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Chapter 1 : Arbitration Rules | italaw

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Cheskin and Hans H. Hertell, Miami As could be expected, international arbitrations usually arise out of cross-border commercial transactions involving a complex interaction of laws. There are many issuesâ€"from the capacity of the parties to sign a contract to the recognition and enforcement of an awardâ€"that require the application of different laws and rules in order to resolve the dispute properly. In this context, questions often arise surrounding which laws or sets of rules should govern the underlying contract, the arbitration agreement and the arbitration procedure. This article is designed to provide a brief overview of these issues as they could play out in an international arbitration. Substantive Law Applicable to the Contract Substantive contractual issues most often refer to the interpretation, validity, rights of parties, performance, breaches and remedies derived from a contract. Given that in a cross-border transaction, laws from several jurisdictions may potentially apply, the question is what criteria should be used to determine the law governing these substantive contractual issues. Parties also may choose other sets of rules such as public international law, transnational law e. Mandatory Law There are some limits to the principle of party autonomy. These limits ordinarily involve laws that regulate matters of public policy within a given country. By way of example only, parties cannot opt out of United States securities laws when the object of the contract is raising capital in the United States, or exclude Venezuelan currency controls when the object of the contract is investing in Venezuela,4 or contract away Colombian environmental regulations when the object of the contract is constructing a power plant in Colombia. Lack of Express Provisions While parties usually provide for their choice of law applicable to the contract in express terms, what happens when the parties to a contract fail to do so? Generally, courts and arbitral tribunals resolve this issue by assessing party intent and selecting the law that the parties are presumed to have intended to choose. For example, in the absence of an express contractual provision, a Mexican arbitral tribunal resolving a dispute between a Mexican company and a U. In cases where no inference as to intent of the parties can be drawn, however, the governing law of the contract shall be the one resulting from the application of conflicts of laws rules from the seat of arbitration. Therefore, different laws may apply to the contract and the agreement to arbitrate. Similar to the substantive law applicable to the contract, the parties can choose the substantive law governing the arbitration agreement. The question is, again, what law should apply absent such agreement. Courts and arbitral tribunals differ about which approach to take. For example, the English Court of Appeals formulated a three-stage inquiry to establish the law of an arbitration agreement: In order to reduce uncertainty, the parties should use clauses stating in express and unequivocal terms the substantive law governing the arbitration agreement. Parties may also choose national or state laws either to govern the arbitral procedure or to supplement the rules of the selected arbitral institution. Lex Arbitri In addition to the procedural law chosen by the parties, the law of the seat of the arbitration, known as the lex arbitri, which the parties are also free to choose by virtue of their choice of arbitral seat, is a source of procedural laws affecting the rights and remedies available to parties. Because the lex arbitri often relates to matters of public policy, parties and tribunals are usually not allowed to circumvent these laws. Therefore, because the lex arbitri may take precedence over other freely chosen rules of procedure, and may subject the arbitral award to annulment if some aspect of the arbitral proceeding or award is found to violate the lex arbitri, parties should be careful in choosing the seat of the arbitration. Conclusion Parties have ample autonomy to choose the law or rules that apply to an arbitration. If chosen hastily, however, this freedom comes with inherent risks, as described above. Therefore, parties should make it a practice to recognize potential conflicts and issues at the outset; limit to the extent possible the number of potentially conflicting laws and rules governing the contract, the arbitration agreement and the arbitration proceedings; and aim to be consistent with national or state laws, including the lex arbitri. He focuses his practice on

international litigation and arbitration of commercial and investor-state disputes, including derivative litigation in U.

Chapter 2 : New Arbitration Law in Qatar | Herbert Smith Freehills â€“ Arbitration notes

The UNCITRAL arbitration rules as interpreted and applied: selected problems in light of the practice of the Iran-United States Claims Tribunal.

