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Maxi Scherer (WilmerHale & Queen Mary University of London) · Tuesday, February 20th, 2018

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Guilherme Rizzo Amaral, Burden of Proof and Adverse Inferences in International Arbitration: Proposal for an Inference Chart

Abstract: This article addresses two subjects that are relevant to the finding of facts in international arbitration, namely, the burden of proof and the power of the arbitral tribunal to draw adverse inferences. Regarding the burden of proof, it shows that despite the existence of a general rule stating that the party making the allegation carries the burden to prove it, there are other factors – such as the applicable law to the merits or to the procedure – that may play a role in defining it. In circumstances where the party carrying the burden of proof is not able to discharge it without evidence that the opposing party possesses, the tribunal has the power to order the opposing party to produce said evidence. Non-compliance with the tribunal's order calls for the drawing of an adverse inference, which is not a reversal of the burden of proof nor a lowering of the standard of evidence, but rather the filling of the gap left by the missing (non-produced) evidence by a complex gap-filler. This article explains the elements within such gap-filler and presents an original methodology (a step-by-step approach) for the drawing of adverse inferences, represented in an Inference Chart.

David Ryan & Kanaga Dharmananda SC, Summary Disposal in Arbitration: Still Fair or Agreed to be Fair

Abstract: Parties may well opt for arbitration as a dispute resolution method because it is fast, flexible, and allows for rapid disposition. Where attempts are made for summary disposition, the traditional view was to resist such processes for fear of offending the fair hearing rule. Close attention to the question, and to recent developments in institutional rules, and the treatment of challenges based on procedural fairness grounds, reveals a picture that is more nuanced than the traditional view. Together with a consideration of waiver provisions, this article considers summary disposition in the face of the requirement for procedural fairness.

Hossein Abedian & Reza Eftekhar, Consent to Investor-State Arbitration in the Second Largest International Investment Protection Agreement: The Correct Interpretive Approach to Article 17 of the OIC Investment Agreement

Abstract: The Organization of the Islamic Conference (OIC) Investment Agreement is the second largest multilateral investment treaty worldwide. Attentions were attracted to this deeply dormant Agreement when the tribunal in Hesham Talaat M. Al-Warraq v. Republic of Indonesia rendered its Award on Jurisdiction in 2012, interpreting the critical Article 17 of the Agreement, holding that it contains binding state consent to investor-state arbitration. The jurisdictional question before the tribunal, which may be at issue in the pending cases or which may very well arise in subsequent cases brought under this Agreement, was twofold: (1) whether investor-state arbitration is contemplated in the OIC Investment Agreement; and (2) whether the consent to arbitration contained in Article 17 is binding. In its jurisdictional analysis, in addition to references to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the tribunal resorted to the principles of contemporaneity and evolutionary interpretation to conclude that Article 17 of the OIC Investment Agreement contained binding state consent to investor-state arbitration. This article considers the viability of the reliance on the principles of contemporaneity and evolutionary interpretation in this context. It argues that the tribunal's jurisdictional analysis in this regard lacks adequate precision: none of these principles, it seems, could successfully be employed to show the existence of a binding consent to investor-state arbitration in the OIC Investment Agreement. Nonetheless, relying on a proper textual and contextual analysis, the article concludes that Article 17 of the OIC Investment Agreement does seem to contain a binding consent to investor-state arbitration. This conclusion is in line with the ultimate outcome reached by the Al-Warraq tribunal. Nevertheless, the textual and contextual interpretive approach proposed by this article finds fault with the interpretive exercise by the Al-Warraq tribunal to the extent that the issue of existence of binding consent to arbitration under Article 17 of the OIC Investment Agreement is concerned.

Tim Wood, State Responsibility for the Acts of Corrupt Officials: Applying the 'Reasonable Foreign Investor' Standard

Abstract: Under the 'reasonable foreign investor' standard – which flows from the general law of state responsibility – the conduct of corrupt officials is attributed to their state insofar as those officials reasonably appear to act within the scope of their authority. Whereas the standard has been conceived of as a liberal one, which will normally result in state responsibility for the conduct of corrupt officials (especially of high rank), this note argues for a more stringent approach. In general, and by virtue of states' international anti-corruption obligations, it is suggested that a foreign investor cannot reasonably assume an official (no matter how high-ranking) to be authorized to engage in and act upon corruption. Consequently, the conduct of a corrupt official should seldom, if ever, be attributable to the state.

Gauthier Vannieuwenhuyse, Arbitration and New Technologies: Mutual Benefits

Abstract: New technologies such as Big Data, blockchain, machine learning, and text-mining have made it to the legal world, simplifying all phases of the dispute resolution process. Arbitration and these new technologies share a mutually beneficial relationship. On the one hand, new technologies will improve efficiency, cut costs, promote the expansion of arbitration into new segments of the market, and improve outcomes for clients. On the other hand, the proliferation of new technologies will inevitably generate disputes that arbitration is best-suited to resolve. For example, although self-execution limits certain litigation risks concerning the performance of smart contracts, conflicts regarding their definition, interpretation, and general framework are likely to arise. The delocalized nature of the arbitral regime, the flexibility of proceedings, and the straightforward enforcement of awards are key features that make arbitration the optimal dispute resolution mechanism for new technology disputes. New technologies can thus reinforce arbitral

proceedings, and arbitration can provide insurance to these emerging practices – these reciprocal benefits should be exploited.

Alain Farhad, Two Steps Forward, One Step Bank: A Report on the Development of Arbitration in the United Arab Emirates

Abstract: Optimists will note that arbitration in Dubai has made great progress in the past decade. Thus, the United Arab Emirates acceded to the New York Convention in 2006 and the number of arbitration cases relating to the economy of the United Arab Emirates (UAE) has increased significantly. Pessimists will retort that much of this progress has been overshadowed by a small number of incongruous court decisions disregarding the New York Convention or revealing an overly formalistic approach to arbitration.
The most recent developments in the practice of arbitration in the UAE, addressed in this report, confirm that development is not always linear. It is sometimes a succession of steps forward and steps back. But beyond these ups and downs, observers of arbitration in the UAE should not lose sight of the bigger picture: arbitration in the UAE has made significant progress in a very short period of time. A much awaited and much debated new arbitration legislation, which reportedly has been in preparation for years, would be helpful to consolidate this progress and give the UAE the place it deserves on the global map of international arbitration.

BOOK REVIEW

Dr Andreas Hacke, Nadja Alexander, Sabine Walsh & Martin Svatos (eds), EU Mediation Law Handbook: Regulatory Robustness Ratings for Mediation Regimes (Wolters Kluwer, 2017; ISBN 978-90-411-5859-8)

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