Kluwer Arbitration Blog

Ups and Downs In Institutional Arbitration

Phillip Capper (White & Case LLP) · Wednesday, March 25th, 2009 · White & Case

"…*so many construction disputes are now heading towards arbitration*" remarks the calling notice for the next Society of Construction Law-Gulf event in Dubai in April. Around the world, the economic downturn is producing very many financial disputes. The speculation is that with the global recession deepening, the number of arbitrations is set to spiral upwards.

Does this mean a smooth ride to increased success for the arbitral institutions? Trends certainly seem to show a global increase in the number of arbitrations and an increasing institutional regionalisation. But is the news only positive for international arbitration?

According to the latest statistics from the LCIA, 221 new cases were filed in 2008, an increase of some 60% on the previous year. We are told that the pace seems even to have quickened with the number of LCIA cases registered in the first two months of 2009. The LCIA is now setting its sights further afield.

There has been a perception in some countries that arbitral institutions were too dominated by Western European thinking – hence a marked preference in Australasia and the emerging territories in the Pacific region to use the UNCITRAL rules.

Now the LCIA is launching its new establishment in India on 18 April 2009 with a view to serving that growing market. Meanwhile in China, CIETAC's latest figures are fast overtaking the totals for other institutions, with 548 foreign-related new cases in 2008, and 1230 overall – quite apart from the arbitration commissions in Beijing and Shanghai, and the ICC's first ever counsel team outside Paris is now established in Hong Kong.

However, the LCIA's efforts to set up its joint venture with the Dubai International Financial Centre (DIFC) to offer dispute resolution services globally to all business and commercial sectors (not just the DIFC) has been met with some adverse comment. In his recent article in *Gulf News*, Habib Al Mulla questions the need for the DIFC/LCIA at all. His previous commentary regarding its utility was met with a strong rebuttal from Essam Al Tamimi.

Western Europe has its own issues to deal with, particularly the intervention of national courts in the arbitral process. Is it inevitable that arbitration will become more enmeshed with state court actions?

The Paris Court of Appeal on 22 January 2009 gave judgment in a case which had challenged the

ICC's practices and freedom from liability – *SNF v ICC*. The court held on that, while the parties had agreed to the 1988 ICC rules when inserting the arbitration clause into their 1993 contract, both parties had willingly submitted to the 1998 version of the rules in signing the Terms of Reference with the arbitrators (which mentioned the 1998 rules nine times). The court's ruling reinforces the significance of the ICC's Terms of Reference as a new agreement between the arbitrating parties.

In an unusually detailed and discursive judgment, the court also held that Art 34 of the ICC's current rules would not protect the ICC from a failure to perform its essential obligations, but those obligations were as a service provider without jurisdictional responsibilities. On the facts, the court was satisfied that the ICC had not failed in its obligations in administration and organisation of arbitral procedure. The level of detail in which a state court examined the procedural steps being taken by the tribunal and the institution will be of interest not only to the ICC, but also to arbitration practitioners and arbitrators.

Now in Western Europe generally, state court intervention in what are argued to be arbitration cases may increase as a result of the *West Tankers* decision before the European Court of Justice. In an early follow up to *West Tankers* in the English courts – *Youell v La Réunion Aérienne* [2009] EWCA Civ 175 – the Court of Appeal held that the **nature of the claim** can allow the court the power to hear a case notwithstanding that one of the parties says that there is an arbitration agreement elsewhere.

For sure, arbitrations are increasing, and the global downturn makes this more so, but will it also lead to more national court attention?

Phillip Capper

Clare Connellan

This entry was posted on Wednesday, March 25th, 2009 at 11:00 am and is filed under Arbitration Institutions and Rules, Arbitration Proceedings, Commercial Arbitration, International Courts, Middle East
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.