Kluwer Arbitration Blog

The Contents of Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Volume 87, Issue 1 (February 2021)

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As we slowly turn the corner of this brutal year, a mixed set of thoughts and reflections come to mind. For a start, one cannot help but feeling a sense of measured optimism that after a vicious tally of human losses worldwide and unprecedented disruption of every single aspect of our social and professional lives which the pandemic has caused, some light appears to slowly shine at the end of what has been a very long tunnel.

And it is only right that I start this year's assessment with a general reflection on the state of our world. Indeed, it would be entirely myopic and solipsistic to mainly think of our niche field of international law in these challenging times.

At the same time however, it is international dispute resolution that we -and the readers of this *Journal*– theorise and practice, and it is only natural for this editorial to also assess the implications of this year's events on our field. And here the sense of measured optimism is overtaken by a sense of enthusiasm and, perhaps, admiration of the resilient and evolutionary nature of the practice of international arbitration.

Writing the introduction of the edited book on *The Evolution and Future of International Arbitration* back in the (what now appears to be) far distant 2016, I identified eight future challenges for the field of international arbitration. Without being able to imagine the wide-ranging plights that the global pandemic would bring about four years later, I was then asking the question as to how "*technology can change the way international arbitration is conducted?*". Specifically, I was writing the following lines:

> "*Despite its flexible nature, international arbitration has failed to embrace technology so far. The only technological innovations introduced in arbitration in the last twenty years are e-discovery of documents and the use of electronic copies of submissions and exhibits. However, electronic submissions have not changed the way arbitration is actually conducted: instead of (and very often in addition to) hard copies parties submit electronic copies of their submissions, including supporting*

> *documents. This is hardly innovative. Information technology has made unprecedented advances that may have far reaching implications for the conduct of international arbitration [….] science and technology can make arbitration proceedings more time and cost efficient.*"

Fast forward to 2020: faced with the prospect of recurrent postponements of arbitration hearings and extensive disruption of the process of thousands of ongoing arbitrations, arbitration institutions, counsel and arbitrators, have been quick to adapt to the new circumstances and come up with new sets of remote practices and protocols for online hearings. This has been international arbitration at its best: innovative, willing to embrace change, and quick to implement solutions to real life problems by relying on the use of cutting-edge technology.

All of us will look back to 2020 hoping that we not have to re-live such a treacherous turn of events. It is, however, likely that we will consider the year of 2020 as the beginning of a new era of a more effective and technologically friendly practice of international dispute resolution.

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We are happy to report that the latest issue of *Arbitration* is now available and includes the following:

ARTICLES

Carlos Molina Esteban, *Bifurcation of ICSID Awards and Reconsideration of Interlocutory Decisions: The Fine Balance of Procedural Economy*

Bifurcation is by no means a rarity:ICSID Tribunals have rendered over 115 decisions on bifurcation. Despite this, until now, there has not been a comprehensive regulation of Bifurcation within the ICSID Convention and Rules. Case law has, thus, been fundamental to its development. This article will examine investment arbitration case law in order to answer a set of questions: What is the objective of Bifurcation? Under which circumstances should Tribunals bifurcate? Do these circumstances change depending on the issues to be bifurcated?

We will then take a look at the post-bifurcation scenario, specifically at the issue of reconsideration of decisions. After a review of case law on the matter, we will examine two further questions: when should Tribunals reconsider their decisions? And what is the rationale behind these reasons to reconsider a decision?

As we will further develop, these questions revolve around one key concept: Procedural Economy. Both bifurcation and reconsideration of decisions can ultimately be seen as a balancing exercise of procedural economy, Tribunals having to carefully balance out the circumstances of each case to decide whether the bifurcation of proceedings or the reconsideration of decisions would benefit efficiency.

Naimeh Masumy & Niyati Ahuja, *Divergence from Conflict-of-Law Analysis: The Need for a*

Coherent Standard of Review for Economic Sanctions in International Arbitration

The recent reinstatement of economic sanctions by the US against Iran, China and Hong Kong (The Comprehensive Iran Sanction, Accountability and Divestment Act of 2010, Pub. L. 111–195, 124 Stat.1312, enacted 1 July 2010; Comprehensive Iran Sanction, Accountability and Divestment Act (CISADA). International Emergency Economic Powers Act (IEEPA), 50 U S C.1701–1706.) brings into focus how to best resolve disputes related to these sanctions in arbitral proceedings. Arbitral tribunals tend to apply conflict-of-law rules in order to determine the application and the validity of the sanctions. This article contends that the invocation of private international law principles, such as the conflict-of-laws analysis, to adjudicate these cases is conceptually and pragmatically challenging as it forces the arbitral tribunal to determine the applicable law according to complicated rules with a discretionary nature and thereby hinders arbitral tribunals from considering sanctions through the prism of public international law. The principles of Public International Law should be considered by arbitral tribunals when reviewing sanctions with transnational elements. The paper analyses the existing approach adopted by arbitrators and proposes that arbitral tribunals undertake a minimal standard of review based on Public International Law principles.

