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VIEWS FROM ASIA

Chief Justice Sundaresh Menon, Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-appointed Arbitrator

Abstract: This article analyses the role of party-appointed arbitrators in international arbitration, providing a comprehensive discussion of the challenges posed to this institution by the growth of arbitration accompanying the expansion of global trade, and the author's views on the justifications for the retention of the institution and the proper role that the party-appointed arbitrator should occupy. The article then turns to providing practical rules of engagement and best practices that may be adopted to minimize the risks that are often associated with the system of party appointments.

Neil Kaplan CBE QC SBS, Winter of Discontent

Abstract: This article discusses some of the major criticisms of arbitration today and considers whether these criticisms are justified and whether there are ways in which they can be dealt with effectively by more efficient procedures.

ARTICLES SECTION

Chiann Bao, Third Party Funding in Singapore and Hong Kong: The Next Chapter

Abstract: 2017 marks an important juncture for the arbitral community in Hong Kong and Singapore as both jurisdictions are legislating to make third party funding available for international arbitration. The road to reform was by no means smooth, as the author describes through a review of the policy and prior case law in this area. The author goes on to describe the new legislation and anticipated legal framework for third party funding for arbitration in both jurisdictions. This article will compare the regulatory framework and substantive protections provided in Singapore and Hong Kong with their common law ancestor in England and Wales, across a number of areas where the availability of third party funding has generated concerns and controversy. Given the pace at which litigation funding is expanding, the author anticipates further development of the concept in Asia.

Dr. Nicolas Wiegand, Can Asia Cut the Costs?

Abstract: In recent years, Asian arbitration hubs such as Hong Kong and Singapore are more and more frequently preferred over established venues in Europe or the United States. Apart from the

geographical advantage and many other attributes, they are uniquely positioned to provide more cost-effective options for arbitration, which may prove to be one of the major attractions to parties using arbitration. The overall costs for arbitration proceedings still impose a deterring factor that drives away potential users of arbitration, including in booming Asia. To target this issue, this article identifies the main cost drivers and analyzes diverging approaches against the backdrop of the legal environment in Asia to make a proposal as to whether and how Asia can cut the costs.

Mel Andrew Schwing, The KLRCA I-Arbitration Rules. A Shari'a-Compliant Solution to the Problems with Islamic Finance Dispute Resolution in Singapore and Malaysia?

Abstract: In 2012, the Kuala Lumpur Regional Centre for Arbitration launched its i-Arbitration Rules in an attempt to attract more disputes from the multitrillion-dollar Islamic finance industry. The i-Arbitration Rules attempt to provide a Shari'a-compliant protocol for international commercial arbitration of those disputes. This article analyses whether they meet that objective by first exploring why there is a need for an alternative method of dispute resolution in Asia for Islamic finance disputes, then looking at the issues that arise when Shari'a matters are subject to international commercial arbitration, and finally considering whether the i-Arbitration Rules resolve those issues.

João Ribeiro and Stephanie Teh, The Time for a New Arbitration Law in China. Comparing the Arbitration Law in China with the UNCITRAL Model Law

Abstract: As China consolidates its position as one of the most important trade players in the international market, arbitration has become an attractive alternative to litigation in commercial disputes between Chinese companies and their foreign trade partners. The UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, represents the accepted international legislative standard for a modern arbitration law. In order to make China an attractive seat for international commercial arbitration and enhance the efficiency of the arbitration system for the benefit of commercial parties, whether Chinese or foreign, it is important for China to consider adopting the UNCITRAL Model Law. This article provides an overview of the UNCITRAL Model Law and its positive impact on the development of arbitration in several jurisdictions worldwide. Next, the benefits of legal reform are highlighted through a contrast between China's current Arbitration Law and the UNCITRAL Model Law. Finally, this article lays out a procedural roadmap through which China's legal framework may be amended to incorporate the UNCITRAL Model Law.

Dr. Fan Yang, "How Long Have You Got?" Towards a More Streamlined System for Enforcing Foreign Arbitral Awards in China

Abstract: Arbitration of China-related commercial disputes has become important because of the growth in trade and investment between China and the rest of the world. Lessons derived from a particular case of recognition and enforcement of a foreign arbitral award in China are of interest to those who are interested in the Chinese reception of arbitral awards. This article will examine the process of enforcing commercial awards in China under the New York Convention (1958). The study will use the concrete experience of the two Australian awards in the Castel v. TCL case to illustrate some deficiencies in the so-called Report System under the current Mainland Chinese law and judicial practice. It will be argued that this Report System needs to be reformed and streamlined. In particular, first, the lower courts should be required to engage the system promptly and without undue delay; secondly, a clear time limit and the consequence of exceeding that time limit should be explicitly provided for each of the stages in the system; and thirdly, the operation of the system should be transparent so that parties can track the progress of their cases once the Report System is engaged. Suggestions will also be made concerning steps which foreign award-

holders should take to improve their chances of gaining swift enforcement in Mainland China.

Harshad Pathak and Pratyush Panjwani, Parallel Proceedings in Indian Arbitration Law: Invoking Lis Pendens

Abstract: Prior to the 2015 amendments, the power to appoint arbitrators under section 11 of the Arbitration and Conciliation Act of 1996 in India was vested with the Chief Justice of India, or a High Court. In 2005, the Supreme Court of India re-characterized it as a judicial function, thereby, departing from the position under the UNCITRAL Model Law. While the recent amendments have drastically altered the machinery for appointment of arbitrators, their retrospective application is dubious. As such, the re-characterization of the appointment proceedings as a judicial function still continues to raise concerns, one of which pertains to the jurisdictional overlap between the proceedings for appointment of arbitrators, and those before a judicial authority while deciding an application for seeking a reference to arbitration. Both judicial proceedings are presently permitted by section 8(3) of the 1996 Act to run parallel, even if they involve deciding an identical question concerning the validity of an arbitration agreement. In this article, the authors critique the Indian courts' failure to identify and address this jurisdictional overlap, and the risks it poses. As a possible solution, the authors rely on the principle of lis pendens, or its common law equivalent of res sub judice, to suggest that where an application seeking reference to arbitration, and involving a question as to existence of a valid arbitration agreement, is pending before a judicial authority, a parallel petition for appointment of arbitrators, raising identical concerns, must not be decided.

NOTES AND COUNTRY REVIEWS

Mariel Dimsey, Hong Kong's Year in Review: a Résumé of 2016 Arbitration Developments

John Bang and David MacArthur, Korean Arbitration Act Amended to Adopt Key Features of 2006 Model Law Amendments

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