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AFRICA

The Chronicles of the Pre-Colonial Method of Settling Disputes: Nigeria as a Case Study

Dr. Chinwe Egbunike-Umegbolu
University of Brighton

Abstract

Since the late 1960s, the Alternative Dispute Resolution (ADR) process has gone through several distinct phases. In many Western jurisdictions, ADR has increasingly gained public recognition as an 'alternative' to litigation. In contrast, non-court adjudication has historically been the primary method of settling disputes/conflicts in much of Africa, using the form of the Traditional African Method of Settling Dispute (TAMSD). This article argues that Western jurisdictions have not sufficiently acknowledged the debt owed to the Traditional African Method of Settling Dispute (TAMSD).

The writer adopts an ethnographic (qualitative) research method, through observation of the process of dispute settlement in two communities from south-eastern Nigeria; Onicha-Ado n'Idu in Anambra State and Amaofuo in Imo State, to offer a detailed description how pre-colonial monarchs settled disputes.

This article provides an overview of ADR processes and their relationship to the Nigerian legal system. It addresses the question of whether the Traditional African Method of Settling Disputes (TAMSD) is a precursor of ADR and evaluates the post-colonial development of this model of dispute resolution. Can 'court-connected ADR' or ADR be validly regarded as a 'legal transplant' from pre-colonial Africa?'

Finally, in line with socio-legal research, the work utilised the qualitative approach for data gathering and analysis as it analysed the research question for the first time on whether the Lagos Multi-Door Courthouse (LMDC) has replicated the pre-arbitral method of settling disputes. It concludes with questioning why the Traditional African Method of Settling Dispute (TAMSD) is still notably effective, while at the same time highlighting some of the similarities with the modern ADR.

Full article here

ROUNDUP OF ARTICLES

The Global South and State Aid Schemes: The Case of Legitimate Expectations for Investors

Dr. Yulia Levashova
Utrecht University; Nyenrode University

Lyndsey Thomsin
RENFORCE, Utrecht School of Law, Utrecht University

Introduction

The concept of legitimate expectations is well known to a number of domestic legal systems, as well as being recognised in public international law and European law. The parallel made in this paper is between the interpretation and application of the notion of legitimate expectations under international investment law and state aid law of the European Union (EU).

This comparison is especially relevant considering a number of investment decisions, where tribunals found the existence of an investor's legitimate expectations in cases involving the withdrawal of state aid schemes that led or contributed to the decision that a host state violated the fair and equitable treatment (FET) standard under an International Investment Agreement (IIA). Some of these investment decisions, e.g. Micula v Romania, have revealed a growing tension between the application and interpretation of the concept of legitimate expectations as a part of the FET standard under IIAs and as a general principle of law under the EU law on state aid. On a large scale, the latter tension is a part of the broader discussion on the relationship between EU law and the intra-EU Bilateral Investment Treaties (BITs). It concerns the fundamental issue of compatibility of the EU law and intra-EU BITs. This paper, however, does not address the latter inquiry, it is limited to the specific notion of the assessment of the legitimate expectations, focusing on the content of this standard, hereby attempting to provide a parallel between investment jurisprudence and case law of the EU courts.

The specific focus of this paper is on the Global South. Although, the EU state aid rules technically apply to the EU Member States, a foreign investor might be confronted with the EU state aid rules while conducting business in the EU and relying upon incentives provided by one of the EU Member States. Therefore, the implications of the state aid rules on investors from Global South countries in relation to the protection of legitimate expectations are discussed in this paper.

Full article here

Impact of Roman Arbitration on the UNCITRAL Model Law on International Commercial Arbitration and its Reception in Austria (Nihil Sub Sole Novum: Nothing New Under the Sun, Ecc. 1:9)

Dante Figueroa
figueroarbitration.com

Viktoria Simone Fritz
University of Graz

Abstract

This article is a tribute to the recently deceased Professor Derek Roebuck, whose vast areas of interest included the topic of arbitration in Greece and Rome. In particular, his book "Roman Arbitration," published by Oxford University Press in 2004, constitutes a singular milestone in the area of research of alternative dispute resolution in the Ancient Western world. Professor Roebuck's scientific rigor and attachment to the original sources contributed to the overall reliability of his work, and are a singular stimulus for contemporary arbitration enthusiasts- both dilettanti and experts- to contemplate, and to also admire, the millenary wisdom of our legal predecessors in the West, both Greek and Roman. In this sense, and emulating even older wisdom from the Hebrew books, we can say with respect to contemporary arbitration that "there is [almost] nothing new under the sun." Our hope is that this discrete excursus built upon Professor Roebuck's "Roman Arbitration" book will elicit a sense of ownership from the part of the global arbitration community, and will also constitute a call to emulate in our field the profound exactness of the ageless Roman legal genius.

