Kluwer Arbitration Blog

# The Contents of Journal of International Arbitration, Volume 40, Issue 4 (August 2023)

Maxi Scherer (WilmerHale & Queen Mary University of London) · Tuesday, August 15th, 2023

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

**Jeff Waincymer, *'Much Ado About . . . The Law of the Arbitration Agreement: Who Wants to Know and for What Legitimate Purpose?'***

Common law cases and commentators have debated whether the law of an autonomous arbitration agreement should be the same as the law designated in a general choice of law clause or should instead, be that of the law of the Seat. The English Law Commission is currently considering this question. This article argues that when common law courts deal with this issue within mere preliminary applications, such as for a stay of litigation, they apply an inappropriate methodology, regardless of the conclusions they come to. They are wrongly trying to impose certainty when simply faced with unclear drafting, an impossible task. In addition, most of the cases that have opined as to the law of the arbitration agreement need not have done so. The cases should have been resolved more simply under different reasoning.

The article then argues that, even if the law of the arbitration agreement is important, the proper question for mere preliminary courts should often simply be, could a reasonable tribunal find validity and sufficient scope under a law it may select under the choice of law and evidentiary discretions it has? If so, the right of a putative tribunal to consider the question fully should be supported. This would then leave it to annulment or enforcement courts to review those findings if asked to do so.

Even courts empowered to make pre-emptive rulings on validity and scope cannot properly do so under the methodology outlined in the leading cases. At least where contested facts could be material, such courts should not decide on these questions without an adequate hearing and without deciding either way on a case-by-case basis as to the particular parties' intent.

**Tamar Meshel, *International Arbitration Agreements in Canada Post-Uber***

In *Uber v. Heller* – a case involving an employment class action subject to an international

arbitration agreement – the Supreme Court of Canada decided three issues that threatened to undermine the enforceability of international arbitration agreements in Canada. The Court: (1) read the scope of the Canadian International Commercial Arbitration Acts narrowly; (2) created an exception to the competence-competence principle; and (3) relaxed the test for invalidating arbitration agreements on unconscionability grounds. At the same time, Uber was decided in a highly specific factual context and its ultimate impact on the enforcement of international arbitration agreements was largely left to be determined by lower courts in future cases. This article examines two such cases involving consumer class actions subject to international arbitration agreements. The article analyses the courts' application of Uber and its effect on their reasoning and on the outcome of these cases. While it is difficult to predict how Uber will unfold in the lower courts over time, the two cases examined in this article suggest that Uber is unlikely to affect the enforcement of most international arbitration agreements in the context of consumer class actions – perhaps the context most akin to that of Uber – let alone in more traditional commercial contexts.

**Antonia Birt , Arthad Kurlekar & Avinash Poorooye, *Anti-suit Injunctions at Crossroads: Navigating Unique Jurisdictions***

Anti-suit injunctions are typically treated differently in common law and civil law jurisdictions. While common law jurisdictions may favour anti-suit injunctions as enforcing the parties' agreement to arbitrate, civil law jurisdictions are generally concerned that anti-suit injunctions risk interfering with the jurisdiction of foreign court proceedings. The United Arab Emirates (UAE), where common law and civil law jurisdictions intersect, presents a unique example. The on-shore UAE courts apply civil law while the off-shore Dubai International Financial Centre (DIFC) and Abu Dhabi Global Market (ADGM) Courts apply common law, bringing a new dynamic to the availability and enforcement of anti-suit injunctions. The interaction of these courts and the fine balance achieved has resulted in remarkable developments in the UAE. However, both in the UAE and further afield, certain challenging issues, such as interim anti-suit injunctions, interim measures filed in parallel court proceedings, and anti-suit injunctions against third parties related to the dispute, serve to test this balance. Nevertheless, with new developments in the region, a positive attitude appears to have emerged on the availability of anti-suit injunctions, opening it up to potential advancements as the jurisprudence continues to evolve.

