Kluwer Arbitration Blog

Arbitrating Bangladesh Labor Rights (Part II)

Roger Alford (General Editor) (Notre Dame Law School) · Wednesday, May 15th, 2013

As reported yesterday, the recent tragedies in Bangladesh factories have resulted in a major breakthrough with the signing of the Accord on Fire and Building Safety in Bangladesh. Thus far, leading retailers such as H&M, Marks & Spencer, Tesco, Sainsbury's, Benetton, and Calvin Klein are on board. Notably absent from the list are leading U.S. retailers such as Wal-Mart and Gap.

As noted in my previous post, I have been arguing for years that international arbitration could serve as an important procedural tool for promoting human rights in global supply chains. I applaud the commitment of these retailers to join with leading labor rights groups and enter into a binding agreement to improve working conditions in Bangladesh factories.

I do take issue with the drafting of the arbitration agreement, which clearly could have benefited from a quick review by a lawyer with international arbitration experience. Here's the relevant language:

> Any dispute between the parties to, and arising under, the terms of this Agreement shall first be presented to and decided by the SC [seven-member Steering Committee], which shall decide the dispute by majority vote of the SC within a maximum of 21 days of a petition being filed by one of the parties. Upon request of either party, the decision of the SC may be appealed to a final and binding arbitration process. Any arbitration award shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought and shall be subject to The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), where applicable. The process for binding arbitration, including, but not limited to, the allocation of costs relating to any arbitration and the process for selection of the Arbitrator, shall be governed by the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006).

Note the peculiarities. There is no governing law clause, no arbitration seat, and no arbitration rules. If a party refuses to arbitrate, there will be no obvious court for the petitioner to file a motion to compel arbitration. Instead the arbitration proceedings are to be governed by the UNCITRAL Model Law on International Commercial Arbitration as a sort of free-floating "anational" governing clause. I suppose that makes the UNCITRAL Model Law the chosen arbitration rules, but I've never seen the Model Law function in this fashion. If that's what the clause does, then any

court where an action is brought can compel arbitration and the arbitral panel will be empowered to fill in most of the gaps, including determining the arbitration seat, the governing law, and the scope of its jurisdiction (See Articles 8, 16, 20, 28). Not ideal, but it may do the trick.

Second, the arbitration clause has a peculiar scope. Only disputes "arising under" the Agreement are subject to arbitration, apparently limiting the scope to breach of contract and excluding disputes relating to third-party injuries that relate to the agreement. The scope appears to be further limited by the fact that arbitration is an appellate function only, which may mean that the arbitral tribunal is limited to reviewing legal or factual errors of the Steering Committee.

Third, there is a question as to whether decisions of the Steering Committee are subject to enforcement pursuant to the New York Convention. It appears that only the arbitration awards rendered following an appeal of the Steering Committee decision are subject to such enforcement. This may mean that an appeal is necessary simply to create a binding mechanism for enforcing the parties' obligations.

My hunch is that despite these errors, if a dispute arises from this agreement the parties will muddle through and find a way to make the dispute resolution clause work. Perhaps in the near term they can clarify these ambiguities when they develop the Implementation Plan mandated by the agreement.

So it's probably not a pathological arbitration clause, but it could have benefited from a good scrubbing.

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