Kluwer Arbitration Blog

The Contents of Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Volume 89, Issue 1 (2022)

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‘Are cryptocurrency assets a protected investment under investment treaties?’ Evgeniya Rubinina asks in the Journal’s first issue of 2023. It is both a topical and complex question to ask.

It is topical because in the wake of an *annus horribilis* that cryptocurrencies had in 2022, including the collapse of major cryptocurrency trading firms such as FTX, Genesis and Gemini, it is likely that claims from investors who have lost their money will ensue. Of course, in these circumstances, it appears that investors have suffered losses not because of governmental regulation which might have triggered a treaty claim; rather, it appears that investor losses were due to the lack of governmental regulation in a wholly decentralized industry that operates outside conventional financial rules, enabling thus mismanagement and irresponsible corporate governance practices.

Yet, it is also likely that, to clean this mess, governments may introduce regulation in the near future to protect investors from fraud and also to ensure that cryptocurrency trading firms are responsibly governed and meet certain requirements of transparency and financial health. It is this governmental regula- tion which may result to further, albeit unintended, losses for investors, in case more cryptocurrency trading firms fail to meet the new regulatory requirements. Against this background, the question of whether cryptocurrency assets qualify as protected investment under investment treaties is an issue which is bound to arise in future investment treaty arbitrations.

As already indicated, this is an issue which gives rise to complex questions: are cryptocurrencies an ‘economic asset’? While some national laws (which may become relevant in an investment treaty arbitration especially in the absence of regulation at the level of international law) recognize cryptocurrency as property, other national laws prohibit the operation of crypto- currencies and, therefore, fail to recognize property rights on such assets. Similarly, can cryptocurrencies meet the requirements of investment under Article 25 of ICSID Convention? Given the delocalized nature of cryptocurrency assets, how can an investment treaty tribunal establish jurisdiction under bilateral investment treaties which typically protect investment made in the territory of the host state? We should all look forward to investment treaty awards dealing with these ques- tions sooner rather than later.

In the meantime, Evgeniya Rubinina's article offers an informative overview of the complexity of the legal issues surrounding investment treaty claims for cryptocurrency assets and puts forward some very interesting proposals.

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

ARTICLES

Evgeniya RUBININA, *Are Cryptocurrency Assets a Protected Investment Under Investment Treaties?*

This article considers the jurisdictional aspects of protection of cryptocurrencies under investment treaties, namely: (1) whether or not cryptocurrencies constitute an asset capable of protection under investment treaties and, in particular, the relevance of recognition of title to cryptocurrency under the applicable law, as well as whether such assets qualify for protection under the Salini test; (2) how the territorial link to the host state can be established, given the delocalized nature of cryptocurrencies and blockchain. A parallel is drawn to the line of jurisprudence on whether or not delocalized financial instruments such as bonds can constitute protected investments under Bilateral Investment Treaties (BITs). It is concluded that whether or not cryptocurrencies can qualify as protected investments will inevitably depend on the specific circumstances of each case. There is no reason why cryptocurrency assets cannot, in principle, be a protected investment under investment treaties; however, at least for self-standing investments consisting of cryptocurrency only, it may be challenging to meet the requirement of proving contribution to the development of the host state.

Aarushi GUPTA, *Eco Oro v. Colombia: Is GATT Article XX to be blamed?*

In this piece, the author highlights that in the Eco Oro v. Colombia decision, the criticism of General Agreement on Tariff and Trade (GATT) Article XX has been misplaced. The general exceptions clause could not achieve its intended effects because the tribunal adopted an incorrect approach. The tribunal's evaluation is contrary to accepted World Trade Organization (WTO) jurisprudence and customary international law. The decision cannot form the basis for blaming the drafting of the provision or the scope of GATT Article XX. It does not define the horizon of WTO style as exceptions, as suggested by many. It is important to prove this hypothesis given that the operation of general exceptions (especially GATT-based) is determined by judicial precedents. It is not advisable to rely upon judicial precedents contrary to accepted legal norms. Furthermore, Canada has been a staunch supporter of GATT Article XX exceptions and has included such in eighteen out of its twenty-four bilateral investment treaties (BITs). Thus it is imperative for Canada (base of claimant Eco Oro), as well as other countries, to know whether the effectiveness of the general exceptions is really at stake in this case.