"...it is hardly surprising that Roman [arbitration] practice was much like ours today, particularly in those jurisdictions whose arbitration law has followed the Roman law on compromissum." -- Roman Arbitration, Derek Roebuck and Bruno de Loynes de Fumichon, HOLO Books (2004), at 199.

Full article here

Note on the costs and financing of an Advisory Centre on International Investment Law

Professor Nicolas Angelet
angelet.law

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Ndanga Kamau Law

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Columbia Law School / The Earth Institute at Columbia University

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Legal Counsel

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International Law Institute

Introduction

A Working Group prepared this Note (1) to estimate the costs of establishing and operating an Advisory Centre on International Investment Law ("ACIIL" or "Centre") that provides assistance to States in handling treaty-based investor-State disputes; and (2) to identify possible sources of finance for the Centre's operation.

It does not deal with the desirability of establishing an ACIIL and the range of other issues to be considered in this respect.

Since the specific objectives, beneficiaries and scope of services of the ACIIL are not known at this point, certain assumptions have been made to arrive at rough estimates. Naturally, these estimates can be--and need to be--adjusted in light of further discussions by States. Moreover, since the number of disputes varies across years (and it is not known how many of them would be brought to the Centre), the approach taken here does not start with the question of how many staff a Centre would need to handle treaty-based investment disputes involving potential beneficiaries that arose, for example, during the past three years; rather, the approach taken in this Note is to assume that the Centre has a certain number of staff and it then estimates how many cases that staff can handle.

Full article here

Multi-Jurisdictional Perspectives to Public Policy Defence in Recognition and Enforcement of Foreign Arbitral Awards - Have the UNCITRAL, ECOSOC and ICC Lived up to Their Traditional Role of Fostering International Trade?

Lawrence B. Ochulor
Babalakin & Co.

Abstract

A controversial but important issue facing international commercial arbitration is how domestic courts interpret the public policy defence under Article V(2)(b) of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). This work examines the practicality of achieving a global consensus on uniform parameters for the public policy defence to the recognition and enforcement of foreign arbitral awards. It further examines whether the United Nation agencies like the United Nations Commission on International Trade Law (UNCITRAL), United Nations Economic and Social Council (ECOSOC) and other international organizations like the International Chamber of Commerce (ICC) have lived up to their traditional responsibility of driving the much needed conversation that could set the pace towards achieving an appreciable degree of certainty and predictability around the public policy defence in the Convention.

Firstly, I examined the historical background to Article V (2) (b) of the Convention with the aim of determining whether the present multi-jurisdictional perspectives on the defence was intended. Secondly, I examined the practicality of achieving a harmonised global approach to the defence and whether a transnational public policy (otherwise known as supranational public policy), can effectively serve as a common global standard for determining the public policy defence. I found that a unified global approach to the public policy defence was intended as state parties to the Convention were not expected to approach the defence based on the dictates and idiosyncrasies of their local laws and circumstances. I also found that transnational public policy can effectively serve as a unified global standard for determining the defence. I therefore concluded that the UNCITRAL, ECOSOC and ICC ought to drive the much-needed global conversation for appropriate reform that would address the obvious anomaly and that they have not lived up to their traditional responsibility in this regard. I consequently called on the UNCITRAL, ECOSOC and ICC to rise to the occasion by setting the pace for the desired reform within a record time as this will address the present situation where the Convention is bedeviled by the same problem it was designed to solve.

Full article here

CASE COMMENTS & AWARDS

State Responsibility and Rebels: An Analysis of the Strabag Award in the Context of Libya's Civil War

Professor Patrick Dumberry
Faculty of Law, University of Ottawa

Abstract

This article examines one aspect of Article 10 of the ILC Articles concerning matters of State responsibility and attribution arising in relation to rebels' conduct in the context of an insurrection or civil war: what happens to the wrongful acts committed by a government while fighting rebels in the context of a successful insurrection? Based on an analysis of State practice and case law, I will explain that the State remains responsible for the wrongful acts committed by the previous government while fighting the rebels. The article also examines how investment tribunals can use Article 10 of the ILC Articles in the context of investor-State arbitration proceedings involving rebellions and civil wars.

