The Contents of Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Volume 86, Issue 4 (November 2020)

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The selected submissions for the current issue deal with a range of diverse dispute resolution topics. Specifically, the issue includes articles on international commercial arbitration, investment treaty arbitration, construction arbitration, and articles on conflicts of laws.

Further, the issue includes not only topics of practical importance, for example the proposal on the appropriate remedies against abuse of document production, but also analytical articles dealing with complex concepts such as issues of procedural arbitrability, non-disclosure and allegations of bias.

It has been a key editorial goal for this Journal to expand its scope and publish articles of international interest that address both theoretical and practical issues from a wide range of dispute resolution sub-fields. While the Journal is also keen to include submissions from other fields of dispute resolution, chiefly on mediation, this issue brings us closer to achieving our goal.

ARTICLES

Hamish Lal, Brendan Casey, Josephine Kaiding & Léa Defranchi, *Abuse of Document Production in International Arbitration: Remedies When the Adverse Inference Falls Short*

This article focuses on the Document Production process. The orthodox arbitral rules and soft law are open to abuse such that a party can participate in the Document Production process but then elect to ignore the Tribunal's Order on Production; make only selective disclosure; and/or fail to provide documents that patently exist and correspond with other factual exhibits. The Tribunal's power to make an adverse inference in respect of such behaviours lacks 'teeth' and thus raises concerns amongst lay users of international arbitration. This Article advocates a robust strategic re-think of the Tribunal's powers when its Document Production Orders are blithely ignored. The authors suggest that institutional rules ought to be amended such that ignorance is visited by costs orders and strike out of claims and defences. Further, the 2010 IBA Rules on the Taking of Evidence in International Arbitration ought to be now revised to supplement the adverse inference proposition in Article 9(5) with discretion to strike out relevant claims and defences.

Felisa Baena, *Valuation of 'Non-operational Projects' in Investment Arbitration: Criteria from the Tethyan Copper Award and from Recent ICSID Case Law*

The quantification of future losses in cases of unlawful expropriations of non-operational projects has always been problematic. Several recent ICSID tribunals have had to deal with this complex issue. When analysing this line of cases, two crucial questions emerge: what is the applicable standard of certainty regarding

the quantification of future lost profits of projects with no record of production? Is a forward-looking valuation method sufficiently certain for these situations? This article will address those questions and will identify the main relevant criteria, developed in recent ICSID awards, regarding the applicability of 'forward-looking' methodologies, and particularly, of the DCF method, for the valuation non-operational projects.

Peter Ashford, *The Power (Or Otherwise) to Disqualify Counsel and Experts: A Review*

The controversial power to disqualify counsel is often deployed but rarely analysed from first principles: if such a power exists, it must derive from somewhere or something. The competing arguments are contractual and status. Although in many cases it will not make any difference, the basis for any such power ought to be known. Furthermore, is the power to disqualify restricted to counsel or can it extend to others involved in the arbitration process, such as an expert? If so, does the analysis of the source of such a power apply equally to participants other than counsel? If not, on what basis can the power to prevent an expert from appearing be exercised? Can connections involve more than one degree of connection or must there be a closer degree of proximity? If the power to remove or disqualify an expert does not apply on the facts, what is the result?

Bwalya Lumbwe, *FIDIC 2017 Edition of Contracts-The Repercussions of Defining the Words Claim & Dispute on the Claims and Dispute Referral Procedures*

The International Federation of Consulting Engineers introduced the second edition of their Rainbow Suite of Contracts in December 2017 with the aim of achieving clarity, certainty and reducing disputes. The conditions of Contract defined for the first time the words 'Claim' and 'Dispute' with the same aim in mind. However, did Federation Internationale des Ingenieurs- Conseils (FIDIC) think through the process carefully enough and mitigate any possible repercussions arising out of defining the words 'Claim' and 'Dispute' and in the light of the introduction of a new claims' procedure? How does this affect the termination of the contract? Are there any serious repercussions resulting from these definitions and the claims

process and if so, what are they? This article looks at all these issues by examining the definitions in detail using legally applicable interpretation principles. The paper then postulates a conclusion as to whether FIDIC's professed aim of achieving clarity, certainty and reducing disputes is an achievable goal given the changes.

