Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Saturday, October 2nd, 2021

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

Michael Hwang S.C. & Kevin Tan, ***The Time Limit to Set Aside an Award under Article 34(3) of the Model Law: A Comparative Study***

The time limit to set aside an award under the United Nations Commission on International Trade Law (UNCITRAL) Model Law is three months. Although Article 34(3) of the Model Law does not appear to confer upon domestic courts discretion to extend this time limit, some exceptional decisions from Asian Model Law jurisdictions suggest that such discretion exists. This article argues that, notwithstanding these decisions, domestic courts do not have any discretion to extend the time limit to apply to set an award aside. This article also highlights certain recurring fact patterns commonly seen when parties try to argue in favour of such a discretion, and studies how the courts in various jurisdictions have treated these similar situations.

Nathalie Allen, Leonor Díaz Córdova & Natalie Hall, ***'If Everyone Is Thinking Alike, Then No One Is Thinking': The Importance of Cognitive Diversity in Arbitral Tribunals to Enhance the Quality of Arbitral Decision Making***

The popularity and longevity of international arbitration depends heavily on the quality of arbitral awards, the arbitral process, and the tribunals appointed by practitioners and institutions. In this article, the authors argue that practitioners and institutions need to consider a more diverse range of candidates for arbitrator appointments, to enlarge and diversify the pool of arbitrators. Not only does diversity make sense from an ethical standpoint, but research has also shown that increased cognitive diversity is required to reduce the risk of biased decision making and improve the quality of awards. More cognitively diverse arbitral tribunals are therefore necessary to preserve the continued legitimacy and success of international arbitration.

Morten Broberg & Niels Fenger, ***Preliminary References to the European Court of Justice by***

Arbitration Tribunals

When a court or tribunal of an EU Member State is faced with a dispute which gives rise to questions concerning the interpretation or validity of an EU legal measure that must be answered in order for the national court to render its decision, Article 267 of the Treaty on the Functioning of the European Union lays down that, prior to delivering its judgment, this court or tribunal may seek a preliminary ruling from the European Court of Justice. With the increased importance of EU law within those legal fields where arbitration is often used and with the growing number of arbitration proceedings, the preliminary ruling procedure may also be valuable to arbitration tribunals. However, the European Court of Justice has shown a pronounced reluctance when it comes to allowing arbitration tribunals access to use the preliminary reference procedure. This article provides an up-to-date examination of the Court of Justice's approach to preliminary references from arbitration tribunals, and it considers the pros and cons of opening more up for such tribunals using the preliminary reference procedure.

Felix Krumbiegel, *The Applicability of the Russia-Ukraine Bilateral Investment Treaty to Crimea in the Light of the Duty of Non-recognition in International Law*

According to international law, Russia's territorial claim over Crimea shall not be recognized as it was brought about by a violation of the prohibition of violence. Despite this obligation, several arbitral tribunals have recently accepted jurisdiction in claims brought by Ukrainian investors under the Russia-Ukraine BIT and declared the Russia-Ukraine BIT applicable. I consider the arbitral tribunals' reasoning to be inconsistent with the duty of non-recognition. Therefore, I analyze possible alternative ways in which Ukrainian and non-Ukrainian investors can obtain protection for their investments in Crimea under the Russia-Ukraine BIT without implicitly recognizing Russia's territorial claim over Crimea.

Mikhail Batsura, *Limits to Party Autonomy in Appointing Counsel in International Commercial Arbitration*

The right of a party to appoint its own counsel is an integral aspect of party autonomy and one of the fundamental rights enjoyed by the parties in international arbitration. However, party autonomy is not absolute and has its limitations. This article discusses whether the parties are free to appoint their legal counsel or face any applicable restrictions when making such appointment. The article invites a discussion on an existence of the immutability principle in international commercial arbitration and its tension with party autonomy in the selection of legal counsel (if any). Finally, the article proposes possible solutions for regulation of a party's right to appoint a counsel of choice.

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