Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Monday, October 8th, 2018

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

Klaus Peter Berger, The Direct Involvement of the Arbitrator in the Amicable Settlement of the Dispute: Offering Preliminary Views, Discussing Settlement Options, Suggesting Solutions, Caucusing

This article explores the question whether and to what extent international arbitrators should become directly involved in the parties' efforts towards an amicable settlement of their dispute. It demonstrates that the controversy over the international arbitrator's role in the facilitation of settlements is just one example of a wider and long-standing debate on the proper role of a tribunal in international arbitral proceedings. The article favours a pragmatic approach based on party autonomy as the foundation of arbitration. The parties may very well agree to expand the tribunal's mandate so that the arbitrators may also act as conflict resolvers by facilitating a settlement of the parties' dispute. However, arbitrators may never impose their preliminary views on the parties or employ any other means to promote an amicable settlement against their will.

Michael W. Bühler, Out of Africa: The 2018 OHADA Arbitration and Mediation Law Reform

Almost twenty years after it adopted the Uniform Act on Arbitration (UAA), the Organization for the Harmonization of Business Law in Africa (OHADA) revised its UAA and adopted a new Uniform Act on Mediation (UAM), along with a fresh set of arbitration rules of the Common Court of Justice and Arbitration in Abidjan (the 'CCJA Rules'). These three texts were revised with the assistance of an external consultant, the author of this article. Among other changes, the 2018 UAA has provided arbitral tribunals with an express power to determine whether compulsory pre-arbitral steps (such as mandatory mediation) have been complied with, and to suspend the arbitration until such requirements have been met. It has also fixed strict time limits for local judges asked to act in support of arbitration. This article further questions whether the few limited improvements to the CCJA Rules will positively impact the future of the CCJA's arbitration centre, given its very low caseload. With the 2018 UAM, a solid legal platform for the use of mediation in the region is now in place. The training of mediators and arbitrators, and their ability to carry out both the acts and rules in an efficient manner and effectively coexist with the judiciary, remain major challenges for the region.

Gordon Blanke, Free Zone Arbitration in the United Arab Emirates: DIFC v. ADGM: (Part I)

This article is published in two parts and discusses the concept and practice of free zone arbitration in the United Arab Emirates (UAE). More specifically, the article seeks to highlight the status quo of arbitration in the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM), both of which may serve as an offshore seat of arbitration in their own right. Both the DIFC and the ADGM offer a common law alternative to arbitration in onshore UAE. Part I of the article focuses on arbitration in the DIFC. It provides an introduction to the judicial and legislative framework of the DIFC, including in particular the main provisions and the operation of the DIFC Arbitration Law, the institutional framework of arbitration in the DIFC, the curial function of the DIFC Courts in DIFC-seated arbitrations, and the recognition and enforcement of domestic DIFC and foreign arbitral awards in the DIFC. Part I also discusses the DIFC Courts' status as a conduit jurisdiction facilitating the recognition and enforcement of non-DIFC awards for onward execution in onshore Dubai and beyond.

Edgardo Muñoz, Mexican Punitive Damages in Commercial Arbitration: Forecasting the Future

In February 2014, the Supreme Court of Mexico, citing US scholarship and case law, held that punitive damages had to be awarded to a tort plaintiff as part of the indemnity afforded by Mexican law under the heading of moral damages (daños morales). Before this landmark decision, nothing similar to punitive damages existed in the Mexican legal system. In the context of arbitral proceedings, this new interpretation of moral damages gives rise to two questions at the core of the international discussion on punitive damages and arbitration. The first has regard to the power of arbitral tribunals with seat in Mexico to award punitive relief when the applicable substantive law, including Mexican law, contemplates it. The second is the possibility of enforcing foreign-based law punitive damages awards in Mexico. Despite the early stage and still incipient discussion regarding the true nature and application of punitive damages in Mexico, the author forecasts that, while they may be an available relief in arbitration proceedings in Mexico, this decision is a rare exception and their quantum limited. In addition, Anglo-American law based punitive damages awards may still find a public policy obstacle for their enforcement or grounds for their nullity in Mexico.

Mauro Megliani, Thou Shalt Not Arbitrate: Sovereign Debt and Investment Arbitration

This article addresses the issue of the interaction between sovereign debt and investment arbitration. The point has been recently highlighted by the Report of the UN Independent Expert on Sovereign Debt. In this context, investment arbitration has been regarded as capable of disrupting an orderly debt restructuring, since creditors may prefer operating outside a restructuring process and submitting their claims to arbitration. Arbitration becomes an escape route for creditors who do not want to accept take-it-or-leave-it conditions and are faced with domestic courts who decline to hear the case on the basis of the immunity doctrine. Arbitration may well be the ideal venue to balance the interests at stake. Under a human rights approach, creditors are called not to lend or have to cease lending when doing so would affect the socio-economic rights of the population. Under a necessity approach, the obligation of paying interest and reimbursing capital would be suspended to the extent that it would affect the duty of a state to provide essential services to the population. Under a transnational public policy approach, a claim is not enforceable when doing so would infringe the socio-economic rights of the population. Under an expropriation approach, the compensation for a default should consider the speculative intent in purchasing bonds after the default and award not the nominal value but the purchase price.

BOOK REVIEW

Philip Wimalasena, Die Veröffentlichung von Schiedssprüchen als Beitrag zur Normbildung [The Publication of Arbitral Awards as a Contribution to Legal Development] Tübingen: Mohr Siebeck. 2016.

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