Kluwer Arbitration Blog

The Contents of Journal of International Arbitration, Volume 34, Issue 5, 2017

Maxi Scherer (WilmerHale & Queen Mary University of London) · Wednesday, October 25th, 2017

Volume 34, Issue 5 contains:

Anthony C. Sinclair & Epaminontas E. Triantafilou, *Specific Performance Under Commercial Contracts with Sovereign States*

Abstract: Awarding specific performance against a state is widely considered an affront to principles of sovereignty and non-interference. Even when permitted under the applicable law and arbitral rules, specific performance against a state may therefore be considered not to be appropriate or desirable. The scarcity of specific performance awards against states is thus likely attributable to practical and policy-based considerations as much as legal principle. Exploring its use as a remedy when a sovereign state breaches a commercial contract, this article recognizes the need for tribunals to exercise caution when entertaining pleas for non-pecuniary relief. To give effect to specific performance without encroaching on sovereignty, and while catering for the economic and practical realities of broken contractual relationships, the authors discuss a hybrid approach. This proposal allows tribunals to award specific performance and monetary compensation as alternatives, while affording the ultimate decision to the state.

Marte Knigge & Pauline Ribbers, *Waiver of the Right to Set-Aside Proceedings in Light of Article 6 ECHR: Party-Autonomy on Top?*

Abstract: Party autonomy is an important principle in arbitration. Parties that opt for arbitration are, to a certain extent, free to organize the arbitral process. The exact scope of this freedom is unclear, especially where fundamental rights of the European Convention of Human Rights (ECHR) are at stake. On 1 March 2016, the European Court of Human Rights (ECtHR) rendered a decision that can shed more light on the scope of the autonomy of parties in arbitration proceedings. In the decision *Tabbane v. Switzerland* the parties had concluded a so-called 'exclusion agreement'. By means of such an agreement parties waive, in advance, their right to seek set-aside proceedings at the state court.

This article analyses the decision of the European Court and addresses questions such as: must parties, who have agreed to exclude the right to set aside an award, be regarded as having waived all of their rights guaranteed by Article 6 ECHR? And, how far does the responsibility of states extend for the course of affairs during arbitral proceedings?

Nathan Yaffe, *Transnational Arbitral Res Judicata*

Abstract: Commercial arbitral awards are universally recognized to give rise to res judicata, but confusion reigns over what law applies to the res judicata effect of a prior arbitral award asserted before a subsequent tribunal. National res judicata laws diverge on key questions such as the availability of issue estoppel and the construction of the 'triple identity' test. Yet the normal tools used to manage divergence in potentially applicable laws – choice of law and codification – have failed to work when it comes to the res judicata effect of awards. I argue the answer is to adopt a transnational approach to res judicata in arbitration. Although this approach has support in principle, questions remain about how it would work in practice. I propose that a modified version of Gaillard's 'transnational rules method' contains the seeds of a promising answer. Specifically, tribunals could look to both other commercial tribunals' awards, as well as International Centre for Settlement of Investment Disputes (ICSID) and International Court of Justice (ICJ) case law on res judicata, to develop a sui generis transnational preclusion standard for international arbitration. This is consistent with informal practices arbitrators have developed with respect to other interstitial issues where choice of law processes do not yield satisfactory results. Finally, I evaluate the implications of taking this approach, as well as its prospects for success.

Silke Noa Elrifai, *Equity-Based Discretion and the Anatomy of Damages Assessment in Investment Treaty Law*

Abstract: This article looks at the manifestation of equity-based arbitrator discretion as a tool to balance treaty-based investor rights with extrinsic public law obligations of states. The article breaks down the process of damages assessment into four separate decision stages and analyses at each stage (1) a dataset of previous International Centre for the Settlement of Investment Disputes (ICSID) awards; (2) the answers to a survey of arbitrators, jurists and practitioners; as well as (3) scholarly opinion. The article argues that equity-based discretion happens at each stage of the conceptualized decision-making chain and contributes to the incoherence of damages awards. The author argues that although arbitrators' resort to discretion must remain unfettered, it is preferable for vague concepts such as equity to be kept to a minimum to protect the continued legitimacy of the investment treaty system. Instead, it is the language of investment treaties that needs to be adapted in the long-term, thus keeping pace with developing international investment law standards.

Boris Kasolowsky & Eric Leikin, *Eli Lilly v. Canada: A Patently Clear-Cut Dismissal on the Facts, but Opening the Door for Future Claimants on the Law*

Abstract: In March 2017, the Tribunal in Eli Lilly v. Canada issued a unanimous final Award, dismissing all claims on the basis that the claimant 'failed to establish the factual premise of its case'. Despite finding against Eli Lilly on the facts, the Lilly decision appears to have opened the door (at least slightly) for investors on two novel points of law. First, the Tribunal suggested that a judicial decision which does not constitute a denial of justice may nonetheless qualify as a breach of the North American Free Trade Agreement's (NAFTA's) minimum standard of treatment (Article 1105) and/or protection against expropriation (Article 1110). Second, the Tribunal did not reject – and indeed appeared willing to consider – the proposition that an investor may support its investment arbitration claims by relying on a host state's international commitments on the treatment of intellectual property rights. Given the potential importance of these issues in future arbitrations, this article first provides an overview of the Lilly decision. It then explores in greater depth the two legal issues raised above, examining the arguments put forward by the parties, the

view expressed by the Tribunal and the potential effect on the development of international investment law, with a particular focus on how these issues may come into play in any future claims arising from the issuance of a compulsory license.

Amr Omran, *The Appearance of Foreign Counsel in International Arbitration: The Case of Egypt*

Abstract: The ability of arbitrating parties to select their representatives in international arbitration is an extension of the principle of party autonomy. In Egypt, some uncertainty has existed as to the ability of the parties to appoint non-lawyers and foreign counsel as their representatives in arbitral proceedings. The Egyptian Legal Profession Law restricts the right to appear before arbitral tribunals to members of the Egyptian bar, who must be Egyptian nationals. Recent decisions by the Cairo Court of Appeal and the Egyptian Court of Cassation go some way in amending this position, holding that foreign lawyers can represent parties in arbitrations conducted in Egypt, subject to the parties' agreement. However, unless the Legal Profession Law and the Arbitration Law are amended, uncertainty will remain.

BOOK REVIEW

Bernard Hanotiau & Iuliana Iancu, *Antonio Parra, The History of ICSID (Oxford University Press, 2017)*

This entry was posted on Wednesday, October 25th, 2017 at 12:51 am and is filed under Journal of International Arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.