Association For International Arbitration

IN TOUCH

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Inside this month's issue:

AIA's Response to the Commission's Green Paper on the Brussels I Regulation Reform

The AIA set up a working group to prepare a submission to the Commission on the aspects of the Green Paper affecting international arbitration. The Committee was headed by Edouard BERTRAND (France) and compromised with the following members Grace AVIGDOR (France), Saurabh BAGARIA (India), Philippe BILLIET (Belgium), Ugo DRAETTA (Italy), Adriana DREYZIN (Argentina), Raphaël GYORI (Belgium), Rosemary Jane HARRISON (United Kingdom), Girish KODGI (India), Emmanuel OPOKU AWUKU (Belgium), Denis PHILIPPE (Belgium), Bettina SCHMALTZ (Germany), Gaëtan ZEYEN (Belgium).

Main Ideas

It seems befitting to set out the aims and objectives that are globally attractive for international arbitration to function effectively. The aims are to provide the international community with a swift arbitration process based on clear and concise rules, procedures and conventions and a clear and non conflictual enforcement system of arbitral awards internationally. The objectives are to arrange for an international arbitration process, within the framework laid down by both Private and Public International Law, to be effective and available on a global scale. The effectiveness of this process is measured by the extent to which it allows for a swift resolution of conflicts and a resumption of trade and commerce between the parties whenever possible.

It is believed that any improvement or furtherance of international arbitration by means of a new legal instrument will fail its purpose if these aims and objectives are not properly supported.

It is respectfully submitted, that the reform envisaged by the Green Paper does not meet those standards. The proposals set forth by the Green Paper, if implemented, would be far reaching. It is believed that the deletion of the exclusion of arbitration from the scope of the Regulation advocated by the Green Paper, far from leaving untouched the operation of the New York Convention, would cause the Contracting

States to be in breach of their obligations under that Convention. It would also have a similar effect upon the Member States which are party to the Geneva Convention on commercial arbitration of 1961.

Another problem, which appears to have been omitted by the Green Paper, is the impact of the proposals upon the functioning of arbitration between enterprises of the European Community and those which are outside. The goal pursued by the Green Paper, insofar as arbitration is concerned, is strictly regional. It is to extend the goal of the Regulation, namely ensuring the circulation in Europe of judgments made in Europe and establishing rules for deciding the jurisdiction of courts in cases of disputes affecting a defendant domiciled in Europe or certain assets located in Europe, to arbitral awards and arbitration proceedings.

It is submitted that this way of thinking is not adapted to the universal nature of arbitration. If adopted, the proposals of the Green Paper would produce a regionalization of the law of arbitration in the European Union which would not serve the commercial and economic interest of the users of arbitration in Europe and which could result in the European Union being perceived, and possibly branded by persons or institutions infused with malevolent intentions, as an area in which the New York Convention no longer applies.

Moreover, the Commission's proposal does not respect the fact that arbitration should be independent and diverse in its nature (e.g. arbitration should not incorporate any binding precedent effects from previous arbitration proceedings). Community law does not serve these goals, as it strives towards uniformity and is essentially driven by political incentives. Therefore, in as far as concerns should be addressed, this should rather be done through a specific international arbitration law instrument than through regional community law.

As a consequence, the arbitration exception should not be suppressed. It is true that in its Report to the European Parliament, the Council and the EESC of 21 April 2009, on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Commission found that difficulties arise from the interface between the Regulation and arbitration and that conflicts between parallel court and arbitration proceedings arise when the court does not uphold the arbitration clause while the arbitral tribunal decides to uphold this clause. We admit that, in some occurrences, the Arbitration Exception has given rise to contradictions. However, this limited number of inconsistencies is not sufficient to justify a sweeping change of law.

Conclusion

The present system has worked well for arbitration so far. The few cases where problems have occurred in the enforcement of arbitral awards within the European Union during the last 40 years do not justify the radical changes advocated by the Green Paper. The arbitration community does not feel the compelling need for such changes. It is also felt that the proposed changes, because of the risks and uncertainties which they would create, may cause EU parties as well as non-EU parties which for a number of reasons would otherwise choose a country of the EU as a seat of arbitration, to deter them from pursuing arbitration in the EU.