I will critically analyse the recent Strabag v. Libya award rendered in the context of a successful rebellion overthrowing the Gaddafi regime during Libya's civil war. I will explain how the tribunal could have made better use of the principles embodied in Article 10 to solve some of the responsibility issues it was facing. I will also examine the Tribunal's interesting findings regarding the State's failure to discharge its due diligence obligation of vigilance and prevention towards foreign investors in relation to the conduct of rebels.

Full article here

The 'Jurisdiction-Admissibility' Dichotomy in Multi-Tier Dispute Resolution Clauses: Why the decisions in Sierra Leone and C v. D are Lighthouses for India and other Jurisdictions

Varad S. Kolhe
ILS Law College, Pune, India

Abstract

Over the years, multi-tier dispute resolution clauses have become common in long-term, multi-party and cross-border commercial contracts. This article: first, discusses benefits and risks associated with the use of multi-tier clauses as well as questions surrounding their enforceability; second, answers whether non-compliance with intermediary tiers in multi-tier clauses raises a question of substantive/threshold 'jurisdiction' of the arbitral tribunal or is simply a matter of 'admissibility' of claims ("jurisdiction admissibility dichotomy"); third, surveys how national courts and arbitral tribunals have approached the jurisdiction versus admissibility debate; fourth, considers the significance of two recent national court decisions that have settled this debate: Republic of Sierra Leone v. SL Mining Ltd. (English High Court decision of 15 February 2021) and C v. D (Hong Kong High Court decision of 24 May 2021); fifth, highlights Indian courts' varying approaches in appreciating the jurisdiction-admissibility dichotomy and stresses the need to recalibrate the Indian lens towards this dichotomy in light of Sierra Leone and C v. D; and finally, concludes with the hope that Sierra Leone and C v. D would develop cross-jurisdictional consistency in both academic and judicial stances on the jurisdiction admissibility dichotomy, burgeoning certainty for parties' utilizing multi-tier dispute resolution clauses.

Full article here

The Arbitrability of Everything: Analysing the Indian Supreme Court's decision in Vidya Drolia

Chitransh Vijayvergia
Panicker & Panicker Advocates

Nikhil Devanand Mahadeva
Klarity Intelligence

Abstract

Indian case laws have been historically inconsistent when addressing the non-arbitrability of different subjects. As such, the Supreme Court of India in the case of Vidya Drolia and Ors v Durga Trading Corporation took the opportunity to bring finality to the issue of how to determine non-arbitrability and who is empowered to make that determination.

The Court expanded on several standards applied by the Supreme Court over the years and laid down a comprehensive fourfold test of non-arbitrability. It also determined that while arbitral tribunals should ideally decide non-arbitrability, a court may also do so while acting as an appointing authority, while ascertaining the validity of the arbitration agreement.

This article analyses the impact of this decision on arbitration in India, both in terms of the immediate and future application of the fourfold test, and the newfound power of courts to scrutinize arbitration agreements while acting as an appointing authority.

Full article here

Two Indian Parties Can Choose a Foreign Seat: Party Autonomy Prevails in India

Abhisar Vidyarthi
AZB & Partners

Abstract

The right of two Indian parties to arbitrate at a foreign seat has been subject to a longstand-ing conflicted jurisprudence in India. In its recent decision in PASL Wind Solutions Pvt. Ltd. v GE Power Conversion India Pvt. Ltd, the Supreme Court of India finally settled this issue by unequivocally holding that two Indian parties may choose a foreign seat of arbitration and the award made at such arbitration would be a foreign award in an "international commercial arbitration," enforceable under Part II of the Arbitration and Conciliation Act, 1996 ("Act"). In doing so, the judgement has clarified that the phrases "international com-mercial arbitration" and "foreign award," in Part II of the Act, are seat oriented, and there-fore the nationality of parties is not relevant in their application. The judgement also held that two Indian parties arbitrating at a foreign seat can approach Indian courts for interim measures and reliefs. This article explores the findings of this judgement in detail, highlight-ing its relevance and impact on the Indian arbitration landscape.

