

Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Tuesday, February 4th, 2020

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

Markus PETSCHKE, *Restrictive Interpretation of Investment Treaties: A Critical Analysis of Arbitral Case Law*

This article critically discusses the recourse to the principle of restrictive interpretation (*in dubio mitius*) by treaty-based investor-state arbitral tribunals. Although its status as a rule of international law is at best controversial, *in dubio mitius* has been applied by a number of arbitral tribunals interpreting umbrella clauses and most-favoured-nation (MFN) provisions contained in investment treaties. This article shows that restrictive interpretation is inappropriate and undesirable. It highlights, first of all, that no rational justification for *in dubio mitius* exists and that the sovereignty-based rationale put forward is obsolete, illogical and largely dysfunctional. It also shows that restrictive interpretation frequently clashes with other, more fundamental, rules of treaty interpretation and that *in dubio mitius* interpretation of investment treaties has an inherently discriminatory effect on investors.

Kabir A.N. DUGGAL & Rekha RANGACHARI, *A Challenger Approaches: An Assessment of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration*

It is no secret that some lawyers, and perhaps civil law lawyers in particular, have felt frustration with the status quo of the evidentiary processes of international arbitration, premised primarily on the International Bar Association (IBA) Rules on Taking of Evidence in International Arbitration ('IBA Rules'). This outcry was vocalized at the Russian Arbitration Association's Conference held in Moscow in April 2017, which ultimately contributed to the formation of a Working Group that developed the Rules on the Efficient Conduct of Proceedings in International Arbitration ('Prague Rules'). This article strives to elucidate the mechanics of the Prague Rules. An understanding of these new provisions, however, cannot be achieved in a vacuum; as such, much of the analysis will touch upon the IBA Rules and their relationship to the Prague Rules. This article provides a critical, comparative analysis of the Prague Rules.

Jose F. SANCHEZ, *Applying the Model Law's Standard for Interim Measures in International Arbitration*

Commentators and practitioners regard Article 17A of the Model Law on International Commercial Arbitration as the international standard for interim measures in international arbitration. Practitioners apply Article 17A often, even when the jurisdiction whose law is relevant to the case has not adopted it as domestic legislation, and even in emergency arbitrations and in investment treaty arbitrations.

To apply Article 17A correctly, however, practitioners must look at Article 2A(1) of the Model Law, which orders practitioners applying any Article of the Model Law, including Article 17A, to follow several mandatory principles of construction. Specifically, Article 2A orders practitioners to have ‘regard’ to the ‘international origin’ of the Model Law, ‘the need to promote uniformity in its application,’ and ‘the observance of good faith.’

Those principles of construction of Article 2A(1) have four specific and mandatory consequences on the application of the standard set forth in Article 17A, namely, that practitioners (1) must consider Article 17A’s *travaux préparatoires*, and must apply Article 17A in a way that does not contradict those *travaux préparatoires*; (2) must consider, but are not bound to follow, the publicly-available decisions by courts and arbitrators around the world that have applied Article 17A and the scholarly writings that have analysed it; (3) cannot construe Article 17A only under the canons of construction that they would apply to a domestic statute in the jurisdiction relevant to the case; and (4) must factor in equitable considerations.

This article helps practitioners with the first two of those four consequences. Specifically, to help practitioners apply the standard for interim measures set forth in Article 17A uniformly and correctly, *i.e.* in a way that complies with Article 2A’s mandatory principles of construction, this article analyses the *travaux préparatoires* of Article 17A, the scholarly writings that have analysed that article, and the publicly available decisions by courts and arbitrators around the world that have applied it, including decisions issued by arbitrators acting for the International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA), and excerpts of non-publicly available decisions issued by arbitrators acting for the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC).

For the reader’s convenience, this Article analyses the *travaux préparatoires* and applicable authorities separately for each of the following elements of Article 17A’s standard: burden of proof; urgency; likely harm not adequately reparable by an award of damages; balance of convenience; reasonable possibility of success on the merits; jurisdiction; and other elements and considerations.

That analysis results in several principles of construction relevant to each element of Article 17A’s standard. The article ends with a chart – effectively a cheat sheet for practitioners – that lists those principles of construction for each element of the standard, and explains the rationale of those principles. It is the author’s hope that this chart will help practitioners apply each element of Article 17A’s standard correctly and uniformly.

Alireza SALEHIFAR, Rethinking the Role of Arbitration in International Tax Treaties

The dispute resolution system of Double Tax Agreements (DTAs) has been a major focus for both tax authorities and researchers around the world. For several years Article 25 of the Model Tax Convention of the Organisation for Economic Co-operation and Development on Income and on Capital ('OECD Model Tax Convention'), and Article 25 of the United Nations Model Double Taxation Convention between Developed and Developing Countries ('UN Model Tax Convention') had relied on a negotiation-based Mutual Agreement Procedure (MAP) as the only mechanism for the resolution of disputes arising from a tax treaty. In order to improve the function of the MAP mechanism, the OECD, in 2008, and the UN Tax Committee, in 2011, introduced a binding ad hoc arbitration clause in Article 25(5) of their respective Model Tax Conventions. However, the OECD and UN Model Tax Conventions have reserved very limited role for arbitration in resolving tax treaty disputes. After establishing that the inclusion of the current arbitration clauses in the OECD and UN Model Tax Conventions have not assuaged the tensions created by divergent interpretation or application of rules espoused in DTAs, this article examines possible techniques for improving the dispute resolution system of DTAs.

Lars MARKERT & Raeesa RAWAL, Emergency Arbitration in Investment and Construction Disputes: An Uneasy Fit?

This article examines the compatibility of emergency arbitration with (1) investment treaty disputes and (2) construction disputes, respectively. The article begins by giving a brief synopsis of the evolution of emergency arbitration, following which its suitability to investment treaty disputes and construction disputes is considered. The authors provide critical analysis of the compatibility of the emergency arbitration procedure with pre-arbitral requirements in both of these categories of disputes. The authors conclude that the practices surrounding emergency arbitration need to be developed further, and specifically, the issues surrounding enforcement need to be resolved.

Kayihura Muganga DIDAS, John Mwemezi RUTTA & Claire Umwali MUNYENTWARI, Striking a Balance Between Assistance and Interventionism: The Role of Courts in Rwanda-Seated Arbitrations

The African Arbitration Association was established in 2018 and its headquarters is in Kigali, Rwanda. This choice of location signals that Rwanda has made meaningful strides in improving its arbitration environment, at least in the opinion of African states. Many questions will arise as to whether Rwanda-seated arbitrations do indeed rest in a legally friendly environment, and receive optimum support of courts which act to foster the efficiency and effectiveness of arbitrations.

The interplay between courts and arbitral tribunals in dealing with Rwanda-seated arbitrations is the subject of this article. Party autonomy, which broadly underscores the freedom of the parties to decide how their disputes should be resolved, is one of the most important principles in arbitration. This principle naturally translates to the autonomy of the arbitral process and notably the freedom of this process from undue judicial interference. While courts are indispensable in the success equation of the arbitral process, too much judicial intervention in matters of arbitration may have serious repercussions on the efficiency of arbitration. This article examines the autonomy of the arbitral process under the law and practice of arbitration in Rwanda. In doing so, the article

discusses different practices in the leading places of arbitration on the interplay between courts and arbitral tribunals in dealing with matters of arbitration and compares these with the corresponding law and practice governing Rwanda-seated arbitrations. It concludes that, with the pro-arbitration stance often demonstrated by the courts in Rwanda and their sparing involvement in the arbitral process, the arbitration environment is as friendly as it is in most other states that are signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, 1958).


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