Michael DAVAR & Ioana BRATU*, Web3 and Beyond: Arbitration or Consumer Rights: The Victor Is …*

This article deals with a new area of legal research at the intersection of jurisdictional issues (the effect of Brussels Recast in the United Kingdom after Brexit), EU law, and the arbitrability of consumer disputes in the context of Web3 transactions. The topic stems from a recent English High Court case, Soleymani v. Nifty Gateway. The authors tease out the main issues that the Court of Appeal will have to grapple with in deciding this case.

Annabelle O. ONYEFULU*, Artificial Intelligence in International Arbitration: A Step Too Far?*

The emergence of the global pandemic has propelled the increased usage of artificial intelligence (Hereinafter referred to as 'AI') in the workplace. Technological advancement in the legal environment, evident in such functionalities as digitalization, blockchain, and machine learning, amongst others, have significantly affected international arbitration. The application of these technologies may promote efficiency, cost, and speed on the one hand, whilst perhaps, violating the current regulatory frameworks in international arbitration on the other. Accordingly, this research article undertakes a brief analysis of the future of international arbitration vis-à-vis the introduction of new technologies, including an evaluation of the possibility of replacing human arbitrators with AI arbitrators. Attention is paid to the public policy requirements and ethical issues that may arise therefrom.

Emad HUSSEIN*, Institutional Arbitration in the UAE: Looking for Missing Pieces of the Puzzle*

With over ten active arbitral institutions in its territory, the United Arab Emirates (UAE) boasts of a rich history of institutional arbitration. Nevertheless, leading international arbitration surveys from the last decade reveal that arbitral institutions in the UAE are yet to receive global recognition and ranking. Recent developments, such as the adoption of the Federal Arbitration Law (FAL), 2018 and the amendments to the Dubai International Arbitration Centre (DIAC) Rules, 2022 aim to place the UAE on the global map for institutional arbitration. The purpose of this article is to evaluate the factors that have inhibited global success for arbitral institutions in the UAE and to discuss whether the current reforms may bring hope for the future.

Peter Nahmias REISS*, The Future of US Discovery in Support of International Arbitration: The US Supreme Court Settles the Debate Over the Reach of Section 1782*

Section 1782 of Title 28 of the US Federal Code is a powerful tool that allows foreign litigants to use US 'discovery' to obtain evidence that in many cases is not available to them in their home forum, allowing a US district court to order a person who 'resides or is found' in its jurisdiction to provide documentary evidence or testimony 'for use in a proceeding in a foreign or international court'. A difference of opinion developed among the federal circuit courts on the scope of the section due in part to the Supreme Court leaving the matter open at Intel Corp. v. Advanced Micro

Devices, Inc., 542 US 241 (2004). On 13 June 2022, the US Supreme Court ruled on this issue in two consolidated cases. ZF Automotive US, Inc. v. Luxshare, Ltd., No. 21-401 (Commercial Arbitration), and AlixPartners LLP v. The Fund for the Protection of the Rights of Investors in Foreign States, No. 21-518 (investment arbitration), ruling that only an adjudicative body of a governmental or intergovernmental nature constitutes an 'foreign or international tribunal' under §1782. This long-awaited ruling will have a significant impact on international arbitration.

BOOK REVIEWS

Gordon BLANKE, *The Protection of Intellectual Property Rights under International Investment Law*, Simon Klopschinski, Christopher S. Gibson & Henning Grosse Ruse-Khan, Oxford, 2021.

Gordon BLANKE & Farhan SHAFI, *Law, Practice and Procedure of Arbitration in India*, Sundra Rajoo, Thomson Reuters, 2021.

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.

This entry was posted on Sunday, May 7th, 2023 at 8:00 am and is filed under Arbitration – The International Journal of Arbitration
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