Kluwer Arbitration Blog

The Contents of Journal of International Arbitration, Volume 39, Issue 1 (February 2022)

Maxi Scherer (WilmerHale & Queen Mary University of London) · Tuesday, February 8th, 2022

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

Kimberley A. Wade & Ula Cartwright-Finch, *The Science of Witness Memory: Implications for Practice and Procedure in International Arbitration*

Witness evidence plays a lead role in international arbitrations, yet the reliability of witness evidence in arbitral contexts has received little attention from legal practitioners. Hundreds of scientific studies have highlighted the fragile nature of witness memory and the ease with which memories can become unwittingly corrupted. In this article, we explain why the psychological research on witness memory is relevant to international arbitration and outline some of the key findings that have important implications for procedure and practice. Alongside the large body of science illustrating the malleability of witness memory, there exists a substantial amount of research outlining how best to preserve or maximize the quantity and quality of witness evidence. Indeed, many simple measures can be adopted by arbitrators and counsel, when eliciting and presenting witness evidence. When educated on the psychological science concerning the factors that can render even the most meticulous and honest witness prone to error, fact-finders will be in a far better position to assess witness evidence in international arbitrations.

Cameron Ford, *The Lost Precedents of Arbitration*

Concerns have been expressed that commercial common law is not developing as it should due to disputes being resolved by confidential international commercial arbitration where the majority of awards are not published, and the resultant lack of precedents. This has contributed to questions of the legitimacy of international commercial arbitration and whether the rule of law is being undermined by the non-publication of awards or by the diversion of disputes to arbitration rather than litigation. This article examines the meaning of precedents in this context and the approximate number being ‘lost’ to international commercial arbitration compared to those made in authoritative common law superior courts of record. It suggests that the number of awards of precedential value (APV) is small compared to the volume of commercial judgments of those

courts, and that the perceived loss of precedents does not support either publication of awards nor determination of disputes by courts rather than by tribunals. Precedent might instead be enhanced by a wider right of appeal from awards and by publication of the appeal decisions.

Patrick Leonard & Hayley O'Donnell, ***Arbitration in Derivatives Contracts***

In recent years, the International Swaps and Derivatives Association (ISDA) has increasingly facilitated the use of arbitration as a means of resolving disputes arising out of derivatives transactions. Although the financial services industry is said to have traditionally preferred court-based dispute resolution, a number of factors suggest that market participants ought to consider the particular advantages of arbitration for such disputes. In particular, factors such as the ability of arbitration to mitigate enforcement risks in the absence of the mutual recognition of judgments and to deal with competing regulatory standards both in European and international derivatives suggest that arbitration should play an important role in the resolution of such disputes.

This article reviews the history of arbitration in derivatives disputes and considers the recent moves by ISDA to facilitate the use of arbitration as a means of dispute resolution. It also considers the various options now available in this regard to market participants who seek to use ISDA standard form documentation, and the factors affecting the use of arbitration as a dispute resolution mechanism. It concludes that more research and data is required to monitor the use of arbitration in this area.

Lucia Bizikova, ***On Route to Climate Justice: The Greta Effect on International Commercial Arbitration***

Climate change is the greatest global challenge that humankind has ever faced. It has changed the way in which communities, governments and businesses interact with each other, how they contract one with another and what legal disputes they face. National and international legal frameworks currently in place rarely provide the necessary mechanisms to resolve new kinds of disputes that have emerged and as a result, important gaps remain.

International commercial arbitration is uniquely placed to respond to the transboundary nature of climate change. Its inherent flexibility, innovativeness, ability to deal with complex, cross-border issues and the possibility to choose a neutral adjudicator according to his/her expertise give commercial arbitration an important advantage over court litigation. However, some of its characteristics that are seen as welcome and desired in different contexts create important challenges for achieving climate justice. Therefore, innovation in this area will be necessary if commercial arbitration is to become an attractive option for resolving climate change-related disputes between businesses. The arbitration community should try to find constructive ways in which commercial arbitration can innovate itself so that it can complement other methods of dispute resolution traditionally used for climate change disputes.

Alice Stocker, ***De-Biasing Counsel: A Call for Agile Minds in Arbitration***

Unconscious biases have been a hot topic for decades and have found their way into arbitration. While the decision-making process of arbitrators has been the focus of attention, there is hardly any legal literature that deals with potential biases of counsel. Psychological studies have identified a general overconfidence bias in counsel that can have a negative impact on case assessments. As a solution to this issue, a recent study of 2018 showed how to use de-biasing techniques and how this improved case assessments: analysing almost 500 law students in the United States, the study demonstrated how overconfidence and self-serving judgments of fairness could tamper with the ability to assess the value of a case when the students were required to represent a client's interests. This effect is called 'partisan bias'. The study displayed its effect on specific case valuation methods and demonstrated how it could be partly eliminated by a de-biasing technique called 'consider the opposite'. Further, the study showed that individuals with a high score of a need for cognitive closure, i.e., a motivational tendency to prefer clear answers over ambiguity, were more inclined to be susceptible to partisan bias, however were equally likely to be receptive to de-biasing.

Saudin J. Mwakaje & Nuhu S. Mkumbukwa, ***The New Arbitration Law in Tanzania: An Appraisal of Its Salient Features and Implications for Investment Disputes Settlement***

Preference for arbitration as an option for dispute settlement is steadily on the rise, partly because of its perceived efficacious proceedings and enforceability. In 2020, Tanzania enacted a new legislation on arbitration with a detailed and defined framework, cascading through the entire qualifying process of arbitrators, initiating the arbitration proceedings, enforcement and recognition of foreign arbitral awards. This article analyses the corpus of the new legislation, its pertinent structural features, the gaps, and future prospects. The analysis is predicated on the ramifications of the new arbitration law for investment dispute settlements, particularly, state versus investors disputes, as envisaged under the national investment legislation. It concludes by highlighting several aspects which need to be revisited, such as the independence of arbitrators, duty to refer disputes to arbitration, and determination of arbitration costs. Further, a case is made for amendment of the existing national investment legislation in respect of dispute settlement provisions in order to create a harmonious arbitration regime in Tanzania.

This entry was posted on Tuesday, February 8th, 2022 at 8:00 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.