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:

Michael Hwang, Gökçe Uyar & Cosima Wimmers, *The Enka v. Chubb/Anupam Mittal v. Westbridge Controversies: Why Not the Hong Kong (Partial) Solution?*

This paper explores the critical theme of determining the governing law of arbitration agreements amidst the intricate landscape of international arbitration. Focusing on divergent approaches from key jurisdictions, including England and Wales, Singapore, and Hong Kong, it elucidates the challenges posed by varying legal frameworks. Recent developments, such as potential statutory adjustments in England and Wales influenced by recommendations from the English Law Commission, underscore the need for clarity in governing law determinations. The controversial 'composite test' approach in Anupam Mittal v. Westbridge and the traditional English approach in Enka v. Chubb exemplifies the global concerns surrounding these divergent approaches, highlighting the complexities faced by common law courts worldwide. Drawing on these cases, the paper emphasizes the importance of parties expressly choosing the governing law of arbitration agreements to mitigate uncertainties. It underscores the potential positive contributions of model clauses and jurisdiction-specific approaches, such as the Hong Kong International Arbitration Centre (HKIAC) model clause and Hong Kong's guidance for HKIAC arbitrations. The paper also addresses enforcement challenges, particularly in light of Article V(2)(b) of the New York Convention. It discusses the discretionary invocation of the public policy exception and its impact on enforcement efficacy, emphasizing the need for a holistic approach transcending contractual formalism.

Hanno Wehland, *Setting-Aside Proceedings Against Treaty-Based Arbitral Awards in Switzerland and Their Contribution to the Debate Regarding the Fundamental Requirements for Protection under Investment Treaties*

The Swiss Federal Supreme Court has rendered over twenty-five decisions in setting-aside proceedings brought against treaty-based arbitral awards to date. Against the backdrop of

conflicting decisions by arbitral tribunals on many issues that regularly arise in investment arbitrations, the emergence of a consistent body of jurisprudence by the Court may be of interest even outside of Switzerland. The present contribution provides an overview of the procedure for setting aside arbitral awards before the Court and assesses the relevance of the various grounds for setting-aside that can be invoked specifically with regard to treaty-based arbitral awards. It addresses the Court's most interesting findings in relation to the fundamental requirements for obtaining protection under investment treaties and shows that the Court will likely further contribute to the debate on jurisdictional issues in treaty-based arbitrations.

Ricardo E. Ugarte & Stephanie Wu, ***International Arbitration in China: 2023 in Review***

2023 was a year of progress for international arbitration in China, as there was positive activity in the Ministry of Justice, in the Courts, and in the arbitral institutes, each paving the way toward making China a more favourable venue for international arbitration. There were also encouraging developments abroad as several foreign court decisions recognized awards issued in China under the rules of Chinese arbitration institutions, demonstrating increasing global acceptance of awards issued in China by Chinese institutions, such as the China International Economic & Trade Arbitration Commission.

With major amendments proposed to modernize its arbitration law, updates of key arbitral institute rules to be aligned with international practices, and judicial and policy measures in aid of arbitration, China has taken concrete steps to strengthen itself as a more modern international arbitration jurisdiction.

Édouard Bruc, ***Nonarbitrability and Mandatory Rules: Brothers, Not Twins***

Notwithstanding the lack of clear legislative intent, Belgian judges have unilaterally prohibited the arbitration of exclusive distribution disputes, unless a specific Belgian pro-distributor statute was applied or unless similar substantive foreign rules were applied. However, in 2023, the Court of Cassation finally reversed its jurisprudence. Yet, the syllogism underlying this longawaited reversal remains unsatisfactory. It mistakenly equates a conflict-of-laws issue concerning mandatory rules with questions of nonarbitrability under international arbitration law. Such an overly simplistic assimilation is inappropriate in many respects. It dilutes the tailored legal standard applicable to international arbitration into a lesser question of applicable rules. It unduly prevents a subject matter from entering *ratione materiae* into the arbitration field. Upon closer examination, it conflates two substantively different gateways to arbitration: the nonarbitrability doctrine (Article V(2)(a) of the New York Convention) and the public policy exception (Article V(2)(b) thereof). In so doing, it needlessly erodes confidence in the arbitral process, which is based on parties' autonomy, and violates the principles of judicial noninterference in international arbitral proceedings and of competence-competence. In essence, regardless of the pro-arbitration outcome in the case at hand, this flawed syllogism violates the New York Convention's straightforward language and pro-arbitration ethos by potentially generating unnecessary, unforeseeable, and improper exceptions to arbitration.

Vuk Cucic, *Administrative Law Challenges in Investor-State Arbitration*

Attributing a wrongful act to a state in an investor-state arbitration is governed by public international law. However, understanding whether such an act was undertaken by an agent of a state or other entity exercising elements of governmental authority, figuring out the legal nature, effects, scope and legality of such acts and comprehending whether they were taken from the point of public authority requires application of domestic administrative (or wider public) law of the respondent state. Administrative law makes applied public international law provisions operational. In order to evaluate the occurrence and frequency of administrative law challenges in investment arbitration, the author carried out a survey amongst ICSID arbitrators. The results of the survey, presented in the paper, confirmed the hypotheses that it is not seldom in investor-state arbitrations to come across complicated administrative law issues, the resolution of which is a prerequisite for deciding an arbitration case; that a majority of arbitrators in investor-state arbitrations did not specialize in administrative law; and that currently applied mechanisms of handling such complex administrative law issues in practice are not satisfactory.

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