Out Now! ‘Multi-Tier Arbitration Clauses: International Trends In Dispute Resolution’ by Anjali Chawla

About the Book

Streamlining disputes has become imperative to reduce the judicial caseload. One may presume that resorting to arbitration or other forms of ADR when the parties wish to resolve their issues amicably might provide them with a speedier remedy. Considering that commercial disputes now are extensively complex and cumbersome, there arose a need for a more evolved dispute resolution mechanism that could cater to the needs of each contract or dispute in a customised manner. MTDR can aid in doing so. It entails successfully employing different kinds of ADR for the same dispute in case there is no resolution. However, MTDR comes with its fair share of issues, such as reservations amongst the parties, lack of rules governing such procedures, limitation period, lack of party cooperation and the non-binding nature of certain forms of ADR. These pertinent questions are merely the tip of the iceberg when it comes to Multi-Tiered Dispute Resolution. The objectives of Alternative Dispute Resolution are saving time and reducing costs. At the end of the day, it is imperative to answer whether Multi-Tier Dispute Resolution is viable in achieving these objectives or if it will manifold the complexities involved in the process. Yet if there is even a

possibility of settling disputes or at least parts of the dispute amicably, this concept is worth a chance. Despite the United Nations' endeavours to promote uniform interpretations of the arbitration law worldwide, several nations have taken varying stands on the enforceability of certain dispute resolution procedures, calling for a study of the varying standards in different jurisdictions. For any dispute resolution mechanism to be effective, the codified law and the jurisprudence of a particular state need to be conducive to enforcing the process adopted by the parties. Thus, in-depth analysis and critical review of this subject's laws and judicial pronouncements have been demonstrated. This book aims to assist the reader in overcoming the issues that one might face with MTDR in a wide range of jurisdictions to make this process of dispute resolution useful, effective and fruitful. The book covers MTDR in different jurisdictions like the UK, USA, France, Canada, Australia, Singapore, Germany, Hong Kong, China, Taiwan and India. The functionality of any reform, particularly one that seeks to provide a multi-faceted solution, predominantly lies in the academic enrichment of the same. Policy and academia can only strengthen public awareness of Multi-Tier Dispute Resolution.

The Book is available for purchase on the Bloomsbury website using this link.

About the Author

Anjali is an Assistant Professor at Jindal Global Law School, O.P. Jindal Global University. Anjali holds an LL.M. in International Commercial Arbitration Law from Stockholm University (SU); and B.A. LL.B. (Hons.) degree from Jindal Global Law School, O.P. Jindal Global University, Sonipat (India). She is also a qualified lawyer at the Bar Council of India. She has also been advising domestic and international clients regarding commercial and civil disputes. Anjali is also acting as a Dispute Resolver (Mediator/Arbitrator/Conciliator) for various ODR platforms. Anjali sits on the Editorial Board of Legal Maxim and the Review Board of Syin & Sern.

Job Vacancy at the University of Bonn, Germany: Researcher in Private International Law, International Civil Procedural Law, and/or International Commercial Arbitration

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The Applicability of Arbitration Agreements to A Non-Signatory Guarantor—A Perspective from the Chinese Judicial Practice

(authored by Chen Zhi, Wangjing & GH Law Firm, PhD Candidate at the University of Macau)

It is axiomatic that an arbitration agreement is generally not binding on a non-signatory unless some exceptional conditions are satisfied or appear, while it could even be more controversial in cases relating to guarantee where a non-signatory third person provides guarantee to the master agreement in which an arbitration clause has been incorporated. Due to the close connection between guarantee contract and master agreement in their contents, parties or even some legal practitioners may take it for granted that the arbitration agreement in master agreement can be automatically extended to the guarantor albeit it is not a signatory, which can be a grave misunderstanding from judicial perspective and results in great loss thereby.

As a prime example, courts in China have long been denying the applicability of arbitration agreements to a non-signatory guarantor with rare exceptions based on specific circumstances as could be observed in individual cases, nonetheless, the recent legal documents have provided possibilities that may point to the opposite side. This short essay looks into this issue.