Full article here

CYBERSECURITY

The Consequences of Cyberattacks in International Arbitration and Prevention Methods

Cemre Cise Kadioglu Kumtepe
University of Leicester

Joel Evans
China University of Political Science & Law

Sophie Nappert
3 Verulam Buildings

Abstract

Cyberattacks are becoming an imminent threat to the arbitration community including law firms, arbitrators, and arbitration institutions. Attacks targeted at legal practitioners as well as service providers distract and severely undermine the course of legal proceedings.

This article aims to analyze how cyberattacks affect arbitration proceedings, law firms, and arbitration institutions by looking at cases and recent events. It considers the complex evidential issues arising out of cyberbreach and argues that hacked evidence can be considered as unlawfully obtained evidence leading to its inadmissibility, the disqualification of arbitrators and later issues in enforcement proceedings whilst also tainting the entire arbitration process. Finally, the article aims to draw lessons from recent incidents by advising stakeholders to take preventative measures before, during, and after the proceedings by introducing a template procedural order to be used in arbitration proceedings.

Full article here

Lex Cryptographia Guidelines for Ensuring Due Process in Transnational Blockchain-Based Arbitration: Study on the Kleros Model

Gabriela Cosío Patiño
Garrigues

Abstract

Nowadays there are several projects around the world, using blockchain to automate alternative dispute resolution, and specifically arbitration, the most popular ones being Kleros, Smart Justice and CodeLegit. Despite recent developments regarding blockchain-based decision-making and blockchain-based arbitration, currently there is no regulation addressing how to preserve due process in transnational blockchain-based arbitration. Regulation around the subject poses serious challenges, the main one being the definition of the applicable jurisdiction to a blockchain-based arbitration. In light of the boom of this type of dispute resolution mechanism and its inherent jurisdictional challenges, the proposal is to develop a series of guidelines that if embedded in the coding of blockchain-based arbitration applications - Lex Cryptographia - could ensure due process.

Full article here

COMPENSATION AND DAMAGES IN INT'L INVESTMENT ARBITRATION

Expert Comments on Assessment of Damages and Compensation (UNCITRAL - Note by the Secretariat of September 2021)

Dr. Herfried Wöss
Wöss & Partners, S.C.

Adriana San Román Rivera
Wöss & Partners

Dr. Irmgard Marboe
University of Vienna

Introduction

In September 2021, the UNITRAL Working Group III published a Note by the Secretariat on the "Assessment of damages and compensation". The

expert comments in this contribution have been prepared in response to the invitation by the Secretariat to comment on the Note until November 15, 2021.

Full article here

Study of Damages in Investor-State Cases (No Jurisdiction Supplement)

Tim Hart
Credibility International

Rebecca Vélez
Credibility International

Introduction

November 2021 - This is a supplement to our Study of Damages Awards in Investor-State Cases, Second Edition, dated January 2021 that has been expanded to include awards where tribunals decided they had no jurisdiction. In the context of our study, cases with a finding of no jurisdiction are wins for the respondent states and losses with zero damages awarded to the claimant.

In the world of international arbitration, disputes between foreign investors and sovereign states are often settled by rights and protections granted in investment treaties. As a general rule, if a foreign investor makes an investment in a country in which the investor's home country has a bilateral or multilateral investment treaty, that treaty often offers protections for the investor in the event of certain adverse actions by the host country, such as expropriation or inequitable treatment. If an investor feels that the host country has violated the investment treaty, the investor can file an international arbitration to try to recover the loss of value in its investment resulting from the alleged bad act of the host government. Many investment treaties specify which arbitral institution can administer an arbitration or, in some cases, the parties can choose. However, for the claimant to avail itself of protection under a treaty, it needs the tribunal to rule that it has jurisdiction over the dispute under a particular treaty.

The first edition of this study, dated June 2014, focused on arbitrations handled by the International Center for the Settlement of Investment Disputes ("ICSID"), a member of the World Bank Group. The study was based upon merit awards issued and publicly available as of 30 June 2013, and the analysis included 99 cases.

