Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Monday, August 3rd, 2020

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Maxi SCHERER, Remote Hearings in International Arbitration: An Analytical Framework

Remote hearings are nothing new, but the Coronavirus Disease-19 (COVID-19) crisis has forced international arbitration out of its comfort zone. Parties, counsel, and arbitrators must adapt to the new reality of conducting arbitrations in the face of travel restrictions and social distancing measures. One particularly thorny question is whether and to what extent physical hearings that cannot be held due to the above-mentioned restrictions should be postponed, or be held remotely, using modern communication technologies. The present article takes a step back from the immediate crisis and proposes an analytical framework for remote hearings in international arbitration. In the context of the current pandemic and beyond, it provides parties, counsel, and arbitrators with the relevant guidance on assessing whether to hold a hearing remotely, and if so, how to best plan for and organize it. The article also tests the risk of potential challenges to awards based on remote hearings, looking in particular at alleged breaches of the parties' right to be heard and treated equally.

Stephan MADAUS, The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings

The commencement of insolvency proceedings has mostly been perceived as a form of disturbance in the arbitration world because it could provide a cause to stay pending arbitration proceedings and hinder the enforcement of arbitral clauses and arbitral awards. Most of the academic discussion has focused on these issues. This article will discuss these issues only briefly. Instead, it aims at demonstrating that disputes which arise in the context of international insolvency proceedings could benefit from a more advanced use of arbitration. The article explains the arbitrability of disputes in insolvency proceedings and the limited scope of the public policy defense with the national insolvency laws functioning as a gatekeeper to arbitration. Consistent with existing insolvency case law in many jurisdictions, an arbitration-friendly approach is formulated. Following this approach, the article outlines disputes that could be resolved efficiently when addressed in arbitration.

Gerome Goh Teng JUN, An Arbitral Tribunal's Dilemma: The Plea of Financially

Impecunious Parties

An arbitral tribunal faces a unique dilemma when a party to an arbitration agreement asserts that it is financially impecunious. While the principle of pacta sunt servanda justifies binding parties to arbitrate regardless of their financial situation, this is challenged by practical access to justice concerns resulting from impecuniosity. A party's impecuniosity may result in serious consequences such as the inability to vindicate its rights or effectively present its defence in the arbitration. It is questionable whether an arbitration agreement can still be fairly performed in those situations. While there have been conflicting national jurisprudence regarding the impact of impecuniosity on the validity of an arbitration agreement, there is a lacuna in arbitral jurisprudence on this point. This article seeks to fill that lacuna by suggesting a principled approach that arbitral tribunals and institutions should follow in the face of such pleas. While impecuniosity should not render an arbitration agreement automatically 'incapable of being performed', an exception should be recognized when the impecuniosity results in a breach of the rules of natural justice. However, the party asserting impecuniosity must prove its impecuniosity on a high threshold and show that it has alternative recourse to national courts.

Beibei ZHANG, Revisiting Disqualification of Arbitrators During Arbitral Proceedings: A Critique of Toyoshima & Co., Ltd. v. Gaomi Luyuan Textile Co., Ltd.

Entering into an arbitration agreement means that the parties forfeit their right to sue before a national court if disputes that fall within the scope of the arbitration agreement arise. This nevertheless does not deprive the parties of the protections universally recognized as fundamental human rights. Therefore, a challenge to the arbitrator during the arbitral proceedings is possible when the integrity of the proceedings and that of the final award would otherwise be compromised. As a result of the influence of the pro-arbitration policy, domestic courts are usually biased towards not disqualifying arbitrators after the commencement of the procedures, especially when the enforcement of the award is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is consistent with the Convention's purpose to facilitate the cross-border enforcement of foreign arbitral awards, as well as global trade activities. In some cases, however, it is worth discussing whether the national courts have gone too far in this direction. Toyoshima & Co., Ltd. v. Gaomi Luyuan Textile Co., Ltd. before the Chinese courts illustrates this concern well.

Nduka IKEYI & Emmanuel ONYEABOR, Ravelli v. Digitsteel Integrated Services Ltd.: Does the Arbitration and Conciliation Act Preclude the Arbitration of Employment Disputes in Nigeria?

The long title of Nigeria's Arbitration Act describes the Act as 'a unified framework for the fair and efficient settlement of commercial disputes by arbitration'. Section 57(1) of the Arbitration and Conciliation Act (ACA) does not include the National Industrial Court of Nigeria (NIC or 'the court') in its definition of 'court'. (The NIC is a specialized High Court with exclusive jurisdiction to hear and determine labour and employment disputes.) Relying on the provisions of section 57(1) of the ACA, the NIC in Ravelli v. Digitsteel Integrated Services Ltd. Recently held that it is not enabled to apply the ACA, and further that the ACA does not apply to employment disputes. Accordingly, the NIC refused to assist the applicant to give effect to an arbitration agreement contained in an employment contract. This case comment reviews the decision in the Ravelli case and contends that, based upon a different rationale, the NIC might have taken jurisdiction to consider, and perhaps grant, the application.

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