**Fabio Giuseppe Santacroce & Andrea Melchionda, *Thou Shalt Have the Power to Grant Interim Relief: The Reform of the Italian Regime on Arbitral Interim Relief***

By Legislative Decree no. 149/2022, Italy made several amendments to its arbitration law, which will apply to proceedings starting after 28 February 2023. The most significant innovation is the eradication of the infamous prohibition of arbitral interim measures. Indeed, the reform introduces a radically new regime on arbitral interim relief that expressly recognizes the arbitrators' power to grant such relief and that contemplates mechanisms for challenging and enforcing arbitral interim measures (including interim measures issued abroad). This article aims to provide an in-depth analysis of the new provisions on arbitral interim relief, highlighting potential issues and solutions. In the authors' view, despite some minor quirks, those provisions set up a very effective regime for arbitral interim relief, and are expected to contribute to making Italy a much more appealing

arbitration seat internationally.

**Raúl Pereira Fleury, *Carbon Credits and Carbon Markets: Future Challenges for ISDS***

The fight to avoid global warming of 1.5ºC above pre-industrial levels intensifies every day. The tension between organizations fighting to make this goal as real as possible and industries that still rely on fossil-based fuels and other greenhouse gas (GHG) emission systems is also growing. Since the inception of the Kyoto Protocol, many systems were put in place to attempt to save the Earth from the catastrophic consequences of global warming. One of them was the creation of carbon credits, and since they first appeared, their popularity has only increased. Together with investment in carbon credits, disputes may arise and therefore, the investor-State dispute settlement (ISDS) system may come into play. But it will not come without challenges.

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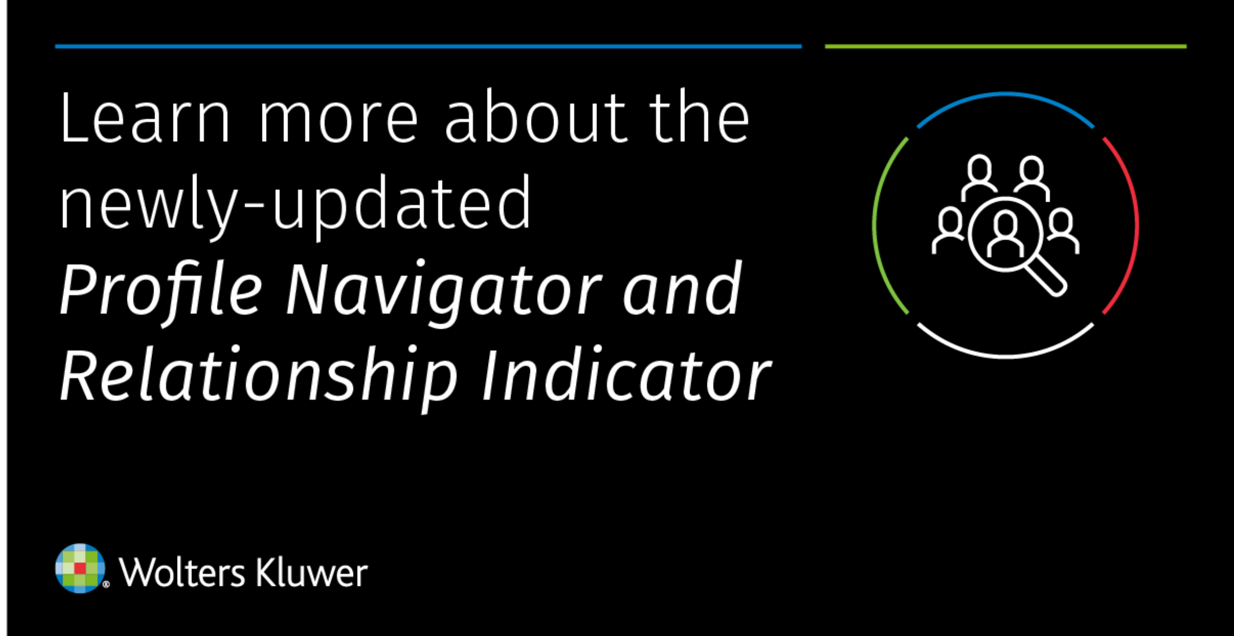

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