Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Sunday, December 19th, 2021

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

Markus Burgstaller & Giorgio Risso, *Due Diligence in International Investment Law*

The obligation to exercise due diligence – which is commonly understood as the degree of care that is legally required or that is to be reasonably expected – emerged in international law in the seventeenth century to mediate inter-State relations. Due diligence then developed throughout the nineteenth and twentieth centuries in the context of the protection of aliens. Against this background, the article analyses the obligation to exercise due diligence in international investment law. The analysis shows that due diligence plays an important role in several aspects of the protection of foreign investments. First, it is accepted that investors should act with due diligence to: (1) benefit from the standards of protection set out in investment treaties; and (2) ensure compliance with host State law. Second, host States are expected to exercise due diligence with regard to substantive standards of protection, particularly the full protection and security (FPS) standard. While investment tribunals have clearly identified the scope of investors' and host States' due diligence, there is no conclusive indication as to the precise requirements to comply with the obligation to exercise due diligence.

Bas van Zelst & Diederik van Besouw, *Private International Law Aspects of Arbitrator Liability: A European Perspective Post-Brexit*

This article investigates how various private international law (PIL) instruments relevant in the European context, post-Brexit, deal with questions of jurisdiction, applicable substantive law, and recognition and enforcement pertaining to the contractual liability of arbitrators. Based on an analysis of applicable European Union (EU) case law and the drafting history of, amongst others, the Brussels I (Recast) Regulation and its predecessors, it submits that that the exclusions included in such Regulation with regard to arbitration proceedings do not apply to the Arbitration Contract between the Parties and the Arbitrator or Arbitrators. Second, we submit that the law applicable to a claim for breach of contract by an Arbitrator must be found through the application of Rome I.

Rome I provides that the law of the country where the Arbitrator that is alleged to be liable vis-à-vis (one of) the Parties has his or her habitual residence. With respect to enforceability of court judgments pertaining to arbitrator liability, we discuss and assess the Pandora's Box that Brexit appears to have opened. This assessment leads us to conclude that, whilst the framework put in place by Brussels I (Recast) and the Lugano Convention remains largely in place, on the departure of the United Kingdom from the existing legal frameworks, enforcement and recognition of court judgments between the United Kingdom and the EU will, in the absence of a jurisdiction clause, largely shift to provisions of national law and/or bilateral treaties.

Dorothee Ruckteschler & Anika Wendelstein, ***Efficient Arb-Med-Arb Proceedings: Should the Arbitrator also be the Mediator?***

The demand for hybrid proceedings combining elements of arbitration proceedings and mediation is growing continuously. The reason for this is the parties' desire to make dispute resolution more efficient. A special type of hybrid proceedings are 'arb-med-arb' proceedings. These proceedings involve first initiating traditional arbitration proceedings. Before the taking of evidence begins, an attempt is then made to settle the dispute outside the arbitration proceedings in a separate mediation procedure. If the mediation fails, the arbitration proceedings are recommenced, and an arbitral award is issued. In the majority of arb-med-arb proceedings, a third party not involved in the arbitration proceedings is appointed as mediator. However, sometimes the parties ask the sole arbitrator or a member of the arbitral tribunal to act as mediator. This identity of the mediator and the (former and later) arbitrator raises many difficult questions, in particular, when the mediation fails. This article first analyses the pertinent most important regulations worldwide in arbitration and mediation laws, institutional arbitration, and mediation rules, and in soft law. Based on the results of this analysis, the authors develop some practical recommendations for the stakeholders in arb-med-arb proceedings.

Luke Nottage, Julia Dreosti & Robert Tang, ***The ACICA Arbitration Rules 2021: Advancing Australia's Pro-Arbitration Culture***

This article compares the new Rules of the Australian Centre for International Commercial Arbitration (ACICA) with ACICA's 2016 Rules and those of other arbitration institutions, especially in the Asia-Pacific region. It shows how the revisions help to minimize formalization and promote efficiencies, arguably essential for arbitration's legitimacy given that many of arbitration's design features are traded off for an attenuated model of the rule of the law, according to a recent analysis by Singapore's Chief Justice Sundaresh Menon. The article explains new ACICA Rules aimed at reducing costs and delays, including measures to deepen digitalization of arbitration following the Coronavirus disease 2019 (COVID- 19) pandemic and to reduce the consent-based limitations inherent in arbitration, especially for multi-party and multi-contract disputes. Other new provisions include time limits for awards, and reference to mediation, although not ultimately hybrid Arb-Med. The article also examines how the Rules balance confidentiality with transparency, including new provisions for disclosure of third-party funding. It concludes by reiterating how the 2021 ACICA Rules help meet the expectations of international arbitration users and practitioners, according to recent surveys, and link to possible further reforms to underpin Australia's increasingly pro-arbitration culture.

Jacob Grierson & Thomas Granier, *Betamax: Has the Privy Council Gone Too Far in Seeking to Ensure that the Second Look Test Does Not Become a Second Guess Test?*

Questions of public policy often arise in international arbitrations, including, in particular, issues of competition law and corruption. Arbitrators' power to adjudicate these issues is conditional upon national courts' power to review such issues when faced with annulment applications and/or objections to enforcement applications (the 'second look' test). However, national courts are divided as to whether, when doing so, they should be allowed to second-guess an arbitral tribunal's decision on whether there has been a breach of international public policy. In its recent decision in Betamax, the Judicial Committee of the Privy Council (the highest court of appeal for Mauritius, constituted of members of the UK Supreme Court) came down very firmly against second-guessing. After having presented the different approaches that various jurisdictions have adopted on this issue, this article proposes that national courts should be allowed to further inquire into and potentially second-guess arbitrators' decisions on issues of international public policy, provided that the party applying for the setting aside of the award establishes before the competent court a strong prima facie case that there has been illegality such that recognising or enforcing the award would give rise to a breach of international public policy.

Maxime Chevalier, *Enforcement of Emergency Arbitrator Decisions: Dream or Reality? The French Perspective*

Emergency arbitration is a recent and significant development in the field of international arbitration. The enforcement of emergency arbitrator decisions is necessary to ensure the full efficiency of the mechanism. This subject is of great interest because the recourse by arbitration users to emergency arbitration for the issuance of interim measures is usually impacted by enforcement concerns. Thus, it is necessary to provide potential emergency arbitration users with an answer with regard to the possible enforcement of emergency arbitration awarded interim measures. This article aims to show that, contrary to popular belief, the enforcement of emergency arbitrator interim measures would be feasible in France.

We will demonstrate that the emergency arbitrator should enjoy a similar status as an arbitral tribunal. Even if there exist no mechanisms for the enforcement of arbitral orders in France, interim measures could be enforced as arbitral awards. Indeed, emergency arbitrator decisions might be considered as being final and, thus, qualify as an award subject to exequatur procedure. Moreover, we will suggest providing emergency arbitration users with an alternative enforcement mechanism which consists of indirectly enforcing the emergency arbitrator decision on the grounds of breach of contract through référé emergency proceedings.

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