The Commission's proposal goes too far as it aims to bring all arbitration aspects under the scope of Regulation 44/2001. This would be a radicalisation of the already controversial perspective that was adopted in the Van Uden case (1998). In the Van Uden decision, the Court confirmed that court's jurisdiction to deal with provisional measures is subject to the Regulation even if the parties agreed on an arbitral agreement.

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Besides this, to the extent that there is a need for improvements, for which neither the Report, nor the Green Paper has produced sufficient evidence, it is believed that they cannot be implemented by a Regulation.

As this paper demonstrates, the overhauling of the status of arbitration advocated by the Green Paper will cause a substantial interference with the obligations and rights of the Member States arising under the New York Convention of 1958 on the recognition and enforcement of foreign arbitral awards and the European Convention on International Commercial Arbitration of 1961 done at Geneva on April 21, 1961. Under the prevailing legal authority, art. 307 par. 1 of the EC Treaty applies to conventions concluded after January 1st 1958 on matters on which the EU acquired competence thereafter. As Regulation 44/2001 is based on Title IV Part III of the EC Treaty introduced by the Treaty of Amsterdam, this paper respectfully submits that Regulation 44/2001 cannot impose on Member States obligations which are inconsistent with the above-mentioned international conventions.

Read the complete text of AIA's Response

The Mediation of Construction Disputes: Recent Research

Introduction

Mediation can no longer be said to be a new phenomenon for the resolution of construction disputes. Mediation has now been used, in the commercial context, for the resolution of disputes in a wide range of industry sectors both before the commencement of and during formal proceedings. It can of course be used, in theory, at any stage not just during litigation but during or when other forms of dispute resolution, such as arbitration, are contemplated or progressing.

The use of mediation within contracts or as part of a dispute escalation clause has also become more popular, not just in the construction industry but in other commercial sectors as well. A large range of dispute resolution techniques is available for use in the construction industry. Arbitration is sometimes still the default dispute resolution procedure, perhaps because it was originally included as the only procedure in the most popular standard forms of contract.

Adjudication is now well established within the construction industry, and in other common law jurisdictions. Litigation of construction-related disputes has received special attention from the courts, originally with the establishment of the Official Referees, in 1998 renamed the Technology and Construction Court (TCC).

New research: aims and purposes

There is some useful data in respect of the use and effectiveness of mediation in the construction industry, and court annexed mediation services. However, the use, effectiveness and cost savings associated with mediations that take place in respect of construction industry litigation is mostly anecdotal. To address this, an evidence-based survey was developed between King's College London and the TCC. Working together, it was possible to survey representatives of parties to litigation in that court.

Parties to litigation in the TCC provide a good opportunity for a survey of a group with similar issues and interests. They have all commenced formal proceedings in the High Court in relation to construction and technology matters and will be progressing towards a hearing. Many of them will of course have settled their dispute before the hearing. Almost all of those parties will be represented by lawyers, so will be incurring legal fees and taking the risk of paying the opposing parties' legal fees if their claim or defence is unsuccessful.

The obvious questions are: i) to what extent do they use mediation in order to settle their dispute; ii) at what stage do they settle; and iii) Do they make any costs savings by using mediation, rather than conventional negotiation.

This group can be divided into two sub-groups: first, those that settled their dispute after commencement, but before judgment; and second, the (no doubt smaller) group who progressed all the way to trial, but nonetheless might have been involved in a mediation that did not resolve all or any parts of the dispute.

The research therefore focused on issues specific to those two sub-groups, with three main research aims: i) to reveal in what circumstances mediation is an efficacious alternative to litigation; ii) to assist the court to determine whether, and at what stage, it should encourage mediation in future cases; and iii) to identify which mediation techniques are particularly successful.

The objective was to collect meaningful data that could assist not only parties, practitioners and mediators in respect of the use of mediation (in commercial disputes as well as construction disputes), but also to provide the court with objective data to assist it in the efficient management of cases.

Methodology

The two different questionnaire survey forms were designed for respondents in the two sub-groups, but also to reflect the characteristics of TCC litigation processes. The commonality between the two forms was to aid analysis and comparison between the two sub-groups. Form 1 was issued where a case had settled, Form 2 where judgment had been given.

Questions

Q1 asked the respondent to identify (by reference to 13 categories) what the subject-matter of their case was.

Q2 sought to ascertain the stage at which the litigation settled or was discontinued, by reference to 13 categories, of which 12 referred to specific stages of the litigation and one was an '*other*' category.

