SESSION SIX

AN INTERNATIONAL OUTLOOK ON AWARD ENFORCEMENT

The last panel of the day saw an international line-up tackle wide-ranging issues surrounding the enforcement of international arbitration awards, giving jurisdictional comparisons from Ireland, Dubai, Russia and beyond. **Angela Bilbow** reports

Sudhanshu Swaroop QC, 20 Essex Street; Peter Bredin, Dillon Eustace

CDR/Dimitar Ganev

Chairing was **Sudhanshu Swaroop QC** of **20 Essex Street**, who introduced the panel consisting of **Peter Bredin**, a partner at **Dillon Eustace** in Dublin, **Tejas Karia**, partner at **Shardul Amarchand Mangaldas**, India, **Iain McKenny**, general counsel, disputes at **Vannin Capital**, Moscow-based **Quinn Emanuel** partner **Vasily Kuznetsov** and **Gordon Blanke**, a partner at **DWF** in Dubai.

Bredin kicked off the discussion by saying that while there was not a huge amount of international commercial arbitrations in Ireland, Dublin had seen a USD 1 billion construction arbitration grace the city, and the country's 2010 Arbitration Act, based on the **UNCITRAL** Model Law, made the jurisdiction "very pro-arbitration and pro-enforcement".

"We are well set up in Ireland for arbitration," he noted, "the Irish courts will only intervene to set aside awards or refuse enforcement in very restricted circumstances".

He cited a landmark Irish enforcement decision (*Danish Polish Telecommunication v Telekomunikacja Polska*) of a partial award issued by the **ICC** in Vienna, in which the Irish court had to deal with an adjournment issue first, before deciding the arbitration, rather than run the risk of conflicting decisions in Ireland and Vienna. An interesting aspect of this case, Bredin said, was whether, if an adjournment was granted, should the court enforce part of a partial award and should security for costs be awarded?

Swaroop then introduced Karia, who was part of the India's Law Commission committee involved with the country's new Arbitration and Conciliation (Amendment) Ordinance 2015, which came into force last October.

India has been in the limelight in terms of enforcement, Karia said, with law also based on UNCITRAL, in two parts – domestic and international commercial arbitrations seated in India and enforcement under the 1958 New York Convention.

So far so good, he said, but when it came to Indian courts, there were controversies when dealing with the law. Since the new amendment came into force, there are now new provisions for interim relief and a new streamlined process in which Indian courts are less able to interfere in foreign awards.

With enforcement, given an identified problem whereby Indian district courts were unequipped to deal with the enforcement of foreign awards, India has redefined the roles of its courts, with district courts now handling domestic arbitrations, and high courts dealing with international commercial arbitrations. "This is a major development which will help to ease the issues with enforcement," he said.

Karia, also discussed new "major grounds" in the new amendments whereby setting aside and enforcement had once fallen under public policy grounds, which was "quite challenging" as there was no definition in any previous legislation of that doctrine. "As far as international commercial arbitration is concerned, if the award is ▶

Gordon Blanke, DWF
Tejas Karia, Shardul Amarchand Mangaldas

CDR/Dimitar Ganev

obtained by fraud, or is issued against the most basic notions of justice and morality, only then will the courts intervene and… resist enforcing a foreign award."

Offering perspective on funding and asset tracing, McKenny began by stating: "Third-party funders are not unique; most clients at some point, although fascinated with the cut and thrust of the legal dispute, ultimately want to know and understand whether their efforts will be rewarded in some form of monetary compensation of loss."

After a very long and expensive process in order to get an award, the client is often told that they are going to have to spend sums running into the millions for an uncertain period of time, after which they may actually get the money they have been seeking, he said.

"I would like to think that lawyers might suggest there are ways of transferring this financial risk to somebody else and have the discussion about third-party funding."

On the investment treaty arbitration side, McKenny said his company often encounters the issue of political risk – is the country likely to pay and what can clients expect in terms of the payment timeline?

Clients ask when discussions should commence with the state on whether an award will be paid. They are "increasingly aware that when it comes to investment treaty disputes, the time for negotiation with a state is often at the time they receive the award". Very few discussions commence with the state earlier than that.

In reference to the **European Commission's** involvement in intra-EU enforcement, McKenny noted: "The difficulty is in trying to assess the impact of time and cost. What is going to happen to the award and will there ever be a point where you can realise the value in it?" This would become more common, he added.

With commercial arbitration, when it came to asset tracing, many companies claim to have a 'global reach' in terms of their ability to locate assets, he noted. However, in his experience, it was another way of saying they outsource work, which can often lead to "somewhat vanilla" asset tracing reports. On this point he emphasised the value of certain software available to parties.

Iain McKenny, Vannin Capital
Vasily Kuznetsov, Quinn Emanuel

CDR/Dimitar Ganev

In thanking McKenny, Swaroop questioned how Brexit would affect his peer's point about EU enforcement, before introducing Kuznetsov, who began by explaining the structure and approach of the Russian commercial and general courts in terms of arbitration, following the collapse of the Soviet Union.

"We are seeing that Russia is becoming a more arbitration-friendly when it comes to the enforcement of awards," Kuznetsov said.

When thinking about enforcement in Russia, he said, the arbitration agreement is vital. In the past, agreements needed to be very precise, but in recent times the courts have adopted a more flexible approach.

State courts are becoming less tolerant to objections about arbitration clauses from parties after enforcement begins, this being seen as 'bad faith', he said, as "good faith requires that parties raise objections to jurisdiction immediately" in the eyes of the courts.

He went on to note aspects that would affect arbitrations, like fraud, where the courts now take a Western-style approach, with the typical period of standard enforcement being between two and four months.

Finally, it was to Blanke to explain how the United Arab Emirates was an "arbitration laboratory".

"Nowadays you can now arbitrate [in the UAE] in three different fora. Consumers have an almost unique choice in seating their arbitrations in the common law **Dubai International Financial Centre (DIFC)** or the **Abu Dhabi Global Market**, or on the civil law mainland."

Of the three, the DIFC has tried to "eke" out a role as a conduit jurisdiction in the recognition and enforcement of both domestic and foreign awards.

This meant that a lot of domestic award creditors would have been concerned in the past about enforcement before Dubai's main courts, now they can commence proceedings for an enforcement order in the DIFC, which can then be exported into mainland Dubai for execution through the Dubai courts. Abu Dhabi is now trying to do something similar in getting its awards enforced anywhere in the UAE, Blanke said, so there were "very exciting times ahead".

"The UAE is an extremely fast-developing and fascinating arbitration jurisdiction, there is something new afoot almost every week. Dubai's ruler has been very forward-looking in developing the jurisdiction and this has created an environment where other rulers want to follow suit." ■