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Maxi Scherer (WilmerHale & Queen Mary University of London) · Wednesday, August 16th, 2017

ARTICLES SECTION

Christopher R. Seppälä, Why Finland should adopt the UNCITRAL Model Law on International Commercial Arbitration

Abstract: This article describes why a small country like Finland, which has excellent natural attributes as a place for arbitration (political neutrality and stability, respect for the rule of law, freedom from corruption and a central location between East and West), but which is little resorted to for this purpose, being over- shadowed by its neighbour, Sweden, should adopt the United Nations Commission on International Trade Law ('UNCITRAL') Model Law on International Commercial Arbitration (the 'Model Law'). The indispensable condition for any country to develop as a place for arbitration is for it to have a modern and internationally acceptable arbitration law. However, Finland's arbitration law is relatively old (dating from 1992) and based on an antiquated Swedish model. What is more serious is that Finland's legal infrastructure for arbitration, that is, its arbitration law and court system, is not perceived by international arbitration users and arbitral institutions as being internationally acceptable. By contrast, the Model Law is recognized today as the 'baseline for any state wishing to modernize its law of arbitration' Accordingly, if Finland wants to become an attractive place for international arbitration, as it should do, the obvious solution is for it to adopt the Model Law. This will make Finland instantly recognizable around the world as having a modern and internationally acceptable arbitration law.

Monica Feria-Tinta, Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris vs. Uruguay

Abstract: Whether considered 'wholly distinct, autonomous, or even antagonistic legal domains', or seen as two sets of legal regimes belonging to the same legal system with 'meaningful relationships between them', the international law of investments and the law of human rights appear to have, in the practice of arbitration, an uneasy, tense, strained relationship.For some commentators, public international law (of which human rights is a part) and international investment law would have 'structural differences', which have 'led investment tribunals to grant precedence to the contractual rules that have been agreed upon by host states and investors'. For others, human rights are 'a marginal issue in investment law', 'peripheral at best', to fulfil 'no more than an ancillary role in the settlement of investor- state disputes'.This article looks into the fundamental relationship between human rights and investment law in the wake of the recent Philip

Morris v. Uruguay and Urbaser v. Argentina cases. In doing so it addresses questions such as: Are human rights and investment arbitration animals of a different nature? Are human rights arbitrable within an investment claim?

Juan Pablo Moyano, Impecuniosity and the Courts' approach to the validity of the arbitration agreement

Abstract: As a private dispute resolution mechanism, arbitration depends on the availability of funds from the parties. However, not infrequently one side will be unable, or unwilling, to advance its share of the costs. Courts faced with such cases can either uphold the validity of the agreement or set aside the agreement and retain jurisdiction over the dispute. This article examines several legal theories courts have relied on when doing so. Initially, it will present the various positions by way of case examples, including that the agreement is rendered invalid due to public policy principles, denial of justice, contractual breaches or waiver. Afterwards, it will analyse various issues that arise from court practice, including conflicts regarding the applicable law, jurisdiction and the burden of proof. The article concludes with the author's suggestions on how decisions over the potential invalidity of the agreement could be guided.

Giovanni Zarra, Orderliness and Coherence in International Investment Law and Arbitration: An Analysis through the Lens of State of Necessity

Abstract: The article addresses the need for orderliness and coherence in international investment law. It does so by reference to Argentina's various claims to necessity in CMS, LG&E, Continental Casualty Co., Enron and Sempra. After having analysed the various doctrinal positions regarding orderliness of international investment law and the need for coherence in this area of international law (both from the perspective of the consistency among investment awards and from the perspective of the integration of other areas of international law within investment disputes), the work reaches the conclusion that arbitrators should endorse an approach according to which, on the one hand, they should not ignore what is done by other tribunals (we can talk of investment arbitration as a network needing internal coherence) and, on the other hand, they should always take into consideration values protected by other areas of international law and general international law (in which investment arbitration is fully integrated).

Nelson Goh, Court-Ordered interim Relief against States in Aid of Arbitration: Sovereign Immunity, Waiver and Comity

Abstract: States and state entities are increasingly involved in commercial arbitration. Despite the fairly settled principles concerning state immunity from adjudication and state immunity from execution, the principles concerning state immunity from interim relief by domestic courts in aid of arbitration remains poorly defined. Adopting Professor McLachlan's approach toward foreign relations law, this article attempts to sketch the principles which may govern state immunity in the context of interim relief against states in aid of arbitration by applying the rules of state immunity in an allocative manner. It is suggested that it is at least arguable that a state's consent to arbitration in many cases could amount to a waiver of state immunity from court-aided interim relief by the court located at the seat of the arbitration. This conclusion is likely to strike a balance between over-deference to states by virtue of their sovereign status, and a liberal erosion of the immunity rules in favour of private counterparties.

Wilson Koh, Think Quality Not Quantity – Repeat Appointments and Arbitrator Challenges

Abstract: Repeat appointments of an arbitrator by the same counsel or party are not uncommon in arbitration, with some even claiming that an ‘inner mafia’ decide the majority of cases. Whether this poses a problem for arbitrator independence or impartiality has been described as ‘highly controversial’. The 2014 IBA Guidelines on Conflicts of Interest expressly identifies repeat appointments as an Orange List circumstance providing possible grounds for challenge, but this has been described by commentators such as Gary Born as ‘poorly-considered’ and ‘relatively extreme’.This article suggests that reports of systemic favouritism have been exaggerated and numerical limits on repeat appointments should be rejected. I begin by outlining in section 2 the two contrasting approaches that authorities faced with such challenges have adopted: a quantitative approach and a qualitative approach. Section 3 examines the legal standards that parties typically subscribe to and argues that they cannot and should not be interpreted to favour the quantitative approach. Section 4 scrutinizes the main reasoning processes that allegedly link repeat appointments to an appearance of bias and suggests that they rely on untenable generalizations. Finally, section 5 assesses the quantitative approach from its impact on party autonomy. I suggest that respecting party autonomy means that the quantitative approach must not be adopted except where parties have explicitly agreed so.

BOOK REVIEWS

Claudio Salas, Annabelle Möckesch, Attorney-Client Privilege in International Arbitration (Oxford University Press, 2017)

Raphael Heffron, Burnett, H. G. and Bret L.-A. Arbitration of International Mining Disputes: Law and Practice (Oxford University Press, 2017)

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