Kluwer Arbitration Blog

The Contents of Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Volume 88, Issue 3 (September 2022)

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In this issue, Professor Doug Jones and Robert Turnbull examine, and indeed question, the efficiency of the current practice of witness statements. As they explain, witness statements have become a 'vehicle for the making of legal submissions' commending, and at times speculating, on every matter which is implicated in a dispute, including third parties' conduct. Professor Jones and Turnbull argue that, in this form, witness statements are wasting time and driving up costs, and propose a reformed witness statement procedure whereby witness statements should give the tribunal nothing more and nothing less of a factual account of what a witness heard, saw or thought at the time of the events the subject of the arbitration. It is a thought-provoking and considered proposal and I am pleased that we have the opportunity to publish their article at the Journal.

But the article, I think, raises a broader question, namely the efficiency of the whole arbitral process currently. While originally the process of arbitration was guided by few general principles, mainly party autonomy and due process, today the arbitral process is dense and heavily regulated by a wide number of instruments, including national laws, institutional rules, guidelines, codified best practices and, lately, codes of ethics. There is hardly any aspect of the arbitration process that remains unregulated: the organization of the proceedings is guided by the UNCITRAL Notes on the Organization of Proceedings; the evidentiary process is guided by the International Bar Association (IBA) Guidelines on the Taking of Evidence; the conduct of the arbitrators is guided by the IBA Guidelines on Conflicts of Interest; codes of ethics are promulgated by professional and institutional bodies such as the American Arbitration Association and the Chartered Institute of Arbitrators.

However, despite or rather because of the plethora of new rules regulating the arbitral process, proceedings in international arbitration have become more com- plex, and often challenging, nowadays. Counsel tend to make more procedural requests and applications (e.g., determination of preliminary matters, security for costs, applications to exclude evidence, several requests for document production, introduction of new claims and counterclaims) and many procedural issues often become unnecessarily contentious (e.g., timetables, mode of hearing, hearing bundles). Speaking in public lectures and conferences, many distinguished colleagues have introduced excellent ideas to increase the efficiency of arbitration

We are happy to report that the latest issue of *Arbitration* is now available and includes the following:

ARTICLES

Professor Doug JONES AO & Robert D. TURNBULL, *Memorials and Witness Statements: The Need for Reform*

Witness statements are a core feature of international commercial arbitration. In current practice, they have become a vehicle for the making of legal submissions, quoting from and commenting on documents, and speculating on all manner of things, including third parties' conduct. In this form, witness statements impede arbitral efficiency, drive up costs and waste time. This article argues that the preparation of witness statements in international commercial arbitration should be reformed. Witness statements should give the tribunal a factual account of what a witness heard, saw or thought at the time of the events the subject of the arbitration. No more, no less. Combined with a memorial approach to the presentation of evidence, a reformed witness statement procedure can assist the arbitral process. Arbitration practitioners can learn from recent reforms to the preparation of witness statements in the English courts, which seek to attain similar objectives. A draft procedural order is appended to this article, to assist arbitrators and counsel to start immediately on the path of making witness statements focus on the real issues in dispute and serve arbitral efficiency.

Lena RAXTER, *Responsibility After Succession: The Work of the International Law Commission and Its Application for Seeking Redress After the Breach of Investor-State Agreements*

Historically, a predecessor state's responsibility for wrongful acts did not transfer to a successor state. Nevertheless, over time, this view has evolved to include the acceptance of responsibility in certain cases – creating ambiguity in the state of the law. To address this ambiguity, the United Nations (UN) International Law Commission (ILC) added 'Succession of States in respect of State responsibility' to its program of work with the objective of identifying and codifying existing and emerging rules – culminating in the creation of the Draft Articles on Succession of States in Respect to State Responsibility. But what effect will this work have in practice for investor-state disputes? In addressing this question, this article concludes that the ILC's work has codified crucial elements in the laws of both state succession and state responsibility, and therefore should be consulted when practitioners are developing their case strategies.

Steve NGO & Steven WALKER, *Impact and Effects of International Economic Sanctions on International Arbitration*

In today's turbulent global geopolitical landscape, economic sanctions are becoming an important feature. In essence, this is a difficult subject to discuss because it involves international diplomacy and politics. However, sanctions invariably influence global trade and commerce and directly affect the business community, including private individuals or organizations wishing to avoid inter- national politics and diplomacy. At the same time, we are seeing an unprecedented rise in the

use of arbitration to resolve international and private commercial disputes. As a result, arbitrants and arbitral players must now navigate the minefield of sanctions in the midst of the already complex conduct of arbitration. This article will examine and discuss the issue of how economic sanctions affect arbitration, including reference to recent case studies and relevant events of interest to the international arbitral community.

