Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Thursday, April 13th, 2023

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

Gauthier Vannieuwenhuyse, ***Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes***

Environmental, Social and Governance (ESG) and Human Rights (HR) have become two of the most widely discussed topics in the last few years for businesses and law firms alike, but to what extent can ESG and HR issues be resolved through arbitration? This article examines the ESG and HR obligations that currently exist for companies, and analyses their gradual shift from soft law to binding hard law obligations. The rising number of ESG and HRrelated hard law obligations, paired with the increasing commercial awareness of the importance of ESG and HR, naturally leads to a greater potential for disputes. This article explores to what extent arbitration may be an appropriate dispute resolution method for these claims. In particular, it recognizes that although limitations to arbitration (such as in transparency and third party participation) exist, amendments have already been made to institutional rules to better position arbitration towards handling ESG and HR disputes. With the continuation of this trend, it is expected that arbitration will be more commonly used to resolve ESG and HR disputes.

Bas Van Zelst, ***Dealing with Accusations of Illegality in International Arbitration: Dutch Perspectives on the Interaction Between Private Law and Criminal Law Standards***

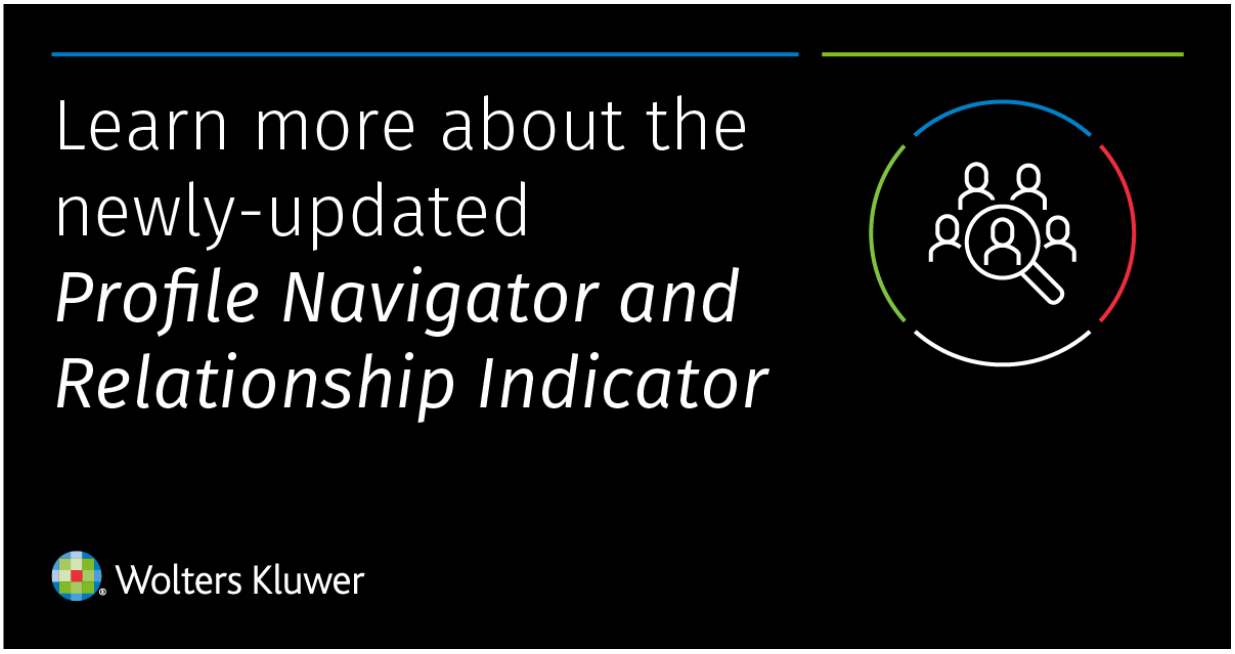
This article finds that private and criminal law standards differ greatly – both in terms of evidence and in terms of applicable substantive norms. On the basis of an assessment of the interaction between criminal and private law standards under Dutch arbitration law, it submits that in the private law assessment of allegations of illegality, evidentiary and substantive criminal law standards should play a more prominent part. To this end, it considers arguments of system coherence, legal policy and the rule of law.

Panfeng FU, *The Complex and Evolving Legal Status of Ad Hoc Arbitration in China*

The current People's Republic of China (PRC) Arbitration Law rejects ad hoc arbitration by requiring the arbitration agreement to specify an arbitration institution. However, such rejection does not constitute a barrier to the enforcement of foreign ad hoc arbitration awards under the New York Convention. To determine the validity of a foreign ad hoc arbitration agreement, China adopts a conflict-of-laws approach in ascertaining its applicable law. Recent years have witnessed China's initiative to experiment with ad hoc arbitration in its Free Trade Zones (FTZs). The draft revised PRC Arbitration Law published by the Chinese Ministry of Justice (MOJ) in 2021 proposes allowing foreign-related disputes to be resolved by ad hoc arbitration. This article argues that the legal status of ad hoc arbitration in China demonstrates a complex and evolving nature. It notes that while complete legalization of ad hoc arbitration in China is unlikely in the short term, its legal status will continue to evolve, reflecting the complicated relationship between China's bureaucratized arbitration regime and its increasingly sophisticated arbitration market.

Sherif Elatafy, *The Distinctive Aspects of Institutional Arbitration Under Egyptian Law*

Both the Egyptian Arbitration Law of 1994 and the relevant jurisprudence are devoid of any rule that regulates arbitral institutions' incorporation and good standing. However, recently, and only after the Chevron Sham Arbitration saga, Egyptian courts have tackled the issue of arbitral institutions' legal framework, where many subsequent related questions were then raised. For instance, is there an actual legal framework that governs arbitral institutions in Egypt? If so, what is the statute applicable to that effect? Are all kinds of arbitral institutions, operating in Egypt, subject to the same legal framework or statute? Is there an actual need to enact a new specific statute to avoid the recurrence of a fraudulent sham arbitration like the Chevron one? This article will attempt to answer all these questions, despite the dearth of Egyptian jurisprudence. It will also shed light on the collateral, but essential, problematic issues that arise while analysing the legal framework of arbitral institutions in general, and the Egyptian Sports Centre, in particular. As a part of this analytical study, and for purposes of comprehensiveness, the current article demonstrates the legal consequences of administering an institutional arbitration (i.e., the internationalization of institutional arbitration) as well as the consequences of wrongful administration of institutional arbitration, with a particular attention to the issue of a fraudulent administration such as in the case of the Chevron Sham Arbitration.



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