Kluwer Arbitration Blog

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Matthias Scherer (Editor in Chief, ASA Bulletin; LALIVE) · Thursday, October 25th, 2018

We are happy to inform you that the latest issue of the ASA Bulletin (3.2018) is now available and includes the following articles and cases:

ARTICLES

Luka GROSELJ, *Stay of arbitration proceedings – Some examples from arbitral practice*

This article outlines a number of situations, illustrated by practical and (thus far) unpublished cases, in which parties requested arbitral tribunals to decide on a stay of the arbitration proceedings. The most frequently invoked reason that would justify a stay is the existence of on-going parallel proceedings. A number of other circumstances may also lead to a stay application, e.g., pending payment of security for costs or clarification of the opposing party's representation.

As the reviewed cases demonstrate, arbitral tribunals have no legal obligation to grant a stay and exercise discretion to decide whether a stay request is well-founded. In principle, a stay will only be granted if exceptional reasons or circumstances exist. There are three guiding criteria that appear to be applied by most arbitral tribunals. First, the circumstances purportedly warranting a stay must have a clear impact on the arbitration. Second, the interests and intentions of the parties to the arbitration must be assessed with due regard to the principles of fairness and due process. Third, a stay should not adversely affect procedural efficiency or cause undue delay.

Michael W. BÜHLER, Anne-Sophie GIDOIN, *L'« étape préalable » dans le nouveau droit de l'arbitrage et de la médiation OHADA*

The new Uniform Arbitration Act, the new Rules of Arbitration of the Common Court of Justice and Arbitration (Abidjan) and the new Uniform Mediation Act, adopted by the Council of Ministers of 17 OHADA Member States of Western and Central Africa, entered into force on 15 March 2018. All three texts expressly grant arbitral tribunals the power to suspend the arbitral proceedings if a party rightfully claims non-compliance with a mandatory pre-arbitral procedure which may be imposed by a multi-tier dispute resolution clause. In such case, the non-compliance may be cured without the arbitral tribunal having to dismiss the claims for not (yet) being

admissible.

Article 8-1 of the revised Uniform Arbitration Act, Article 21-1 of the revised Arbitration Rules of the Common Court of Justice and Arbitration, and Article 15 of the Uniform Mediation Act allow arbitral tribunals to fix a time limit for the parties to comply with the pre-arbitral procedure, after which the arbitral proceedings will resume unless the parties were able to settle their dispute. These truly innovative provisions are a first of their kind in modern arbitration law worldwide as they address, in a pragmatic and cost-effective manner, the growing number of objections (whether they be as to the tribunal's jurisdiction and/or to the admissibility of the claims) related to the issue of compliance with mandatory pre-arbitral steps in multi-tier dispute resolution clauses.

This article compares the OHADA's new provisions on mandatory pre-arbitral procedure with diverging positions taken by the French and Swiss courts in two decisions issued in 2016. Treating compliance with a pre-arbitral conciliation step as an issue of admissibility (the French solution) or as a jurisdictional matter (the Swiss solution) may have dire consequences for parties to an arbitration, not just in terms of the award's ultimate judicial control.

Harshad PATHAK, ***India's Tryst with Non-Signatories to an Arbitration Agreement in Composite Economic Transactions***

Indian courts have dealt with issues relating to the effect of an arbitration agreement on related non-signatory entities in a plethora of circumstances. And, like a pendulum, their response has swung from one end of the jurisprudential paradigm to the other. While initially reluctant to bind non-signatory entities to an arbitration agreement as a matter of principle, the courts of India now adopt a pragmatic approach. Today, they are inclined to venture beyond the formal constraints of an arbitration agreement in writing to identify entities that may have tacitly consented to arbitrate, despite not signing the agreement. Against the backdrop of a conceptual discussion surrounding the issue, this article maps this particular journey undertaken by Indian courts over the past decade. It keeps a close eye on the inconsistent application of the principles expounded by the Supreme Court of India in its seminal judgment in Chloro Controls v Severn Trent Water Purification Inc., resulting in some confusion. In this light, the article examines why the Supreme Court of India's latest exposition on this issue in its judgment in Rishabh Enterprises attains significance. Accordingly, while it is inevitable that Indian courts will continue to struggle to distinguish the circumstances in which they may bind non-signatories to an arbitration agreement from those where they may not, for now, there are more signs of clarity than concern.

Hui WANG, ***Multidimensional Thinking about the 'Soft Laws' Phenomena in International Commercial Arbitration: A Chinese Perspective***

The arbitration regime is a multidimensional system. Together with 'hard laws', 'soft laws' are also inalienable components of the arbitration regime. 'Soft laws' are non-state enacted texts which aim at regulating procedural issues in international commercial arbitration. Although 'soft laws' are not legally binding, they are of some normativity. 'Soft laws' cover various arbitration topics, ranging from arbitration law harmonisation, arbitration evidence, arbitration ethics and arbitration management skills to the latest arbitration developments. The history of arbitration, global governance, and social interrelation all help to explain why 'soft laws' are developed. The author

explains the reluctance of Chinese practitioners and tribunals to apply ‘soft laws’ and militates for more acceptance of ‘soft laws’ in China.

ARBITRAL DECISIONS

In this issue of the Bulletin, we have compiled extracts of a number of rulings by arbitral tribunals upon applications for a stay of arbitral proceedings. They are summarised by Luka GROSELJ in his paper, *Stay of arbitration proceedings – Some examples from arbitral practice*, see above.

DECISIONS OF THE SWISS FEDERAL SUPREME COURT

- 4A_322/2015 of 27 June 2016 [Dissenting opinion – Prohibition to take the parties by surprise]
- 4A_250/2013 of 21 January 2014 [Enforcement of an Iranian arbitral award despite sanctions against Iran]
- 5A_862/2017 of 9 April 2018 [Enforcement of English arbitral awards – US Sanctions – Receipt of notice of arbitration by e-mail challenged]
- 4A_50/2017 of 11 July 2017 [Alleged acts of bribery, threat of regulatory sanctions and violation of compliance rules not demonstrated – Ultra petita (declaratory ruling not based on any prayer) – Award confirmed]
- 4A_448/2013 of 27 March 2014 [Illegally obtained evidence]
- 4A_314/2017 of 28 May 2018 [Membership in sport federation – Interpretation of arbitration clause in statutes – Jurisdiction ratione materiae et personae – Ultra petita]
- 4A_356/2017 of 3 January 2018 [Belated expert report rejected by arbitral tribunal – No absolute right to a double exchange of submissions]
- 4A_136/2018 of 30 April 2018 [Arbitral tribunal’s decision rejecting a challenge must be brought before the Supreme Court immediately]

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