Srishti Kumar & Raghvendra Pratap Singh, *Transparency and Confidentiality in International Commercial Arbitration*

The debate between confidentiality and transparency in international commercial arbitration is not recent. While confidentiality had been considered one of the critical features of international commercial arbitration, lately, it has been argued that transparency is required for arbitration to succeed as an efficient and reliable method of dispute resolution. This article seeks to address if confidentiality forms the cornerstone of all commercial arbitration or the higher calls for transparency are justified and possible without adversely affecting the popularity of arbitration as the most preferred mode of alternative dispute resolution.

Michael Kern, *Why the Rome I Regulation Has No Mandatory Application When Determining the Substantive Law in International Commercial Arbitration*

Since the entry into force of the Rome I Regulation, there is controversy as to whether it must be applied mandatorily in arbitral proceedings to the effect that it overrides specific conflict of laws rules in national arbitration laws. This article re-examines this issue and argues that Rome I is not mandatory in international arbitral proceedings. This proposition is based on a textual, historical and teleological interpretation of the Regulation as well as on a systematic analysis of EU law within the field of private international law. Against this background, it is reasonable to not apply Rome I mandatorily when determining the lex causae.

CASE NOTES

Janet Walker, *Heller v. Uber and Procedural Arbitrability*

In Heller v. Uber, the Supreme Court of Canada marked another milestone in its jurisprudence on competence-competence. By deciding that the inclusion of an arbitration clause in the Uber drivers' agreement did not oblige a court to refer to an arbitral tribunal the jurisdictional question of whether the driver was an employee for purposes of the Employment Standards Act, the Court demonstrated a mature arbitration-friendly approach that will support the legitimacy of international commercial arbitration even as the Court marked the limits of competence-competence. Although the reasoning may have benefited from the application of the principle of arbitrability, and may have developed this principle by describing the question as one of 'procedural arbitrability', but the decision stands as a strong precedent for judicial reasoning on the relationship between the courts and arbitral tribunals.

Bankole Sodipo, *Dealing with Arbitrator Challenge, Nondisclosure and Allegations of Bias: A Review of the Lagos Court Ruling Setting Aside the ICC Global Gas v. Shell Award*

This case review debunks the view that Nigeria is not arbitrator friendly. It outlines party autonomy and the independence and impartiality of arbitrators. It analyses the court's decision that an arbitrator whose appointment is challenged must recuse himself. It discusses misconduct in other areas of law in contrast with misconduct in arbitration. It considers whether non-disclosure of prior engagement as expert witness for or against one party, or the non-disclosure of member- ship of a professional/trade association constitute a misconduct. It considers whether the court took the proper approach in determining if the president of the arbitral panel acted for Shell, or against Shell. It examines whether a court can amend an arbitration contract and empower parties to seek court trial. It discusses the extent to which a court can set aside an award on the grounds of error of law.

CONFERENCE PAPER

James Clanchy, *Ad hoc Arbitration and Its Enemies – International Congress of Maritime Arbitrators (ICMA XXI), Rio de Janeiro, 9 March 2020*

This is an edited version of a paper delivered at the twenty-first International

Congress of Maritime Arbitrators (ICMA XXI), held in Rio de Janeiro from 8 to 13 March 2020. ICMA was established in Moscow in 1972 by a group of maritime arbitrators from various jurisdictions, including the legendary Cedric Barclay, a former CIArb president. It brings together arbitral institutions, arbitrators' associations, lawyers, and shipping professionals from around the world. This paper draws attention to ad hoc arbitration, still the most popular form of international commercial arbitration for the resolution of shipping disputes.

BOOK REVIEWS

Gordon Blanke, Book Review: John W. Hinchey & Troy L. Harris, International Construction Arbitration Handbook – 2020 Edition (Thomson Reuters, 2020)

The book under review is one of the very few titles that is dedicated to the subject of construction arbitration. For that reason alone, it deserves special mention and should not go unnoticed by the community of arbitration specialists that constitute the readership of this Journal.

Giuditta Cordero-Moss, Book Review: Gustav Flecke-Giammarco, Christopher Boog, Siegfried H. Elsing, Peter Heckel & Anke Meier (eds), The DIS Arbitration Rules: An Article-by-Article Commentary (Kluwer Law International, 2020)

A new version of the DIS Arbitration Rules was released in 2018, after an extensive process involving numerous experts and practitioners. DIS is the acronym of the German Arbitration Institute, based on the German name Deutsche Institution für Schiedsgerichtsbarkeit. The new DIS Rules are meant, among other things, to cater for an increased international profile of the DIS, which administers not only the resolution of domestic disputes, but also more and more international disputes.