Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Monday, May 27th, 2019

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

ARTICLES

Klaus Peter Berger: ***Common Law v. Civil Law in International Arbitration – The Beginning or the End?***

The presentation of the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration on 14 December 2018 has revived the age-old debate about the existence of a common law-civil law divide in international arbitration. This article examines the impact of the Prague Rules on the transnational paradigm of international arbitral procedure, clarifies their nature as an alternative repository of state-of-the-art techniques to save time and costs in the conduct of international arbitrations, and suggests to give up the traditional distinctions, which are rooted in domestic legal systems.

Milo Molfa, Adam Grant, Paul Kleist & Amy Wen Wei: ***Challenges in the Taking of Evidence in Arbitrations Seated in Mainland China***

Arbitration is often hampered by obstacles to the taking of evidence, either because one party fails to produce relevant documents when requested or the documents are held by a third party outside the tribunal's powers. Parties engaged in arbitration seated in Mainland China are constrained by the Chinese state court's limited powers to assist in evidence taking. This article considers the wider scope of options for the taking of evidence in arbitrations seated in Mainland China. The first port of call may be to seek an order from the arbitral tribunal to impose sanctions within the arbitration, such as adverse inferences or adverse cost orders. If the arbitral tribunal cannot compel the recalcitrant party or a third party to produce documents or other evidence, the party may seek assistance from the court at the arbitral seat or a foreign court connected to the arbitration. This article compares the options for state court assistance in evidence taking available in the state courts of Mainland China, England and Wales, Hong Kong, and the United States. Practitioners should be aware that the powers of state courts to assist in evidence taking in international

arbitration varies widely between these jurisdictions, from allowing only orders for preservation of key evidence in Mainland China to wide-ranging discovery from third parties by way of Section 1782 applications in the United States.

Christopher Adams & Giles Harvey: ***No Man Is an Island – Compelling Witness Evidence in Support of Arbitration Proceedings Seated in London***

Parties to arbitration proceedings seated in London may wish to compel evidence from witnesses located outside the English jurisdiction by applying to the English and/or foreign courts for assistance. This article provides an overview of the available methods and discusses some of the practicalities thereof, together with likely developments in this area as a result of the United Kingdom's imminent withdrawal from the European Union.

Alex Ye: ***The Good Faith Principle in the Context of the Enforcement of New York Convention Awards – An Analysis of Hong Kong's Position in Light of the Apparently Conflicting Court Decisions***

In the recent landmark case *Astro v. Lippo*, the Hong Kong Court of Appeal adopted an approach of applying the good faith principle in the context of the enforcement of New York Convention awards that departed from the previous approach adopted by the Hong Kong Court of Final Appeal in the Hebei case. This article aims to ascertain Hong Kong's position on the good faith principle in the situation that led to the apparently conflicting approaches. This is concerned with the situation where an award-debtor could have raised, but failed to raise, objections to challenge the award before the supervisory courts of the seat of arbitration, but applies to resist enforcement of the award before the enforcing court. This article argues that the apparently conflicting approaches should be reconciled by differentiating the grounds of resisting enforcement between jurisdictional and non-jurisdictional grounds. In the author's view, the good faith principle is not applicable if the ground for objection relates to jurisdiction. The award-debtor can still seek resisting enforcement on jurisdictional grounds before the enforcing court. If the ground does not relate to jurisdiction, a breach of good faith would be established. The award-debtor would then be precluded from raising the relevant points (i.e., factual foundation) relating to the grounds of resisting enforcement that it could have, but did not raise at the supervisory courts of the seat before the enforcing court.

NOTES

Sam Luttrell: ***Observations on the Proposed New ICSID Regime for Security for Costs***

International Centre for Settlement of Investment Disputes (ICSID) is currently engaged in a review of its rules and regulations. This article considers the new rule on security for costs that ICSID is proposing to introduce as part of this review process. After outlining the existing regime for security for costs in ICSID arbitration, the author analyses the text of the proposed new rule (Draft Rule 51) and explains how it lacks balance and will work in favour of respondent States if it is adopted as currently drafted. The writer concludes by proposing certain amendments to Draft Rule 51, the intention of which is to ensure that the new rule strikes a proper balance between the

interests of investors and States as users of the ICSID system.

James Morrison: ***Recent Developments in International Arbitration in Australia 2017/2018***

This article summarizes recent developments in international arbitration in Australia over 2017 and 2018. After briefly canvassing the major international arbitration-related conferences held in Australia and statistics from Australian and international arbitral institutions, the author explains the new amendments to the International Arbitration Act (IAA) 1974 (Cth) and the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, then provides case notes on recent cases before the Australian courts dealing with (1) an application to remove an arbitrator and set aside his awards for breach of natural justice and prejudgment; (2) an ambiguous dispute resolution clause providing for mediation under institutional arbitration rules; and (3) an anti-arbitration injunction and the basis of the power of the Federal Court of Australia to issue it.

BOOK REVIEW

Stephan W. Schill, Christian J. Tams, & Rainer Hofmann (eds), ***International Investment Law and History*** **(Edward Elgar Publishing Ltd., 2018), reviewed by Remy Gerbay & Darby Hobbs**

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