1. **The Basic Stance in China: Severability of the Guarantee Contract**

Statutes in China provide limited grounds for extension of arbitration agreement to a non-signatory. As set out in Articles 9 & 10 of the *Interpretation of the Supreme People's Court's (hereinafter, SPC) on Certain Issues Related to the Application of the Arbitration Law*?which was issued on 23 August 2006?, this may occur only under the following circumstances:

"(1) An arbitration clause is binding on the non-signatory who is the successor of a signed-party by means of merge, spilt-up of an entity and decease of a natural person or;

(2) where the rights and obligations are assigned or transferred wholly or partially to a non-signatory, unless parties have otherwise consented".

Current laws are silent on the issue where there is a guarantee relationship. Due to the paucity of direct instructions, some creditors seeking for tribunal's seizure of jurisdiction over a non-signatory guarantor would tend to invoke Article 129 of the *SPC's Interpretation on Certain Issues Related to Application of Warranty Law* (superseded by SPC's *Interpretation on Warranty Chapter of Civil Code* since 2021 with no material changes being made), which stipulates that the guarantee contract shall be subject to the choice of court clause as set out in the main agreement, albeit the creditor and guarantor have otherwise consent on dispute resolution. Nevertheless, courts in China are reluctant to apply Article 129 to an arbitration clause by way of *mutatis mutandis.* In the landmark case of *Huizhou Weitong Real Estate Co., Ltd v. Prefectural People's Government of Huizhou*,[1] the SPC explicitly ruled that the Guarantee Letter entered into between creditor and guarantor had created an independent civil relationship which shall be distinguished from the main agreement and thereby the arbitration clause should not be binding on the guarantor and the court seized with the case could take the case accordingly. In a nutshell, due to the independence of the guarantee contract from the main contract, where there is no clear arbitration agreement in the guarantee contract, the arbitration agreement in the main contract cannot be extended to be applicable to the guarantor.

The jurisprudence of *Weitong* has been subsequently followed and acknowledged as the mainstream opinion for the issue. In SPC's reply to Guangxi Provincial High Court regarding enforcement of a foreign-related arbitral award rendered

by CIETAC on 13 September 2006?*Dongxun*?,[2] where a local government had both issued a guarantee letter and signed the main agreement, the SPC opined that as there was no term of guarantee provided in the text of main agreement, the issuance of guarantee letter and signature of main agreement was not sufficient to make the government a party to the arbitration clause. In light of this, SPC agreed with the Guangxi Court's stance that the dispositive section regarding execution of guarantee obligation as set out in the disputed arbitral award had exceeded the tribunal's power and thus shall be rejected to be enforced. In the same vein, in its reply on 20 March 2013 to Guangdong Provincial High Court regarding the annulment of an arbitral award[3], the SPC held that the disputed arbitral award shall be partially vacated for the arbitral tribunal's lack of jurisdiction over the guarantee for which the guarantor was a natural person. Hence, it can be drawn that whether the guarantor is a governmental institution or other entity for public interest is not the determining factor to be considered for this type of cases.

2. **Controversies and Exceptions**

Theoretically, it is correct for the SPC to unfold the autonomous nature of arbitration jurisdiction, which shall be distinguished from that of litigation. Parties' autonomy to designate arbitration as a method of dispute resolution and the existence of an arbitration agreement are key elements for a tribunal to be able to obtain the jurisdiction. By this logic, the mere issuance of guarantee letter or signature of a standing-alone guarantee is not sufficient to prove parties' consent to arbitration as expressed in the main contract. The SPC is not alone in this respect. Actually, one of the much-debated cases by foreign courts is the decision made by the Swiss Supreme Court in 2008 which opined that a guarantor providing guarantee by virtue of a standing-alone letter was not bound by the arbitration clause as provided in the main agreement to which the guarantee letter has been referred, except there was an assumption of contractual rights or obligations, or a clear reference to the said arbitration clause. [4]

All that being said, the SPC's proposition has given rise to some controversies for the sacrifice of efficiency through a dogmatic understanding of arbitration. Moreover, the segregation of the main contract and guarantee contract may produce risks of parallel proceedings and conflicting legally-effective results. As some commentators have indicated, albeit the severability of guarantee contract in its formality, its content is tight with the main agreement. In the light of the

tight connection,[5] the High Court of England ruled in *Stellar* that it was predictably expectable for a rational businessman to agree on a common method of dispute resolution as set out in the main contract, where the term of guarantor's endorsement was involved, based on the close connection between the two contracts.[6]