Q3 asked respondents to identify whether the case was concluded as a result of mediation, negotiation or some other method of dispute resolution.

Summary and conclusions

The completed survey forms provide an interesting insight into the types of claim being dealt with by the TCC. The TCC *Annual Report* 2006 does not provide an indica-

tion of the number of payment disputes coming before the court; our survey indicates that a surprisingly low number of typical mainstream construction disputes (variations, delays and site conditions) now do so, suggesting that adjudication is successful in settling such disputes promptly. However, the percentage of payment disputes increases from 18% of claims for which settlement was reached prior to judgment to 21% where no settlement was reached prior to judgment. Arguably, payment claims that do not get resolved by adjudication are less likely to settle by negotiation or mediation after the commencement of TCC proceedings, so are more likely to result in a hearing and be resolved by the court giving a judgment.

The number of defects claims being dealt with by the TCC is also high (18% for both Forms 1 and 2), suggesting that the courts are better placed to deal with such claims (which often require extensive expert evidence) than adjudication. Design issues, also technically complex, represented 13% of Form 1 cases and 12% of Form 2 cases.

Where a settlement was reached prior to judgment, the most successful method used was conventional negotiation, not mediation. That said, the majority of respondents who had used mediation said it resulted in a settlement. Even where the mediation did not result in a settlement it was not always viewed negatively.

Mediation was undertaken on the parties' own initiative in the vast majority of cases. Of the successful mediations only 22% were undertaken as a result of the court suggesting it or due to an order of the court. Even where mediation was unsuccessful, 91% occurred as a result of the parties' own initiative: only 1 out of 11 unsuccessful mediations was ordered by the court. This suggests that the incentives to consider mediation provided for by the CPR (namely, costs sanctions) are effective; and that those advising the parties to construction disputes now routinely consider mediation to try and bring about a resolution of the dispute.

The cost savings attributed to successful mediations were also significant, providing a real incentive for parties to consider mediation. Only 15% resulted in savings of between zero and £25,000. 76% resulted in cost savings of over £25,000, with 9% saving over £300,000. The cost savings were generally proportional to the cost of the mediation itself with greater cost savings being found the higher the costs of the mediation were. This may be an indication that high value claims spend more money on the mediation itself presumably because they realise that the potential savings resulting from the mediation will be higher.

The parties themselves generally decided to mediate their disputes at three key stages: as a result of exchanging pleadings; during or as a result of disclosure; and shortly before trial. The results are similar in respect of mediations undertaken as a result of the indication from the court and/or an order; these tended to occur during exchange of pleadings (possibly as a result of a first case management conference), as a result of disclosure and shortly before trial (possibly as a result of a pre-trial conference). Of successful mediations, a higher percentage of respondents believed that the dispute would have gone progressed to judgment if mediation had not taken place when this was undertaken during exchange of pleadings and shortly before trial. This suggests that mediation may have been comparatively more successful at these stages.

The vast majority of mediators were legally qualified; only 16% were construction professionals. The uptake for the TCC Court Settlement Process appears very limited; only five respondents stated that they had used it, though these five experiences resulted in settlement. Nonetheless, there is clearly a place for this distinct court service.

Unsuccessful mediations used a range of mediators similar to those in successful mediations, so conclusions are hard to draw about what type of mediator is most likely to result in success. What is clear is that the parties generally opt for legally qualified mediators, perhaps diminishing the strength of the arguments for greater regulation of

mediators and supporting the market-based approach adopted by the recent EC Mediation Directive.

For the vast majority of mediations, the parties were able to agree between them on the mediator to appoint; appointing bodies were only used by 20% of respondents. There was also a tendency to use the same mediators again, suggesting a comparatively mature market, parties' advisors suggesting well-known mediators within the construction disputes field.

Taken as a whole, the data derived from the various surveys charting the use of mediation over the years (both court-annexed mediation and 'free standing' mediation), show how mediation has transformed from a novel idea into its current position as an indispensible tool for construction litigators.

Get access to the detailed summary report.

