Kluwer Arbitration Blog

The Contents of Journal of International Arbitration, Volume 37, Issue 6

Maxi Scherer (WilmerHale & Queen Mary University of London) · Monday, November 30th, 2020

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

Johannes Landbrecht & Andreas R. Wehowsky*, Transnational Coordination of Setting Aside and Enforcement of Arbitral Awards – A New Treaty and Approach to Reconciling the Choice of Remedies Concept, the Judgment Route, and the Approaches to Enforcing Awards Set Aside?*

The rendering of a final arbitral award can be the starting signal for a multiplicity of state court proceedings. Not all of those will be illegitimate, for instance if an award creditor needs to commence several enforcement proceedings in order to enforce the whole award. More critical, however, and more likely to invite abuse, is the relationship of setting aside and enforcement. Where an award debtor fails to request that an award be set aside, or fails to raise grounds for setting aside, or loses setting aside proceedings, should this award debtor be allowed to rely on those very same grounds again in subsequent enforcement proceedings? Or in turn, if the award is set aside, should the award creditor be allowed to enforce it? All this raises questions of how to coordinate setting aside and enforcement. While coordination mechanisms exist under domestic law, it is submitted that coordination at the transnational level leaves much to be desired. We will therefore take critical inventory of the current level of coordination at the domestic and the New York Convention level, assessing its respective strengths and weaknesses, also in light of well-known doctrines such as the choice of remedies concept and the judgment route. We will then propose wording for a new international treaty, complementing the New York Convention, to improve coordination of setting aside and enforcement and discuss the feasibility of such a project.

Jan Frohloff*, Per arbitrum ad astra*

‘Non est ad astra mollis e terris via’ – there is no easy passage from the Earth to the stars. Along the way, parties engaged in space activities might find themselves entangled in disputes. To facilitate the efficient settlement of such disputes, the Permanent Court of Arbitration has introduced the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities. This article describes the key features of this special set of arbitration rules and how it supplements

international space law and space disputes, so that the parties through arbitration can continue their journey to the stars.

Aiswarya Murali & Vivek Krishnani, *'Minority Awards' in India: A Low-Hanging Fruit for Judicial Interference?*

While Indian courts are entitled only to 'set aside' an arbitral award under section 34 of the Indian Arbitration and Conciliation Act, 1996, there have been numerous instances of modification of arbitral awards and this interventionist tendency has driven Indian courts to further devise new tools for interfering with the arbitral process. One such tool is the opinion of the dissenting arbitrator(s). The 'minority awards', which were completely overlooked back in time, are now being referred to not only for finding defects in the majority award but also for replacing them altogether. In fact, Indian jurisprudence in this regard has been very peculiar as no other Model Law jurisdiction has witnessed such overemphasis on the significance of the awards of the minority. This article analyses the various reasons cited by the Indian judiciary to approach arbitral awards in the foregoing manner. Particularly, the article addresses the conflict between these reasons and one of the most fundamental objectives sought to be achieved by the 1996 Act, viz. limiting judicial intervention.

Nima Nasrollahi Shahri, Mohammad-Reza Narimani & Navid Sato Rahbar, *Arbitrability of Disputes Under Iran's Bilateral Investment Treaties: Article 139 of the Iranian Constitution Reconsidered*

This article intends to investigate a major set-back to arbitration under Iranian law, i.e. the requirement of receiving an authorization from the Iran Council of Ministers and/or Parliament to refer disputes relating to public and state-owned assets to arbitration. This requirement is enshrined in Article 139 of Iranian Constitution ('Article 139').

The article examines this provision through the prism of arbitrability focusing on treaty-based investment arbitration. To this end, the existing practice and court precedence pertaining to Article 139 are studied and critically analysed. In particular, the implications of this requirement on the jurisdiction of arbitral tribunals and enforcement of awards are considered in depth in the light of the wording of bilateral investment treaties (BITs) concluded between the Islamic Republic of Iran and other countries.

Overall, we conclude, that Article 139 is not as serious a problem in BIT arbitration as it may be in commercial arbitration, especially as far as enforcement of awards is concerned. This has to do, partly, with the wording of Iran's BITs, the risk of state responsibility for nonenforcement of awards in investment arbitration, and, of course, the possibility to enforce arbitral investment awards outside of Iran.

Gustavo Guarín Duque, *The Termination Agreement of Intra-EU Bilateral Investment Treaties: A Spaghetti-Bowl with Fewer Ingredients and More Questions*

This article deals with the issue of the implementation of the Achmea judgment of the Court of Justice of the European Union (CJEU) through the Termination Agreement of Bilateral Investment Treaties ('Termination Agreement', TA) between some Member States of the European Union (EU). The article focuses on the analysis of the TA provisions that terminate Bilateral Investment Treaties ('intra-EU BITs') and investor-State dispute settlement (ISDS) among EU Members. It also describes TA provisions regulating concluded, new, and pending arbitration proceedings having as a reference the date the CJEU issued the Achmea judgment. Also, it examines how the TA regulates pending arbitration proceedings and discusses how TA Members are allowed to resort to transitional measures to resolve their dispute, throughout an amicable resolution proceeding, if they fulfil some conditions. Further, the article analyses some systemic issues of the TA, some related to the EU investment protection regime, others regarding the legal implications for intra-EU BIT provisions for EU Member States which did not sign the TA. Further, the article examines some possible issues related to the legal nature of the TA under international law and EU law.

This entry was posted on Monday, November 30th, 2020 at 9:02 am and is filed under Journal of International Arbitration
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.