A like but nuanced approach, however, has been developed through individual cases in China, to the author's best knowledge, one of the prime cases is *Li* v. *Yu* decided by Hangzhou Intermediate Court on 30 March 2018 concerning an annulment of an award handed down via arbitration proceedings.[7] The case concerns a main agreement entered into by the creditor, the debtor and the guarantor (who was also the legal representative of the debtor), which had set out a general guarantee term but did not provide detailed obligations. The guarantor subsequently issued a guarantee letter without any clear reference to arbitration clause as stated in main agreement. After the dispute arose, the creditor lodged arbitration requests against both the debtor and the guarantor, the tribunal ruled in creditor's favor after tribunal proceedings started. The guarantor then applied for annulment of the arbitral award on the basis that there was no valid arbitration agreement between the guarantor and the creditor, contending tribunal's lack of jurisdiction over the guarantor. The court, however, opined that the guarantor's signature in the main agreement, in combination of the general guarantee clause incorporated therein, was sufficient to prove the existence of arbitration agreement between the creditor and the guarantor and the guarantor's consent thereby. Therefore, the annulment application was dismissed by the court.

Admittedly, the opinion as set out in *Li* is sporadic and cannot provide certainty, largely relying on specific circumstances drawn from individual cases, hence it is difficult to produce a new principle hereby. However, the case does have some novelties by providing a new track for extension of arbitration agreement to a guarantor who is not clearly set out as one of the parties in main agreement. In other words, the presumption of severability of guarantee relationship is not absolute and thus rebuttable. To reach that end, creditors shall furnish proof that the guarantor shall be well aware of the details of the main contract (including arbitration clause) and has shown inclination to be bound thereby.

3. **New Rules That Shed New Light**

On 31 December 2021, the SPC released *Meeting Note of the National Symposium on Foreign-related Commercial and Maritime Trials*, which covers judicial review issues on arbitration agreements. Article 97 of the *Meeting Note* provides systematical approach in reviewing arbitration agreement where an affiliated agreement?generally refers to guarantee contract or other kinds of collateral contract?is concerned, which can be divided into two facets:

First, where the guarantee contract provides otherwise dispute resolution, such consent is binding on the guarantor and thus shall be enforceable. As a corollary, the arbitration agreement in main agreement is not extensible to the guarantor.

Secondly, while the guarantee contract is silent on the issue of dispute resolution, the arbitration agreement as set forth in the main agreement is not automatically binding on the guarantor unless the parties to the guarantee contract is the same as that of main agreement.

In summary, the *Meeting Note* has sustained the basic stance while providing an exception where the main agreement and the guarantee contract are entered into by the same parties. As indicated by one commentator, the *Meeting Note* is not a judicial interpretation which can be adopted by the courts to decide cases directly but it to a large extent reflects consensus of judges among China, [8] and hence will produce impact on judicial practice across the whole country.

Nevertheless, some uncertainties may still arise, for instance, whether a mere signature in the main contract by the guarantor is sufficient to furnish the proof about "the same parties", or shall be in combination with the scenario where an endorsement term of guarantor is incorporated in the main contract. On the contrary, it is also unclear whether a mere existence of term of guarantee is sufficient to make a non-signatory guarantor a party to the main contract.

Another more arbitration-friendly method can be observed from the draft for Revision of Arbitration Law that has been released for public consultation since 30th July of 2021, Article 24 of which provides that the arbitration clause as set out in the main agreement shall prevail over that in the guarantee contract where there is a discrepancy; where the guarantee contract is silent on dispute resolution, any dispute connected thereto shall be subject to the arbitration agreement as set out in main agreement. This article is a bold one which will largely overturn the SPC's current stance and makes guarantee relationship an

exception. A piece of more exciting news comes from the newly-released law-making schedule of 2022 by the Standing Committee of the National People's Congress,[9] according to which the revision of Arbitration Law is listed as one of the top priorities in 2022 whilst it is still to be seen whether Article 24 in the draft can be retained after scrutiny of the legislature.

4. **Concluding Remarks**

It is not uncommon that a guarantee for certain debts is provided by virtue of a standing-alone document which is separated from the main contract, whether it is a guarantee contract or a unilaterally-issued guarantee letter. It shall be borne in mind that the close connection between the guarantee document and main contract alone is not sufficient to extend the arbitration agreement as set out in main agreement to a non-signatory guarantor per the consistent legal practice in China over the past 20 years. While the new rules have provided more arbitration-friendly approaches, uncertainties and ambiguities will probably still exist.

