Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Thursday, November 28th, 2019

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Kathrin Betz, Stéphane Bonifassi, Nadia Darwazeh & Mark Pieth, *Navigating Through Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators and Counsel*

Arbitral tribunals and counsel have to address corruption and money laundering with ever increasing frequency in both commercial and investment arbitration. In light of the growing regulation and awareness in this area, as well as the risk that an award may not be enforceable, arbitrators can no longer shy away from dealing with corruption and money laundering. Since no clear guidelines were available to arbitrators and counsel in the past, it was more often than not a daunting task to work through such complex issues. Earlier this year, the Competence Centre for Arbitration and Crime of the University of Basel and the Basel Institute on Governance published a Toolkit that will assist arbitrators and counsel in navigating through issues of corruption and money laundering. In this article, the authors, who were closely involved in the conception and drafting of the Toolkit, share the background and the aims of the Toolkit and provide a brief overview of its workings.

Michal Kaczmarczyk & Joanna Lam, *The Future of Arbitration: A Poet's Prophecy*

In this study, the authors argue for a more refined methodology in research on commercial arbitration. Drawing on new developments in international commercial arbitration, they seek to create a typology of various aspects of legal conflict resolution and, as a consequence, to increase the relevance of empirical work on this topic. The article identifies three key areas of tensions, which generate new developments in commercial arbitration and cannot be addressed from the perspective of the existing sociological paradigms. First, the tension between procedural formality and flexibility can be observed, as reflected in the well-established judicialization trend, combined with a recent renewed interest in mediation and 'soft' hybrid procedures. Second, the confluence of global and local factors (as seen in the American and Asian 'waves' in arbitration) affects, inter

alia, the professional culture of arbitration practitioners. Finally, the tension between public and private interests and values, which influences procedural preferences and solutions in the field of commercial arbitration, can be identified.

Gautam Mohanty & Raghav Bhargava, ***Separability of Arbitration Agreement in Mutual Termination of Contracts in India: A Legislative Guideline***

The separability for an arbitration agreement from the underlying contract is a well-established theory in commercial arbitration by courts and arbitral tribunals across the globe. However, the position becomes complex in circumstances where the underlying contract is mutually terminated between the parties. Jurisdictions across the globe have adopted a different approach to this kind of separability either through legislative provisions or judicial decisions. Unfortunately, the position remains rather unclear in India due to conflicting judicial decisions of the Bombay High Court and lack of any authoritative ruling by the Supreme Court of India. This article aims to conduct a comparative analysis of various national systems as well as international rules and arbitral institutions regarding this theory and to suggest the way forward for India.

Daniel Garcia-Barragan, Alexandra Mitretodis & Andrew Tuck, ***The New NAFTA: Scaled-Back Arbitration in the USMCA***

In December 2018, the United States, Mexico, and Canada entered into the United States- Mexico-Canada Agreement (USMCA), a new multilateral investment agreement to replace the 1994 North America Free Trade Agreement (NAFTA). This article summarizes the differences between the investor-state dispute settlement (ISDS) provisions provided in Chapter 11 of NAFTA and those covered in Chapter 14 of the USMCA from the perspective of the United States, Mexico and Canada. This article covers when an investor can assert claims under the USMCA (including NAFTA claims for legacy investments), what kind of claims can be brought, and what rules govern in USMCA arbitrations. The authors of this article conclude that the USMCA provides diluted ISDS provisions compared to NAFTA's Chapter 11.

Nduka Ikeyi & Gabriel Onovo, ***Re-examining the Legal Basis for the Co-existence of Federal and State Arbitration Laws in Nigeria***

The National Committee on the Reform and Harmonisation of Arbitration and ADR Laws in Nigeria recommended the co-existence of a federal arbitration law (dealing with arbitration arising from international and inter-state transactions) and state arbitration laws (dealing with arbitration arising from intra-state transactions). In arriving at its conclusion, the committee relied on the 'trade and commerce' argument as well as the 'pith and substance argument'. But disagreement exists regarding the scope or application of state arbitration laws vis-à-vis the federal arbitration law. Whilst anchoring our foundational argument on the constitution, we will in this article contend that a conflict of laws approach would provide a valid conceptual framework and the mechanics for the co-existence of a federal arbitration law with state arbitration laws in Nigeria.

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