

The Contents of the Yearbook Commercial Arbitration, Volume XLV (2020), Upload 4

Kluwer Arbitration Blog

September 14, 2020

Stephan Schill (Amsterdam Center for International Law, University of Amsterdam)

Please refer to this post as: Stephan Schill, 'The Contents of the Yearbook Commercial Arbitration, Volume XLV (2020), Upload 4', Kluwer Arbitration Blog, September 14 2020, <http://arbitrationblog.kluwerarbitration.com/2020/09/14/the-contents-of-the-yearbook-commercial-arbitration-volume-xlv-2020-upload-4/>

The fourth upload of ICCA Yearbook materials in 2020 is now available on KluwerArbitration.com. It features a total of twenty-one court decisions applying the New York Convention - from Austria, Germany, Italy, Kenya, Luxemburg, Malaysia, the Russian Federation, Seychelles, Switzerland, Tanzania, the United Kingdom, the United States, and Uzbekistan - as well as two decisions reflecting the practice and doctrine of arbitration in France and Ghana.

One of the latter decisions is of particular interest, not least because it shows a continuous rift on international arbitration law in the courts on both sides of the Channel. In June 2020, the Paris Court of Appeal held in *Kabab Ji v. Kout Food Group* that French law applied to determining the validity and personal scope of application of a clause providing for ICC arbitration in Paris, even if the main agreement between the parties was governed by English law. That choice, the Court held, was not by itself sufficient to establish the common intention of the parties to submit the arbitration clause - an independent agreement - to the same law. On this basis, the French Court found that binding a non-signatory to the arbitration agreement passed muster. By contrast, the English Court of Appeal had reached the opposite conclusion only in January 2020, when it refused to enforce the award in question in England because under English law, which the English

Court found to be applicable, the issue had to be decided differently.

Three decisions on the New York Convention also merit special attention.

The Austrian Supreme Court denied recognition and enforcement of a Belorussian award on the ground that one arbitrator on the panel had been excluded from deliberations. The arbitrator had been told at the conclusion of the evidence-taking phase that there would be further meetings, but then was simply presented a draft award already signed by two arbitrators and asked to sign it as well.

The Berlin Court of Appeal denied recognition of the part of a Russian award directing the defendant to pay a particularly high penalty for delay. It found that the contractually agreed daily rate of 0.5 percent, which corresponded to an annual rate of 180 percent was exorbitant and incompatible with German public policy.

The Swiss Federal Supreme Court, finally, affirmed that an arbitration agreement could be based on a consent by implied action (*konkludentes Handeln*). It found the arbitration clause in a distribution agreement to be binding on a party that had performed under the distribution agreement for many years, with the agreement of all parties, even though it had not signed the agreement or the arbitration clause.