ALSCHNER, W. y SKOUGAREVSKY, D.: “The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe”, The Journal of World Investment & Trade, vol. 17, nº 3, 2016, pp. 339–373. The Trans-Pacific Partnership (TPP) has been labeled a ‘new, high-standard trade agreement’. But just how ‘new’ and ‘high’ are the standards it sets? To answer that question we combine traditional legal analysis with computational text comparisons situating the TPP in the universe of international investment agreements (IIAs). We find that the TPP investment chapter offers few truly novel features — 81% of its text is taken from prior American treaties. Compared to the majority of IIAs, however, the TPP goes beyond existing practice: it sets high levels of investment protection, explicitly safeguards host state sovereignty and establishes a sophisticated investment arbitration architecture. Nevertheless, the TPP is unlikely to revolutionize the IIA universe. Its innovations are open to circumvention given that older treaties remain in force parallel to the TPP. Moreover, as disagreement persists with Europe and BRICS countries, the TPP is unlikely to serve as a template for future multilateralization.

BANTEKAS, I.: “Interstate Arbitration in International Tax Disputes”, Journal of International Dispute Settlement, vol. 8, nº 3, 2017, pp. 507–534. The proliferation of interstate alternative dispute resolution (ADR) mechanisms, such as joint tax vetoes and mutual agreement procedures, as well as investor–state tax-related arbitration, are the chief reasons for the decline of interstate arbitration (or other forms of adjudication) in tax matters. The article argues that interstate arbitration is envisaged, apart from energy pipeline agreements, as a residual dispute settlement mechanism, but the relative success of ADR has limited interstate arbitration to a limited set of contexts and cases. The following instruments typically serve as submission agreements, namely: bilateral investment treaties, bilateral tax treaties, multilateral regional economic cooperation (or free trade) agreements and pipeline treaties. Ultimately, as the article concludes, a hybrid system that combines: (i) the direct involvement of the taxpayer; (ii) the efficiency of institutional arbitration; and (iii) the transparency guarantees of interstate arbitration is perhaps the way forward.

BEATSON, J.: “International arbitration, public policy considerations, and conflicts of law: the perspectives of reviewing and enforcing courts”, Arbitration International, vol. 33, nº 2, 2017, pp. 175–196. This article considers the different approaches to public policy by national courts to conflicts of law in international arbitration, the possible senses of the term ‘public policy’, which or whose public policy is to be taken into account, and barriers to certainty and uniformity despite international rule-systems or substantially harmonized national legal systems as a result of the adoption of the Model Law or which are largely based on it. s used to exemplify the problems and as pointers to a way forward. It considers the nature of the discretion to refuse to enforce, and how the interests and policies of the seat of the arbitration and those of enforcing courts should be balanced in the light of the structure of the New York Convention and the choice a losing party has between active remedies in the court of the seat and passive remedies by way of a defence to enforcement proceedings. The issues are illustrated by contrasting the circumstances of the decision of the Supreme Court of the United

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Kingdom in Dallah Real Estate v Government of Pakistan and those in the more recent litigation in Singapore and Hong Kong between PT First Media and Astro Nusantara.

BECKER, M.A. y ROSE, C.: “Investigating the Value of Site Visits in Inter-State Arbitration and Adjudication”, *Journal of International Dispute Settlement*, vol. 8, nº 2, 2017, pp. 219–249. Site visits by the bench occur rarely in inter-state adjudication and arbitration. Against this backdrop, the recent site visits in Indus Waters Kishenganga Arbitration (Pakistan v India) and Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India) are noteworthy and raise questions about how on-site inspections influence the decision-making process and whether site visits are an underused fact-finding tool. An analysis of these site visits, as well as past examples of site visits by arbitral tribunals and the International Court of Justice, reveal that the utility and value of site visits by the bench is difficult to ascertain, and there is little evidence that site visits have played a dispositive role. Moreover, in many disputes, other fact-finding methods may be more suitable than a site visit. But if site visits do, in fact, play a significant role in decision-making, then adjudicators should acknowledge that influence in a more transparent manner.

BETANCOURT, J.C.: “State Liability for Breach of Article II.3 of the 1958 New York Convention”, *Arbitration International*, vol. 33, nº 2, 2017, pp. 203–247 This article examines the concept of state liability for non-compliance with the obligation to refer the parties to arbitration pursuant to Article II.3 of the 1958 New York Convention. Article II.3 of the New York Convention obligates the courts of contracting states to safeguard the party against whom legal proceedings have been initiated in violation of a valid international arbitration agreement. The author argues that when the court of a given contracting state decides not to refer the parties to arbitration, particularly, in those cases involving the application of foreign law, and in which an error of judgment has been made (ie misapplication, misinterpretation, or lack of application of the law governing the agreement to arbitrate), the injured party should be entitled to make a claim for damages against the relevant contracting state for breach of a New York Convention right, ie the right to arbitrate.

BETHENCOURT RODRÍGUEZ, G. y AGULLÓ, D.: “Reconocimiento y ejecución internacional de los laudos arbitrales anulados un análisis crítico”, *Revista jurídica Universidad Autónoma de Madrid*, nº 34, 2016, p. 343-372. La Convención de Nueva York de 1958, sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras establece, por un lado, los motivos por los que se puede impugnar un laudo arbitral y obtener, eventualmente, la anulación total o parcial del mismo y, por otro, los supuestos que podrán dar lugar a que se deniegue el reconocimiento y la ejecución de la sentencia arbitral. En este sentido, cabe resaltar la problemática que se suscita en torno a los laudos que han sido anulados o suspendidos por una autoridad competente de un Estado en que, o conforme a cuya ley, ha sido dictada dicha sentencia arbitral. A este respecto, conforme el tenor literal de la Convención, se concede cierto margen de discrecionalidad a los Estados para determinar si se procede o no a la ejecución de un laudo que previamente ha sido anulado. Este trabajo analizará en el contexto internacional en qué medida la anulación del laudo constituye un verdadero obstáculo para la satisfacción de los intereses de la parte vencedora en el arbitraje.

BETZ, K.: “Economic crime in international arbitration”, *ASA Bulletin*, vol. 35, nº 2, pp. 281–292. In international investment and trade, arbitration is a frequently used mechanism to settle disputes between the parties. Economic crime such as corruption, money laundering or fraud may affect global investment and trade relationships in some way. If this is the case, arbitrators will be confronted with alleged or suspected criminal conduct. Since the late 1980s, a number of international and regional conventions as well as ‘soft law’ have emerged to combat transnational economic crime that has a detrimental impact on the economy and society of states and distorts fair competition. The conventions and soft law provisions have been implemented by states in their domestic criminal law. Public international law as well as domestic criminal law are relevant in international arbitration in cases of...
alleged criminal conduct if the parties choose to apply them, or if they apply on a mandatory basis. Criminal law defines the objective requirements of an offence that need to be proven by the evidence in detail. Arbitrators should identify and apply criminal law in cases where criminal conduct is suspected or alleged, and inquire into criminal allegations ex officio. Regarding evidence, arbitrators can rely on ‘red flags’ that are a form of circumstantial evidence, and draw adverse inferences from the non-production of requested evidence by the parties. If a party is able to produce prima facie evidence of criminal conduct, arbitrators can ask the defendant to produce rebuttal evidence. There is no need to apply a higher (or lower) standard of proof when assessing allegations of criminal conduct. The impact of proven criminal conduct on the outcome of the proceedings is different in investment and in commercial arbitration and depends on the circumstances of the case.

