Kluwer Arbitration Blog

The Contents of Journal of International Arbitration, Volume 38, Issue 3 (June 2021)

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

Gary Born, Anneliese Day & Hafez Virjee, *Remote Hearings (2020 Survey): A Spectrum of Preferences*

A detailed survey of users' experience of remote hearings shows that, as of July 2020, in-house and external counsel, and arbitrators and tribunal secretaries, were generally enthusiastic about fully remote hearings, but more nuanced when it came to breaking down their preferences according to the amount in dispute and the number of witnesses and experts to be examined: for short hearings and meetings, users will very likely prefer a videoconference over meeting in person or conducting the proceeding by telephone, whereas for merits hearings and hearings dealing with major procedural issues, preferences hinge primarily on the value of the case and secondly on the number of witnesses and experts to be examined. Where parties are in disagreement as to how to hold the hearing, tribunals are likely to factor into their decision any flexibility around the hearing dates, cost considerations and the number of time-zones that need to be accommodated.

The article also discusses the survey results relating to the benefits and challenges of fully remote hearings, the rate of objections to fully remote hearings and how tribunals dealt with them, and provides additional insight into the profile of fully remote hearings resulting from the pandemic.

Lucy Greenwood, *The Canary Is Dead: Arbitration and Climate Change*

As international lawyers, arbitration practitioners are at the forefront of global issues, yet in relation to climate change and its impact on our practices, we have been slow to act. This article considers the role that arbitration should play in determining climate change disputes and the role that arbitration practitioners could play in shaping and adapting international law to respond to the climate crisis. The pandemic has driven significant behavioural change in the arbitration community. Now is the time to reflect on our practices to ensure that arbitration remains relevant and fit for purpose in a world where climate change will impact every area of our lives.

Jacob Grierson, Thomas Granier & Sacha Karsenti, ***Is Arbitration Helping or Hindering the Protection of the Environment and Public Health?***

On the occasion of the sixth edition of the Casablanca Arbitration Days, some leading arbitration practitioners from the Middle East and North Africa (MENA) region and further afield convened to discuss an important and topical issue: 'is arbitration helping or hindering the protection of the environment and public health?'. This conference examined the various areas where arbitration and the protection of the environment and public health interface. First, from a substantive view point, it is clear that environmental issues have become prevalent in commercial arbitration and that the latter has proven to be well suited to resolve such issues. Secondly, while some steps have already been taken in this respect, the climate change crisis requires the international arbitration community to change its ways and arbitrate in a much more environmentally friendly way. Thirdly, amidst the progressive emergence of environmental issues in investment arbitration and the responses that have already been provided by investment treaty arbitral tribunals, numerous uncertainties remain in respect of the way in which environmental issues should be treated. There is no doubt that environmental issues will give rise to intense debates before investment tribunals (and courts) and in legal literature in the near future. Finally, in addition to the protection of the environment, the arbitration community has already begun addressing (and, we would submit, successfully so) the substantive and procedural issues related to the protection of public health, in particular as a result of the COVID-19 global pandemic. This article provides an account of what was said about these various topics during this edition of the Casablanca Arbitration Days.

Thomas Williams, Ahmed Durrani & Umang Singh, ***The Advance on Costs in Arbitration: Reimbursement of Substituted Payment***

This article explores the issues arising from the refusal of a respondent to pay its share of the advance on costs in an arbitration, the claimant's substituted payment in respect of it, and the claimant's entitlement to immediate reimbursement by the respondent before the final award is rendered and costs are allocated. The article will discuss the position under various institutional rules and draw a comparative analysis between them. It will also explore the legal basis of a claim for reimbursement, consider the approach that arbitral tribunals should adopt when granting relief, and examine a recent partial award in a Doha-seated International Chamber of Commerce (ICC) arbitration which ordered the immediate reimbursement of a substituted payment of the advance on costs.

Charles Kimmins, Nigel Rawding, Luke Pearce & Olivia Valner, ***The Test for Apparent Bias and Arbitrators' Duties of Disclosure Following Halliburton v. Chubb: Welcome Clarification, but Questions Remain***

The UK Supreme Court handed down its judgment in Halliburton v. Chubb in November 2020. The case addressed the test for apparent bias and the issue of arbitrators' duties of disclosure in English-seated arbitrations. The authors of this article represented the London Court of International Arbitration (LCIA) as interveners in the Supreme Court appeal.

This article explores the key points arising out of the judgment and takes stock of the current position under English law. The authors discuss certain issues that remain open following the judgment, including the relationship between the duties of disclosure and confidentiality. They explore the extent to which parties' adoption of institutional rules can modify the English law position, and comment on the extent to which English law is now in line with that of other jurisdictions.

The article notes that Halliburton v. Chubb is one of a number of recent cases globally concerning the scope of arbitrators' duties. It concludes that while the decision of the Supreme Court provides a welcome degree of clarity as to the English law position, and a necessary confirmation that the English courts take a robust approach to such issues, the judgment itself was necessarily confined to relatively narrow facts. As such, questions relating to arbitrators' duties are likely to return to the spotlight in future cases, and English law is likely to continue to develop as the relevant principles are applied to different fact patterns and as new norms emerge amongst arbitrators.

Johannes Koepp & David Turner, *A Massive Fire and a Mass of Confusion: Enka v. Chubb and the Need for a Fresh Approach to the Choice of Law Governing the Arbitration Agreement*

The recent judgment of the Supreme Court of the United Kingdom in Enka v. Chubb has provided an answer, at least provisionally, to the thorny question of how the proper law of an arbitration agreement is to be determined under English law. The majority of the Supreme Court (in a 3–2 split) held that in the absence of an express or implied choice of law by the parties, the 'default rule' should be that the arbitration agreement is presumed to be governed by the law of the arbitral seat, as the law 'most closely connected' to the arbitration agreement. Yet the Supreme Court's reasoning is not wholly satisfying, and the two dissenting judgments present powerful arguments for taking a contrary approach. This article proposes a means to sever this enduring Gordian knot: drawing from the *in favorem validitatis* principle applied by the Swiss, Dutch and Spanish legal systems in determining the substantive validity of an arbitration agreement, we suggest extending this principle to encompass questions of the scope of an arbitration agreement and arbitrability. Under this approach, instead of focusing on determining the proper law of the arbitration agreement, the courts need only ask themselves two questions: (i) does the claim in question fall within the scope of the arbitration agreement, as interpreted under any of the potentially applicable laws, and (ii) is it arbitrable under any of those laws?

Laura Yvonne Zielinski, *Property Rights in Treaty Cases: Lessons for Investor-State Arbitration from Case A15 (II:A) of the Iran-United States Claims Tribunal*

On 10 March 2020, the Iran-United States Claims Tribunal (IUSCT) rendered its partial award No. 604-A15 (II:A)/A26 (IV)/B43-FT in Case No. A15 (II:A), ordering the United States to pay Iran over USD 29 million in damages, including decades of interest, and to return several properties that had been frozen during the 1979 hostage crisis.

In deciding which properties had to be transferred by the United States to Iran, the Tribunal – having concluded that there are no public international law rules on property – struggled to identify the law applicable to property rights in the context of an inter-state arbitration based on a treaty.

While the majority applied international private law principles to determine the domestic law applicable to questions of ownership, several of the dissenting arbitrators expressed the view that the nature of the dispute, as a treaty case, required the exclusive application of public international law.

These two diverging approaches offer an interesting perspective on recent investor-state decisions, which also present conflicting views on the role that should be attributed to domestic law in determining the contours of those property rights, which are the subject of treaty violations and the corresponding compensation of investors.
