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:

Klaus Peter Berger, ***The UNIDROIT Principles of International Commercial Contracts as a System of Transnational Contract Law: Two Recent Arbitral Awards***

Are the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts just a restatement-like collection of principles and rules or a system of transnational contract law? Two recent arbitral awards support the latter view. In both cases, the tribunals decided complex international business disputes solely on the basis of the 2016 edition of the UNIDROIT Principles. In both cases, the tribunals used the UNIDROIT Principles as a self-sufficient, comprehensive, transnational legal system which enabled them to resolve all legal issues of the complex disputes before them to the exclusion of any domestic law.

Darius Chan & Elias Khong, ***Re-calibration of Curial Intervention in Public Policy Challenges Against Arbitral Awards***

When an award debtor challenges an award on public policy grounds, usually the principle of finality prevails, and courts will consider the award debtor bound by the decision of the tribunal. However, because public policy has implications beyond the disputing parties themselves, some courts consider themselves justified in reviewing the award. There is therefore a tension between finality versus the court’s duty to stand as the guardian of public policy. Whether a review of an award should be allowed under this ground, and if so, the extent of permissible review, differs across various jurisdictions. For instance, common law authorities have generally preferred a very strict approach where a court may review an award on public policy grounds only in extremely limited situations. This paper considers the prevailing approaches taken across different jurisdictions and ultimately proposes an alternative approach for common law to strike a better balance among all competing interests.

Kathrin Asschenfeldt & Lisa-Marie Ross, *The Role of International Commercial Arbitration in Mastering Climate Change Disputes: Initiatives, Advantages, and Challenges*

The number of disputes relating to climate change, and the embedded concerns of environmental and energy law, is growing rapidly. Increasingly, corporations and other non-State actors are parties to such disputes. This article analyses in detail the multifaceted types of disputes involving businesses, as well as the responses by international arbitration institutions. After highlighting how international commercial arbitration can resolve existing limitations in the adjudication of climate change-related disputes, the authors discuss such specific challenges as the consent of the parties, confidentiality of arbitral proceedings, and public interest restrictions. Identifying the potential for optimization, the authors argue that arbitration institutions are well advised to take a proactive approach in addressing the topic, and suggest how such institutions can provide guidelines to parties and tribunals on how to handle climate change-related disputes in arbitral proceedings. These guidelines can assist parties to jointly agree on a mechanism to increase the transparency of relevant arbitral proceedings, including the submission of amicus curiae briefs. In addition, lists of arbitrators and specialists with expertise in climate change-related fields of knowledge can be made available. Such guidelines and expert assistance aimed at increasing transparency, legitimacy, and accessibility, once adopted by parties and tribunals, would help make arbitration all the more tailored to handle climate change-related disputes.

Bas Van Zelst & Naimeh Masumy, *The Concept of Arbitrability Under the New York Convention: The Quest for Comprehensive Reform*

This article critically examines the interpretation of the concept of arbitrability under the New York Convention. Taking stock of divergent interpretations that pose challenges to achieving a uniform enforcement regime, the article proposes a pragmatic approach to interpreting arbitrability under the New York Convention, which seeks to minimize judicial interference and enhance the efficiency of enforcement procedures. By promoting the principle of Kompetenz-Kompetenz and advocating for greater transparency in public policy defences, this article contributes to the ongoing discussion on these issues. It aims to bridge jurisdictional divides by offering a harmonized interpretation of arbitrability that not only illuminates the theoretical underpinning of the concept, but also provides a roadmap for a more coherent and universally applicable interpretation. This will enhance predictability and efficiency in resolving cross-border disputes.

Long Tran Viet & Hai Phan Thanh, *Determinants of Commercial Arbitration Selection to Resolve Disputes: Insights from Vietnamese Managers*

In commercial and investment transactions, disputes represent an inevitable, though undesirable, occurrence arising when one of the contracting parties fails to meet agreed-upon rights and obligations. This study aims to identify the determinants influencing the selection of commercial arbitration and examines whether a managerial level position affects this decision. Data were collected through interviews with 480 managers across five managerial levels in businesses with arbitration agreements in Vietnam's leading arbitration centres. The results of a partial least squares–structural equation modeling (PLS-SEM) analysis suggest that the decision to choose a commercial arbitrator is indirectly influenced through the mediating intention by five factors

related to the characteristics of the commercial arbitrator. These factors are as follows: legal expertise; reputation, knowledge, and experience; time and cost of dispute resolution; litigation process; and business manager's risk perception regarding the dispute at hand. Notably, managerial level does not significantly impact the relationship between the intention to choose a commercial arbitrator and the actual selection. These research findings are significant for legislative bodies and offer practical insights for businesses and arbitration centres, especially in emerging economies.