BLANDFORD, A.C.: “The History of Fair and Equitable Treatment before the Second World War”, ICSID Review – Foreign Investment Law Journal, vol. 32, nº 2, 2017, pp. 287–303. This article traces the history of the concept of fair and equitable treatment (FET) in international law before the Second World War. Based on extensive historical research, it concludes that FET developed in two basic stages prior to its codification in post-war treaties. In the first stage, early arbitration treaties required tribunals to base their decisions on what were then called ‘the general principles of justice and equity.’ In the second stage, Elihu Root and his colleagues derived a minimum standard for the treatment of aliens from these general principles of justice and equity. The United States thus referred to the minimum standard as ‘just and equitable treatment’ (or the equivalent ‘fair and equitable treatment’) for many years before the Second World War—long before ‘the minimum standard’ became the dominant term used to refer to the international standard for the treatment of aliens. In short, the original meaning of FET was (what is known today as) the minimum standard.

BLOCK, M.: “The Benefits of Alternate Dispute Resolution for International Commercial and Intellectual Property Disputes”, Rutgers Law Record, vol.44, 2016–2017, pp. 1–20. As global commerce continues to expand, the volume of cross-border disputes regarding commercial and intellectual property disputes has increased substantially. Contract, business and intellectual property disputes are protected by laws which might vary from region to region. The question naturally arises as to the proper forum to handle international litigation between parties located in different countries and across cultural divides. Alternative Dispute Resolution (“ADR”) allows interested parties to explore options, beyond traditional judicial intervention, to handle global commercial and intellectual property disputes. This article provides an overview of the benefits of ADR to international intellectual property and commercial disputes, and argues that ADR and the support of world intellectual property organizations offers a proper medium to address the unique substantive and procedural issues of international litigation.

BONAFÉ, E. y METE, G.: “Escalated interactions between EU energy law and the Energy Charter Treaty”, Journal of World Energy Law and Business, 2016, 0, pp. 1–15. The European Union (EU) has a recognized international legal personality and it has signed the Energy Charter Treaty (ECT) as a Regional Economic Integration Organization (REIO). As a result, the ECT, the EU and national legislation together establish different regulatory layers governing energy markets. Although those layers are in principle complementary, rules adopted in different periods and frameworks may cause inconsistencies in their implementation. The arbitral tribunal ward on 21 January 2016 in the case Charanne and Construction v Spain, is only the latest illustration of the uneasy boundaries between the EU and ECT. This article will look into some of the dynamics and tensions between the EU internal energy market and policy and the ECT in the areas of transit, long-term contracts, renewable energy and external relations. The review of selected measures and case law will reveal the existence of tensions at regional and international levels and the way they are addressed to simultaneously accommodate regional and international legal orders. This article will help to understand what kind of
interactions are happening today between the EU and the ECT legal systems and will offer a particular view to explain and approach those relations.

BÜHLER, M.W. y HEITZMANN, P.R.: “The 2017 ICC Expedited Rules: From Softball to Hardball?”, J. Int’l Arb., vol. 34, nº 2, 2017, pp. 121–148. The 2017 Rules of Arbitration of the International Chamber of Commerce (ICC), in force since 1 March 2017, have adopted new provisions for expedited procedures with the objective of having final awards issued by sole arbitrators six months after the first case management conference. These new provisions apply whenever the value of the claims in question is under USD 2 million. Users of ICC arbitration can opt in to or opt out of the expedited procedures provisions (EPP), partially or totally, regardless of the amount in dispute. The decision to institutionalize expedited procedures is an implicit admission that the objectives of the 2012 Rules have not been met when it comes to improving the time- and cost-efficiency of ICC arbitrations. The new provisions offer users dissatisfied with increased time and costs of arbitration an alternative to expedite the resolution of their disputes under the ICC Rules. While this offer is not novel in the landscape of international arbitration, it is to be welcomed, although it entails new challenges for users, arbitrators, as well as the ICC Court and its Secretariat. In practice, expedited procedures may increase due process challenges by dissatisfied litigants, before and after awards are issued. For these reasons, more than before, selecting a pro-arbitration seat will be important.

ELOFSSON, N.: “Immediate reimbursement of substituted advance on costs in international commercial arbitration”, Arbitration International, vol. 33, nº 3, 2017, pp. 415–425. Where the respondent fails to pay its share of the advance on costs to the tribunal or the arbitration institution, the case will generally be dismissed unless the claimant pays the entire advance. This article reviews whether a claimant who has made a substitute payment of the advance is entitled to immediate reimbursement from the respondent, and whether the decision should take the form of a procedural order or an award. Recent case law from national courts and decisions from tribunals show that the claimant is often entitled to an award from the tribunal on immediate reimbursement of the substituted advance. However, the legal basis for such request and the likelihood of success are, to a significant extent, dependent on the situation, the jurisdiction, and the applicable institutional rules. While there is a presumption for immediate reimbursement under some institutional rules, such as the current Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules) and Rules of the London Court of International Arbitration (LCIA Rules), it appears to be difficult to obtain immediate reimbursement in some jurisdictions without explicit provisions or an agreement between the parties. It is also suggested that the introduction of explicit provisions in legislation or institutional rules may reduce the uncertainty and the number of cases in which a party chooses not to pay its share of the advance without legitimate reasons.

ELRIFA, S.N.: “Equity-Based Discretion and the Anatomy of Damages Assessment in Investment Treaty Law”, J. Int’l Arb., vol. 34, nº 5, 2017, pp. 835–888. This article looks at the manifestation of equity-based arbitrator discretion as a tool to balance treaty-based investor rights with extrinsic public law obligations of states. The article breaks down the process of damages assessment into four separate decision stages and analyses at each stage (1) a dataset of previous International Centre for the Settlement of Investment Disputes (ICSID) awards; (2) the answers to a survey of arbitrators, jurists and practitioners; as well as (3) scholarly opinion. The article argues that equity-based discretion happens at each stage of the conceptualized decision-making chain and contributes to the incoherence of damages awards. The author argues that although arbitrators’ resort to discretion must remain unfettered, it is preferable for vague concepts such as equity to be kept to a minimum to protect the continued legitimacy of the investment treaty system. Instead, it is the language of investment treaties that needs to be adapted in the long-term, thus keeping pace with developing international investment law standards.
FIROOZMAND, M.R. Y ZAMANI, J.: “Force majeure in international contracts: current trends and how international arbitration practice is responding”, *Arbitration International*, vol. 33, nº 3, 2017, pp. 395–413. The concept of force majeure has been the subject of much judicial and academic debate that aims to find out how different national legal systems deal with the question of changed circumstances in general, and force majeure in particular. Through review of a number of international arbitration cases, arising from such events including war, revolution, strike, supervening illegalities, and economic crises, the purpose of the present article, however, is to examine the interpretation given by international arbitration tribunals to the concept of force majeure, more specifically to such notions as unforeseeability, externality, and unavoidability. As the article demonstrates, even though international tribunals would excuse the non-performance, if a contracting party successfully shows that the occurrence of an unanticipated supervening event has rendered the fulfilment of a contractual obligation impossible, yet the proportionally small number of force majeure cases accepted by international tribunals suggests that tribunals have been more disinclined, than national courts, to entertain claims of force majeure.

