Kluwer Arbitration Blog

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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:

Jacob Grierson, ***Two Brief Comments on the Law Commission's Proposed Reform of the Arbitration Act 1996***

The Law Commission of England and Wales is currently reviewing the English Arbitration Act 1996 with a view to its being reformed. In September, it published a consultation paper making various recommendations on a preliminary basis. This article respectfully suggests that the Law Commission should revise its approach in respect of its proposed amendment to section 67 (challenges to jurisdiction) and its decision not to include in the review the question of the law governing the arbitration agreement: the former in order to protect the legitimacy of arbitration; and the latter in order to enhance legal certainty and clarity.

Charles Tay, ***Satellite Launch and Production Services and Arbitration in the Chinese Private Sector***

China has grown to become one of the largest producers and launchers of rockets and satellites in recent years. Both Chinese private companies and state-owned enterprises (SOEs) are in this sector, and there are reports of satellite launch and sale contracts being signed between Chinese and foreign parties. Over the past decade, South Korea, India, the United States, France and other countries have had experience with very large arbitration claims being made arising from satellite contracts. Chinese companies have not yet had such arbitrations, but they may in the future. What likely issues might such arbitrations involve? This article examines.

Martim Della Valle & Pedro Schilling De Carvalho, ***Corruption Allegations in Arbitration: Burden and Standard of Proof, Red Flags, and a Proposal for Systematisation***

Arbitration is widely regarded as one of the most efficient mechanisms to solve complex

commercial disputes. However, it has not yet been able to present sufficiently cohesive solutions for cases involving contracts obtained through corruption and, oftentimes, the current arbitrator's toolkit might not be enough to deal with such disputes without compromising the decision, risking its enforceability, and eventually unsettling the status quo of arbitration as an adequate mechanism for dealing with commercial disputes. To harmonize the current treatment of corruption allegations in arbitration and the broader societal fight against corruption, this article analyses the issues arising out of corruption allegations in arbitration and demonstrates how burden and standard of proof can be used as the missing link to seek such cohesiveness. Moreover, it analyses how the use of red flags – which can be obtained primarily from anti-corruption compliance practice – in arbitration is desirable. As a result, this article proposes a systemized framework for addressing allegations of corruption, in which a red flag of great gravity or the accumulation of red flags, in the absence of counterevidence or sufficient evidence to rule out the plausibility of the risk, authorizes arbitrators to apply negative inferences vis-à-vis the suspicion of corruption.

Gary J. Shaw, Michael Evan Jaffe & Lindsey Mitchell, ***Exercising Governmental Authority to Claim Section 1782 Assistance: What Does It Mean?***

On 13 June 2022, the Supreme Court published a highly anticipated decision in two consolidated cases that limited the availability of 28 USC § 1782. The Court ruled (1) that § 1782 was only available to arbitral tribunals exercising governmental (sovereign) authority; and (2) that neither private contract-based arbitral tribunals nor many investor-state arbitral tribunals meet the sovereign authority test. From a broad strokes perspective, the Court's narrow reading of § 1782 resolved the split among the Courts of Appeals. The decision left open, however, important questions that will no doubt be the focus of future cases. This article will review the § 1782 cases that played out in the Courts of Appeals prior to the Supreme Court's decision. The article will then examine the June 2022 decision and identify some of the questions left unanswered.

W.J.L. De Clerck, ***Dutch Supreme Court Finds for the First Time on Corruption and Arbitration in Context of Annulment Proceedings: Case Report on the Bariven and Yukos Decisions***

This article reports on the findings of the Dutch Supreme Court in its first two decisions on corruption and arbitration in the context of annulment proceedings. In the Bariven decision of 16 July 2021, the Supreme Court reinstated an arbitral award which the Court of Appeal in The Hague had annulled, citing strong indications of corruption. The Yukos decision was handed down on 5 November 2021 but did not put an end to a saga which has been playing out in the Dutch courts since 2014. The annulment proceedings are currently pending before the Amsterdam Court of Appeal which will have to find on the merits of the Russian Federation's procedural fraud defence following cassation by the Supreme Court over a refusal to admit this defence by the Hague Court of Appeal. This article is a case report, and its aim is limited to providing non-Dutch readers with insight into the Bariven and Yukos Supreme Court decisions. The article includes an introduction on Dutch annulment proceedings, the public policy exception as applied in such proceedings, and the related but distinct action of revocation.

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