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Maxi Scherer (WilmerHale & Queen Mary University of London) · Friday, September 9th, 2016

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ARTICLES SECTION

Stephan Wilske & Chloë Edworthy, The Future of Intra-EU BITs: A Recent Development in International Investment Treaty Arbitration Against Romania And Its Potential Collateral Damage

Abstract: The article explores the debate surrounding intra-EU investment treaty arbitration and the intervention of the European Commission in an investment treaty arbitration against Romania. The European Commission has demonstrated great appetite to pursue its own agenda in multiple proceedings generating an outcome which, it is argued, is likely to lead to an uncertain future for foreign direct investment in Romania and several other Member States. The article warns that if the Commission is not prepared to countenance that international law obligations can prevail over EU law (at least in so far as it is interpreted by the Commission) a dangerous precedent may be set and there could be adverse consequences for the rule of law.

Sam Luttrell & Peter Harris, Reinventing The Redfern

Abstract: The ‘Redfern Schedule’ – a device used to organise requests for the production of documents in arbitration – was initially conceived as a way of limiting document production to the documents critical to each party’s case, and avoiding the costs and delays associated with discovery in common law jurisdictions. Despite these noble intentions, it is apparent that Redfern-governed document production is too often ending up like US-style discovery, and that thought needs to be given to how the Redfern Schedule might be modified to deal with this trend – the cost consequences of which are bad for parties and arbitration alike. To that end, the authors propose various ways through which parties can minimise the costs of document production through creative use of the Redfern schedule, whilst retaining strategic imperatives and ensuring they do not alienate the Tribunal.

Bas van Zelst, Unilateral Option Arbitration Clauses in the EU

Abstract: This article analyses the operation of unilateral option arbitration clauses (UAC) in the European context. The approach to UACs varies depending on the Member States of the European Union. This has lead to significant uncertainty. This uncertainty is attributable partly to the recent

amendments in the recast Brussels I Regulation which has come into force on 10 January 2015. Under the Recast Regulation, the substantive validity of jurisdiction clauses is governed by the law of the chosen forum. After an introduction (Section 1) and a discussion of the typical wording and use of UACs (Section 2), Section 3 sets out the framework applicable to the assessment of jurisdiction clauses in the EU. Section 4 submits that the framework relevant to the assessment of the law applicable to UACs is provided by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and discusses the operation of this Convention in the context of UACs. Section 5 provides a comparative assessment of the approach to the validity of the UACs in the UK, Germany and France.

Arthad Kurlekar, Space The Final Frontier – Analysing Challenges of Dispute Resolution Relating to Outer Space

Abstract: The development of outer space law at an international level has arguably stagnated after the Moon Agreement in 1979. With the rise in private space activities from the end of the 20th century, a robust framework for dispute resolution has become an increasingly vital necessity in the Space law regime. Scholars have theorised several schemes for settlement of disputes such as consultative ADR, a tribunal for the settlement of space law disputes, a multi-door courthouse etc. but very few concepts have transformed into operable mechanisms. In space law at the international level, diplomatic consultation, claims commission under the Liability Convention, the international court of justice and in support of arbitration, the rules of the Permanent Court of Arbitration for the Settlement of Disputes relating to Outer Space 2012 remain the only existing viable mechanisms. The paper evaluates all these forums for dispute settlement to demonstrate their inadequacies. Thereafter, having identified its long-term limitations, the paper seeks to justify a multi-tiered arbitration clause as an effective means of settlement of disputes relating to outer space.

Victoria Narancio & Laura Galindo-Romero, Colombia: New Presidential Directive Seeks to Increase Governmental Oversight Over Arbitration Agreements And The Arbitral Selection Process

Abstract: This article summarises Colombia’s new 2015 presidential directive which seeks to increase governmental control over the use of arbitration agreements in state contracts, and the arbitral selection process in disputes arising out of these contracts. It also addresses certain potentially undesirable consequences that might arise from the presidential directive and proposes a number of practical steps that the Colombian government could take to ensure public officials continue to enter into arbitration agreements and thus reduce the potential anti-arbitration impact of the 2015 presidential directive.

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