From a lawyer's perspective, as the mainstream opinion in judicial remains unchanged currently, it is necessary to attach higher importance while reviewing a standing-alone guarantee contract which is separated from a master agreement in its formality. In the light of avoiding prospective parallel proceedings incurred thereby, the author advances two options in this respect:

The first option is to insert an article endorsing guarantee's obligation into the master agreement, and require the guarantor to sign the master agreement, which resembles the scenario in *Stellar* and *Li*. Whereas this approach may be less feasible in the post-negotiation phase of master agreement when all terms and conditions are fixed and endorsed, the option mentioned below can be served as an alternative.

The second option is to incorporate into guarantee document a clause which unequivocally refers to the arbitration agreement as set out in master agreement, in lieu of any revision to the master agreement. This approach is in line with Article 11 *SPC on Certain Issues Related to the Application of the Arbitration Law* which provides that parties can reach an arbitration agreement by reference to dispute resolution clauses as set out in other contracts or documents. While it is noteworthy that from judicial practice in China, such reference shall be specific and clear, otherwise the courts may be reluctant to acknowledge the existence of

such arbitration agreement.

[1] Case No: 2001 Min Er Zhong No. 177.

[2] Case No: 2006 Min Si Ta No. 24.

[3] Case No: 2013 Min Si Ta No. 9.

[4] Case No. 4A_128/2008,decided on August 19, 2008, decided by Tribunal federal(Supreme Court) of Swiss, as cited in *Extension of arbitration clause to non-signatories (case of a guarantor) – Arbitration clause by reference to the main contract (deemed too general and therefore not admitted),* available at https://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua.

[5] See Yifei Lin: Is Arbitration Agreement in Master Agreement Applicable to Guarantee Agreement? Available at http://www.360doc.com/content/16/0124/11/30208892_530188388.shtml.

[6] Stellar Shipping Co Llc v Hudson Shipping Lines [2010] EWHC 2985 (Comm) (18 November 2010).

[7] Case No: 2018 Zhe 01 Min Te No. 23.

[8] Lianjun Li *et al?China issues judicial guidance on foreign related matters,* Reed Smith In-depth?25 April 2022??available at https://www.reedsmith.com/de/perspectives/2022/04/china-issues-judicial-guidance-on-foreign-related-matters.

[9] For more details, please see the news post available at https://m.thepaper.cn/baijiahao_18072465. Moreover, per the news report released in late May of 2022, The National Committee of Chinese People's Political Consultative Conference had discussed the revision of Arbitration Law in its biweekly symposium held on 30 May 2022, where the attendees had stressed the significance of party autonomy in commercial arbitration, available at: http://www.icppcc.cn/newsDetail_1092041.

Can Blockchain Arbitration become a proper ‘International Arbitration’? Jurors vs. arbitrators

Written by Pedro Lacasa, Legal Consultant, Universidad Nacional de Asunción

There is no doubt that the use of emerging technologies has impacted the international arbitration arena. This tech revolution was unprecedently accelerated by the 2020 pandemic whilst national States’ borders were closed, and travel activity diminished (if not directly forbidden by some States).

The increase of the application of the Blockchain technology in commercial contracts and the proliferation of smart contracts (even though some think they are in essence merely a piece of software code[1]) have reached the point of being a relevant part of international commerce and suddenly they demand more attention than before (see the overview of these new technologies and its impact in arbitration here http://arbitrationblog.kluwerarbitration.com/2019/01/27/2018-in-review-blockchain-technology-and-arbitration/).

The omnipresence of technology in arbitration and the application of the blockchain technology to dispute resolution mechanisms in the international arena led to the naissance of the ‘blockchain arbitration’.

But just because a method focuses on dispute resolution, is not *ipso facto* a proper ‘*arbitration*’.

While the utilization of a trusted chain of information enhanced by technology is encouraged in arbitration proceedings, particularly in international arbitrations, we must underscore the fact that not any dispute resolution mechanism is a proper ‘*arbitration*’… not even if based on the blockchain.

Blockchain arbitration models do not share some of the essential features of

arbitration. The parties cannot choose the arbitrator in charge freely. They cannot easily choose aspects like the language of the procedure, the nationality of the arbitrators, the qualification of the arbitrators, the applicable law, etc. If the parties choose the arbitrators based on their qualifications or nationality, such choices can directly impact the *availability* of the existing ‘blockchain arbitrators’. *A fortiori*, the parties cannot choose the applicable law to the arbitration itself or to the merits of the dispute either.