FELLAS, J. Y PETROVAS, P.: “Diag Human SE v Czech Republic-Ministry of Health: A Broad Interpretation of the ‘Arbitration Exception’ of the Foreign Sovereign Immunities Act”, *ICSID Review - Foreign Investment Law Journal*, vol. 32, nº 2, 2017, pp. 259–266. In a previous case comment, we discussed the decision of the District of Columbia (District Court or lower Court), which had dismissed sua sponte the petition of Diag Human (Diag) for the enforcement of a foreign arbitral award for lack of subject matter jurisdiction, finding that the Czech Republic had not waived its immunity under the FSIA. On 31 May 2016, the US Court of Appeals for the District of Columbia Circuit (Court or Circuit Court) reversed the decision of the US District Court, finding that the Czech Republic had, in fact, waived immunity. This case comment considers the Circuit Court’s decision.

FERNÁNDEZ ROZAS, J.C.: “La ordenación del arbitraje comercial internacional en América Latina y el Caribe: entre el particularismo y la unificación”, *Revista Chilena de Derecho Internacional Privado*, vol. II, nº 2, 2016, p. 40-57. Este artículo trata sobre todo del marco legal del arbitraje comercial internacional en América Latina y el Caribe y la influencia de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional en las leyes de arbitraje adoptadas por la mayoría de los países de la región, que han adoptado un modelo normativo moderno del arbitraje comercial internacional. También incorpora información sobre el marco jurídico en vigor para el arbitraje internacional en América Latina y el Caribe. Por último, muestra el esfuerzo importante en estos países para superar las tendencias nacionales e idiosincrasias formalistas en esta materia. A pesar de la resistencia negativa por los países de la región y de la defensa de un cierto particularismo en la actualidad no existe una actitud hostil hacia el arbitraje comercial internacional.

FIROOZMAND, M.R. y ZAMANI, J.: “Force majeure in international contracts: current trends and how international arbitration practice is responding”, *Arbitration International*, vol. 33, nº 3, 2017, pp. 395–413. The concept of force majeure has been the subject of much judicial and academic debate that aims to find out how different national legal systems deal with the question of changed circumstances in general, and force majeure in particular. Through review of a number of international arbitration cases, arising from such events including war, revolution, strike, supervening illegalities, and economic crises, the purpose of the present article, however, is to examine the interpretation given by international arbitration tribunals to the concept of force majeure, more specifically to such notions as unforeseeability, externality, and unavoidability. As the article demonstrates, even though international tribunals would excuse the non-performance, if a contracting party successfully shows that the occurrence of an unanticipated supervening event has rendered the fulfilment of a contractual obligation impossible, yet the proportionally small number of force majeure cases accepted by international tribunals suggests that tribunals have been more disinclined, than national courts, to entertain claims of force majeure.
GARCÍA CUETO, J.I., SORIANO LLOBERA, J. y ROIG HERNANDO, J.: “Reconocimiento y ejecución de laudos arbitrales anulados en la sede del arbitraje”, Cuadernos de Derecho Transnacional, vol. 8, nº 1, 2016, p. 101-110. El cumplimiento de los laudos arbitrales por las partes es voluntario pero existen casos que dan cuenta de los obstáculos que una parte vencedora en la disputa puede verse expuesta a sortear. La asunción de una posición respecto a la localización o deslocalización del arbitraje es realmente determinante para decidir sobre el reconocimiento de un laudo anulado o, si por el contrario, el énfasis debe ser puesto en consideraciones que la comunidad internacional ha identificado como “nociones básicas de justicia.” Los instrumentos que regulan el libre tránsito de laudos internacionales permiten el ejercicio de discrecionalidad lo cual genera incertidumbre e incita el forum shopping, planteándose entonces la pregunta respecto a cuáles son los valores que deben primar: certeza y respeto por las jurisdicciones locales o un posible mayor grado de incertidumbre. El presente artículo pretende unificar posiciones respecto a la (des)localización del arbitraje la cual no solo parece una tarea titánica, sino además ineficiente. Por su parte, el establecimiento de principios básicos de justicia y debido proceso parece no solo más alcanzable, sino también deseable.

GARCIMARTÍN ALFÉREZ, F.J. y SÁNCHEZ FERNÁNDEZ, S.: “Sobre el reconocimiento en España de laudos arbitrales extranjeros anulados o suspendidos en el estado de origen”, Cuadernos de Derecho Transnacional, vol. 8, nº 1, 2016, p. 111-124. El execuátur en España de laudos extranjeros está regido por el Convenio de Nueva York de 1958. Este establece una serie de causas de denegación del reconocimiento entre las que se cuenta que el laudo haya sido anulado o suspendido en el Estado de origen, ex art. V.1º.e. Asimismo, el Convenio de Nueva York establece, como criterio para resolver los problemas de concurrencia normativa que pueden surgir entre este y otros convenios internacionales, caso del Convenio de Ginebra de 1961 dentro de su ámbito de aplicación, o el propio Derecho interno, un principio de mayor favorabilidad. El trabajo analiza el régimen que dispone el art. V.1º.e) del Convenio de Nueva York y el juego del principio de mayor favorabilidad para determinar si cabe el exequéutur en España de laudos anulados o suspendidos en el Estado de origen.

GESSEL, B. y KALISZ, K.V.: “UNCITRAL Model Law: Composition of the Arbitration Tribunal Re-considering the Case upon Setting Aside of the Original Arbitration Award”, J. Int’l Arb., vol. 34, nº 1, 2017, pp. 17–33. In this article, the author analyses the question whether it is possible for the arbitrators, after their original award had been annulled, to sit on the arbitration tribunal hearing the case again, to reconsider the case, and to issue a second award in the same case in light of the UNCITRAL Model Law regulations. This question is addressed from two basic perspectives. The first one relates to arguments rooted in the functus officio principle, especially in reference to rectification and remission proceedings, as laid down in relevant regulations. The second perspective, meanwhile, encompasses the ethical principles and usages concerning appointment of arbitrators in international commercial arbitration, including the concept of prejudgment. In her conclusions, the author rejects a blanket prohibition on re-appointment of arbitrators, arguing that it does not duly account for all the nuances of the notion of impartiality in the context of actual practice.