On 7 August , the arbitral tribunal issued the first procedural order available in Spanish only disclosing the fact that the parties to the arbitration had agreed to the application of the Rules on Transparency to their proceeding. The application of the Rules on Transparency in these cases represents not only a significant change in the way investor-state disputes are resolved, but the agreement of the parties to their application also suggests a change in the way states and investors view the public interest in the process. Under the Transparency Convention, the Rules on Transparency apply to claims arising under treaties "providing for the protection of investments or investors" concluded after 1 April , unless the relevant treaty expressly opts out of the Rules. The arbitration initiated by Iberdrola, against the Bolivian state, falls within the second category of treaties; that is, treaties concluded before 1 April In accordance with the Supreme Decree No. Iberdola argues that the Bolivian government has not compensated it for these alleged expropriations. The parties have agreed that the Permanent Court of Arbitration PCA will administer the case and that the language of the arbitration will be Spanish. The parties did not agree on the seat of the arbitration, leaving this matter for the tribunal to decide. Since the Bolivia-Spain BIT entered into force in thus before the 1 April commencement date for the Rules on Transparency , the Rules on Transparency could only apply to the arbitration if the parties to the arbitration so consented, which the parties did. Accordingly, the Tribunal decided that: Under Article 6 of the Rules on Transparency, an arbitral tribunal may close proceedings to the public, if it is necessary to prevent the disclosure of confidential information or it is necessary for logistical reasons such as space limitation of the arranged hearing facilities. BSG Resources Limited v. Interestingly, the arbitration does not originate from an investment treaty, rather it is a result of specific provisions contained in the Guinean Investment Code that establish that any disputes between the Guinean Government and foreign nationals should be settled by arbitration conducted according to the ICSID Convention. Furthermore, this dispute arises in the context of accusations of bribery committed by BSGR in order to obtain its mining license rights in Guinea back in In its Procedural Order No. The parties decided to modify some of the provisions of the Rules on Transparency to align them to their interests concerning the conduct of the arbitration. The parties agreed that: Finally, in order to protect confidential information during hearings, the parties agreed that the broadcast would be delayed by thirty minutes. The latest webcast was made in Spence International Investments et al. Upon the disagreement of the parties on the appropriate modality for enabling the hearing to be open to the public; the Tribunal determined that the hearing should be webcast. Thus, the considerable cost of live streaming is certainly a matter that the parties should contemplate when opting for public access to hearings. These decisions are significant because in neither case could either of the parties or the Tribunal insist on transparency in the proceedings. Both cases represent the first time parties to an investor-state arbitration publicly adopt the opt-in provisions of article 1 2 a of the Rules on Transparency. Furthermore, the decision in BSGR is a good example of how parties can take advantage of flexibility afforded to them by international arbitration. Thus, parties in international arbitration can benefit from the choice of procedural rules that are narrowly tailored to its specific needs.

Chapter 3 : the uncitral arbitration rules in practice | Download eBook pdf, epub, tuebl, mobi

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The Supreme Court of Canada Supreme Court has held that courts should not undertake a detailed consideration of evidence on stay applications to determine if any of the exceptions apply, but should leave that determination to the arbitration tribunal, at least in the first instance. Generally, parties are free to define the nature and scope of disputes they wish to have determined by arbitration. The parties must be treated with equality and be given a full opportunity to present their cases. Does the law prohibit any types of disputes from being resolved via arbitration? There is no answer content for this Question, as it is a new addition to the template that did not exist at the time of writing. Does the law of limitation apply to arbitration proceedings? In Canada, limitation legislation varies from province to province. Historically, in some provinces, limitation periods were regarded as matters of substantive law, and in other provinces they are considered matters of procedural law only. In addition, some provinces have expressly stated that statutory limitation periods apply to arbitral proceedings. For the purposes of enforcement proceedings under the New York Convention, limitation periods have now been determined to be "procedural". The Supreme Court has recently confirmed that Canadian limitation statutes apply to the enforcement in Canada of an arbitral award from a jurisdiction outside Canada. Generally, limitation periods for contractual claims in Canada are between two and six years from the date that the cause of action arose the breach. Limitation legislation typically provides that the running of time is postponed until the existence of the rights was discoverable with reasonable diligence. Some legislation further extends time if there is a later confirmation of the claim. Which arbitration organisations are commonly used to resolve large commercial disputes in your jurisdiction? There is a strong tradition of ad hoc domestic arbitration in Canada, as there has been no truly national arbitral institution until recently. However, its caseload consists primarily of British Columbia domestic arbitrations. All these international institutions frequently appoint Canadian persons as arbitrators in disputes not involving Canadian parties. See box, Main arbitration organisations. What remedies are available where one party denies that the tribunal has jurisdiction to determine the dispute s? Does your jurisdiction recognise the concept of kompetenz-kompetenz? Does the tribunal or the local court determine issues of jurisdiction? The concepts of separability and kompetenz-kompetenz are well recognised. The Supreme Court recently considered the division of responsibility between the arbitral tribunal and the court for determining whether a dispute should be arbitrated. The court held that a departure from that rule should be made only if both: The challenge is based solely on a question of law. The court is satisfied that the challenge is not a delaying tactic and will not unduly impair the conduct of the arbitration. What are the requirements for an arbitration agreement to be enforceable? Generally, an arbitration agreement must be in writing. The right to arbitration and the binding force of arbitral awards are contractual obligations based on the mutual intention and agreement of the parties. The principles of formation and interpretation of contract apply. A document signed by the parties. An exchange of letters, telex, telegrams or other means of telecommunication that provide a record of the agreement. An exchange of pleadings in which the existence of an agreement is alleged and not denied. In relation to domestic arbitration, the formal requirements are set out in provincial legislation. In Ontario, for example, an arbitration agreement is not required to be in writing. In addition, the Supreme Court has enforced arbitration agreements formed by web-based "click-through" agreements. An arbitration agreement will describe the: Scope of issues to be arbitrated. Place where the arbitration will occur. Any arbitral institution that is to supervise or administer the arbitration. Rules to be applied in the arbitration. Process for appointing arbitrators. Language of the arbitration. The parties may adopt a specific set of arbitration rules from an independent arbitral institution, or may create their own set of arbitration rules, or some combination of these.

