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:

Adam Tahsin & Marius B. Gass, *Codification, Convenience, and the Common Law: The Rationales Underpinning the Law Commission's Proposed Reforms to the English Arbitration Act 1996*

The Arbitration Act 1996 has regulated arbitrations in England and Wales for almost thirty years. Given the evolution of arbitral practice during this time, the UK Government in 2021 asked the Law Commission to consider potential amendments to the Act to ensure that it continues to be 'state of the art'.

The Law Commission concluded that wholesale reform of the Arbitration Act was not necessary or desirable in order to achieve that aim. The Law Commission instead proposed a series of targeted amendments, which are due to be implemented in legislation during the course of 2024. This article provides an overview of the Law Commission's review process before discussing its key recommendations and their potential impact on London's position as a preeminent seat for international arbitration.

The article also discusses the rationales underpinning the Law Commission's recommendations. In summary, some proposals merely modify the wording of the Arbitration Act without changing the substance of English law. A second category represents a conscious effort towards progressive development of the arbitration framework in England and Wales, to ensure in particular that London remains competitive internationally. A third category of changes seeks to build on the strengths of the English courts to ensure that the Arbitration Act continues to reflect the evolving world of arbitration. Taken together, the authors consider that the Law Commission's targeted recommendations should go some way to ensuring that England – and London – continue to have a prominent place in that world.

Lorenz Raess, *Statutory Arbitration Clauses and the Supplemental Swiss Rules for Corporate Law Disputes in Switzerland*

On 1 January 2023, revisions to the corporate law came into force which, among other things, allow Swiss companies to include a statutory arbitration clause in their articles of association (AoA) in respect of corporate disputes. Unless drafted otherwise, such arbitration clauses will bind the general meeting, the board of directors, the auditors and the shareholders. In such cases, corporate disputes will be conducted solely in the private sphere.

In this regard, the Swiss Arbitration Centre published a Model Statutory Arbitration Clause and supplemental rules for corporate law disputes in Autumn 2022. This article analyses the new possibility for statutory arbitration clauses in Switzerland and evaluates the importance of the supplemental rules in practice.

Alessandro Monti & Matteo Fermeglia, ***The FET Standard between Treaty Reform and ISDS Practice: An Analysis of the Modernized ECT***

The Modernization of the Energy Charter Treaty (ECT) counts as a prominent attempt to better incorporate climate change considerations into an investment treaty that is highly impactful from a climate change perspective. Among other initiatives, reform efforts in the ECT Modernization have led to amendments of key standards of treatment providing the substantive legal basis for claims by foreign investors. Focusing on the Fair and Equitable Treatment (FET) standard, this article contrasts the new treaty provision under Article 10 of the 'modernized' ECT with consolidated interpretations of the FET standard in previous arbitral practice. Building on such a jurisprudential analysis, this article evaluates the extent to which reformed standards of investment protection in the Modernized ECT can lead to an increased likelihood of climate-aligned outcomes in investor-State disputes, thereby providing an analytical assessment as to the potential of the newly introduced ECT provisions on FET – which may also serve as benchmark for further reforms of international investment agreements (IIAs) – to expand regulatory space for host States and support the adoption of more stringent climate policies.

Zhang Yuying, ***Sustainable Arbitration Along the Belt and Road Initiative: The Green Model Clause***

While there may be developments in the substantive obligations in green arbitration, it is difficult to say the same for the procedural aspects. Many have voiced concerns over the huge environmental impact in cross-border arbitration as a result of flights necessary for hearings and countless bundles of documents (just to name two examples). A select number of arbitral institutions have implemented climate-friendly practices in their rules and practice (whether pre- or during the COVID-19 pandemic), but such initiatives are far from sufficient. Although the new norm of virtual hearings has become common, some are concerned about their adoption, alleging a violation of the right to a physical hearing and consequently access to justice. Yet a relevant report released by the International Council for Commercial Arbitration ('ICCA') has definitively concluded otherwise. In this article, the Belt and Road Initiative ('BRI') provides the backdrop as one of the biggest infrastructure projects in the world that utilizes international arbitration. There are various initiatives within the BRI that gather major stakeholders, with the most relevant project here being the Beijing Joint Declaration by Arbitration Institutions for the BRI (the 'Beijing Declaration'), which was issued by major arbitral institutions around the world and pushes for

innovative changes in arbitration. Building on green practices in the arbitration community and the confirmation by ICCA that virtual hearings in and of themselves do not encroach on access to justice, the author suggests that arbitral institutions involved in the Beijing Declaration or along the BRI could pioneer changes in green arbitration by launching a Green Model Clause, which could operate as a clause for parties to adopt alongside carbon emissions scorecards, with the scorecards setting out a framework on the relevant factors for the tribunal to consider in the process of cost optimization.

Alexander Yean & Dexter Tan, ***The Subtle Knife of Separability: Legal Fictions of Consent to Arbitration and the Problem of Conditions Precedent***

The seminal House of Lords decision in Fiona Trust is best known for setting out the 'one-stop shop' presumption vis-à-vis the construction of arbitration clauses. Just as important, but often overshadowed, is the requirement it lays down that a challenge to the validity of the arbitration agreement nestled within a surrounding contract must be directed specifically to the arbitration agreement; a challenge that is merely 'parasitic' to a general challenge to the surrounding contact will not suffice to impeach the arbitration agreement.

This article suggests that this dimension of Fiona Trust in fact requires the acceptance of a legal fiction in relation to the parties' consent to the arbitration agreement (the 'Legal Fiction of Untainted Consent', or 'LFUC'), which ought properly to be recognized. This article then considers the recent Court of Appeal decision in The Newcastle Express, which involved a challenge to the existence of the arbitration agreement premised upon a condition precedent to the existence of the surrounding contract remaining unfulfilled. This article argues that a modified version of the LFUC (the 'Legal Fiction of Complete Consent', or 'LFCC') can potentially apply to such 'condition precedent' cases, and concludes by conceptualizing and defending a potential LFCC doctrine.

Rafael Quintero Godinez, ***A Case Note on the ICSID Tribunal's Decision in Hydro and Others v. Albania: Indirect Expropriation and Proportionality***

This case note delves into the complexities of balancing state regulatory authority and investor protections in the context of indirect expropriation, as exemplified in Hydro and Others v. Albania. The commentary scrutinizes the inherent structural bias of the Tribunal, which favored the sole effects doctrine over the police powers doctrine, thereby slanting the scale towards investor interests. This focus often leaves states defending not just the merits of their regulations but also the extent to which these regulations impact the investor, shifting the tribunal's attention from regulatory intent to merely quantifying investor detriment. Building on the notion of managerialism, the note argues that this bias makes it challenging for the Tribunal to shift away from its initial pro-investor stance. To restore balance, the commentary advocates for a framework guided by the police powers doctrine, enriched by the principle of proportionality. The note concludes by discussing the ramifications of continued bias, including the erosion of the regime's legitimacy, evidenced by several countries, including Albania, reconsidering or severing their affiliations with the International Centre for Settlement of Investment Dispute (ICSID), thus signaling an urgent need for recalibration to preserve the legitimacy of the international arbitration

regime.

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