Nominating the arbitrators

In Kleros, one of the most popular blockchain arbitration applications, the candidates for adjudicators first self-select themselves into specific courts (i.e., specific types of disputes) and then, the final selection of the adjudicators is done randomly (meaning a party cannot directly nominate someone in particular as an arbitrator for the underlying dispute). As it specifies in its whitepaper[2] “*contracts will specify the options available for jurors to vote*”, meaning the contract itself is the first factor that restrain party autonomy. In Kleros anyone can be an adjudicator. The probability of being drawn as an adjudicator for a dispute is proportional to the amount of tokens such user stakes within the platform.

Whilst other platforms such as Aragon[3] use the same drafting (of adjudicators) system, networks such as Jur[4], Mattereum and Sagewise[5] use a system that go a step closer to the International Arbitration legal framework (like the 1958 New York Convention, the UNCITRAL Model Law, etc.) in order to make their awards more enforceable worldwide but still lack the flexibility of a wider private autonomy and the role of the conflicts of laws, both present in classical international commercial arbitration processes.

These blockchain-based dispute resolution adjudicators are referred also as ‘jurors’[6]. ‘Jurors’ are Blockchain users elected to vote in favor of one of the parties to the underlying dispute utilizing the Schelling Point method.

But without even analyzing what the Schelling Point methodology has to do with the art of rendering justice in a definitive and final manner, we must ask the question: if the ‘jurors’ have more features of a jury and not of an arbitrator, why do we call a mechanism that solves disputes through decisions made by jurors and not by arbitrators *arbitration*?

Moreover, these jurors, like users of the Blockchain, have a direct economic interest in serving as jurors in the dispute at hand[7]. However, to think that an arbitrator decided to assume the task of being a part of an arbitral tribunal in an international arbitration constituted to resolve an international dispute, only because that would mean eventually more money to him, is an obscure idea at best. Such arbitrator was elected because of his or her qualities, experience, background, and reputation. This also occurs in domestic arbitrations. Nonetheless, such private autonomy is not possible in some blockchain arbitrations.

It is one thing to refer to such mechanisms as blockchain-based methods. But it is completely different is to maintain that such mechanisms are indeed 'arbitrations' *stricto sensu**[8]***, just like suggested by many authors[9] and professional associations such as the Blockchain Arbitration Society

Although the global society must embrace all the tech innovations regarding dispute resolution, the clear definition of what is an '*arbitration'* and what is not should be a healthy practice.

Conclusion

Overall, the technology evolution within the dispute resolution mechanisms is here to stay. This disruption needs a twofold adaptation: on one hand, the parties on an international contractual commercial relationship must adapt themselves to the new ways of solving disputes. The same goes for Sovereign States, that must update their domestic and international legislation to recognize and somehow regulate such new dispute resolution mechanisms.

On the other hand, these platforms for dispute resolution must adapt to the historical surrounding of the conflict solving industry, calling a dispute resolution mechanism for what it is and avoid euphemisms.

Lastly, the misconception on the dispute resolution mechanisms and international arbitration procedures may provoke a confusion to the detriment of the users of such digital networks.

[1] See Charlie Morgan 'Will the Commercialisation of Blockchain Technologies

Change the Face of Arbitration?' [Kluwer Arbitration Blog, March 5, 2018] available at http://arbitrationblog.kluwerarbitration.com/2018/03/05/topic-to-be-confirmed/.

[2] Kleros white paper [September 2019] available at https://kleros.io/whitepaper.pdf.

[3] See "Juror staking" and " Juror drafting" https://github.com/aragon/whitepaper.

[4] See "Open Justice Platform" in Jur's whitepaper V 3.0.0 [March 2021], available at https://jur.io/wp-content/uploads/2021/03/jur-white-paper-v.3.0.0.pdf.

[5] See Darcy W.E. Allen, Aaron M. Lane & Marta Poblet, 'The Governance of Blockchain Dispute Resolution' [Harvard Negotiation Law Review, vol. 25, issue 1, Fall 2019] 75-102.

