Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Tuesday, April 11th, 2023

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

Klaus Peter Berger, *Contractual Arbitration Clauses and Non-Contractual Claims*

Are non-contractual claims such as tort claims covered by standard arbitration clauses? Italian arbitration law contains a provision which seems to resolve this issue in favour of arbitration but which is interpreted restrictively by the Italian Court of Cassation. In other jurisdictions, the traditional approach was to find the answer by interpreting the wording of the clause. The modern view is to focus instead on the requirement of 'factual equivalence' between the non-contractual claim and the performance of the contract that contains the arbitration clause.

Lee Carroll, *What Place Does an Umbrella Clause Have in the New Generation of Bilateral Investment Treaties?*

In the new wave of international investment treaties, investor protections are under scrutiny as states seek to 'restore' their right to regulate. The umbrella clause is one investor protection under reconsideration. The perception, held by some, is that the umbrella clause permits an 'unjustified intrusion' into a state's right to regulate within its territory. For that reason, the clause is increasingly being omitted from modern-day treaties. This article undertakes a detailed analysis of the umbrella clause and its divergent construction by investment treaty tribunals. It focuses on four particular complexities associated with the umbrella clause that have confronted tribunals to date. In conducting this analysis, the author seeks to demonstrate that, properly construed, the umbrella clause does not have far-reaching ramifications or interfere with a state's right to regulate. It has an important place in the new wave of international investment treaties but should be carefully drafted. A suggested formulation, which has in mind the four complexities discussed, is offered up.

Yves Herinckx, *Enforcement of Awards v. Enforcement of Judgments in the EU: Arbitration Must Catch Up*

Arbitral awards are easier to enforce across borders than court judgments, through the New York Convention, and this is one of arbitration's key advantages compared to court litigation. In the European Union, however, this comparative advantage has been lost since the Brussels I Regulation Recast provides for the enforcement of judgments throughout the Union without the need for a local exequatur, whilst arbitral awards still require enforcement proceedings in each country. This article submits that arbitration must catch up and proposes a limited amendment to the recast Regulation, providing that arbitral awards issued in the European Union are capable of enforcement throughout the Union on the basis of a single exequatur in the jurisdiction of the seat. The proposed single exequatur at the seat will be optional; there will be no 'double exequatur' requirement.

Thomas Dillon, ***The Human Right of Freedom of Expression in Investor-State Arbitration***

Investor-state dispute settlement (ISDS) by arbitration under bilateral investment treaties (BITs) frequently entails the application of international law extrinsic to the BIT itself, either as a principle of interpretation or by importation to the BIT of external rules as a matter of construction. Since the Second World War, a huge domain of law has been developed by international tribunals under human rights treaties. These treaties are international law instruments of equal status to any BIT. However, when claimants have brought ISDS claims relating to investments in television and radio broadcasting, human rights law, in particular the right of freedom of expression, has often been ignored or dismissed by arbitral tribunals. Yet a jurisprudence constant in human rights tribunals clearly provides that there is a presumption in favour of freedom to broadcast, a presumption potentially material to the merits of such disputes. The conventional protections provided to investors under BITs require tribunals to apply human rights law, with the result that the presumption of freedom to broadcast throws a burden on states to justify the withholding of necessary permissions. As political interference with free media, often foreign-owned, continues to be reported, the societal responsibility of tribunals to take such rights seriously becomes pressing.

Rodrigo Barradas & Jorge Vázquez, ***Baseball Arbitration as a Suitable Alternative for Construction and Real Estate Disputes***

Baseball Arbitration (or Final Offer Arbitration (FOA)) is a dispute resolution mechanism to resolve controversies where each party submits a final offer. The arbitral tribunal must then decide by picking only one of these proposals. Given the arbitrators' powers' limitations, these proceedings are usually shorter and less expensive than traditional dispute resolution mechanisms. In addition, contrary to conventional arbitration, parties tend not to assume unrealistic or extreme positions, which could promote amicable settlement since it is an all-or-nothing proceeding. FOA could effectively resolve monetary disputes in industries where parties seek to preserve the commercial relationship while avoiding unnecessary delays. Therefore, Baseball Arbitration could be advantageous in the construction and real estate sectors. However, most arbitral institutions do not have specific rules for conducting Baseball Arbitration proceedings. This article proposes a model clause for parties wishing to submit their disputes to FOA. In our proposal, the arbitrator will receive the parties' final offers and then issue its reasoned award, asserting the rationale to choose one offer over the other.

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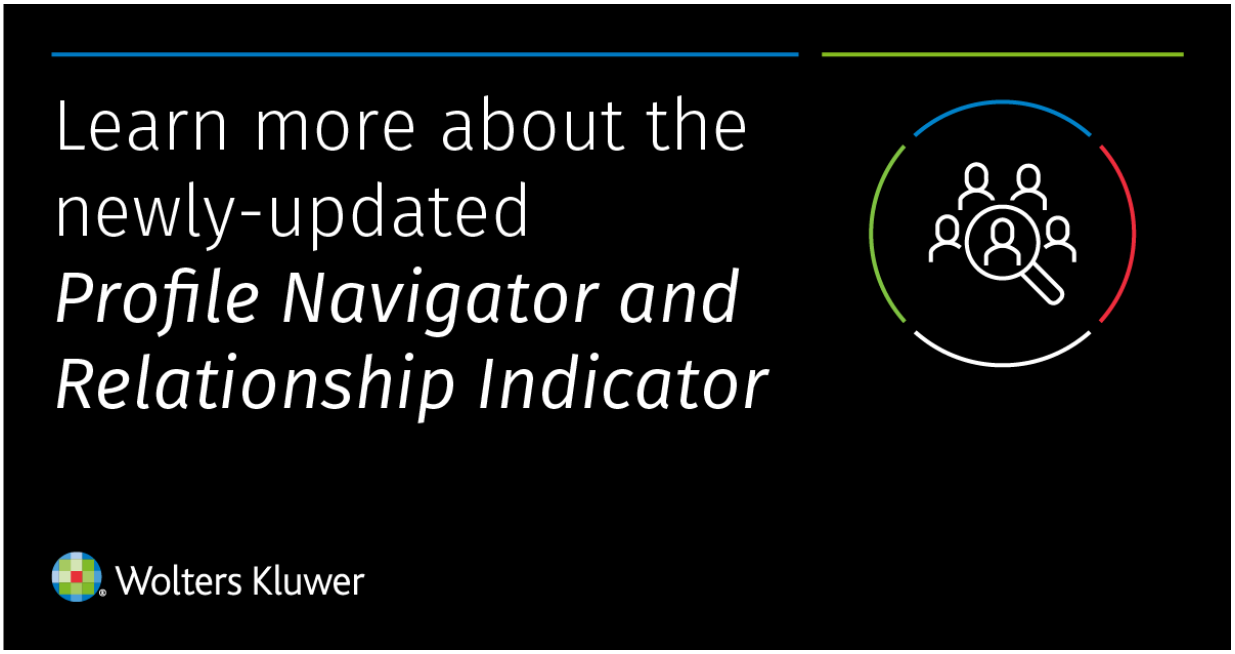

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