A second edition, dated January 2021, entailed a more comprehensive study of all investor-state cases which are primarily investment treaty cases, with a few contract cases, based on publicly available awards as of 31 March 2020. It analyzed additional arbitrations under ICSID rules, as well as arbitrations under UNCITRAL, SCC, PCA, ICC, LCIA, and CRCICA rules.

The second edition included an additional 70 ICSID awards, as well as 72 awards from other forums, totaling 241 awards, 143% more than the first edition. We endeavored to study the damages and quantitative aspects of the awards, including interest and costs. Our analyses excluded cases that were dismissed on jurisdictional grounds or were otherwise discontinued or settled prior to a final merits award.

Based on feedback from users of our second edition study, we decided it would be valuable to publish this supplement to the second edition to include cases with a ruling of no jurisdiction.

The addition of these cases improves the information from the study as no jurisdiction awards typically disclose the amount of the claim, and with a finding of no jurisdiction, the claimant clearly lost with an award of zero. The cutoff dates used in this supplement were kept constant with those used in the second edition (31 March 2020), and any changes in the case status were not considered in order to keep the data set as consistent as possible, except for the addition of the no jurisdiction awards.

Including the no jurisdiction awards allowed us to add an additional 87 awards to the data set. The inclusion of the no jurisdiction awards in the data set drives the damages awarded as a percentage of claim down steeply when compared to our prior studies. Based on the publicly available data for the 328 awards now included in this analysis, damages awarded total $71.9 billion on claims of over $322.2 billion, which results in an average award as a percentage of claim amount of 22.3%.

The average awarded amount was $219.2 million on an average claim amount of $982.3 million. Three awards alone accounted for 81.7% of the awarded damages and 47.8% of the amount claimed. Excluding these three awards, the average damages awarded were $40.4 million, with the average claimed amount being $517.7 million, which results in an average award as a percentage of claim of 7.8%. Within the 87 no jurisdiction cases, we identified three cases with very high claim amounts, which skew the analysis. If these were excluded, the average claimed amount was $305.2 million, increasing the average award as a percentage of claim to 13.2%.

Our analyses indicate that the respondent won in approximately 73% of the reviewed cases, 6 either through awards of: (1) no jurisdiction; (2) no liability; or (3) awards with liability but less than 20% of the amount claimed being awarded. The claimant was awarded more than 20% of the claim in 27% of the cases.

Footnotes omitted from this introduction.

Full article here

MEDIATION & ADR

Designing a Hybrid Dispute Resolution Process in Investor-State Dispute Settlement

Vakhtang Giorgadze
Singapore International Dispute Resolution Academy (SIDRA)

Abstract

The paper proposes the use of a hybrid dispute resolution mechanism in investor-state dispute settlement. While hybrid dispute resolution mechanisms can take a variety of forms, this paper focuses on a mechanism that combines arbitration and mediation into one integrated dispute resolution system. The purpose of this paper is to examine how mediation can be integrated into a hybrid dispute resolution mechanism. Mediation is not likely to replace arbitration as the main mechanism for the resolution of investor-state disputes. Instead, parties can take advantage of the benefits that both mechanisms mediation and arbitration offer in conflict resolution. The paper examines four key themes that are necessary for designing a hybrid dispute resolution process, namely, (1) different ways that mediation can be integrated into a hybrid dispute resolution process, (2) the timing of, and (3) confidentiality of, mediation within hybrid dispute resolution, and (4) the qualifications of those mediating in hybrid procedures. The paper relies on a survey and interviews conducted by the Singapore International Dispute Resolution Academy (SIDRA) in designing a hybrid dispute resolution mechanism for investor-state disputes.

Full article here

DISCUSSION / OGEMID

Summary of (Young-)OGEMID Symposium: "Valuing Businesses in the Time of COVID (Nov 15 - 22 2020)"

Naimeh Masumy
Swiss International Law School

Introduction

The virtual (mini) symposium ("Symposium") focused on the thorny issue of determining the value of a business in the COVID era and was conducted on the OGEMID and Young-OGEMID listservs simultaneously.

Determining the value of a business that is caught in a dispute is fraught with difficulties. This is largely due to different assumptions and the degree of uncertainty involved in the process. Nevertheless, Covid-19 has brought about an unusually high increase in uncertainty in various markets. As a result, the task of valuating the assets at the heart of a dispute have become exceedingly difficult. In addition, Covid-19 has served as a catalyst for a shift in the conventional approach towards assessing damages.