Edwin Teong Ying Keat, *Calling a Spade a Spade: Making the Case for Construing Exclusion Agreements in Arbitration as Exclusion Clauses*

Exclusion Agreements (‘EAs’) are agreements excluding the right to appeal arbitral awards. However, a lacuna exists in the analysis of EAs. courts when ruling on EAs, lapse into dichotomous outcomes – enshrine party autonomy or respect issued awards. Therefore, this article argues for the law on exclusion clauses to be applied to EAs for five reasons. First, EAs are essentially exclusion clauses as they also demarcate obligations. Second, the proposed solution adds rigour to the analysis of EAs. Third, EAs share very similar policy considerations with exclusion clauses. Fourth, the potential doctrinal objection – doing so violates the doctrine of separability – is rebutted. The tribunal presides over proceedings to issue arbitral awards, while courts decide the validity of EAs. Further, the roots of ‘separability’ is arguably procedural in enshrining choice of dispute settlement. Lastly, subjecting exclusion clauses to stricter scrutiny than EAs sends the wrong signal to parties invoking EAs.

Silpi Jain, Aryan Mohindroo & Harshil Manchanda, *Mediating the Irish Way: Taking an Alternative Approach to Alternative Dispute Resolution in India*

In the past couple of decades, Ireland and India, both common law countries, have made attempts to strengthen the mediation regime in their respective countries, however, Ireland has experienced greater growth, both in terms of law and practice. Through this article, the authors attempt to study the developments in the legal regime on mediation in both countries and propose the adoption of certain features of the Irish model into the Indian legal system for greater regulation of mediation practices. The authors explore the various features of the Irish regime and the suitability of adopting the same into the Indian system. The authors address a wide range of issues relating to building a robust regulatory framework in India, such as the scope of enacting a legislation, providing better enforcement mechanisms and enhancing the quality of mediators.

Bas van Zelst, *Similar ? Equal – a Nuanced Approach to Remote Hearings: A Dutch Perspective*

This article proposes a nuanced approach to remote hearings, from the perspective of Dutch law. The Dutch Arbitration Act was revised in 2015. It grants an arbitral tribunal the discretionary power to decide that a hearing be conducted 'by electronic means'. This article challenges the notion that that power is of a mandatory nature. It submits that the power for arbitrators to opt for a remote hearing is limited by fundamental principles of procedural law, the principle of parity, in particular. The article goes on to list relevant considerations in opting for a remote hearing in Netherlands-seated arbitral proceedings and considers this approach to be feasible in the international setting as well.

Benjamin Williams, *Qualifying Achmea: Investor-State Arbitration, Jurisdictional Conflict and EU Decision-Making*

In 2019, the European Court of Justice shocked the arbitration community with the release of Opinion 1/17. The opinion turned once again to the compatibility of Investor-State Dispute Settlement mechanisms under EU law, finding the provision in Canada's Comprehensive Economic and Trade Agreement compatible. Yet the ruling appeared at odds with the court's own case law. Only a year earlier, in Slovak Republic v. Achmea, the court had found the Investor-State Dispute Settlement (ISDS) provision in a Netherlands-Slovakia treaty incompatible.

This article examines the two cases to consider the jurisdictional compatibility of investor-state arbitration bodies under EU law. Through a close reading of the judgements, it traces a common thread in the court's reasoning – the principle of mutual trust. It argues that mutual trust can be seen both as the Court's metric for limiting the scope of arbitration practice, as well as the source of the court's autonomy within the EU legal order. In so doing, the paper seeks to resolve the apparent conflicts between these two contrasting cases, while also commenting on the Court's approach to decision-making more broadly.

Viktoriia Korynevych, *Revisiting Kompetenz-kompetenz and Arbitrability in the US Supreme Court: Vicious Circle of Delegation Clauses and Carve-out Provisions in Henry Schein Inc. v. Archer and White Sales Inc*

The US courts have long recognized that arbitral tribunal has power to rule on arbitrability as long as parties 'clearly and unmistakably' delegated such power in the arbitration clause. The question as to what exactly constitutes 'clear and unmistakable' delegation still remains unanswered. In the 2020–2021 term, the US Supreme Court will have an opportunity to shed some light on the concept of 'clear and unmistakable' delegation. In 2019, in Henry Schein Inc. v. Archer and White Sales Inc., the Fifth Circuit Court of Appeals held that the presence of carve-out provisions in the arbitration clause negates an otherwise 'clear and unmistakable' delegation of arbitrability to arbitral tribunal. In other words, if arbitration clause excludes, for example, intellectual property disputes or injunctions, then arbitrability question automatically goes to courts. On 8 December 2020, the US Supreme Courtheard the argument in the case and will likely decide it in 2021.

BOOK REVIEWS

Margie-Lys Jaime, *Mediation in International Commercial Arbitration and Investment Disputes*, by Catharine Titi & Katia Fach Gómez (eds) (Oxford University Press, 2019)

Erik Van Wellen, *Construction Contracts: Law and Management*, by Will Hughes, Ronan Champion & John Murdoch (eds) (Routledge, 5th Edition, 2015)

Gordon Blanke, *Commercial Arbitration in Zimbabwe*, by D. Kanokanga (Juta, 2020)

The Editor welcomes the submission of articles for consideration for publication in the Journal. All prospective contributions should be in accordance with the guidelines set out here.

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This entry was posted on Thursday, February 18th, 2021 at 4:00 am and is filed under Arbitration – The International Journal of Arbitration
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