against Host States. This potentially allows States to filter out unmeritorious and controversial claims. Despite its inclusion in several international investment agreements, the SSIA clause has rarely been invoked. However, State to State Dispute Settlement mechanisms, which predate ISDS, are regaining focus, as reflected by their inclusion in the India-Brazil and United States-Mexico-Canada Agreements. This trend is likely to continue with COVID-19, as States will be faced with myriad claims against pandemic measures, combined with the challenge of recreating favourable investment climates. In these uncertain times, the SSIA mechanism appears a suitable tool as it seeks to overcome the problem of multiplicity of similar claims by different investors overburdening States; as well as inconsistencies in treaty interpretation under the ISDS, which have been a major drawback of investor-State arbitrations. In light of the above, this panel would examine the advantages and drawbacks of SSIA; its potential as a viable alternative to ISDS when compared with the other proposed models; and the interplay between SSIA and ISDS.

Panellists

Dr. Romesh Weeramantry
(Counsel, Clifford Chance Asia)

Mr. David Gaukrodger
(Senior Legal Advisor, OECD Investment Division)

Dr. Catharine Titi
(Research Associate Professor, French National Centre for Scientific Research (CNRS)–CERSA, University Paris II Panthéon-Assas, France.

Moderator

Dr. Prabhash Ranjan
(Senior Assistant Professor, Faculty of Law, South Asian University, New Delhi)

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Panel III

The Rise of Effective Cross-Border Litigation and Mediation: Does Arbitration Still Wear the Crown?

International Arbitration has reigned as the most preferred mode for the resolution of cross-border disputes for several years now, by virtue of perceived neutrality of arbitral tribunals in comparison to domestic courts, confidentiality/privacy, ease of enforcement and efficiency. However, recently, international arbitration has been criticised for being both expensive and time-consuming. These criticisms – though not severe enough to discourage the use of arbitration completely – must still be examined against the backdrop of recent developments in other modes of dispute resolution, to re-evaluate the appeal of arbitration for cross-border disputes in the future. In addition to the prevailing criticisms, there are also concerns about the impact of pandemic-induced economic changes on the future preference for arbitration. The most significant developments in dispute resolution, which may potentially impact the usage of arbitration, came in the form of two recent instruments that endeavour to promote the use of mediation and litigation for the resolution of international disputes. The United Nations Convention on International Settlement Agreements Resulting from Mediation 2015 ["Singapore Mediation Convention"] provides a framework for the enforcement of mediated settlements, the lack of which has been one of the primary reasons parties decided against mediation for the resolution of cross-border commercial disputes. Similarly, the Hague Conference on Private International Law has adopted the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters ["Hague Judgments Convention"], which seeks to establish a regime for enforcement of civil and commercial judgements, mirroring the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["New York Convention"]. Additionally, the possibilities of mediation are being explored in investor-state disputes by the Investor-State Mediation Taskforce, 2013. In light of the above, this panel will discuss the suitability of different forms of dispute resolution for commercial/investment related disputes in different sectors, the problems plaguing international arbitration today as well as its undeniable benefits, the role of the above-mentioned Conventions and similar instruments in promoting international mediation and litigation, possible interaction between the different modes of dispute resolution for effective resolution of international disputes, and the changes that must be brought to the arbitral process to ensure that international arbitration retains its premier position in commercial dispute resolution.

Panellists

Ms. Edna Sussman, Esq.
(Arbitrator & Mediator)

Mr. Paul Eric Mason
(International Counsel, Arbitrator and Mediator)

Prof. Katia Fach Gómez
(Tenured Professor, University of Zaragoza, Spain)

Prof. Robert G. Volterra
(Partner, Volterra Fietta, London)

Moderator

Ms. Sherina Petit
(Partner, Norton Rose Fulbright, London)

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