Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Monday, September 16th, 2019

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

Maxi Scherer, *Artificial Intelligence and Legal Decision-Making: The Wide Open?*

The article explores the use of Artificial Intelligence (AI) in arbitral or judicial decision-making from a holistic point of view, exploring the technical aspects of AI, its practical limitations as well as its methodological and theoretical implications for decision-making as a whole. While this article takes the angle of international arbitration, it looks at examples and studies from a wide variety of legal areas and its conclusions are relevant for adjudicatory decision-making more globally. The author assesses existing studies on decision outcome prediction and concludes that the methodology and assumptions employed put into doubt the claim these models might be used for ex ante outcome predictions. The article also discusses whether AI models, which are typically based on information extracted from previous input data, are likely to follow 'conservative' approaches and might not be adapted to deal with important policy changes over time. The article further finds that a blind deferential attitude towards algorithmic objectivity and infallibility is misplaced and that AI models might perpetuate existing biases. It discusses the need for reasoned decisions, which is likely to be an important barrier for AI-based legal decision-making. Finally, looking at existing legal theories on judicial decision-making, the article concludes that the use of AI and its reliance on probabilistic inferences could constitute a significant paradigm shift. In the view of the author, AI will no doubt fundamentally affect the legal profession, including judicial decision-making, but its implications need to be considered carefully.

Peter Georg Picht & Gaspare Tazio Loderer, *Arbitration in SEP/FRAND Disputes: Overview and Core Issues*

This article takes a look at arbitration in intellectual property matters with regards to the licensing of standard-essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. Due to the digital transformation, the importance of FRAND licensing of SEPs is likely to increase and with it the need for appropriate conflict resolution. This is where arbitration can come into play

due to its flexibility and efficiency. The resolution of SEP/FRAND disputes through Alternative dispute resolution (ADR) is also supported by administrative and judicial bodies and institutions such as the International Court of Arbitration of the International Chamber of Commerce (ICC) or the World Intellectual Property Organization (WIPO) have already gained experience in this field. The article lays down particularities regarding the scope of arbitration in such disputes before briefly touching upon the question of arbitrability. Due to the lack of a law applicable to a pre-existing contract in prototypical SEP/FRAND constellations, the choice of law is also of importance. A special emphasis is put on the issue of confidentiality in view of a public interest in having access to key results of SEP/FRAND arbitration proceedings. As set forth in the article, the FRAND ADR Guidelines authored by the Munich IPDR Forum propose a solution in the form of disclosure of the FRAND determination methodology to a neutral instance, subject to party approval. Lastly, the article looks at how state courts might assess licenses reached in alternative dispute resolution and examines whether EU competition law is a public policy hurdle in subsequent enforcement proceedings.

Angshuman Hazarika & Pieter Van Vaerenbergh, *'One Rule to Rule Them All': Rules for Article 25 DSU Arbitration*

The Appellate Body faces a crisis and risks being dissolved in December 2019. In order to safeguard the dispute settlement mechanism and ensure a functioning system without the Appellate Body of the World Trade Organization (WTO), many proposals have been put forward. Among these proposals, this Article highlights the potential of arbitration in the WTO.

Article 25 of the Dispute Settlement Understanding (DSU), which provides for arbitration as a means of dispute settlement, remains underused due to insufficient procedural guidance. This article provides a set of rules for Article 25 DSU arbitration, which could be adopted by WTO Members 'off the shelf' when initiating an arbitration procedure. This formulation of procedural rules combines the need for party autonomy of WTO Members engaged in an arbitration procedure with the need for procedural certainty, which has hampered its usage until date. Experience of past arbitration in the WTO and international sources for trade-related arbitration have been used to shape these customized rules for Article 25 DSU arbitration.

Robert Bradshaw, *How to Obtain Evidence from Third Parties: A Comparative View*

Obtaining evidence from third parties poses a unique problem in international arbitration. Unlike litigation, the consensual and private nature of arbitration means that tribunals lack the authority to compel third-party disclosure given to many State courts. Yet even if they are not subject to the tribunal's jurisdiction, third parties to the proceedings may still possess valuable evidence.

This article considers the practical options for obtaining evidence from third parties, whether through requests by the arbitral tribunal itself or judicial assistance from State courts. In the latter case, national laws must balance the interest of supporting arbitration against the risks of judicial interference and the potential burden of disclosure on third parties, and resolve this dilemma in very different ways. Given the lack of uniformity on judicial assistance, and the fact that evidence is frequently located in a different jurisdiction to the arbitral seat, practitioners may make strategic use of procedures such as those under US federal law to gain the benefit of third-party evidence.

Karolina Mania, *American and European Perspectives on Arbitration Agreements in Online Consumer Contracts*

This article offers a discussion of systemic differences between the American and European approach to the application of arbitration clauses in contracts between consumers and enterprises (businesses) included in the digital environment.

The first section features a summary of the relevant US regulations and jurisprudence, with special emphasis on judgments of the Supreme Court concerning arbitration as used in online consumer contracts. An analogous analysis is then offered, as part of a legal comparative study, of solutions applied in the European Union. The discussion is accompanied by the author's suggested reasons for the differences found, while pointing to some of the most recent proposals of legislative changes from the European Commission.

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