GOH, N.: “Court-Ordered Interim Relief Against States in Aid of Arbitration: Sovereign Immunity, Waiver and Comity”, J. Int’l Arb., vol. 34, nº 4, 2017, pp. 679–709. States and state entities are increasingly involved in commercial arbitration. Despite the fairly settled principles concerning state immunity from adjudication and state immunity from execution, the principles concerning state immunity from interim relief by domestic courts in aid of arbitration remains poorly defined. Adopting Professor McLachlan’s approach toward foreign relations law, this article attempts to sketch the principles which may govern state immunity in the context of interim relief against states in aid of arbitration by applying the rules of state immunity in an allocative manner. It is suggested that it is at least arguable that a state’s consent to arbitration in many cases could amount to a waiver of state immunity from court-aided interim relief by the court located at the seat of the arbitration. This con-
clusion is likely to strike a balance between over-deference to states by virtue of their sovereign status, and a liberal erosion of the immunity rules in favour of private counterparties.

GOODMAN, R.E.M. y PARKHOMENKO, Y.: “Does the Chorzów Factory Standard Apply in Investment Arbitration? A Contextual Reappraisal”, ICSID Review – Foreign Investment Law Journal, vol. 32, nº 2, 2017, pp. 304–325. Foreign investors seeking to recover heightened damages, especially in the context of expropriation, invariably invoke Chorzów Factory to support their argument that compensation must be calculated not at the time of a wrongful act, but at the time of the award to reflect the possible rise of the value of the affected property. This article analyzes the historical context and underlying reasoning of the Chorzów Factory’s standard of damages to demonstrate that this standard cannot be automatically applied in investment arbitration for several reasons. First, Chorzów Factory stated that the rights and interests of an individual and those of a State are always in a different plane, and thus the damage suffered by an individual is never identical in kind compared to the damage suffered by a State from the same wrongful act. This suggests that the scope of recoverable damages depends on whether an alleged breach concerns the injury to a sovereign State or the injury to an investor invoking the international responsibility of a State on its own account. Second, Chorzów Factory’s pronouncement about the calculation of damages at the time of indemnification was limited to the protection of complex international security and economic interests safeguarded by the Geneva Convention on Upper Silesia after the contested partition of Upper Silesia; those interests were of a different order of magnitude than the interests underlying investment protection treaties. Finally, contrary to common misconceptions, Chorzów Factory was not a paradigm case of “unlawful” expropriation under customary international law or an investment protection treaty. The case involved the seizure of property that could not have been taken even against compensation. It is based on the distinction between different levels of illegality that Chorzów Factory also distinguished between different measures of damages, limiting its heightened standard of compensation in that case to the serious breach of the international obligations of essential importance for the maintenance of international peace and security.

HAN, I.: “Rethinking the Use of Arbitration Clauses by Financial Institutions”, J. Int’l Arb., vol. 34, nº 2, 2017, pp. 207–237. In 1995, this journal published an article considering the use of arbitration clauses in the area of banking and finance, which was observed to be ‘practically non-existent’ at the time. In the two decades that have followed, financial institutions have gradually increased their use of arbitration clauses. However, arbitration has yet to become the norm in resolving international financial disputes, and there is a gap between the use of arbitration in the field of banking and finance and in the general commercial sphere. This article explores the justifications provided for this gap – in particular, financial institutions’ traditional preference for litigation – to argue that many of these justifications are in fact misconceived. The article also highlights fundamental characteristics of arbitration that make it highly appropriate for use in the financial context. In particular, four widely used financial transactions are identified as being highly suited to arbitration. The article then considers two case studies of current efforts being made to promote the use of arbitration clauses. Finally, three suggestions are proposed to further facilitate the increased use of arbitration clauses by financial institutions.

HERRERA PETRUS (Ch.): “Reflexiones sobre el discovery y otros aspectos probatorios del common law en el arbitraje internacional desde la perspectiva del jurista continental”, Diario La Ley, nº 8829, 2016. En materia de prueba el contraste entre las reglamentaciones nacionales es particularmente intenso y orbita en torno a los dos principales modelos o familias jurídicas: el common law y el Derecho continental o civil. En tanto que espacio flexible de encuentro de esas tradiciones, el arbitraje ofrece un laboratorio para ensayar fórmulas mixtas o caleidoscópicas en la configuración de las reglas de prueba. Indudablemente, los dos modelos tienen ventajas y atractivos y el arbitraje proporciona la oportunidad para tratar de encajarlos en un mismo procedimiento. El presente artículo describe someramente las principales diferencias generales existentes en materia de prueba civil entre la tradición
HOVAGUIMIAN, P.: “The Res Judicata Effects of Foreign Judgments in Post-Award Proceedings: To Bind or Not to Bind?”, J. Int’l Arb., vol. 34, nº 1, 2017, pp. 79–106. This comparative analysis explores the question of preclusive effects arising from arbitration related judgments, particularly when a foreign court has already ruled upon an issue relevant to the grounds for refusal under Article V of the 1958 New York Convention. It argues that arbitration-related judgments like exequatur or non-annulment decisions, along with the res judicata and estoppel effects arising from them, can be subject to recognition in other countries. The article thereby rejects some of the views contending that various legal obstacles stand in the way of such recognition, including its compatibility with the 1958 New York Convention. However, risks of forum shopping and undue imbalances in the parties’ rights ultimately support restricting this recognition to judgments rendered at the arbitral seat only. Such judgments should be able to preclude the re-litigation of identical issues in non-seat countries as a matter of res judicata and estoppel.

KESSLER, J.L.: “Investment arbitration, legitimacy and national law in Latin America: an arbitrator’s perspective”, Am. Rev. Int’l Arb., vol. 27, nº 3, 2016. Nyone with a serious interest in investment arbitration cannot have avoided the long-running discussion regarding its legitimacy. Depending on how the starting date is selected, this debate has now gone on for at least 25 years, with no end in sight. The discussion has, without doubt, produced a number of serious proposals for reform, some of which have already been implemented. But in speaking with a number of colleagues who have served as arbitrators in investment cases, I find their reactions to the legitimacy discussion (notwithstanding critiques from outstanding scholars in the field) to be basically, that much of the criticism reflects either ideological bias or ignorance of how the process works in practice. For better or for worse, it seems that the discussion, at this point, focuses principally on ways to expand the number and diversity of those serving as arbitrators and various proposals for unifying international investment law through a new appellate body or the creation of one or more permanent investment arbitration courts. Though these proposals are certainly worth serious thought, my impression is that they do not sufficiently credit the achievements of the existing international investment regime or its sophistication in resolving international investment disputes. With new ICSID and other investment cases being filed in record numbers, one may justifiably wonder why the legitimacy discussion continues with such considerable intensity. Might there be deeper issues, which, if brought to the surface, would ameliorate the negative reactions of some parties, especially certain governments, to the investment arbitration process?.