Separate arbitration agreement The arbitration agreement can be included in the main contract or set out in a separate document. Unilateral or optional clauses 9. Are unilateral or optional clauses, where one party has the right to choose arbitration, enforceable? Yes, unilateral and option clauses are enforceable. Enforceability is a question of interpretation of the agreement granting that right. If the right to choose arbitration reflects the mutual understanding and agreement of the parties at the time the agreement was made, generally that agreement will be enforceable. In what circumstances can a third party that did not sign the contract incorporating the arbitral clause in question be compelled to arbitrate disputes relating to the contract in question? In what circumstances is a third party that did not sign the contract incorporating the arbitral clause in question entitled to compel a party that did sign the contract to arbitrate disputes relating to the contract? Does the applicable legislation recognise the separability of arbitration agreements? The requirements for an arbitration agreement are set out in provincial legislation, which varies with respect to the express recognition of the doctrine of separability of arbitration agreements. However, the case law across Canada clearly recognises the doctrine of separability. Challenging the validity of the contract containing the arbitration clause, even if successful, will not of itself invalidate the arbitration agreement. According to case law, the part of the contract containing an arbitration agreement is considered to be a separate and independent contract. Breach of an arbitration agreement What remedies are available where a party starts court proceedings in breach of an arbitration agreement or initiates arbitration in breach of a valid jurisdiction clause? Court proceedings in breach of an arbitration agreement If a party to an arbitration agreement, whether domestic or international, commences local court proceedings, the other party to the agreement can apply for an order staying the court proceedings. Canadian courts must stay court proceedings in favour of arbitral proceedings, whether international or domestic, if the relevant dispute falls within the scope of an arbitration agreement that is not: Incapable of being performed. A party to an arbitration agreement can also claim damages for breach of the arbitration agreement, but these claims are not common. Arbitration in breach of a valid jurisdiction clause The right to arbitration is a purely contractual obligation created by the agreement of the parties. Generally, Canadian courts recognise the principle that an arbitrator has the initial opportunity to decide jurisdiction. Typical objections to jurisdiction are based on arguments that the subject matter of the dispute is not arbitral because it falls outside the scope of the arbitration agreement or public policy. However, where the jurisdictional issue is based on undisputed facts and is based primarily on a question of law, the court will determine whether or not the dispute is arbitrable. Will the local courts grant an injunction to restrain proceedings started overseas in breach of an arbitration agreement? The Canadian courts can, and do, issue anti-suit injunctions to restrain parties from proceeding with litigation in court. To enjoin a court proceeding, the parties seeking the injunction must demonstrate that: A valid arbitration agreement exists. The arbitral forum acquired by the agreement is more appropriate than the judicial forum that is the subject of the injunction based on the principles of forum non conveniens. Granting the injunction would not unjustly cause a party to lose a legal right or advantage in the judicial forum. Joinder of third parties In what circumstances can a third party be joined to an arbitration or otherwise be bound by an arbitration award? There is no legislative regime in Canada enabling the joinder of third parties to an arbitration. Generally, arbitration awards are not binding on persons who were not parties to the arbitration. In certain circumstances, non-parties to the arbitration agreement can be bound by the arbitral decision. This generally occurs through the operation of doctrines of contract law such as agency, assignment or novation. The general rule in Canada is that arbitration, and the binding force of the arbitral decision, is a matter of contract, and there must be privity between the parties to the arbitration agreement. The ability of an arbitrator to take jurisdiction over a non-signatory is restricted by the doctrine of privity of contract. Must an arbitrator be a national of, or licensed to practice in, your jurisdiction in order to serve as an arbitrator there? There are no specifically required qualifications or characteristics other than independence and impartiality. Different and additional default rules apply to domestic arbitration under the relevant provincial legislation. Arbitrators must be independent and impartial. In an arbitration with three arbitrators, each party appoints one arbitrator and the two arbitrators

