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Issue 34, Volume 2 contains:

Michael W. Bühler & Pierre R. Heitzmann, The 2017 ICC Expedited Rules: From Softball to Hardball?

Abstract: The 2017 ICC Rules of Arbitration, in force since 1 March 2017, have adopted new provisions for expedited procedures with the objective of having final awards issued by sole arbitrators six months after the first case management conference. These new provisions apply whenever the value of the claims in question is under U.S.$2 million. Users of ICC arbitration can opt in to or opt out of the expedited procedures provisions, partially or totally, regardless of the amount in dispute. The decision to institutionalize expedited procedures is an implicit admission that the objectives of the 2012 Rules have not been met when it comes to improving the time- and cost-efficiency of ICC arbitrations. The new provisions offer users dissatisfied with increased time and costs of arbitration an alternative to expedite the resolution of their disputes under the ICC Rules. While this offer is not novel in the landscape of international arbitration, it is to be welcomed, although it entails new challenges for users, arbitrators, as well as the ICC Court and its Secretariat. In practice, expedited procedures may increase due process challenges by dissatisfied litigants, before and after awards are issued. For these reasons, more than before, selecting a pro-arbitration seat will be important.

Michael Polkinghorne & Sven-Michael Volkmer, The Legality Requirement in Investment Arbitration

Abstract: Many investment treaties require foreign investments to be made or owned 'in accordance with' or 'in conformity with' the laws of the host State. Some treaties incorporate this 'legality requirement' in the definition of investment, whereas in other treaties it can be found in substantive provisions on investor protection. This article explores three specific issues with respect to the legality requirement in investment arbitration: what is the source of the legality requirement, what is its scope, and is legality a jurisdictional or a merits issue? The article provides an overview of the answers that arbitral tribunals have given based on a selection of awards.

Andrzej Olaś, May International Arbitral Tribunals Declare Laws Unconstitutional? An International and a Polish Perspective on the Issue of Dealing with Unlawful Laws

Abstract: This article focuses on the issue of the international arbitral tribunals' authority to disregard supposedly applicable statutory provisions of a given national law, which it deems to be non-compliant with relevant constitutional norms from the perspective of the Polish constitutional and

arbitration law. Due to the fact that, in recent years, the present issue attracted a significant attention from the international academia, the analysis of the article begins with the report of various positions adopted by some of the leading international scholars on the matter in question. This initial study provides a firm basis for further exploration of this issue in light of the Polish law, which is preceded by a brief summary of the fundamental constitutional principles and notions underpinning the contemporary Polish legal order. Such critical analysis drives the author to a conclusion that there are no sufficiently persuasive arguments which would justify barring international arbitrators from applying the Polish substantive law in its entirety, including denying application of provisions violating the Constitution, which will supersede other normative acts. Conversely, the exercise of such arbitral review amounts to a basic duty of arbitrators (integral part of their mandate to resolve a dispute in accordance with the Polish law as the applicable substantive law of a dispute) rather than their discretionary authority.

Irene Han, Rethinking the Use of Arbitration Clauses by Financial Institutions

Abstract: In 1995, this journal published an article considering the use of arbitration clauses in the area of banking and finance, which was observed to be “practically non-existent” at the time. In the two decades that have followed, financial institutions have gradually increased their use of arbitration clauses. However, arbitration has yet to become the norm in resolving international financial disputes, and there is a gap between the use of arbitration in the field of banking and finance and in the general commercial sphere. This article explores the justifications provided for this gap – in particular, financial institutions’ traditional preference for litigation – to argue that many of these justifications are in fact misconceived. The article also highlights fundamental characteristics of arbitration that make it highly appropriate for use in the financial context. In particular, four widely used financial transactions are identified as being highly suited to arbitration. The article then considers two case studies of current efforts being made to promote the use of arbitration clauses. Finally, three suggestions are proposed to further facilitate the increased use of arbitration clauses by financial institutions.

Maxim Osadchiy, Emergency Relief in Investment Treaty Arbitration: A Word of Caution

Abstract: Emergency interim relief – a procedure widely available in commercial arbitration – is now being put to use in investment treaty cases. Five documented cases of emergency interim relief in the investment treaty context are known today. The article discusses these cases and uses them as a basis for assessing some of the issues that are likely to arise with the application of emergency interim relief in future investment treaty cases. The article argues that emergency interim relief in its current form, an instrument developed with commercial arbitration in mind, may not be entirely suitable for investment treaty arbitration, due to the unique features of the latter. While acknowledging the utility of emergency interim relief in investment treaty arbitration, the article suggests that the existing rules regarding emergency interim relief and the treatment of emergency relief applications by emergency arbitrators could be changed to adequately take into account challenges unique to investment treaty arbitration.