KHO, S., YANOVICH, A., CASEY, B.R. y STRAUSS, J.: “The EU TTIP Investment Court Proposal and the WTO Dispute Settlement System: Comparing Apples and Oranges?”, ICSID Review - Foreign Investment Law Journal, vol. 32, nº 2, 2017, pp. 326–345. In the Fall of 2015 and following an open consultation process, the European Union proposed important changes to the standard investor-state arbitration regime in the Transatlantic Trade and Investment Partnership (TTIP)—a multilateral investment and trade agreement between the European Union and the United States. Through these changes, the EU seeks to significantly reform investor-state dispute resolution (ISDS) given what it characterizes as “widespread public concern” that the current ad hoc arbitration model lacks arbitral neutrality, transparency, and consistency and predictability in arbitral awards. The key element of the EU’s proposed reforms is the creation of an Investment Court System (ICS) that is institutionally modeled after the WTO dispute resolution system. Similar to the WTO dispute resolution system, the ICS would have a First Instance Tribunal and an Appeals Tribunal dedicated to resolving international investment disputes staffed by permanent “judges” chosen by the EU and the US. However, the EU’s significant departure from traditional investor-state arbitration has raised
many questions as to the suitability of importing WTO dispute resolution features into ISDS and, in particular, whether or not the proposed ICS would in fact serve the EU’s goals of ISDS reforming through increased arbitral neutrality, transparency, and consistency and predictability in arbitral awards. Although both the WTO and ISDS regimes deal with matters of international economic law, there are key differences in each regime that should be considered. These differences include the characteristics of the disputing parties, the remedies available, and the underlying objectives of the dispute resolution systems. The authors conclude that these differences are so significant that certain institutional features tailored for the WTO simply do not translate into ISDS. As a result, these differences are likely to hinder the EU’s efforts to reform ISDS through the ICS.

**KNIIGGE, M. y RIBBERS, P.:** “Waiver of the Right to Set-Aside Proceedings in Light of Article 6 ECHR: Party-Autonomy on Top”, *J. Int’l Arb.*, vol. 234, nº 5, 2017, pp. 775–793. Party autonomy is an important principle in arbitration. Parties that opt for arbitration are, to a certain extent, free to organize the arbitral process. The exact scope of this freedom is unclear, especially where fundamental rights of the European Convention of Human Rights (ECHR) are at stake. On 1 March 2016, the European Court of Human Rights (ECtHR) rendered a decision that can shed more light on the scope of the autonomy of parties in arbitration proceedings. In the decision *Tabbane v. Switzerland* the parties had concluded a so-called ‘exclusion agreement’. By means of such an agreement parties waive, in advance, their right to seek set-aside proceedings at the state court. This article analyses the decision of the European Court and addresses questions such as: must parties, who have agreed to exclude the right to set aside an award, be regarded as having waived all of their rights guaranteed by Art. 6 ECHR? And, how far does the responsibility of states extend for the course of affairs during arbitral proceedings?

**KOH, W.S.W.:** “Think Quality Not Quantity: Repeat Appointments and Arbitrator Challenges”, *J Int’l Arb.*, vol. 34, nº 4, 2017, pp. 711–740. Repeat appointments of an arbitrator by the same counsel or party are not uncommon in arbitration, with some even claiming that an ‘inner mafia’ decide the majority of cases. Whether this poses a problem for arbitrator independence or impartiality has been described as ‘highly controversial’. The 2014 IBA Guidelines on Conflicts of Interest expressly identifies repeat appointments as an Orange List circumstance providing possible grounds for challenge, but this has been described by commentators such as Gary Born as ‘poorly-considered’ and ‘relatively extreme’. This article suggests that reports of systemic favouritism have been exaggerated and numerical limits on repeat appointments should be rejected. I begin by outlining in section 2 the two contrasting approaches that authorities faced with such challenges have adopted: a quantitative approach and a qualitative approach. Section 3 examines the legal standards that parties typically subscribe to and argues that they cannot and should not be interpreted to favour the quantitative approach. Section 4 scrutinizes the main reasoning processes that allegedly link repeat appointments to an appearance of bias and suggests that they rely on untenable generalizations. Finally, section 5 assesses the quantitative approach from its impact on party autonomy. I suggest that respecting party autonomy means that the quantitative approach must not be adopted except where parties have explicitly agreed so.

**LENK, H.:** “Investment Arbitration under EU Investment Agreements: Is There a Role for an Autonomous EU Legal Order?”, *European Business Law Review*, vol. 28, nº 2, 2017, pp. 135–162. The present paper argues, that the investment court fails to guarantee overall compatibility with the Treaty. In particular, the principle of autonomy, which the Court of Justice has over the years developed into an effective tool protecting its own jurisdictional prerogatives, is likely to have an impact on the establishment of the investment court. Accordingly, as the investment court will ultimately engage in the interpretation of EU law and it assessment against broadly defined international standards it fulfills a judicial function that is reserved to the Court of Justice. In the absence of the prior involvement of the Court, and considering the exclusion of domestic courts from the process of dispute resolution, the present paper concludes that the currently envisaged investment court system is incompatible with the Treaty.
MENON, S.: “Adjudicator, Advocate, or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator”, *J. Int’l Arb.*, vol. 34, nº 3, 2017, pp. 347–371. The disturbing revelations arising out of the Croatia-Slovenia arbitration have underscored the importance of having a clear understanding of the role of the party-appointed arbitrator. The problem can be traced at least in part to the tension between the arbitrator’s personal incentives and professional obligations. On the one hand, the party-appointed arbitrator owes his appointment to the favour of his appointer. How the appointer assesses his performance will likely have a bearing on the appointee’s prospects of future appointments. But any such assessment will be from the subjective perspective of the appointer and will almost inevitably be tied to the outcome of the matter. This can create an economic incentive for the appointee to be sympathetic to the appointer’s case. On the other hand, most members of the arbitration community still hold to the view that there subsists a professional obligation of impartiality which inheres in the office of arbitrator and which is not to be diminished at all in the case of a party-appointed arbitrator. This requires not only that he act fairly, but also that he be seen to be doing so. This article examines the functions, duties and obligations of the party-appointed arbitrator from preappointment consultations to the final discharge of the mandate, and suggests some practical rules of engagement and best practices that emerge from the analysis. It also proposes a systematic approach to arbitrator regulation in the establishment of a central body to oversee the discipline of international arbitrators.

MOYANO, J.P.: “Impecuniosity and Validity of Arbitration Agreements”, *J. Int’l Arb.*, vol. 34, nº 4, 2017, pp. 631–652. As a private dispute resolution mechanism, arbitration depends on the availability of funds from the parties. However, not infrequently one side will be unable, or unwilling, to advance its share of the costs. Courts faced with such cases can either uphold the validity of the agreement or set aside the agreement and retain jurisdiction over the dispute. This article examines several legal theories courts have relied on when doing so. Initially, it will present the various positions by way of case examples, including that the agreement is rendered invalid due to public policy principles, denial of justice, contractual breaches or waiver. Afterwards, it will analyse various issues that arise from court practice, including conflicts regarding the applicable law, jurisdiction and the burden of proof. The article concludes with the author’s suggestions on how decisions over the potential invalidity of the agreement could be guided.

