Kluwer Arbitration Blog

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The ever-recurring issue of investment treaty law and arbitration reform takes again center stage in this issue, courtesy of Noah Barr's excellent piece focusing on the EU Commission's 'model' of international investment protection as such model arises from the so-called new-generation International Investment Agreements ('IIAs') which the EU signed in recent years. Noah discusses the EU Commission's ambitious plans to develop a grand scheme of EU legal framework towards 'a special responsibility to lead the reform of the global investment regime' on the basis of non-economic values, including sustainable development, corporate social responsibility and human rights. As Noah explains, the EU Commission has, to date, failed to implement this framework. Instead, Noah posits, the main thrust of any investment law reform at EU level lies at the efforts of individual Member States many which have already begun modernizing their Bilateral Investment Treaties. Nevertheless, the EU model of international investment protection has been highly influential for Member States in aligning national policies on investment law and dispute settlement.

One might be excused to feel a sense of fatigue, or indeed exhaustion, from the ongoing discussions about EU's reform plans of investment treaty law and arbitration. But the Commission's investment law policy (and, for that matter, the CJEU's decisions on investment arbitration) continue to divide opinions and remain important developments to follow. This is why it is interesting to note Noah's conclusion that while some recent national reforms largely align with the EU reformed approach to investment protection, other domestic reforms bring together some innovative features of dispute settlement and non-economic provisions which are not included in EU's IIAs.

On this occasion, EU's failure to implement its broader 'model' of investment protection has failed, even if temporarily, by accident rather than design, as many of the EU's IIAs, including the EU-Canada Comprehensive Economic and Trade Agreement, have been subject to legal challenges which has hindered their ratification process.

This raises a broader issue of reform process rather than reform content: namely, that ambitious reform plans might be more likely and organically implemented if the EU Commission merely sets

out the broader goals and general direction of the desired reform allowing, at the same time, the policy space for national states to implement these policy goals in line with their domestic legal systems and traditions. While one understands their need to implement a coherent legal framework at a European level, the EU Commission and CJEU often appear to disregard valid national claims for legal nuance and national policy space.

This is not an issue of form; rather, it is an important matter of principle upon which wider acceptance of Commission's reform initiates may rest.

Stavros Brekoulakis, Editor-in-Chief

We are happy to report that the latest issue of *Arbitration* is now available and includes the following:

ARTICLES

Noah A. BARR*, The Replicability of the EU Model?of International Investment Protection?into Member States' Treaty Practice: A Strategic Alignment*

Since most EU IIAs have not yet entered into force, this article posits that investment law reform should take place at the domestic level. It examines to which extent recent investment treaty reforms undertaken by Member States have indirectly implemented the EU model. While national initiatives align with the EU template on substantive investment protection, some of them are particularly innovative regarding dispute settlement and non-economic provisions.

Peter ASHFORD*, The Need for Authority to Contract*

The validity of the agreement to arbitrate is fundamental to any arbitration. That validity can raise many issues, one of which is the authority of the signatory to bind the party. That authority must be actual or apparent (ostensible) and slightly different considerations will apply to corporations and states, but authority must always be present. Absent authority the agreement can, nevertheless, be ratified. Reliance on apparent authority is generally sufficient unless it is unreasonable to do so: a concept closely allied to honesty.

Setyawati FITRIANGGRAENI, Eva Fatimah FAUZIAH, and Sri PURNAMA, *Would Ratification of the Singapore Convention on Mediation Enrich Indonesian Mediation Culture?*

Mediation, focusing on achieving consensus, generally aligns with Indonesia's inclination towards amicable dispute resolution steeped in the nation's cultural heritage. This article seeks to explore how agreements resulting from mediation are enforced under the existing Indonesian legal framework and to evaluate whether the Singapore International Mediation Convention (SMC) would enrich the current mediation practices and enforcement mechanisms in Indonesia.

Hakan Ali TURGUT, *Existential and Cognitive Aspects of Successful Mediation*

Though the underlying issue of a conflict may differ in many ways, there is one common element in every conflict: human involvement. Therefore, it is understandable that existential aspects of the human condition may shed some light on dispute resolution. Such existential anxieties as fear of death, fear of freedom, loneliness, time and temporality, and uncertainty inevitably interfere with the successful outcome of any mediation. In this sense, practical applications of existential philosophies and some awareness of the cognitive sciences are the essential elements of a successful mediation outcome. A psychologically and cognitively informed mediator is especially positioned to resolve conflicts in a transformative manner.

Promise OKEZIE, *Resolving Smart Contract Disputes Through Blockchain Arbitration*

This paper finds that, due to the sue generis nature of smart contracts, off-chain systems of dispute resolution are not adaptive to the characteristics of Blockchain transactions or to disputes arising out of smart contracts, thus indicating the need for Blockchain arbitration. This paper discusses some of the legal impediments and implications that come with Blockchain arbitration and the need for Blockchain arbitration to be adapted to some of the principles that guide off-chain dispute settlement so as to make it a fair system of dispute resolution. The paper argues that Blockchain arbitration is a sue generis system of dispute resolution, which draws its authority from the *Lex cryptographia* legal order, and as such, need not be subjected to the legal authority of any nation.

Daniel COOKMAN, *Anti-Suit and Anti-Arbitration Injunctions: The Parallel Paradoxarbitration Injunctions*

The purpose of this article is to examine the current system of anti-suit and anti-arbitration injunctions as they pertain to parallel legal proceedings. Parallel proceedings undermine the effectiveness of arbitration agreements. Discourse provides an alternative priority model – based solution, seeking to prevent separate jurisdictional courts from proceeding with independent determinations of the matters of substance. The subject matter herein comprises examinations of anti- arbitration injunctions, anti-suit injunctions, and the relevant legal European landscape, providing an overview of national jurisdictions' approach to matters of competence.

BOOK REVIEW

Pijan WU: *Achieving the Arbitration Dream. Liber Amicorum for Professor Julian D.M. Lew KC*, by Stavros Brekoulakis, Romesh Weeramantry & Lilit Nagapetyan (ed.). Kluwer Law International. Netherland. 480 pp. $192. ISBN-13: 9789403549064.

This *liber amicorum* is not a random collection of unrelated papers given by friends. The book is by itself 'autonomous' as Julian Lew advocates for arbitration. The chapters address the essential aspects of international arbitration, with consistent themes that permeate the contributions. The

themes, i.e., the challenging questions probed by Julian Lew, include: autonomy of arbitration/arbitrators, applicable law, due process, institutions, etc.

The Editor welcomes the submission of articles for consideration for publication in the Journal. All prospective contributions should be in accordance with the guidelines set out here.

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