[6] Maxime Chevalier, 'From Smart Contract Litigation to Blockchain Arbitration, a New Decentralized Approach Leading Towards the Blockchain Arbitral Order' [*Journal of International Dispute Settlement*, vol. 12, issue 4, December 2021] 558 – 584 https://academic.oup.com/jids/article-abstract/12/4/558/6414874?redirectedFrom=PDF.

[7] Kleros white paper [September 2019] available at https://kleros.io/whitepaper.pdf.

[8] See for example Sharath Mulia & Romi Kumari, 'Blockchain Arbitration: The Future of Dispute Resolution' [Fox Mandal, November 2021] available at https://www.foxmandal.in/blockchain-arbitration-the-future-of-dispute-resolution/.

[9] For example, see Ritika Bansal, 'Enforceability of Awards from Blockchain Arbitrations in India [August 2019] available at: http://arbitrationblog.kluwerarbitration.com/2019/08/21/enforceability-of-awards-from-blockchain-arbitrations-in-india/.

Bitcoin and public policy in the field of international commercial arbitration

Is a foreign arbitral award granting damages in bitcoin compatible with substantive public policy? The Western Continental Greece Court of Appeal was recently confronted with this question. Within the framework of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, it ruled that the recognition of a US award runs contrary to Greek public order. Cryptocurrency, such as bitcoin, favors tax evasion and facilitates economic crime, causing insecurity in commercial transactions to the detriment of the national economy.

FACTS

The applicant, a German national, was a member of a website, governed by a US company. The website was a platform through which members could conclude credit contracts in cryptocurrency (bitcoin). The applicant agreed with a resident of Greece to finance his enterprise by providing a credit of 1.13662301 bitcoin. The Greek debtor failed to fulfill his obligations, and he refused to return the bitcoin received. On the grounds of an arbitration agreement, an award was issued by an online arbitration court, located in the USA. The debtor appeared in the proceedings and was given the right to challenge the claim of the applicant. The court of first instance decided that the arbitral award may not be recognized in Greece for reasons of substantive public policy (CFI Agrinio 23.10.2018, unreported). The applicant lodged an appeal.

THE JUDGMENT OF THE COURT APPEAL

The appellate court began with a short description on the nature of bitcoin. It then mentioned the position of the European Central Bank with respect to the same matter. It concluded that the use of bitcoins endangers transactions both for the parties involved and the state. This comes from the fact that any income resulting from the use of cryptocurrency is tax-free, given that this kind of transactions are not regulated in Greece. Hence, importing capital in bitcoins and generally any kind of cryptocurrency, irrespective of the type of legal matter,

infringes the domestic legal order, because it favors tax evasion and facilitates economic crime, causing insecurity in commercial transactions to the detriment of the national economy.

As a result of the above, the recognition of an award which recognizes bitcoin as a decentralized currency unit (peer to peer), and orders the payment of a certain debt in bitcoins, runs contrary to public policy, i.e., to fundamental rules and principles of Greek legal order in present times, reflecting predominant social, financial, and political values.

Finally, by enhancing transactions in bitcoin and promoting its equalization to legal currency, the recognition of such an award in Greece would essentially disturb prevailing standards of the country, given bitcoin's sudden and unpredictable fluctuations [Western Continental Greece Court of Appeal 27.09.2021, unreported].

COMMENT

Unlike the profound analysis of the first instance court, the appellate court confirmed the judgment mechanically, with zero references to legal scholarship and case law. The developments in the subject matter between 2018 (publication of the first court's ruling) and 2021 (publication of the appellate court's judgment) were not taken into account. The Hellenic Republic has transposed crucial directives related to cryptocurrency (see DIRECTIVE (EU) 2019/713 of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA). New income tax rules and regulations focusing on cryptocurrency are prepared by state authorities. Even now, i.e., without a special law on cryptocurrencies, bitcoin profits must be declared for taxation purposes. Bitcoin exchange offices are active in the country. To conclude, the judgment seems to be alienated from contemporary times.

Referring to the judgment of the CJEU in the case Skatteverket / David Hedqvist (C-264/14), the first instance ruling underlined that the decision focused on the Swedish economic environment, which may not be compared to the situation in Greece. Therefore, and in light of recent developments in the country, we may hope that the courts will soon shift course towards a more pragmatic approach.

[Many thanks to Professor Euripides Rizos, Aristotle University of Thessaloniki, for his valuable insight into the field of cryptocurrencies]

EVENT ANNOUNCEMENT: Section 1782 (& Other Circuit Splits Regarding Arbitration) at the U.S. Supreme Court

The Center for International Legal Education at Pitt Law and the Chartered Institute of Arbitrators–North America Branch are jointly hosting a hybrid panel event on 21 April from 1-5ET.