OSADCHIY, Maxim: “Emergency Relief in Investment Treaty Arbitration: A Word of Caution”, *J. Int’l Arb.*, vol. 34, nº 2, 2017, pp. 239–255. Emergency interim relief – a procedure widely available in commercial arbitration – is now being put to use in investment treaty cases. Five documented cases of emergency interim relief in the investment treaty context are known today. The article discusses these cases and uses them as a basis for assessing some of the issues that are likely to arise with the application of emergency interim relief in future investment treaty cases. The article argues that emergency interim relief in its current form, an instrument developed with commercial arbitration in mind, may not be entirely suitable for investment treaty arbitration, due to the unique features of the latter. While acknowledging the utility of emergency interim relief in investment treaty arbitration, the article suggests that the existing rules regarding emergency interim relief and the treatment of emergency relief applications by emergency arbitrators could be changed to adequately take into account challenges unique to investment treaty arbitration.

PASCHALIDIS, P.: “The Future of Anti-Suit Injunctions in Support of Arbitration After the EU Court of Justice’s Judgment in the Gazprom Case”, *J. Int’l Arb.*, vol. 34, nº 2, 2017, pp. 333–345. By its judgment of 10 February 2009 in Allianz and Generali Assicurazioni Generali (C-185/07, EU:C:2009:69), the EU Court of Justice declared anti-suit injunctions issued by Member States’ courts in support of an arbitration contrary to the Brussels I Regulation if proceedings between the same parties and on the same matter had been commenced before the courts of a Member State. However, in its judgment of 13 May 2015, Gazprom (C-536/13, EU:C:2015:316), the Court ruled that
the said Regulation posed no obstacle to the recognition and enforcement of such injunctions when issued by arbitral tribunals. Since then, the Brussels I Regulation (recast) has come into force. Its recital 12 removes the foundation on which the Court based its judgment in Allianz and Generali Assicurazioni Generali, paving the way for Member States’ courts to issue anti-suit injunctions in support of arbitrations.

PATHAK, H. y PANJWANI, P.: “Parallel Proceedings in Indian Arbitration Law: Invoking Lis Pendens”, J. Int’l Arb., vol. 34, nº 3, 2017, pp. 509–543. Prior to the 2015 amendments, the power to appoint arbitrators under section 11 of the Arbitration and Conciliation Act of 1996 in India was vested with the Chief Justice of India, or a High Court. In 2005, the Supreme Court of India recharacterized it as a judicial function, thereby, departing from the position under the UNCITRAL Model Law. While the recent amendments have drastically altered the machinery for appointment of arbitrators, their retrospective application is dubious. As such, the re-characterization of the appointment proceedings as a judicial function still continues to raise concerns, one of which pertains to the jurisdictional overlap between the proceedings for appointment of arbitrators, and those before a judicial authority while deciding an application for seeking a reference to arbitration. Both judicial proceedings are presently permitted by section 8(3) of the 1996 Act to run parallel, even if they involve deciding an identical question concerning the validity of an arbitration agreement. In this article, the authors critique the Indian courts’ failure to identify and address this jurisdictional overlap, and the risks it poses. As a possible solution, the authors rely on the principle of lis pendens, or its common law equivalent of res sub judice, to suggest that where an application seeking reference to arbitration, and involving a question as to existence of a valid arbitration agreement, is pending before a judicial authority, a parallel petition for appointment of arbitrators, raising identical concerns, must not be decided.

PENADÉS FONS, M.: “El effet utile del Derecho de la Unión Europea y la prohibición de revisión au fond en el arbitraje internacional”, Anuario Español de Derecho Internacional Privado, t. XVI, 2016, p. 249–278. En términos generales el arbitraje comercial internacional ha permanecido fuera de la agenda legislativa de la Unión Europea. Sin embargo, la influencia del Derecho europeo sobre el arbitraje ha adquirido un nivel fundamental, y alcanza aspectos tanto sustantivos como procedimentales. Como este artículo demuestra, más allá del fondo del asunto, también afecta a la distribución de la carga de la prueba en las acciones post–laudo, a la intensidad de revisión que pueden llevar a cabo las autoridad judiciales de los Estados miembros y a la posibilidad que cualquier infracción de la normativa europea pueda privar al laudo de validez y efficacia. Esta importante intromisión tiene su base en el deber de los Estados miembros de garantizar la efectividad real del Derecho de la Unión. Un principio clave en sistema jurídico europeo que, una vez internalizado en el régimen de las acciones post–laudo, priva a los laudos de la finalidad que los caracteriza y amenaza con desnaturalizar los valores esenciales del arbitraje internacional. Un arbitraje à l’européenne.

POLKINGHORNE, M. y VOLKMER, S.M.: “The Legality Requirement in Investment Arbitration”, J. Int’l Arb., vol. 34, nº 2, 2017, pp. 149–168. Many investment treaties require foreign investments to be made or owned ‘in accordance with’ or ‘in conformity with’ the laws of the host State. Some treaties incorporate this ‘legality requirement’ in the definition of investment, whereas in other treaties it can be found in substantive provisions on investor protection. This article explores three specific issues with respect to the legality requirement in investment arbitration: what is the source of the legality requirement, what is its scope, and is legality a jurisdictional or a merits issue? The article provides an overview of the answers that arbitral tribunals have given based on a selection of awards.

REEDER, M.: “Estop that! Defeating a corrupt state’s corruption defense to Icsid bit arbitration”, Am. Rev. Int’l Arb., vol. 27, nº 3, 2016. When disputes arise between private investors and foreign states, investors often distrust foreign courts to resolve the disputes impartially. Accordingly, many investment treaties – which are designed to facilitate bilateral investment – provide specific enforce-
ment mechanisms for dispute settlement, including arbitration. One such arbitral forum is the International Centre for Settlement of Investment Disputes (“ICSID”), which was created in 1966 in consideration of “the need for international cooperation for economic development, and the role of private international investment therein.” When enforcing an investment treaty in an ICSID arbitration, the terms of the treaty control. One such term is an “in accordance with laws” provision, which often will come acutely into focus during the jurisdictional phase of an arbitration. In this context, a plaintiff makes a claim, and the defendant argues that the tribunal lacks jurisdiction because the investment was illegally made under the laws of the host country. Similarly, a tribunal will not hear a case that is “created in violation of national or international principles of good faith”. Consequently, when corruption occurs during international investment contract formation, this issue often arises. As a result, many critics have argued that the international investment arbitration framework, including ICSID’s framework, inadvertently incentivizes state corruption. As these critics point out, ICSID arbitrators have never reached the merits of a case involving corruption; thus, states can immunize themselves against arbitral judgments by preparing in advance a corruption defense. By asserting this defense, a state may avoid liability, even for willfully violating an investment treaty.

RIBEIRO, J, y TEH, S.: “The Time for a New Arbitration Law in China: Comparing the Arbitration Law in China with the UNCITRAL Model Law”, J. Int’l Arb., vol. 34, nº 3, pp. 459–487. As China consolidates its position as one of the most important trade players in the international market, arbitration has become an attractive alternative to litigation in commercial disputes between Chinese companies and their foreign trade partners. The UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, represents the accepted international legislative standard for a modern arbitration law. In order to make China an attractive seat for international commercial arbitration and enhance the efficiency of the arbitration system for the benefit of commercial parties, whether Chinese or foreign, it is important for China to consider adopting the UNCITRAL Model Law. This article provides an overview of the UNCITRAL Model Law and its positive impact on the development of arbitration in several jurisdictions worldwide. Next, the benefits of legal reform are highlighted through a contrast between China’s current Arbitration Law and the UNCITRAL Model Law. Finally, this article lays out a procedural roadmap through which China’s legal framework may be amended to incorporate the UNCITRAL Model Law.

