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

Georgia Dawson & Kate Apostolova, Banks as Claimants in Investment Arbitration

Historically, banks have tended to prefer litigation over arbitration for their disputes. However, in recent years, banks have increasingly been using international arbitration instead, particularly when doing transactions in Asia and in emerging markets. The 2018 Queen Mary International Arbitration Survey also concluded that financial institutions, including banks, and their counsel are 'contemplating arbitration with much greater interest than ever before'. In addition to using international commercial arbitration more often, banks have increasing sought to benefit from treaty-based international investment arbitration. The protections afforded in investment treaties mitigate some of the key risks banks face when investing abroad, such as having their investment nationalized or being subjected to unfair investigations. This article focuses on banks as claimants in treaty-based investment arbitrations, a subject not addressed in commentaries. It examines the publicly available investment arbitration awards in cases brought by banks against States and sets out to identify some key trends and themes.

Eunice Chua, The Singapore Convention on Mediation and the New York Convention on Arbitration: Comparing Enforcement Mechanisms and Drawing Lessons for Asia

This article considers the enforcement mechanism for international mediated settlement agreements proposed by the Singapore Convention on Mediation and critically examines this mode of enforcement as against enforcement as an arbitral award in Asia, including through a hybrid process like Arb-Med-Arb. Similarities and differences between the New York Convention and the Singapore Convention on Mediation will be discussed and used to consider how Asian jurisdictions may respond to the Singapore Convention on Mediation and what lessons may be learnt from the arbitration context.

Faadhil Adams, The Semi-Autonomy of the Arbitral Legal Order

The term arbitral legal order refers to the tapestry of conventions, model laws and guidelines that applies in the field of international arbitration and renders it a selfstanding community among the international legal order of States. This article discusses the allegiance owed by the arbitral community to States generally and the State in which it is seated more specifically. It takes as its point of departure that the growth in international arbitration merits a reconsideration of the international standing of the arbitral legal order. The article considers earlier viewpoints that argued for the total detachment of arbitration from State legal systems in terms of what is referred to as delocalization. It delves into the impact that such views have on the choice of law process and considers the possibility of this detachment against pluralistic and State sovereign perspectives. It comes to the conclusion that modern day arbitration is neither dependent on States nor independent from them but exists among them as a semi-autonomous community. The semi-autonomy derives from the idea that the international arbitral community is by and large afforded the freedom to regulate itself. It has the ability to create norms and to create international jurisprudence that is largely followed, regardless of the State in which the tribunal is seated. In this way the field is autonomous. This freedom is, however, restricted by the interests of States where certain countries can and sometimes do impose their will on the community in the form of legislation that restricts the freedom of the arbitral process. On the other hand the arbitral order is still in need of States, as it is only State machinery that can compel parties to comply with the arbitral process where a party chooses to attempt to escape the obligation imposed by the arbitral clause or choose to delay or subvert the arbitral process. The arbitral community is also dependent on State machinery for enforcement of its awards. In these cases, State assistance is not only welcomed but imperative. States have, however, gradually reduced impediments to arbitration through a pro-arbitral sentiment that is globally expressed. The article thus concludes that a symbiosis exists between the international arbitral community and States more generally.

Anirudh Hariani, Indian Arbitration and the Shifting Sands of Public Policy

The ‘public policy’ test is a statutory exception to the enforcement of arbitration awards. The doctrine has its roots in common law. At times, the test has been construed narrowly, and at other times, expansively. What actually constitutes and what is contrary to public policy, however, is never clear. This article seeks to trace the tumultuous development of the public policy doctrine in India, from its beginnings as a common law concept, to arrive at the current understanding of the doctrine and its parameters, in the context of Indian arbitration law. In the process, this article discusses the approach of Indian courts in limiting interference with foreign arbitration awards on the public policy ground. The author argues that it is necessary to further check the public policy exception in India, particularly in the context of enforcement of foreign awards and awards from international commercial arbitration, in view of the Indian government’s aim of making India a ‘hub of arbitration’.

Ritunjay Gupta, Res Judicata in International Arbitration: Choice of Law, Competence & Jurisdictional Court Decisions

Given the twin goals of finality and efficiency, the doctrine of res judicata has come to be applied,

although less frequently, in the international arbitration context as well. However, being largely perceived as a proverbial 'twilight issue' in international arbitration, its application is fraught with uncertainties and inconsistencies. Amongst the more compelling concerns regarding the subject matter, this Article tackles the ambiguities around the choice of law analysis for preclusion standards; the doubts regarding the arbitral tribunal's kompetenz-kompetenz to address the issue; and the peculiar nature of jurisdictional court decisions and its res judicata effect in subsequent arbitral proceedings.

Rarely, if ever, does the lex arbitri shed light on the precise standards of preclusion to be applied in a particular case. Instead, the choice of law analysis by arbitral tribunals are guided by a fluid balancing act between varying degrees of private rights and public interests. While the The International Law Association (ILA) Recommendations (Resolution No. 1/2006) do come close to a purported international standard, its limited acceptability within the community and lean adoptability across jurisdictions, brings to the fore the uncertainties attached to the doctrine itself.

Confusion further ensues when the authority of the tribunal to decide on its own jurisdiction is brought into question on confronting the defense of res judicata. While the New York Convention's mandate of recognition of awards empowers the Courts to afford res judicata effect to a prior adjudication, the same conflicts with the arbitral tribunal's own competence to address arguably procedural arbitrability issues such as this. These concerns amplify manifold when an arbitral tribunal encounters a prior Court's decision regarding the tribunal's jurisdiction, including the question of non-arbitrability of the disputed claim.

In the absence of exacting standards and principles to deal with any of these issues, different tribunals have been discharging their own brand of the doctrine's broad interpretation. This Article expounds the existing literature on the subject, and thereafter, attempts to analyse each of these complex and controversial issues to better equip practitioners and arbitrators when faced with such concerns; at least until universal conformity is achieved through promulgations bordering a truly international standard.

Book Review: Edward Poulton (ed), Arbitration of M&A Transactions: A Practical Global Guide (Second Edition) (Globe Law and Business, 2020) by Angela Yap

Ashwin Shanbhag & Amoga Krishnan, NAFED v. Alimenta: Has India Missed the Wood for the Trees?

Crests and troughs mark the development of the jurisprudence of Indian arbitration law. The enforcement of arbitral awards has regularly been hobbled by an anachronistic judicial approach that allowed for the merits to be examined despite it not being within the court's remit – the proverbial Achilles heel to an otherwise robust legal framework that mirrors the UNCITRAL Model Law, 1985. Judgments that applied the brakes on the advancement of India as an arbitral hub took shelter behind the esoteric 'public policy' principle. A recent decision by the Supreme Court of India in National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta serves as a worthy example. This case note considers the implications of the Court's approach in setting aside an arbitral award that was held to violate the public policy of India. It argues that though the Court may have erred in examining the terms of the parties' contract, its ultimate decision to set the award aside is capable of justification.

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