In this Symposium, the panelists - Ms. Funke Adekoya - San; Ms. Kathleen Paisley; and Richard E. (Rory) Walck - covered a wide range of topics ranging from the various types of government interventions that can impact upon the value of a business, to the impact on valuation approaches of unforeseen events that brought about abrupt changes overnight.

Full article here

Summary of Young-OGEMID Hot Topic Discussion No. 1: "Investment Issues and Economic Sanctions Following Russian Aggression in Ukraine (March 2022)"

Ayushi Singhal
Agami India

Introduction

Young-OGEMID (YO) is proud to launch a new series for its members: the Hot Topic Discussions. As part of this series, YO will invite experts to participate in a virtual (online) discussion/ rapid-response presentation on 'hot topics' of interest in international arbitration. The first such discussion took place from 15 March to 21 March 2022 and featured expert panelists Markus Wagner ("Markus") and J Benton Heath ("Ben"). Ben is an assistant professor of law at Temple University in Philadelphia, where his teaching and research interests include international law, global security, investment law, trade, arbitration, civil procedure, and administrative law. He previously worked on issues relating to international economic law for the U.S. Department of State and at the law firm Curtis, Mallet-Prevost, Colt & Mosle in New York. His forthcoming piece, Making Sense of Security, will appear in the American Journal of International Law next month. Markus is Associate Professor at the University of Wollongong and the Director of the UOW Transnational Law and Policy Centre (TLPC). He teaches and researches in the areas of international law, international trade and investment, peace and security, dispute resolution and constitutional law. He is the Executive Vice-President of the Society of International Economic Law (SIEL) and has advised governments and international organizations on matters of international economic law and international security.

The topic for discussion was the financial and economic ramifications of Russia's aggression against Ukraine in February 2022. Amongst other issues, the panelists spoke about the current measures as a matter of international law and the likelihood of investment arbitration arising as a result of various measures.

Full article here

Summary of Young-OGEMID Symposium No. 13: "Effective Legal Writing: Written Submissions in International Arbitration (October 2021)"

Earvin S. Delgado

Executive Summary

Young-OGEMID, conducted its thirteenth virtual symposium, *Effective Legal Writing: Written Submissions in International Arbitration* ("Symposium") last October 4th to 13th of 2021. It focused on the important role which written submissions play in the field of international arbitration.

The Symposium observed written submissions in international arbitration by combining the knowledge, expertise, and experience of leading legal practitioners and arbitrators from across the world.

The Symposium sought to help the participants understand what was needed in their written submissions and aid them to improve their rapport and communication within the arbitral setting.

The esteemed panelists covered a range of topics, from their real-life experiences to their professional advice.

Panelists:

- Hagit Muriel Elul, *Hughes Hubbard - Virtues of Brevity in Written Advocacy*
- Michael Nolan, *Independent Arbitrator - Arbitrators' Views on Written Advocacy*
- Crina Baltag, *Stockholm University - Cross-Border Issues involving Written Advocacy*
- Ali Yeşilırmak, *İbn Haldun Üniversitesi Rektör Yardımcısı - Effective Legal Writing*

Full article here

Young-OGEMID Author Interview Professor Luke Nottage - International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts (Elgar 2021)

Piergiuseppe Pusceddu
University of Tilburg

Introduction

Young-OGEMID (YO) is proud to launch a new series for its members: the author interview. As part of this series, YO will invite both new and established authors to participate in a virtual (online) interview concerning their recent publications.

The first such interview took place from 29 November to 3 December 2021 and featured Professor Luke Nottage of the University of Sydney. Prof. Nottage holds the Chair of Comparative and Transnational Business Law at Sydney Law School and is Special Counsel at Williams Trade Law. Prof. Nottage is also a founding director of the Australian Network for Japanese Law and Japanese Law Links Pty Ltd.

Prof. Nottage spoke about his latest book, *International Commercial and Investor-State Arbitration: Australia and Japan in Regional and Global Contexts,* which was published by Edward Elgar Publishing in 2021.

