

## BOOK REVIEWS

*Autonomous Versus Domestic Concepts under the New York Convention* edited by FRANCO FERRARI and FRIEDRICH JAKOB ROSENFELD [Kluwer Law International, Alphen aan den Rijn, 2021, 348pp, ISBN: 9789403531731, €197 (h/bk)]

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) is one of the most important legal instruments in international commercial arbitration. Having been the object of extensive scholarship, one may wonder what has not yet been said about it? The editors of this book—Franco Ferrari and Friedrich Rosenfeld—argue that the boundaries between when to apply the Convention rules and when to apply domestic law are not clear and deserve clarification, considering that practice varies in State courts worldwide.

The book addresses several instances where the boundaries between the Convention's uniform rules and national laws are unclear or understudied. Two key questions provide an underlying theme throughout the book: whether a uniform interpretation of the Convention is desirable and, if so, how to promote it? Two alternatives are presented in answer to the latter. Uniformity could either be promoted through the autonomous (ie non-domestic) interpretation of certain key concepts of the Convention, or, through the application of national laws in conformity with the conflict rules provided in the Convention.

The book is composed of 13 chapters. Chapter 1 by August Reinsch analyses the Convention as an instrument of international law and focuses on transnational judicial communication to achieve uniformity under the Convention's decentralised application model. In Chapter 2, Filip de Ly critically assesses the efforts made over time to avoid 'treating identical or similar cases differently depending on the place of enforcement and of the place of origin of the award', including the creation of case-law databases, recommendations, and guides to assist national courts and practitioners in this endeavour. Chapter 3 explores the establishment and desirability of an autonomous notion of arbitral award. Cristina M Mariottini and Burkhard Hess argue against such a notion and that the Convention, in the pursuit of its objective to promote the effectiveness of party autonomy, is flexible so as to allow space for the contribution of national laws. In Chapters 4 and 5, George A Bermann and Lucas Siyang Lim, respectively, analyse the interpretation of Article III's reference to the rules of procedure of the territory where the award is relied upon. Bermann examines several potentially problematic procedural issues and characterises them as either falling under Article III or not, concluding that the inability to provide uniform rules has the 'inescapable price' of lack of procedural uniformity across jurisdictions. Lim proposes a three-step rule for interpreting this article in line with the Convention's purpose and the contracting States' interest in applying important rules of domestic procedure.

In Chapter 6, Fabrizio Marongiu Buonaiuti argues that the courts of the place of enforcement will have discretion to interpret the requirements related to duly authenticated copies of the award and certification of translations of the award or arbitration agreement. In relation to technical issues not regulated by Article IV, the law of the place of enforcement should apply. Chapter 7 deals with Articles II(3) and V(1)(a) and the conflict rules relevant to rendering an arbitration agreement null and void, invalid, inoperable, or incapable of being performed. Lawrence Collins conducts an extensive case-law review and determines that, while the interpretation of these concepts and the application of the choice-of-law provisions contained in these articles are theoretically questionable in some respects, they are applied in practice without raising problems. In Chapter 8, Francesca Ragno proposes a restrictive interpretation by national courts of the incapacity defence under Article V(1)(a), suggesting that this concept includes issues of general capacity and (general) contractual capacity, but not of authority or subjective arbitrability.

Chapters 9 and 10 both deal with the scope of the arbitration agreement, where the Convention does not provide for a conflict rule (Article V(1)(c)). Alan Scott Rau focuses on the distinction between the scope of the arbitration agreement and its validity, arguing that the law of the seat

applies to both, as per Article II(3). Dennis Solomon reaches a similar conclusion and considers that this approach allows for uniformity in the seat and at the place of enforcement. However, Solomon proposes that third-party effects of the arbitration agreement and *ultra petita* issues are governed by other laws. In Chapter 11, Ferrari and Rosenfeld address Article V(1)(d), dealing with the composition of the arbitral authority and the arbitral procedure. The authors propose an autonomous interpretation of these concepts, providing a negative definition and arguing that municipal law only has a role insofar as it may be relevant to determining the validity of the arbitration agreement on these topics (determined as per Article V(1)(a)), considering the lack of autonomous rules of contract law for this purpose. The final two chapters deal with the concepts of arbitrability (Chapter 12), and public policy (Chapter 13). Winnie Jo-Mei Ma and Lawrence Boo, on the former, and Andrea Bonomi, on the latter, argue for an autonomous characterisation of these issues by the enforcing courts, relating to their scope or outer limits, prior to considering the content of these concepts.

The approach of the book is interesting because it combines elements of public international and private international law and applies and develops an existing interpretative methodology to fill a gap in the literature. As the editors acknowledge, the contributions do not amount to a thorough commentary analysing all case law concerning the Convention. The chapters are accessible and well written, but in some instances are quite demanding for readers unfamiliar with the subject matter.

Not all authors reach identical conclusions regarding the desirability of uniform interpretation (for arguments against uniformity, see Chapters 3 and 6) or the tools to achieve uniform interpretation (see contrasting views in Chapters 1, 2, 13). However, this discussion adds to the ongoing dialogue on how to promote uniformity and this book can be welcomed as an assistance to its target audience—national courts, arbitrators, counsel and academics—in this endeavour.

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*The Protection of Intellectual Property Rights under International Investment Law* by SIMON KLOPSCHINSKI, CHRISTOPHER GIBSON and HENNING GROSSE RUSE-KHAN [Oxford University Press, Oxford, 2021, 592pp, ISBN: 9780198712268, £125.00 (h/bk)]

This is the first book-length treatment (based on the first author's doctoral thesis, published in 2011) of the issues raised by recent cases in international investment arbitration dealing with intellectual property rights (IPRs). It is a timely work as the international protection of IPRs via investment law has attracted scholarly attention for some time now and its practical relevance will only increase—one need only think of the potential legal challenges that may result from announced plans to issue TRIPS waivers due to the COVID-19 pandemic or the issuance of compulsory licences in the context of vaccines.

The book can be contextualised as a scholarly response to recent high-profile cases which have shown that a turn to investor–State dispute settlement (ISDS) raises a myriad of novel legal issues with public policy implications. Examples include the prominent cases involving the tobacco company Philip Morris, which turned to investment arbitration over tobacco regulation affecting the company's trademarks in two separate cases against Australia and Uruguay. Possible future cases could involve the issuance of compulsory licences, the rejection of pharmaceutical patents, and the commission of widespread copyright violations by State-controlled entities, among others.

The study under review analyses all these issues and offers a systematic in-depth study of the protection of IPRs under international investment law. It follows a clear structure. After a general introduction to the book, Chapter 2 provides necessary background and context to the fields of international investment law and IP law and introduces the key questions related to their

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