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The Contents of the Asian International Arbitration Journal, Volume 14, Issue 2

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The contents of this issue of the journal is now available and includes the following contributions:

Rachel Chiu Li Hsien, 'A World Without Borders; A New World Order: Navigating Cross-Border Insolvencies Through Arbitration'

To date, multi-jurisdictional efforts aimed at managing cross-border insolvencies are largely limited to broad speaks of cooperation between national Courts. Absent is pointed attention to the incongruence in national insolvency laws at play. Without a single cross-jurisdictional forum with policing-like powers to navigate these differences, detours from the certainty, speed, and predictability that insolvency law serves have become a recurrence. This article posits realigning the goals of insolvency law in the context of cross-border insolvencies, by employing arbitration and mediation as lubricants to the difficult 'choice of law' and 'choice of forum' issues that present. The author proposes the construct of a specialized interstate dispute resolution centre that runs on a quasi-arbitration-mediation model and a set of 'choice of law' principles. This framework offers a path to resolve certain cross-border insolvency related disputes that carry a substantial transnational element. Most critically, the author advocates the value of a transnational integrated framework aimed at building consensus around 'choice of law' and 'choice of forum' issues. She believes this is key to realizing the goals of certainty and expeditious management of multinational commercial enterprises in financial distress.

Michael Neumeier, 'Class Arbitration in Australia: A Bright Future or a Pipe Dream?'

Class arbitration has been a hotly debated issue in academic circles since the turn of the century throughout the world. Much literature has recognized that class arbitration could be an effective means of resolving the ever-increasing number of mass claims with cross-border implication. However, the cross-border advantage of class arbitration is dependent on the legal community's ability to craft a procedure that is acceptable across a diverse tapestry of legal systems around the world. In continental European legal systems there appears to be a jurisprudential battle underway with some supporting class arbitration, and many fundamentally objecting to it (some authors have even argued that class arbitration would be unconstitutional). These objections have not halted the

development of alternative collective redress regimes in EU Member States, (albeit they are disparate and often incomplete) demonstrating an underlying appetite for collective redress. Australia has had a wealth of experience with judicial class actions, whilst there is little literature considering the possibility of class arbitration. This paper: (1) considers whether class arbitration would even be possible under Australian law, and (2) proposes a 'less is more' class arbitration regime that would be harmonious on an international level.

Sharad Bansal, 'The Dampening Effect of 'Foreign' Mandatory Laws'

Party autonomy – a foundational facet of international arbitration – is often at loggerheads with public policy elements. A recurrent debate in international arbitration has been the extent of limits imposed by public policy on party autonomy. One aspect of this debate is when parties expressly opt for a law governing the merits of the dispute, can an arbitral tribunal derogate from such law and apply a mandatory rule which it finds to be relevant to the dispute? This issue has repercussions on the enforceability of arbitration agreements as well as arbitral awards where mandatory rules are involved. In this article, the author argues that arbitrators are bound to apply mandatory laws notwithstanding the fact that such a measure constitutes a departure from the *lex contractus*, since parties inherently lack the capacity to contract out of mandatory rules. To the extent that mandatory rules reflect public policy they now cast a limit to parties' *lex contractus*.

Binsy Susan & Adarsh Ramakrishnan, 'How to Trump a "No Claims Certificate" in Arbitration'

In construction contracts, employers generally insist on submission of 'no due/certificate' claims signed by the contractors, as pre-condition to release payments due under the final bill. To secure the full amount, contractors generally send an arbitration invocation notice setting out their claims (or in cases where there is no arbitration clause, a legal notice) to the employers, in defiance of any such settlement certificate/voucher. When the employers contend that the dispute is not 'arbitrable' on account of discharge of the contract in terms of the No Dues/Claims Certificate, the contractors refute it by stating that any such settlement certificate/voucher was obtained by fraud, coercion or undue influence and that there was absence of free consent. The article will analyse the Indian law on validity of such no dues certificates/settlement certificates/discharge vouchers in construction contracts and the possible course of action that contractors may adopt to contest claims, despite such certificates.

Saad Aljadean Badah, 'Capacity of Parties and Arbitration Agreement, Part I'

The Gulf Cooperation Council ('GCC') is a political and economic alliance of six states namely Saudi Arabia, Kuwait, the United Arab Emirates, Qatar, Bahrain and Oman. They share similar political and cultural identities rooted in the creed of Islam (See: https://www.gcc-sg.org/en-us/AboutGCC/Pages/StartingPointsAndGoals.aspx). They are all parties to the New York Convention 1958. This article seeks to examine the concept of capacity under the laws of the GCC states and how it impacts the enforcement of the agreement to arbitrate under the New York Convention when interposed with the Civil Codes of the GCC states.

Chahat Chawla, ‘Legislation Update: India’

On 10 August 2018, the Lok Sabha (Lower House of the India’s bicameral Parliament) passed the Arbitration and Conciliation (Amendment Bill), 2018 (‘2018 Amendment Bill’), to further amend the Arbitration and Conciliation Act, 1996 (‘1996 Act’). In a short span of three years, the Indian Parliament has sought to overhaul India’s principal arbitration legislation for the second time, after the initial reforms introduced by the Arbitration and Conciliation (Amendment) Act, 2015 (‘2015 Amendment Act’). The 2018 Amendment Bill has been described as ‘a momentous and important legislation’ by the Indian Minister of Law and Justice, which is aimed at making India a ‘hub of domestic and international arbitration’. Other than the introduction of the 2018 Amendment Bill, the Indian Government, this year, also introduced the New Delhi International Arbitration Center Bill, 2018 (‘NDIAC Bill 2018’) in the Lok Sabha. The primary objective of the NDIAC Bill is to establish a ‘flagship arbitral institution’ to enable the growth of institutional arbitration in India. This Note undertakes a review of the key features of the 2018 Amendment Bill and the NDIAC Bill 2018 and how the proposed legislative measures impact the existing arbitral regime in India.

The issue also includes a book review by Qian Wu of ‘Arbitration in the Digital Age: The Brave New World of Arbitration’, edited by Maud Piers and Christian Aschauer (Cambridge University Press, 2018).

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