SANUBARI, S.: “Arbitrator’s Conduct on Social Media ”, Journal of International Dispute Settlement, vol. 8, nº 1, 2017, pp. 483–506. This article proposes a revision to the ‘Green List’, sections 4.3.1 and 4.4.4 of the International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration 2014. It argues that the classification of social media relationships for disclosure requirements should be divided into two categories: (i) connections on professional and (ii) general social network sites, based on the functionalities of the platform’s features. The article then suggests that social media mining can be used for assessing challenges based on social media relationship with quantitative analysis on close personal relationship between an arbitrator and a party or counsel that gives rise to justifiable doubts as to independence and impartiality by measuring the tie strength of the said online relationship. The article also explores the possibilities of social media mining for profiling arbitrators. Lastly, the article discusses the concerns related to social media mining and proposes social media mining procedure for arbitration to address them.

SANTENS, A. y KUDRNA, J.: “The State of Play of Enforcement of Emergency Arbitrator Decisions”, J. Intl Arb., vol. 34, nº 1, pp. 1–15. The 2015 Queen Mary/White & Case International Arbitration Survey found that 79% of respondents considered the enforceability of emergency arbitrator decisions to be the most important factor influencing their choice between state courts and emergency arbitration when seeking urgent relief before the constitution of the arbitral tribunal. Given that the enforceability of emergency arbitrator decisions is a major concern for users of international arbitration, it is useful to explore the state of play of the enforcement of these decisions. This article provides
an overview of all cases reported globally to date involving a request for enforcement of an emergency arbitrator decision and discusses key questions that arise in that context. The authors conclude by analysing the impact of the enforceability of emergency arbitrator decisions on whether users should seek emergency relief from an emergency arbitrator or a state court.

SIM, Ch.: “Security for Costs in Investor–State Arbitration”, *Arbitration International*, vol. 33, nº 3, 2017, pp. 427–495. When the tribunal in RSM v St Lucia became the first investor–state arbitration tribunal to order the claimant to post security for costs, it paved the way for other applications to follow. Despite investor–state arbitration’s unfamiliarity with the mechanism, security for costs could be an economically effective mechanism to regulate costs, control complex proceedings, and restrict frivolous claims in investor–state disputes. Domestic jurisdictions use this mechanism effectively to tackle abuses of process, regulate extra-jurisdictional influences on proceedings, and ensure equal access to justice. Against the backdrop of anxiety over third-party funding and repeated calls for procedural efficiency, this article evaluates the potential of security for costs to improve investor–state arbitration. What is the regime currently available for security for costs? Is security for costs inherently unfair to claimants? Which policy arguments are important to the investor–state arbitration system? How should tribunals assess applications for security for costs? What sanctions can safely be imposed for a breach without threatening the enforceability of the award? This article answers key questions in order to clarify unease with the mechanism, de-bunks the myths of third-party funding, and suggests solutions for practitioners dealing with applications for security for costs.

SINCLAIR, A.C. y REPOUSIS, O.G.: “An Overview of Provisional Measures in ICSID Proceedings”, *ICSID Review - Foreign Investment Law Journal*, vol. 32, nº, 2017, pp. 431–446. This article provides an overview of provisional measures in International Centre for the Settlement of Investment Disputes (ICSID) proceedings. In a time of mounting concerns over the efficiency and efficacy of investor–State arbitration, the need for provisional measures to be an effective tool grows all the more important. ICSID tribunals are, according to the Convention and ICSID Arbitration Rules, vested with the power to recommend binding provisional measures, provided that such measures are ‘provisional’ in character and are appropriate in nature, extent and duration to the risks impacting upon the rights to be preserved. ICSID tribunals have in practice helped clarify, and at times expand, their power to recommend provisional measures. This article reviews the framework for the recommendation of provisional measures under the Convention and provides an overview of ICSID arbitral practice in this important aspect of investor–State dispute settlement.

SINCLAIR, A.C. y TRIANTAFILOU, E.E.: “Specific Performance Under Commercial Contracts with Sovereign States”, *J. Int’l Arb.*, vol. 34, nº 5, 2017, pp. 747–774. Awarding specific performance against a state is widely considered an affront to principles of sovereignty and non-interference. Even when permitted under the applicable law and arbitral rules, specific performance against a state may therefore be considered not to be appropriate or desirable. The scarcity of specific performance awards against states is thus likely attributable to practical and policy-based considerations as much as legal principle. Exploring its use as a remedy when a sovereign state breaches a commercial contract, this article recognizes the need for tribunals to exercise caution when entertaining pleas for non-pecuniary relief. To give effect to specific performance without encroaching on sovereignty, and while catering for the economic and practical realities of broken contractual relationships, the authors discuss a hybrid approach. This proposal allows tribunals to award specific performance and monetary compensation as alternatives, while affording the ultimate decision to the state.

SWARABOWICZ, M.: “Identity of Claims in Investment Arbitration: A Plea for Unity of the Legal System”, *Journal of International Dispute Settlement*, vol.8, nº 2, 2017, pp. 280–302. Identity of claims is a highly technical concept determining the scope of coordination and preclusion in domestic adjudication. It has also a deeper meaning. By limiting possibilities or repetitive and parallel litigation
concerning the same conduct, it guarantees coherence in many mature legal systems. Investment arbitration rejects the integrationist potential of this notion and follows a path marked by systemic biases. This article examines the potential that the identity of claims may have for restoring unity of the fragmented legal system. A way forward may consist in realizing that other mechanisms pursuing different institutional agendas are equally capable of delivering justice. By extending the notion of the same claim adopted in private adjudication to international proceedings international law may follow an emerging social reality in which States and private investors are equal participants.

TINTA, M.F.: “Like Oil and Water? Human Rights in Investment Arbitration in the Wake of Philip Morris v. Uruguay”, J. Int’l Arb., vol. 34, nº 4, 2017, pp. 601–630. Whether considered ‘wholly distinct, autonomous, or even antagonistic legal domains’, or seen as two sets of legal regimes belonging to the same legal system with ‘meaningful relationships between them’, the international law of investments and the law of human rights appear to have, in the practice of arbitration, an uneasy, tense, strained relationship. For some commentators, public international law (of which human rights is a part) and international investment law would have ‘structural differences’, which have ‘led investment tribunals to grant precedence to the contractual rules that have been agreed upon by host states and investors’. For others, human rights are ‘a marginal issue in investment law’, ‘peripheral at best’, to fulfil ‘no more than an ancillary role in the settlement of investor-state disputes’. This article looks into the fundamental relationship between human rights and investment law in the wake of the recent Philip Morris v. Uruguay and Urbaser v. Argentina cases. In doing so it addresses questions such as: Are human rights and investment arbitration animals of a different nature? Are human rights arbitrable within an investment claim?

