Kluwer Arbitration Blog

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

Gary B. Born & Sonya Ebermann, *A New Patent Mediation and Arbitration Centre for Europe*

With the Unitary Patent (UP) and Unified Patent Court, some Member States of the European Union are creating a new system that reaches beyond the existing European Patent (EP). The goal of the Agreement on a Unified Patent Court is to reduce fragmentation and provide more uniform territorial patent protection by establishing a centralized patent court. In an effort to promote alternative dispute resolution, the Agreement also provides for the creation of a Patent Mediation and Arbitration Centre. This is the first statutory mechanism that recognizes the availability of arbitration for resolving certain types of intellectual property (IP) disputes at an EU-wide level. With thirteen states having ratified the Protocol on Provisional Application, the entry-into-force clause has been triggered and the last part of the preparatory work has commenced. The new system is expected to be fully implemented in early 2023. This article first introduces the new Centre and its role within the framework of the Unitary Patent System (section 1). It then explains the operation of the Centre (section 2) and analyses the Centre's impact on the arbitrability of claims relating to patent invalidity or scope (section 3).

Therese Wilson, Yuri Banens & Shanayah Sharif, *ISDS and States' Ability to Deal with Financial Crisis*

This article reports on the results of an empirical study focused on "carve outs" with respect to financial regulation in bilateral investment treaties (BITs) and free trade agreements (FTAs) entered into during the five-year period between 2015 and 2019. It did so by analysing the eighty-five BITs and FTAs signed in the period from 2015 to 2019 inclusive, which were available in English in the UNCTAD Investment Policy hub, identifying three primary types of carve outs. We define carve outs as clauses which either provide an exception or defence to investor-state dispute settlement (ISDS) claims in certain circumstances or exempt altogether particular conduct by a state from the scope of ISDS, in order to protect state sovereignty. The article explores the likely

effectiveness of those carve outs in protecting state sovereignty and minimizing ISDS claims against states arising out of regulatory measures taken to protect national economies in the event of crisis. The inclusion of appropriate carve outs is likely to support perceptions of the legitimacy of ISDS in BITs and FTAs. The article considers some earlier cases of ISDS relating to financial regulation and considers the impact that some of the more modern carve outs might have had on those scenarios. The article concludes with recommendations for model clauses and approaches in BITs and FTAs.

Kevin Ongenae, ***Electronic Arbitral Awards: Yea or Nay? A Glimpse Inside the Minds of Arbitral Institutions***

More and more publications address the validity of electronic arbitral awards. The underlying assumptions of such articles are often that (1) the arbitration community does not make use of electronic awards; and (2) that the reason for that is that there may be legal validity issues due to the formal requirements that apply to them. This article verifies whether that is really the case, and does so on the basis of questionnaire data obtained from leading arbitration institutions during Spring and Summer 2022. The data from the questionnaire pertains to (1) how exactly arbitral institutions render arbitral awards in practice; and (2) how they perceive electronic awards (in general and with respect to their desirability and legality). This article finds that, indeed, institutions rarely make use of electronic awards. Their reasons for doing so are both legal and practical in nature.

Orlando Federico Cabrera Colorado, ***The Future of International Arbitration in the Age of Artificial Intelligence***

This article postulates that there will be two stages for the implementation of Artificial Intelligence (AI). In the short term, the first stage will lead to a complementary relationship between predictive machines and humans. After the cost of prediction decreases, new players come to the arbitration arena, and the flow of capital to finance AI's use in international arbitration is widely available, we will see the second stage's outset where predictive machines will assist in more sophisticated tasks. AI may assist counsel in crafting arguments, and arbitrators in comparing evidence submitted and finding conflicting fact patterns in the evidence. AI may even decide some aspects of a case. This requires a new division of labour. Lawyers will have to adapt and learn to delegate to such machines while being aware of their limitations. In response, new arbitration specialties will inevitably emerge. However, flesh-and-blood arbitrators will not be eliminated. While predictive machines may be able to decide certain aspects of arbitrations quickly and at a lower cost, the amount of data, the lack of repetitive patterns, inconsistencies, and parties' agreement that the award shall remain confidential and state the reasons upon which it is based may hinder their capabilities. The current legal framework seems to require drastic changes to make way for AI.

Kenneth Ugwuokpe, ***Limitation Period for Enforcing Arbitral Awards in Nigeria: A Case of Justice Without Remedy***

In *Murmansk State Steamship Line v. Kano Oil Millers Ltd, City Engineering Nigeria Ltd v.*

Federal Housing Authority, and *Tulip Nigeria Ltd v. Noleggioe Transport Maritime SAS*, the Supreme Court of Nigeria held that the limitation period for enforcing arbitral awards runs from when the cause of action for arbitration arose and not when the awards were made, unless they contain *Scott v. Avery* clauses. The purpose of this article is to analyse if and to what extent such decisions constitute denial of access to justice against arbitral award creditors.
