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Maxi Scherer (WilmerHale & Queen Mary University of London) · Thursday, June 16th, 2016

Volume 33 Issue 3 contains:

ARTICLES SECTION

Richard HAPP & Sebastian WUSCHKA, *Horror Vacui*: Or Why Investment Treaties Should Apply to Illegally Annexed Territories

Abstract: The 2014 Crimea crisis, in addition to issues of general international law, triggered questions relating to international investment law and arbitration. One of these is to what extent a state's investment treaties bind that state on another state's territory which it has put under its control by means of annexation. Starting from the assumption that annexation must not be recognized as legal, it seems necessary to adjust the application of this principle of non-recognition in the case that it ultimately benefits an aggressor. Such a situation might arise with respect to investment claims. Having impaired investments in an annexed territory, investors might want to hold the annexing state liable. However, as a jurisdictional hurdle, they need to satisfy a common criterion of investment treaties, which require investments in the territory of the contracting parties. A strict application of this territorial nexus by a tribunal would deprive investors of protection under international investment law. The interest of the international community to sanction illegal acquisition of territory thus clashes with the individual's interest to have the investment protected under international law. The result might leave the investors in a legal vacuum. Addressing the issue on an abstract level, this article argues that an extension of a state's investment treaties to annexed territories can well be founded in the law of treaties and is supported by custom and general principles.

Patrick DUMBERRY, The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law

Abstract: This article examines the question of the role and relevance of arbitral awards in the formation, development and evolution of customary rules in international investment law. Judicial decisions and arbitral awards are not formal

sources of international law. They cannot be considered as evidence of state practice for the formation of customary rules. Yet, while international judges or arbitrators have no formal role in the creation of these rules, they nevertheless play an essential role in "revealing" their existence as well as in their development and evolution. Thus, any decision/award containing a comprehensive and persuasive analysis (based on a detailed examination of both state practice and *opinio juris*) on whether or not a given rule should be considered as custom will greatly influence other future tribunals as well as the subsequent practice of states. I will observe in this article, however, that arbitral tribunals have so far generally failed in their task of properly revealing the existence of customary rules. Thus, instead of conducting their own analysis of practice and *opinio juris*, they generally simply rely on the findings of other tribunals.

Justin P. LEE, Lessons from Cuba: Case Commentary on Exemption from Damages and the Right to Interest under the CISG

Abstract: This commentary analyzes a recent 2014 decision from the Cuban Court of International Arbitration, *Empresa Italiana X v. Empresa Mixta Y*. It addresses two issues raised by the case: (1) whether the Cuban buyer should have been exempt from liability for damages under Article 79 of the 1980 Vienna Convention on the International Sales of Goods, (CISG), because, after the conclusion of the parties' contract, the Cuban government, through the Central Bank of Cuba, established a new regulation that required the buyer to obtain a letter of liquidity from the Central Bank, which it failed to do; and (2) whether the parties derogated from the right to charge interest under Article 78 of the CISG because they agreed in their contract that no penalty would be applied for late delivery of the goods or for late payment. The commentary concludes that the arbitral panel erred by failing to exempt the Cuban buyer from liability under Article 79 and by failing to award the Italian seller interest under Article 78. It hopes to aid international arbitration practitioners dealing with cases subject to Cuban law or who may have such matters in the future.

James MENZ & Anya GEORGE, How Much Assistance Is Permissible? A Note on the Swiss Supreme Court's Decision on Arbitral Secretaries and Consultants

Abstract: This case note discusses the Swiss Supreme Court's May 2015 decision on the use of arbitral secretaries and legal consultants. It places the ruling in the context of the current international debate about arbitral secretaries, spurred by the Yukos appeal, the Young ICCA and other surveys, and institutional guidelines and notes, focusing on the central issues of appointment, payment, and scope of duties. It concludes that while the decision has certain shortcomings, it represents a milestone and an appropriate, endorsement of the use of arbitral secretaries in arbitration.

BOOK REVIEWS

Sigvard JARVIN, Book Review –ICC Arbitration in Practice, by Herman Verbist, Erik Schäfer, and Christoph Imhoos, 2nd edn.

Jonathan LIM, Book Review – Arbitration in China: A Practitioner's Guide, by

Wei Sun and Melanie Willems.

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