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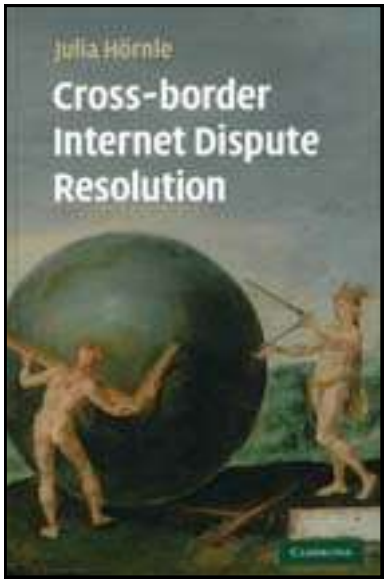
Book Review: Cross-border Internet Dispute Resolution (Author: Julia Hörnle)

The audience involved in ADR is aware of the importance of ICT (Information and Communication Technologies) in the processes and techniques for dispute resolution. In fact, ADR and ICT have gained widespread acceptance and use in the last decade. Nevertheless, sometimes it is difficult to understand how they interact with each other and which could be the best way to benefit from them in the future.



This is the topic of a recent book *Cross-border Internet Dispute Resolution* by Julia Hörnle, which is an important contribution to the debate on ODR (Online Dispute Resolution) and a must-read for those interested in ODR. What is ODR? In the author's words: "ODR is a collective noun for dispute resolution techniques outside the courts using ICT and, in particular, Internet applications".

In developing the book, the author analyzes the interaction between ADR (with special emphasis on arbitration law) and internet law. The work presents the following issues in seven chapters: i) the concept of fairness; ii) the need for fair and effective resolution mechanisms for internet disputes; iii) the nature of ADR and applicable law; iv) ODR and its improvement of access to dispute resolution; v) arbitration and due process; vi) internet disputes and fair arbitration; and finally, vii) the books develops a fair model for the resolution of cross-border internet disputes.

The starting point of the book is the cross-border nature of the internet and its potential to lead to cross-border disputes. The book analyses dispute resolution mechanisms specific tothe online world such as the role of payment service providers, the use of online technology for mediation and arbitration, ODR schemes and their advantages

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and legal issues surrounding business-to-consumer (B2C) arbitration comparing the European and US approaches. Also, the book explains the technologies used in online mediation and online arbitration. In the case of online arbitration readers may find the explanation of the use of online platforms and electronic file-management software interesting. The use of (online) arbitration for internet disputes expands again the range of disputes for which arbitration is used as a dispute resolution mechanism. The book provides a thoughtful and engaging discussion of due process issues in arbitration, particularly relevant in disputes where the parties are of unequal bargaining power.

This book is much more than a description of legal issues, but a structured conceptualization of the main problems coupled with a practical analysis with clear conclusions and innovative proposals for solving internet disputes. The book presents a thoughtful and critical analysis written in a clear and concise manner.

The academic purpose of the book is to present a system in which cross-border internet disputes may be solved fairly through an arbitration process. For this purpose, the author suggests a new paradigm: online arbitration as a necessary dispute resolution mechanism for internet disputes. The conclusion is well supported having in mind the argument advanced throughout the book and the parameters given for a workable model in the final part. The research focuses mainly on English and US law (including cases and statutes) but the book also refers to other legal systems in a comparative perspective. In short, this book could be of great help to all of those who want to understand more in detail the issues related to cross border internet dispute resolution in a format which is well presented in terms of style and structure.

Arbitration in Brazil: Some Basic Concepts and Ideas

Brazil is the fifth most populated country in the world with a population around 190 million people and the fifth biggest country with an area of 8.5 million square kilometers. Brazil has large and developed agricultural, mining, manufacturing and service sectors, as a large labor pool. This country has been expanding its presence in international financial and commodities markets, and is regarded as one of the fast-growing developing economies (jointly with China, Russia and India).

As it travels down the path of growth and sustainability, Brazil has gained the credibility that makes it an obligatory component in the portfolio of major investors. Today, anyone considering great business opportunities will include Brazil. Besides, some commentators have mention that Brazil has weathered the downturn much better than most: not a single bank went under; its debt is low and is predicted to fall rather than rise significantly in the coming years.

In short, the Brazil of this century has a very important role on the international stage. For this reason, it is of great significance to understand some basic concepts and ideas about arbitration in Brazil.

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Background

Brazil's Arbitration Law (BAL) is modeled on the Spanish arbitration law of 1988 and the UNCITRAL Model Law. The Arbitration Act is incorporated in Law 9.307 of September 23rd, 1996. Soon, after this modern arbitration statute came into force its constitutionality was challenge. After some discussion, the Brazilian Supreme Federal Court upheld the constitutionality of the Arbitration Act. Furthermore, in the year 2002, Brazil ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. As a result, these two legal instruments have moved Brazil into the mainstream of international arbitration.

