
Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Monday, October 5th, 2020

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

Mees Brenninkmeijer & Fabien Gélinas, *Execution Immunities and the Effect of the Arbitration Agreement*

The prevailing view in international legal practice is that a state does not waive its immunity from execution by merely consenting to arbitration. Yet, in the context of arbitration between states and private parties, execution immunities have emerged as a very significant obstacle to the effective implementation of arbitral awards. When immunity from execution allows states to escape obligations they have freely undertaken, and when it withholds from claimants the fruits of a favourable award, the benefits of arbitration become illusory. This article contends that the prevailing view is no longer compelling because, in the context of arbitration, deference to state immunity is misplaced and imposes an unjustified limit on the rule of law. It is suggested that an agreement to arbitrate should ultimately have the presumptive effect of waiving immunity from execution. The proposed waiver may be viewed as following from the obligation that the sovereign voluntarily undertakes when submitting to arbitration, and tracks the normative evolution of the relation between the doctrine of sovereign immunity and arbitration law.

Klaus Peter Berger, *Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems*

For many decades, international arbitrators have gone beyond deciding traditional legal disputes and have been involved in the adaptation of long-term contracts. These contracts are particularly vulnerable to extreme and unforeseen changes of economic circumstances such as those caused by the consequences of the Coronavirus Disease 2019 (COVID-19) pandemic. However, doubts have always been raised as to whether, how, and to what extent international arbitrators may interfere with the parties' contractual bargain. In dealing with these concerns, this article explores three essential issues. They relate to the procedural authority for and the substantive legitimacy of the tribunal's adaptation decision, as well as to the search for adaptation standards, which ensure

outcomes of contract adaptations by international arbitral tribunals that make business sense.

Thomas Obersteiner, *Provisional Measures Under ICSID Rules: The Power of Tribunals to Interfere with Domestic Criminal Proceedings*

In several recent International International Centre for Settlement of Investment Disputes (ICSID) cases, investors accused the respondent state of unfairly using its criminal law enforcement powers to advance its position in the arbitration. If the investor turns to the tribunal to intervene by ordering provisional measures, the tribunal finds itself in the most uncomfortable position: at the heavily contested border between state sovereignty and the tribunal's duty to safeguard the arbitration process. The latest decisions indicate that tribunals are prepared to step in and order the suspension of domestic criminal proceedings when presented with specific evidence of harassment or intimidation of claimants or witnesses. This article reviews these controversial cases, describes the situations in which a request for provisional measures can be successful, what exactly the investor is required to show, and how far tribunals have been willing to go.

Darius Chan & Teo Jim Yang, *Ascertaining the Proper Law of an Arbitration Agreement: The Artificiality of Inferring Intention When There Is None*

The common law choice of law principles for determining the proper law of an arbitration agreement previously thought to be settled by the English Court of Appeal's decision in *Sulamérica v. Enesa* [2013] 1 W.L.R. 102 have now been thrown into disarray after a recent string of three judgments: starting with the Singapore Court of Appeal's decision in *BNA v. BNB* [2019] S.G.C.A. 84, followed by two decisions from the English Court of Appeal in *Kabab-Ji v. Kout Food Group* [2020] EWCA Civ 6 and *Enka Insaat Ve Sanayi A.S. v. OOO 'Insurance Company Chubb'* [2020] EWCA Civ 574.

This article undertakes a comparative analysis of English and Singapore case law and argues that the common law should take party autonomy more seriously by ascertaining whether the parties have a clear and real intent to choose a particular system of law to govern their arbitration agreement. The current reliance on presumptions or inferences of what the parties must have intended is in reality an artificial arrogation to judges and arbitrators on what 'commercial' sensibilities businessmen should be taken to have. In the absence of a clear and real intent, arbitrators and state signatories to the New York Convention ought to apply the law of the seat as the default choice of law rule in the New York Convention.

Adrian Fourie, *Unionmatex v. Turkmenistan: The Emerging Jurisprudence of Security for Costs in Investor- State Arbitration*

Applications for security for costs raise fundamental principles of legal philosophy, with leading arbitrators being divided on whether such orders should be available in investor-State arbitration and, if so, in what circumstances. Security for costs has only ever been granted in three decisions, and in two of those decisions the tribunal has been firmly divided – a rarity for procedural orders.

Unionmatex v. Turkmenistan marks the third such decision. This article summarizes the key findings in the case, outlines the framework for making such orders in International Centre for Settlement of Investment Disputes (ICSID) proceedings, summarizes the prior jurisprudence in this area, and concludes with a discussion of how the jurisprudence is likely to develop in the future.

Dimitrios Katsikis & Anthony Cheah Nicholls, *Enforcement in Indonesia: Obtaining a Power of Attorney for Registration of the Award*

Indonesia is forecast to become one of the world's top ten economies by 2030, which will lead to an increase in arbitrations with an Indonesian element. Sophisticated commercial parties and arbitration specialists alike are often unaware of a peculiarity of Indonesian arbitration law which requires that the arbitral tribunal must apply for, and obtain, registration of an arbitral award with the Indonesian courts before the award can be enforced. If a tribunal is not aware of this peculiarity, and becomes *functus officio* without having obtained registration, the parties risk having an award that cannot be enforced in Indonesia.

In this article, we examine the registration requirement and set out steps that an arbitral tribunal must take in order to register an award with the Indonesian courts. We then consider the circumstances in which a tribunal can satisfy the registration requirement by providing parties' counsel with a Power of Attorney, so that they can register the award on its behalf. We analyse some of the key features that the Power of Attorney should have, as well as the pitfalls parties should be aware of, drawing on aspects of Indonesian law as well as our practical experience.

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