Full article here

INDIA

Arbitrability of Competition Law Disputes in India

Arjun Solanki
World Trade Advisors (WTA)

Anushka Tanwar
World Trade Advisors (WTA)

Abstract

Arbitration and competition law are regarded to be the opposite poles of a magnet. Arbitration resolves disputes involving parties in the agreement. Whereas, competition law cases are resolved by courts since they affect the public as a whole. Arbitrability of competition law in other countries such as USA and EU are far more coherent than in India. There are no substitute methods provided by the Indian Competition Act, 2002 other than approaching domestic courts. Moreover, the statutory powers of Competition Commission of India are limited.

In India, the bitterness towards arbitration is due to the concerns regarding the public interests; it is believed that arbitration will harm the public interests if competition law disputes are resolved by arbitration. Indian courts should try to appear more approachable to commercial parties by laying down a more predictable competition law dispute regime.

As India is expanding into a powerhouse in world economy, there lies a need to develop an efficient and effective way for arbitrability of disputes, in consistency with US and EU law.

Full article here

BOOK REVIEWS & RELATED MATERIALS

Book Review - Arbitration of M&A Transactions, A Practical Global Guide Second Edition

Aracelly López
Dentons Muñoz

Introduction

This practical global guide to the world of arbitration of M&A transactions is a must-read for arbitration, and corporate lawyers alike. This Book includes practical information to deal with M&A transactions, from the early stages of the negotiations to the unfortunate conclusion of a conflict arising out of it, hence its importance for attorneys involved in these areas of the law.

Arbitration of M&A Transactions, Consulting editor Edward Poulton, Global Law and Business, 2020, 552 pages, ISBN 9781787422902, https://www.globelawandbusiness.com/books/arbitration-of-ma-transactions-a-practical-global-guide-second-edition

Full article here

New Frontiers in Asia-Pacific International Arbitration and Dispute Resolution - Book Review

Somesh Dutta

Introduction

Edited by Professor Luke Nottage, Professor Shahla Ali, Dr. Bruno Jetin and Dr. Nobumichi Teramura, the book examines significant 'new frontiers' for Asia-Pacific international business dispute resolution by focusing on major economies in East and South Asia which have a close economic and geographical link. The principle questions addressed are: (a) whether the attractiveness of the existing and new venues for international commercial arbitration could be improved through law reform, case law development, and other measures despite worries about cost and delay; (b) whether emerging concerns about investment treaty commitments backed by investor-State dispute settlement (ISDS) would prompt Asian States to become rule-makers in international investment law, rather than mere rule-takers; and (c) whether international dispute settlement can be developed in the Asia-Pacific region through innovations in existing and new fields.

In the fourteen chapters of the book, the discussion focuses on developments in Australia, Japan, Hong Kong, China (including the Belt and Road Initiative (BRI)), India, Malaysia and Singapore. The fifteenth chapter, which is the concluding chapter, highlights key findings in the individual chapters along with identifying several challenges for the post-COVID-19 era. The value of this exciting book lies in its challenges to existing procedures and frameworks for cross-border dispute resolution, both in commercial and treaty-based (investor-State) arbitration, rather than being simply descriptive of the existing mechanisms.

Full article here

Forming Transnational Dispute Settlement Norms: Soft Law and the Role of UNCITRAL's Regional Centre for Asia and the Pacific - Book Review

Somesh Dutta

Introduction

Concerns relating to greater diversity, inclusivity and representation in global soft law-making are set against a backdrop of uneven representation in global institutions. To re-assess what is the current situation, in the context of formation of transnational dispute settlement norms, Professor Shahla F. Ali brings to us the first study of its kind exploring decentralised soft law-making through the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific (UNCITRAL RCAP) which was established in the year 2012.

Full article here

Book Review: Felix Dasser - "Soft Law" in International Commercial Arbitration

Dr. Andrea Marco Steingruber
Attorney-at-law

Introduction

The book "Soft Law" in International Commercial Arbitration of Felix Dasser follows the development of the so-called 'soft law' from its origins in public international law to international commercial arbitration (ICA), where the concept of 'soft law' is used today as a label for various instruments and phenomena, covering both procedural aspects and the applicable substantive law: model laws, arbitration rules, guidelines, the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles), the lex mercatoria, and others.

The monograph presents three particularly well-known sets of guidelines by the International Bar Association (IBA) and discusses the pros and cons of 'soft law' instruments and their potential normativity. The analysis suggests that 'soft law' instruments are typically less well recognised in practice than is generally assumed. The author explains what such instruments can achieve and

what minimum requirements they have to fulfil to at least aspire to some legitimacy. He argues ultimately that 'soft law' instruments can be very useful tools, but they do not carry any normativity.