This event will bring together academics, arbitrators, and counsel to discuss strategic considerations, best practices, and the legal discord in procuring third-party discovery in aid of arbitration. Top of the agenda will be a discussion of the recent Supreme Court argument regarding 28 U.S.C § 1782, which has given rise to nationwide discord regarding whether parties in international arbitrations can ask federal courts to order U.S. discovery in aid of arbitral proceedings.

Registration for both virtual and in-person attendance in Pittsburgh can be found here.

CILE-CIArb Event

“Victory or Defeat: Predictability vs. Confidentiality” – A Research

Project of the German Arbitration Institute (DIS) – 3 March 2022, 12 to 2 pm (Bonn time)

Arbitral proceedings are confidential, and this confidentiality is one of the biggest assets of arbitration. Arbitral awards usually must not be published without prior consent of the parties. However, as we all know, this confidentiality makes it difficult for parties to predict outcomes in a concrete case and the public is kept from learning about lines of case law and from innovative developments in the practice of arbitral tribunals. This problem is particularly relevant in relation to M&A disputes that hardly ever occur in state court litigation. This is the reason why a working group of the German Arbitration Institute (DIS) analysed more than 100 awards from DIS arbitrations, and these awards of course often relate to international disputes. The question is anyway a fundamental one of transnational commercial law and dispute resolution in general. The results are presented by a distinguished panel.

Programme:

Dr Reinmar Wolff, member of the board of the DIS and University of Marburg: Welcome and Introduction

Part I

Karl Pörnbacher, Hogan Lovells International LLP, Munich: Violation of pre-contractual information duties

Professor Dr Siegfried Elsing, LL.M., Orrick Herrington & Sutcliffe LLP, Düsseldorf: Disputes in connection with price adaptation / earn out

Dr Günter Pickrahn, LL.M., Baker McKenzie Rechtsanwaltsgesellschaft mbH, Frankfurt, Calculation of damages after violation of balance sheet warranties

Discussion

Johanna Wirth, LL.M., Hengeler Mueller Partnerschaft von Rechtsanwälten mbB, Berlin: Moderation

Part II

Prof Dr Gerhard Wagner, LL.M., Humboldt University Berlin: Predictability v. Confidentiality: What is the right balance?

Dr Elmar Schweers, RWE Power AG, Essen: Response

Discussion

Johanna Wirth, LL.M., Hengeler Mueller Partnerschaft von Rechtsanwälten mbB, Berlin: Moderation

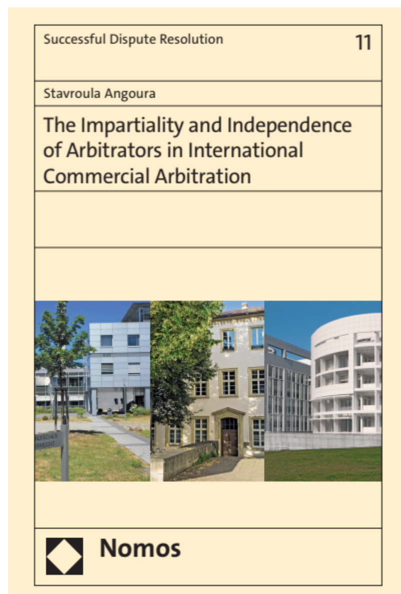
The language of the online event is German.

For more information see here: https://255310.seu2.cleverreach.com/c/68157384/58a830d933b-r7cad2.

Please register by 1 March 2022 here (or via the link in the Programme): https://255310.seu2.cleverreach.com/c/68157385/58a830d933b-r7cad2.

You have questions? Email to: events@disarb.org.

Out now: Stavroula Angoura, The Impartiality and Independence of Arbitrators in International Commercial Arbitration



Impartiality is key to any kind of production of justice and probably one of the very few principles of "justice" recognized universally, see e.g. Amartya Sen, The Idea of Justice, Chapter 5: "Impartiality and Objectivity", pp. 114 et seq. with references also to non-Western traditions, see also e.g. Leviticus 19:15 (New International Version): "Do not pervert justice; do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly."; see also e.g. IBA Rules of Ethics, rule 1: "Arbitrators shall … remain free from bias". Thus, there cannot be put enough emphasis and thought on how to implement this command, for acting arbitrators as well as parties and reviewing state courts, when they ask themselves in countless greyish constellations how to behave or judge in order to avoid even the slightest perception of bias but also to abstain from unproductive "due process paranoia". The PhD thesis by Angoura, supervised by Burkhard Hess and published in the Luxembourg Max Planck Institute's series "Successful Dispute Resolution", offers solid information and thorough analysis on a comparative basis – highly recommended.