Maxime CHEVALIER, *French Wine in New Bottles: Revirement de Jurisprudence in French Consumer Arbitration Law*

For almost two centuries, French judges had closed their eyes when arbitration agreements were inserted in international consumer contracts, allowing such clauses to stand and favouring the rigid application of French international arbitration law at all costs. Arbitration agreements inserted in international consumer contracts were systematically enforced, in the name of both the negative effect of the compétence-compétence and the autonomy of international arbitration agreements. However, in the PwC case, the Cour de cassation recently reversed its long-standing jurisprudence by refusing to enforce an international consumer arbitration agreement. To do so, the Court quashed the applicability of the negative effect of compétence-compétence, giving supremacy to European law protecting consumers, and characterized this arbitration agreement as abusive. While such an audacious decision is to be welcomed, it could open the door to European law's primacy over French international arbitration law. Besides, international consumer arbitration agreements are not all abusive. Online arbitration agreements should be enforceable against consumers, even if such a process presents challenges.

Wolf VON KUMBERG & Jessica CROW, *The Development of Investor-State Mediation and Its Future in Supporting Energy Transition*

This Article provides updates on the recent developments in investor-state mediation and sheds light on some of the efforts undertaken by several institutions to regulate and promote this amicable mode of dispute resolution. This development is particularly important in the light of climate change and the efforts being made by governments to reduce greenhouse gas (GHG) emissions in order to meet the long-term temperature goals established in the Paris Agreement. As states and private enterprise move forward to put in place sustainable energy systems and to eliminate fossil fuel emissions, this will lead to a seismic shift in the way we deal with energy production. This, in turn, will lead to disputes based on current investments and contractual commitments in heavy emitting industries. States, in particular, will be vulnerable to investment claims as they make changes to domestic energy policy and environmental regulations become more stringent over time. This article will seek to explore how mediation might be used as an effective mechanism to deal with these investor-state climate-related disputes.

Adolf PETER, *Document Production, Late Evidence, Cross-Examinations and Witness Coaching in CIETAC Arbitrations Seated in Vienna, Austria*

The article explores China International Economic and Trade Arbitration Commission (CIETAC) arbitrations seated in Vienna and addresses legal implications of the interplay between the

CIETAC Arbitration Rules and the Austrian arbitration law in connection with document production, additional rounds of written submissions/late submissions of new facts and evidence, and cross- examinations including witness preparation and coaching. The Austrian arbitration law vests the arbitral tribunal with the power to conduct the proceedings in such a manner as it considers appropriate. As a consequence, the arbitral tribunal is authorized (unless the parties agree otherwise) to apply the Rules on the Taking of Evidence in International Arbitration of the International Bar Association (IBA Evidence Rules), the CIETAC Guidelines on Evidence (CIETAC Guidelines) or the Prague Rules. As a consequence, the article also highlights some of the most important differences between the IBA Evidence Rules, the CIETAC Guidelines and the Prague Rules. US-style discoveries or fishing expeditions violate Austrian public policy. Cross-examinations are allowed, but witness coaching and leading questions are available only to a limited extent. The article provides a proposal for new provisions to be included in CIETAC's Procedural Order No. 1 covering additional rounds of written submissions, the late submission of evidence and the introduction of new facts.

CASE NOTE

Steven P. CAPLOW, *Supreme Court's Splitting of the 'Jurisdictional Atom' Threatens to Blow up the Federal Arbitration Act*

A recent US Supreme Court decision sharply narrows the jurisdiction of federal district courts to administer arbitration matters under the Federal Arbitration Act (FAA). When a federal district determines whether it has subject-matter jurisdiction to compel arbitration, it may take into consideration both the petition to compel arbitration and the underlying dispute. This is known as the 'look through approach' because the court can look beyond the pending motion to the underlying case. Recently, the US Supreme Court ruled that the look through approach cannot be used when the federal court is asked to confirm or vacate an arbitral award. This can produce the incongruous result that a federal district court could have the authority to compel an arbitration but not to confirm the resulting award. The US Supreme Court left for future determination the question of whether the look through approach can be used for other judicial functions under the FAA such as appointment of the arbitrator.

BOOK REVIEW

Gordon Blanke, *Construction Disputes: Seeking Sensible Solutions, Wayne Clark. London Publishing Partnership. 2021. 154 pp., £30. ISBN: 978-1-913019-48-8*

The Editor welcomes the submission of articles for consideration for publication in the Journal. All prospective contributions should be in accordance with the guidelines set out here.

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This entry was posted on Sunday, October 16th, 2022 at 9:00 am and is filed under Arbitration – The International Journal of Arbitration
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