Scope

The Act permits arbitration only of conflicts involving disposable patrimonial rights. Therefore, like in many different legal systems which have incorporated the same "formula", the interpreter is responsible for qualifying the issues subject to arbitration. Brazilian Courts have a significant responsibility on this regard and different reports about judgments in Brazil have showed a friendly approach to arbitration in recent years. Besides, the Act applies to both national and international disputes as it is the current trend around the world.

Arbitration Agreement

The BAL distinguishes between arbitration commitment (compromisso) and arbitration clause and either one of them is sufficient to exclude the judiciary's power over the disputes (Article 3). As a result, the BAL maintains the classical distinction between submission to arbitration and an arbitration clause which falls under the general term arbitration agreement. Also, the Arbitration Act includes the "kompetenz-kompetenz" and "party autonomy" principles (Article 8) which give arbitrators enough space to decide about their authority.

Applicable Law

The parties to the arbitration may state in the arbitration agreement the applicable law regarding the merits of the dispute, including foreign legislation. In this manner, the Act grants individuals the right to "freely choose the rules of law to be applied in the arbitration provided that their choice does not violate good morals or the public policy" of the country (article 2). Consequently, BAL requires courts to enforce the choice of law and arbitral forum made ex ante by the parties in the arbitration agreement.

Arbitrators

The Acts establishes that any "legally capable individual, trusted by the parties, may act as an arbitrator" (Art. 13). Therefore, issues like nationality, experience and training are not special requirements. However, BAL establishes that arbitrators, in the exercise of their functions or as a result thereof, are subject to the same criminal law provisions applicable to civil servants (Art. 17) and they should behave in an impartial, independent, competent, diligent and discreet manner.

Arbitration Procedure

The arbitral procedure shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitral institution or specialized entity, it being possible for the parties to empower the sole arbitrator or the arbitral tribunal to regulate the procedure (Art. 21). However, the Acts requires complete compliance with the principles of due process, equality of the parties, impartiality of arbitrators and arbitrator's judicial discretion.

Award

The award must be in writing and must contain: i) a description of the parties and a summary of the dispute; ii) the grounds for the decision; iii) the actual decision; and iv) the date and place of the making of the award. If there are several arbitrators, decisions shall be taken by majority vote (Arts. 24 and 26). If the parties do not provide a time limit for the award to be issued, the law provides a period of six months. In any case, the parties and the arbitrators, by mutual consent, may extend the stipulated period (Art. 23).

Nullification of the Award

The Arbitration Act provides than an arbitration award has the same effect as a judicial decision (Art. 31). Then, if a party wants to request nullification of the award he must do it based on the grounds stated in the Act. In this case, it is important to mention that only procedural aspects of the award may be challenged as the court has no power to review the merits of an arbitration award (Art. 32 and 33).

An Example: Arbitration of Corporate and Capital Market Disputes

BOVESPA (the stock exchange of Sao Paulo) created a center for arbitration called Market Arbitration Panel (Câmara de Arbitragem do Mercado). The Market Arbitration Panel seeks to provide a proper forum for discussion of matters relating to the Corporation Law and companies' bylaws, in addition to regulations issued by the National Monetary Council (Conselho Monetário Nacional – CMN), the Central Bank of Brazil, the Brazilian Securities Commission (Comissão de Valores Mobiliários - CVM), and BOVESPA, as well as other rules applicable to capital markets in general. Issues dealt with in the Novo Mercado Listing Rules, Differentiated Corporate Governance Practice Rules and their corresponding agreements may also be brought before the Market Arbitration Panel.

At present, 137 companies have undertaken to submit conflicts concerning them, their controlling shareholders, officers and directors and members of the audit committee to arbitration. Some of these companies are the most traded in the stock exchange. In this way, this is a new area in which arbitration will develop in Brazil.

Final Remark

Brazil has experienced significant changes over the last decade in arbitration. There is a more friendly approach by courts, as well as new rules and new ADR centers and institutions. As a result, Brazil has transformed itself into a jurisdiction favorable to international arbitration. The issue that still pending is when this trend will move towards investment arbitration by way of BITs or Brazil's decision to ratify the ICSID Convention.