Milan Arbitration Week

From 7 to 13 February 2022, Università degli Studi, Milan and the European Court of Arbitration organize, in cooperation with Comitato Italiano dell'Arbitrato,

the Milan-based international law firms Bonelli Erede and DLA Piper, with the support of the Centre of Research on Domestic, European and Transnational Dispute Settlement, the Milan Arbitration Week which, through various events, deals with domestic arbitration, international commercial arbitration and arbitration in the field of international investment.

All the information is available at this link: https://www.transnational-dispute-management.com/news/20220207.pdf

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The Reform of Italian Arbitration Law

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On November 25, 2021, the Italian Parliament passed the long-awaited Enabling Act for "the efficiency of the civil trial" as one of the conditions attached to the Next Generation EU funding. Among its provisions, this law amends part of the Italian arbitration law with a view toward making arbitration in the country more appealing to individuals and foreign investors. Worthy of particular attention are the amendments regarding (1) the independence and impartiality of arbitrators, and (2) the arbitral tribunal's power to grant interim relief.

Up until now, the Italian Code of Civil Procedure (CPC) has not compelled arbitrators to disclose any fact or circumstance that would reasonably call into question their impartiality and independence. This is not to say, though, that Italian law neglects impartiality and independence on the part of arbitrators. To the contrary, Article 815 CPC enumerates several situations where arbitrators can be challenged for specific circumstances that are likely to give rise to justifiable doubts about their unbiased judgment. However, the Enabling Act aims at shoring up this reactive guarantee by introducing a proactive duty of disclosure, which directly burdens the arbitrators appointed. Specifically, Article

15(a) of the Act calls for an express mandate for arbitrators to disclose, upon acceptance of their appointment, any situation that may give grounds for a challenge under Article 815 CPC. Along those lines, Article 15(a) also introduces broad grounds to challenge an arbitrator for any "severe reason of suitability." Through these amendments, the Government commits to enhance the guarantee of fairness of the parties' fact- and law-finder at the very outset of proceedings, thus avoiding the costs associated with a challenge.

Arguably, the Enabling Act's most important innovation is contained in Article 15(c) and relates to the arbitrators' power to grant interim relief. To date, with the only exception of corporate law disputes, no arbitral tribunal whose seat is in Italy is vested with the power to provide provisional relief. Article 818 CPC leaves no room for doubt by proscribing any provisional remedies rendered by an arbitral tribunal. The magnitude of this provision is reflected, for instance, by Article 26 of the Milan Chamber of Arbitration's (CAM) Rules, which point out that the arbitral tribunal may issue interim measures unless "barred by mandatory provisions applicable to the proceedings." Article 15(c) enables the Government to empower arbitrators to grant interim relief as long as parties manifest the intent of achieving this end. Therefore, arbitrators will have the power to issue conservatory measures, subject to the Italian lex arbitri, if the arbitration agreement expressly provides so as well as references institutional rules that contemplate such a power (like the above-mentioned CAM's Rules). Understandably, Article 15(c) specifies that a national court issues the interim measures if a party seeks them before the arbitral tribunal has been fully appointed. Of course, the enforceability of said interim relief remains a prerogative of national courts. Lastly, Article 15(c) directs the Government to create a new appeal as of right whereby a party may challenge the arbitral tribunal's decision regarding the requested interim relief before a national judge. However, said appeal can be brought exclusively for errors of law enumerated in Article 829(1) CPC, which currently warrants an appeal designed to void the final award. It follows that a national judge will not be allowed to hear the appeal if the party avers errors of fact.

While awaiting the implementing regulations issued by the Government, these changes represent a desirable modernization of the Italian arbitration law and should therefore be hailed. However, while they bring Italy up to the speed of countries that are legally more appealing to foreign investors, it remains to be

seen whether they will be sufficient to effectively attract foreign investors or prove to be too late or too timid.