Felix Dasser, "Soft Law" in International Commercial Arbitration, The Pocket Books of The Hague Academy of International Law / Les livres de poche de l'Académie de droit international de La Haye, Volume 44 (Martinus Nijhoff 2021), 300 pages, ISBN: 978-90-04-46289-2

Full article here

Book Review: Aikaterini Florou, Contractual Renegotiations and International Investment Arbitration: A Relational Contract Theory Interpretation of Investment Treaties

Dr. Emily Sipiorski
Tilburg Law School

Introduction

In Aiketerini Florou's monograph, Contractual Renegotiations and International Investment Arbitration, she provides an impressive theoretical contribution to the practice of international investment law by exploring the issue of contractual renegotiation of concession contracts. Its basis in both law and economics enriches the approach, enabling a perspective that strips away legal assumptions and allows a focus on "governance design". Her analysis benefits by focusing on a relevant sector of investments during the era of sustainable development, namely energy contracts, and examines fair and equitable treatment as exemplary of structural imbalances, its relevance applied at the stage of dispute resolution. The book promises a "focus[] on failures in the legal reasoning of arbitral tribunals that have impeded them from realizing their full potential as an independent and de-politicized dispute-resolution mechanism." She sets up this task by starting somewhere that most lawyers will not begin: economic analysis. To that end, she provides a "legal-realist approach to treaty interpretation drawing from the school of transaction cost economics."

The book is a timely and innovative addition to the scholarship on international investment law and an interesting perspective from which to observe the changing approach to investment protection. The interactions with concession agreements in investment protection are increasingly important as an element of energy law. This subject matter is well-chosen for its ability to reveal the instability in the system; there are significant changes as a result of laws on renewable energy and changing environmental regulations. However, it also represents an essential element of the public interest element to foreign investments. These elements of the system impact those investment relationships.

Full article here

Review of Enforcement of Investment Treaty Arbitration Awards in a (re)Politicized World: Increasing Fragmentation or Constructive Diversity?

Peng Wang
Xi'an Jiaotong University School of Law

Abstract

The investment treaty regime comes at its crossroad: with faltering multilateral reforms, investment arbitration is increasingly descending into the national level. Investment arbitration is undergoing institutional trial-outs in multiple dimensions and in multiple directions. Enforcement of investment arbitration awards is one of the key issues. This book reveals the clash of legal cultures and legal institutions in areas of enforcement of investment treaty arbitration awards: the overlaps of general and specialized regimes of recognition and enforcement, different conceptualizations of government-market-right relation in investment disputes, and culturalized rules on public policy and fundamental principles. This book highlights the diversity of representative jurisdictions in terms of supporting or regulating arbitral activism in a changing context. The previous commercialization and ongoing judicialization of investment arbitration reveal the intertwined forces underpinning the system of international investment arbitration: the localized public policy and state immunity procedures to respond to the increasing nationalism and populism while the internationalization of investment arbitration and the commercialized enforcement of resulted awards to respond to the embedded globalization.

A Book Review of "Julien Fouret ed., Enforcement of Investment Treaty Arbitration Awards: A Global Guide, Second Edition, Globe Law and Business, 2021, ISBN 9781787423497, Hardback, pp.791".

Full article here

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transnational-dispute-management.com

About TDM (ISSN 1875-4120)

Transnational Dispute Management is a peer-review online journal publishing about various aspects of international arbitration with a special focus on investment arbitration. Since the first issue was published in 2004 it has gained popularity among a large number of law firms, academics and other professionals in the field of arbitration. A TDM subscription includes **A)** access to the journal; **B)** OGEMID membership; and **C)** the Legal & Regulatory database.

Unfamiliar with our OGEMID forum? Feel free to apply for a free trial membership via transnational-dispute-management.com/ogemid/

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- TDM 3 (2022) - 2021 SOAS Arbitration in Africa Conference - Navigating the Interests of African States in Int'l Arbitration and Mediation
- TDM 2 (2022) - VI Symposium on Salient Issues in Int'l Arbitration: Does a Transnational Legal Order Exist in Int'l Arbitration?
- TDM 1 (2022) – Insolvency Proceedings and Arbitration

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