Kluwer Arbitration Blog

The Contents of Journal of International Arbitration, Volume 38, Issue 1 (February 2021)

Maxi Scherer (WilmerHale & Queen Mary University of London) · Monday, February 1st, 2021

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

Sundaresh Menon, ***Arbitration's Blade: International Arbitration and the Rule of Law***

The legitimacy of a system of dispute resolution depends intrinsically on the trust and confidence of its users in its decision-making processes, and that in turn rests on the general adherence of those processes to the values and principles that constitute the rule of law. While international arbitration has long been a close partner of the courts in sustaining the rule of law, some of arbitration's key features and practices – such as its consent-based limitations, its predisposition toward confidentiality, its longstanding practice of permitting parties to unilaterally appoint arbitrators, and its philosophy that parties have no right to a right answer – mean that arbitration supports an attenuated model of the rule of law. That is largely the result of conscious decisions to forgo certain rule of law values in order to realize other goals. But the problem of rising costs and delays, underpinned by arbitration's growing procedural rigidity and lack of agility, exacts a heavy price on arbitration's users and their confidence in arbitration, without obvious returns. We must be cognizant of arbitration's sacrifice in terms of rule of law values when seeking to advance other objectives, and regularly reflect on whether those gains are still worth their cost.

Kevin Ongenae & Maud Piers, ***Procedural Formalities in Arbitration: Towards a Technologically Neutral Legal Framework***

This article addresses the ongoing process of digitalization in arbitration proceedings, particularly in light of the recent coronavirus disease 2019 (COVID-19) pandemic. It focuses on the different communications that occur throughout arbitration proceedings, i.e. written communication at the start and during the proceedings, oral communication at hearings, and the rendering of the arbitral award. The authors assess the past, present and future use of digital means of communication in relation to each of these instances, and analyse the extent to which the applicable legal framework (institutional rules, national laws, and the New York Convention) is actually an obstacle to digitalization. They find that the evolution towards more technologically oriented proceedings had

already started, but that the COVID-19 pandemic will likely be a decisive step towards fully digital arbitration proceedings. The authors welcome that evolution, and argue that there are no overriding legal or policy arguments to hold back this trend.

Chiann Bao, *Return to Reason: Reigning in Runaway Due Process Claims*

This article will explore the Singapore Court of Appeal's recent decision in China Machine New Energy Corp. v. Jaguar Energy Guatemala LLC. Offering welcome guidance regarding due process under Singapore law, this judgment clarifies the rights available to parties for a 'full opportunity' to present their cases. From the individual procedural decisions made by the arbitral tribunal to the cumulative effect of such decisions, the Singapore court dissects the various acts that might not have met the expected procedural fairness standard, as well as the Respondent's failure to object in a timely manner, and concludes that the arbitral tribunal did not violate the Respondent's right to due process. Recognising the wide latitude in balancing procedural fairness and efficiency of process bestowed upon arbitral tribunals, Chief Justice Menon sends a strong message that makes unequivocally clear that the standard for granting a set aside application is high and any abuse of due process protection is not to be tolerated under Singapore law.

Joséphine Hage Chahine, ***UN and EU Sanctions Versus US Sanctions: Two Different Yardsticks Commentary on the Decision of the Paris Court of Appeal (International Commercial Chamber) (5th Pole, Chamber 16) of 3 June 2020, No. 21/2020***

The Paris Court of Appeal rejected a challenge to an ICC award rendered in favour of an Iranian government-owned company. That challenge was based on allegations of breaches by the tribunal of due process, of the arbitrators' mandate, and of public policy. Of note, the public policy challenge was based on the tribunal's alleged failure to take into consideration UN, EU and US sanctions against Iran. This decision of the Paris Court of Appeal is in line with the established French case law regarding its answer to the above mentioned three grounds of challenge, but it drew a peculiar conclusion that US sanctions, contrary to UN and EU sanctions, are not part of French international public policy, even though having the same object.

Bankole Sodipo, ***Enforceability of Awards Vitiated by Illegality and Fair Hearing: A Review from a Nigerian Law Perspective of PID v. FRN***

This article reviews, from a Nigerian law perspective, the judgment of the English court and the majority arbitral award in Process & Industrial Developments Ltd. (PID) v. The Federal Republic of Nigeria (FRN). The arbitral tribunal awarded record-breaking damages, totalling over USD 9 billion, inclusive of interest. The award relates to an alleged breach by the FRN of a Gas Supply and Processing Agreement (GSPA) to a facility that was never constructed by PID. The signatory of the GSPA, PID, was a British Virgin Island corporation. Although PID had incorporated a local PID Corporation in Nigeria (PID Nigeria), it never executed the GSPA. This article is divided into three sections. Section 1 features the introduction and a general commentary. Section 2 focuses on the second leg of the FRN's objection: 'Whether or not the Claimant failed to comply with the provisions of section 54 of the Company and Allied Matters Act (CAMA) 1990 as alleged, and if

so whether the GSPA is void, and/or affected by illegality, as a result'. This article does not discuss the first leg of the FRN's objection, namely, the capacity of the Ministry of Petroleum Resources to contract on behalf of the FRN. Section 3 examines the consequences of the order issued by the Federal High Court of Nigeria (FHC) on FRN's application, restraining the parties from proceeding with the arbitral hearing, which the tribunal ignored. It considers whether the order can bind members of the tribunal who were not parties to the FHC action; if it was proper for the tribunal to ignore the order; and the consequences of the order on the FRN. It analyses whether the principle of fair hearing was breached when the tribunal reached a determination on the issue of the seat of arbitration without taking further submissions from the parties.

Arpan Banerjee & Ashwin Murthy*, Rand Investments v. Republic of Serbia: Transparency and the Limits of Consent*

International investment law has consistently grappled with the issue of transparency. While the need for increased transparency in the practice of investment tribunals is generally recognized in principle, in practice the application of transparency norms often raises contentious issues. One common issue is the appropriateness of transparent proceedings where the Bilateral Investment Treaty (BIT) governing the dispute is silent on the matter. A further, more vexed question arises when claimants proceed under multiple BITs with disparate transparency obligations. This situation arose in Rand Investments v. Republic of Serbia, where the claimants instituted an arbitration under both the Canada-Serbia and the Cyprus- Serbia BITs. Noting that the Cyprus-Serbia BIT was silent on the question of transparency, the Majority held that the transparency provisions of the Canada-Serbia BIT could be applied to the entire arbitration on grounds of procedural efficiency. However, the respondent's arbitrator dissented, finding that the Majority's approach violated Serbia's consent and sovereignty. Upon examining the dichotomous approaches adopted by the Majority and the Dissenting Arbitrator, this case comment offers an insight into the potential implications of the case on future investment arbitrations involving multiple BITs with disparate transparency obligations.

This entry was posted on Monday, February 1st, 2021 at 4:46 am and is filed under Journal of International Arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.