appointed then appoint a third arbitrator. Where the parties have agreed on a particular appointment process, any party can ask the court to take any necessary steps to secure an appointment if: Any decision of the court on an issue relating to the appointment of an arbitrator is subject to no appeal. The parties are free to agree on a procedure for challenging an arbitrator. In the absence of agreement, a party who intends to challenge the appointment of an arbitrator must, within 15 days of becoming aware of the appointment or the circumstances giving rise to the challenge, send a written statement of the reasons for the challenge to the arbitral tribunal. The arbitral tribunal must decide on the challenge. If the challenge is not successful, the challenging party may request, within 30 days after receiving notice of a decision rejecting the challenge, that a court determine the challenge. While such a request is pending, the arbitral tribunal, including the challenged arbitrator, can continue the arbitration proceedings and make an award. On withdrawal by the arbitrator. If the parties agree on termination. Procedure Commencement of arbitral proceedings Does the law provide default rules governing the commencement of arbitral proceedings? Applications can be made to the superior court in the province in which the arbitration is seated for the appointment of arbitrators.

Chapter 4 : Applicable Law to the Contract, Arbitration Agreement and Arbitration Procedure

The Rules cover all aspects of the arbitral process, providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitrators and the conduct of arbitral proceedings, and establishing rules in relation to the form, effect and interpretation of the award.

The New Arbitration Law has not yet been published in the Official Gazette and implementing regulations are yet to be issued, but the New Arbitration Law will come into force 30 days after this occurs. We set out below the key provisions of the New Arbitration Law. Jurisdiction The New Arbitration Law expressly recognises the fundamental principle of competence-competence, which provides that it is the arbitral tribunal that has competence to decide on its own jurisdiction. Jurisdictional challenges must be brought before the defence is submitted; however, the tribunal has the discretion to accept late challenges if it decides the delay is justified. Decisions on jurisdiction are subject to review by the Qatari Courts, although review by the Courts will not stay the arbitration. Procedural Rules Procedural objections are deemed to have been waived if parties do not raise an issue about a law or violated procedure at the time it happens. Interestingly, the New Arbitration Law sets out a framework of procedural rules for arbitrations, encompassing matters usually covered by the rules of arbitral institutions. While the New Arbitration Law allows parties to adopt a different set of procedures under Article 19, it will nonetheless be intriguing to see the way in which certain provisions which are drafted in a manner that may be construed as taking precedence over any agreed procedural rules will be interpreted in practice. Arbitrators The New Arbitration Law imposes a duty on arbitrators to observe the principles of impartiality and equality between the parties. Notably, arbitrators are granted a general immunity under Article 11, except in cases where they conduct their functions in bad faith, collusion or gross negligence. This will provide some comfort to foreign arbitrators considering appointment nominations in Qatar, particularly given the issues around the recent amendment to Article of the Penal Code in the UAE, and instances in Qatar of parties seeking to hold arbitrators financially and criminally liable for their actions. Parties are required to appoint an arbitrator from a list issued by the Ministry of Justice under Article 11, but can appoint their own arbitrators if the appointment complies with the following conditions: Although the conditions are fairly straightforward, we are yet to see the way in which these requirements will be interpreted and applied under the New Arbitration Law. Awards Awards under the New Arbitration Law are final and binding and the process of recognising and enforcing awards has to some extent been simplified. The award is final and capable of execution, with fairly limited grounds for refusal by courts based on the New York Convention. An award can be annulled through an application to set aside the award, which must be filed within one month of the award; any court judgment on an annulment application is final and not subject to appeal. However, an award can only be enforced after the expiry of the one month period provided for challenging the arbitration award. The New Arbitration Law provides that an award is to be kept confidential unless agreed otherwise, however, it also imposes a requirement that a copy of the award is sent to the Arbitration Affairs Department at the Ministry of Justice within two weeks of it being issued. It is unclear how these awards will be used by the Ministry and what duties of confidentiality will apply to the department. Nonetheless, it is hoped that this duty would implicitly remain applicable to those in the department who gain access to it. Requests for additions or corrections to the award are to be submitted within 7 days, and if it is impossible for the arbitral tribunal to deal with these requests for any reason, the courts will have the jurisdiction to do so. Nevertheless, it remains to be seen how the onshore Qatari courts will respond the New Arbitration Law.

