Kluwer Arbitration Blog

The Contents of Journal of International Arbitration, Volume 41, Issue 1 (February 2024)

Maxi Scherer (WilmerHale & Queen Mary University of London) · Sunday, March 3rd, 2024

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

Maxim Osadchiy, *Calibrating De Novo: Judicial Review of Arbitral Jurisdiction*

De novo review of arbitral jurisdiction at the post-award stage, that typically involves full, independent assessment of arbitrators' findings with respect to questions of law and fact, has become the norm under most legal regimes. This approach is geared towards the legitimacy of the arbitral process and ensures that a party contesting jurisdiction has the full opportunity to do so before the courts. However, while seeking to preserve important public policy objectives, *de novo* review may sometimes lead to inefficiencies and unfairness in the process, contrary to arbitration's stated goals of obtaining the fair resolution of disputes without unnecessary delay or expense. This article thus calls for a critical evaluation of the *de novo* standard with a view to developing a more balanced system that would pay due regard to the competing goals of efficiency and legitimacy of the arbitral process.

Giovanni Zarra, *Separability and the Law Applicable to the Substantive Validity of Arbitration Agreements*

This article discusses the related topics of the doctrine of separability and the law applicable to arbitration agreements, showing the continuous interaction between them. It fosters an approach according to which, while the law of the seat will continue to play a significant role in the evaluation of the validity of arbitration agreements, such validity may also be ascertained on the basis of other systems of law – relevant on a case by case basis – as dictated by the principle of *favor arbitrati*, which today provides a mandatory approach for domestic law judges.

Lukas Brunner, *The Arbitration Exclusion under the Brussels Regime: A Story of Colliding and Sinking Ships*

‘O Captain! My Captain! our fearful trip is done’. In Walt Whitman’s poem ‘O Captain! My Captain!’, the ship arrived at the harbour with cheering crowds awaiting its arrival. In contrast, the ships on which the arbitration exclusion sailed under the Brussels Regime were assigned a different destiny. They either ran into collisions or sank to the bottom of the ocean. In this regard, the Court of Justice of the European Union (“CJEU”) was requested to rule on the scope of the arbitration exclusion. In particular, the absence of a definition of the term ‘arbitration’ gave rise to uncertainty and controversy which the CJEU was asked to resolve. The approach that the CJEU pursued to resolve this issue changed significantly throughout the history of the arbitration exclusion, reflecting the CJEU’s growing mistrust towards arbitration. This has left a mark on the arbitration landscape within the European Union that has earned criticism from the international arbitration community. In the wake of the CJEU’s most recent ruling concerning the arbitration exclusion, and the following reaction of the English High Court, this article evaluates whether the arbitration exclusion has followed the ships on which it sailed to the bottom of the ocean, or whether it was handed a lifebelt for its continued existence.

Ammar Tanhan, ***Addressing the Costs Imbalance Resulting from Third-Party Funded Investment Claims***

Third-party funding has become a hot topic in investment arbitration, and its significant growth has provoked concerns from policymakers, academics, and states. One of the issues raised most frequently has been its impact on costs and security for costs orders. Growing case law suggests that states will likely be held liable for the funded legal costs of the claimant and may even be held liable for the costs incurred by the claimant to obtain funding. At the other end of the spectrum, states face the risk of being unable to recover their costs as the use of funding facilitates access to financially distressed investors. This article highlights that the current arbitral practice and legal framework have brought about a situation in which funders and claimants are able to transfer the risk associated with funding to states. It also demonstrates that the proposed options to address states’ concerns, namely holding funders liable for adverse costs and requesting security for costs, are unlikely to function as solutions. Thus, this article argues that unless appropriate amendments or reforms are undertaken to address this imbalance, states will be unfairly burdened for the benefit acquired by the claimant and funder.

This entry was posted on Sunday, March 3rd, 2024 at 8:02 am and is filed under Journal of International Arbitration
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