Adam J. Weiss, Erin E. Klisch, and Joseph R. Profaizer, Techniques and Tradeoffs for Incorporating Cost- and Time-Saving Measures into International Arbitration Agreements

Abstract: Empirical research reveals that users of international arbitration view undue time and cost as international arbitration’s worst attributes. This article offers some potential solutions to combat this increasing dissatisfaction, focusing on a prophylactic approach in which parties are encouraged to negotiate and incorporate cost- and time-saving measures directly into the arbitration clause of their underlying contract.
In the early stages of a commercial relationship, parties operate behind a “veil of ignorance,” a

concept derived from modern social philosophy in which members of a nascent society are prevented from knowing what position they will occupy in that society. Without the knowledge of how the future society's rules and policies might affect them personally, each participant will be naturally inclined to promote, agree to, and implement rules and policies that are fair and advantageous to all. Likewise, if parties to a nascent commercial relationship address cost- and time-saving techniques during the earliest stages of that relationship, they will be incentivized to agree to a dispute resolution framework that reduces time and costs more effectively than if they sought to implement those measures after a dispute has arisen.
This article discusses several suggested measures designed to increase the economy and efficiency of international arbitration, along with a discussion of the respective tradeoffs and practical limitations of including those measures in the parties' arbitration agreement.

Paul Comrie-Thomson, A Statement of Arbitral Jurisprudence. The Case for a National Law Obligation to Publish International Commercial Arbitral Awards.

Abstract: The confidentiality attaching to arbitral proceedings and awards remains of uncertain scope globally and is a matter of continuing debate. The weight of opinion appears, however, to be shifting in favour of greater transparency. As part of this trend, a number of scholars and commentators have made a strong case for the sanitized publication of arbitral awards by arbitral institutions. This article goes a step further and makes the case for a national law obligation to publish awards. It does so on the basis that there are significant public interests in the making available of certain information contained within arbitral awards which arbitral institutions have little or no incentive to provide. The article proposes a "statement of arbitral jurisprudence"—an annual publication by a state of the purely legal elements of decisions of arbitral tribunals seated in that state—as an appropriate mechanism. The statement of arbitral jurisprudence would achieve a careful balance in facilitating access to information that meets these public interests without discouraging the use of arbitration.

Toms Krūmiņš, Arbitration in Latvia: A Cautionary Tale?

Abstract: This article endeavours to explore the thorny development of arbitration in Latvia. Having started off on the wrong foot in the 1990s, the arbitration environment in Latvia is still far from being perfect. Contrary to its neighbouring Baltic states, Latvia has continuously ignored the possibility of adopting the UNCITRAL Model Law and currently deals with the adverse consequences of an ill-functioning arbitration system, rather than provides for appealing and efficient arbitration environment. All the more, by introducing disproportionately strict qualification requirements for arbitrators and still not providing a mechanism for challenging arbitral awards, the recently adopted 2015 Law on Arbitration is a severe disregard of fundamental international arbitration principles and standards.

Paschalis Paschalidis, The Future of Anti-Suit Injunctions in Support of Arbitration After the EU Court of Justice's Judgment in the Gazprom Case

Abstract: By its judgment of 10 February 2009 in Allianz and Generali Assicurazioni Generali (C-185/07, EU:C:2009:69), the EU Court of Justice declared anti-suit injunctions issued by Member States' courts in support of an arbitration contrary to the Brussels I Regulation if proceedings between the same parties and on the same matter had been commenced before the courts of a Member State. However, in its judgment of 13 May 2015, Gazprom (C-536/13, EU:C:2015:316), the Court ruled that the said Regulation posed no obstacle to the recognition and enforcement of such injunctions when issued by arbitral tribunals. Since then, the Brussels I Regulation (recast) has come into force. Its recital 12 removes the foundation on which the Court based its judgment in Allianz and Generali Assicurazioni Generali, paving the way for Member States' courts to issue anti-suit injunctions in support of arbitrations.