Chapter 5 : UNCITRAL Arbitration Rules

*UNCITRAL Arbitration Rules as Interpreted and Applied: Selected Problems in the Light of the Practice of the Iran-United States Claims Tribunal [Caron Pellonpaa] on calendrierdelascience.com *FREE* shipping on qualifying offers.*

The tribunal rejected the objection and found it had jurisdiction over the dispute. The tribunal found that: The BIT had not been terminated. The relevance of EU law to the dispute did not make the dispute non-arbitrable. The dispute will now proceed to the merits phase. The award illustrates the potential competition between two overlapping regimes of international economic law: When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefore The claimant was a Dutch financial services group. Slovakia raised a jurisdictional objection, arguing that its accession to the EU in had terminated the BIT or rendered its arbitration clause inapplicable. The incompatibility concerned, among other things, the BIT provisions covering transfers of capital and arbitration. As the subject matter of the dispute was governed by EU law, the ECJ had exclusive jurisdiction over the dispute due to its "interpretative monopoly" with regard to EU law. The tribunal had no jurisdiction to decide a dispute governed by EU law. The dispute was not arbitrable under the law of the seat of the arbitration German law because it was governed by EU law. The tribunal invited the European Commission and the Netherlands government to file written observations. The European Commission observed, among other things, that: Certain provisions of the BIT, in particular, the investor-state arbitration mechanism, raised "fundamental questions regarding compatibility with EU law". Investor-state arbitration undermined the principle of mutual trust in the administration of justice in the EU. The exclusive jurisdiction to determine whether a member state had terminated its obligation under the EU law rested with the Luxembourg courts. Under the EU judicial system, investors from one member state must address their claims against another member state in national courts, or refer the issue to the European Commission. Investor-state arbitration under intra-EU BITs could create discrimination between investors from different member states and, as a result, was in conflict with EU law. The Commission disagreed that such discrimination could be resolved positively, by granting all investors the same preferential rights. This did not make the BITs invalid but meant that they could not be applied where they conflicted with the EU law. In the event of such a conflict, the BIT provision had to be interpreted in the light of the EU law, not the other way round. The claimant had already lodged a complaint with the Commission against Slovakia in relation to the present dispute and the Commission proceedings were pending. Continuing the arbitration posed a risk of conflicting decisions or an award that was inconsistent with EU law. For these reasons, the Commission suggested suspension of the arbitral proceedings. Decision The tribunal found that it had jurisdiction. To terminate the BIT, the parties should have followed the procedure set out in Article 65 1 of the VCLT, which required, among other things, a formal notification, which Slovakia had failed to give. Notification under Article 65 5 of the VCLT in response to the claim of the breach of the BIT was not available to Slovakia because the claimant was not a party to the BIT; there was no evidence of any intention that the provisions of EU law should entirely displace the provisions of the BIT; Article 59 of the VCLT concerned termination of the entire treaty, and its application could be triggered only in the case of a broad incompatibility between the BIT and EU law. There was no such incompatibility here; the claims raised by the claimant under the BIT were not covered by EU law. The fact that a BIT granted wider rights to investors than

those granted by EU law could amount to discrimination. The host member state was not prohibited from granting equivalent rights to investors from other member states. Substantive BIT obligations, however, were not relevant at the jurisdictional phase. Only the BIT arbitration clause could be considered at this stage of the proceedings. The arbitration clause was not incompatible with EU law, which does not prohibit investor-state arbitration. The ECJ had no general interpretative monopoly over EU law but rather "a monopoly on the final and authoritative interpretation of EU law". The tribunal could interpret and apply EU law in the merits phase and this did not deprive it of its jurisdiction. The potential application of EU law did not make the dispute non-arbitrable. The tribunal refused to suspend the proceedings pending the proceedings before the European Commission. It did not consider the proceedings to be so close as to be "a cause of procedural unfairness or serious inefficiency. The legal status of these BITs is controversial and so far unresolved. More generally, the award and the arguments of the European Commission and the tribunal in particular , illustrate the competition between two regimes of international economic law: They represent competing principles and interests and there are currently no special rules for resolving the conflicts between them. For further discussion, see Legal updates, Commission publishes EU investment policy and sets its approach to bilateral investment agreements member states and third countries and Council adopts conclusions on a European foreign direct investment policy.

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shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.