TZENG, P.: “Favoring validity: the hidden choice of law rule for arbitration agreements”, Am. Rev. Int’l Arb., vol. 27, nº 3, 2016. On December 21, 2000, an arbitral tribunal seated in Colombia rendered a $60 million award in favor of a contractor against a Colombian state-owned enterprise. Less than two years later, the contractor was robbed of all $60 million. The thief? The law governing the arbitration agreement. Often difficult to identify and increasingly difficult to apprehend, the law governing the arbitration agreement ("LGAA") has caused ‘extensive confusion’ among commentators and practitioners of international arbitration. Its fundamental importance, however, cannot be denied. In any given arbitration, the LGAA dictates whether the arbitration agreement is valid, and hence whether the entire arbitration is valid. It can therefore convert a contractual clause into a billion-dollar asset, and can likewise transform that billion-dollar asset back into ‘mere waste paper’. How does one go about determining the LGAA? In the words of one esteemed arbitrator, it’s ‘a magnificent confusion.’ International instruments such as the New York Convention and the UNCITRAL Model Law provide uniform standards for recognizing arbitration agreements, interfering in arbitral proceedings, and enforcing arbitral awards. However, they do not provide a uniform choice of law rule for determining the LGAA. Consequently, the choice of law rules that national courts apply to determine the LGAA vary considerably across jurisdictions. This wide variation has received significant attention in recent years.

VIÑUALES, J.: “Investor Diligence in Investment Arbitration: Sources and Arguments”, ICSID Review - Foreign Investment Law Journal, vol. 32, nº 2, 2017, pp. 346–370. Most contemporary observers of international investment law will likely share with the author of these lines the impression that the criticism expressed by many commentators over the last decade with respect to the operation of investor–State arbitration is no longer of merely theoretical interest.2 Practice, broadly understood so as to encompass more circumspect stances taken by arbitration tribunals, more carefully reflected treaty negotiation and design, and even the wide variety of events, discussions and writings through which a certain idea of the state of investment arbitration is formed, is indeed changing. And the drivers are not confined to stigmatized countries (and authors) but also include an increasing number of developed countries and even the European Commission.
VON SEGESSER, G. y BELL, K.: “Arbitration of Trust Disputes”, ASA Bulletin, vol. 35, nº 1, 2017, pp. 10–39. Trusts instruments are nowadays widely used for commercial purposes. Although news coverage surrounding offshore leaks have had a negative impact on the public perception of trusts, this is but one very specific aspect of trusts and disregards the fact that trusts are used for many legitimate purposes and with full fiscal transparency. The article explains the characteristics of trusts and the fact that in recent years they have reached civil law legal systems and are no longer confined within their traditional borders of common law. The Hague Convention on the Law Applicable to Trusts and their Recognition has promoted an increased acceptance of trusts in many countries across civil law and common law jurisdictions. Trust disputes broadly fall into three categories: (i) internal trust disputes, i.e. disputes with regard to the trust based on which the trustee holds the subject matter of the settlement; (ii) disputes between the trustee and the beneficiaries regarding e.g. a breach of trust by the trustee, the exercise of power by the trustee; and (iii) disputes with third parties who are not beneficiaries. Only the first two categories are dealt with in this article, as they create interesting and challenging issues to be addressed in arbitration proceedings. Such issues are, in particular, the effectiveness of arbitration clauses placed in the trust instrument which is typically only signed by the settlor. Other specific topics related to the arbitration of trust disputes are the arbitrability of trust matters, e.g. the dispute about information rights of a beneficiary or the application by the trustee pertaining to the interpretation of a trust provision, and the representation of beneficiaries in the proceedings including unascertained, unborn, minor or incapable beneficiaries. As trust disputes frequently involve complex legal and financial issues with connections to different countries and their laws, and with parties and assets in various jurisdictions, arbitration appears to be a viable method to resolve such disputes, in particular as it allows to concentrate the proceedings in one forum and provides for an individually structured process capable of dealing with the specific issues related to trust disputes. The article refers to a number of trust laws and arbitration laws of different jurisdictions that address arbitration in the trust context, providing examples how the specific issues of trust arbitration can be dealt with.

WEISS, A.J., KLISCH, E.E y PROFAIZER, J.R.: “Techniques and Tradeoffs for Incorporating Cost- and Time-Saving Measures into International Arbitration Agreements”, J. Int’l Arb., vol. 34, nº 2, 2017, pp. 257–273. Empirical research reveals that users of international arbitration view undue time and cost as international arbitration’s worst attributes. This article offers some potential solutions to combat this increasing dissatisfaction, focusing on a prophylactic approach in which parties are encouraged to negotiate and incorporate cost- and time-saving measures directly into the arbitration clause of their underlying contract. In the early stages of a commercial relationship, parties operate behind a ‘veil of ignorance’, a concept derived from modern social philosophy in which members of a nascent society are prevented from knowing what position they will occupy in that society. Without the knowledge of how the future society’s rules and policies might affect them personally, each participant will be naturally inclined to promote, agree to, and implement rules and policies that are fair and advantageous to all. Likewise, if parties to a nascent commercial relationship address cost- and time-saving techniques during the earliest stages of that relationship, they will be incentivized to agree to a dispute resolution framework that reduces time and costs more effectively than if they sought to implement those measures after a dispute has arisen. This article discusses several suggested measures designed to increase the economy and efficiency of international arbitration, along with a discussion of the respective tradeoffs and practical limitations of including those measures in the parties’ arbitration agreement.

YAFFE, N.: “Transnational Arbitral Res Judicata”, J. Int’l Arb., vol. 34, nº 5, 2017, pp. 795–833. Commercial arbitral awards are universally recognized to give rise to res judicata, but confusion reigns over what law applies to the res judicata effect of a prior arbitral award asserted before a subsequent tribunal. National res judicata laws diverge on key questions such as the availability of issue estoppel and the construction of the ‘triple identity’ test. Yet the normal tools used to manage divergence in
potentially applicable laws – choice of law and codification – have failed to work when it comes to the res judicata effect of awards. I argue the answer is to adopt a transnational approach to res judicata in arbitration. Although this approach has support in principle, questions remain about how it would work in practice. I propose that a modified version of Gaillard’s ‘transnational rules method’ contains the seeds of a promising answer. Specifically, tribunals could look to both other commercial tribunals’ awards, as well as International Centre for Settlement of Investment Disputes (ICSID) and International Court of Justice (ICJ) case law on res judicata, to develop a sui generis transnational preclusion standard for international arbitration. This is consistent with informal practices arbitrators have developed with respect to other interstitial issues where choice of law processes do not yield satisfactory results. Finally, I evaluate the implications of taking this approach, as well as its prospects for success.

ZARRA, G.: “Orderliness and Coherence in International Investment Law and Arbitration: An Analysis Through the Lens of State of Necessity” (2017), J. Int'l Arb., vol. 34, nº 4, 2017, pp. 653–678. The article addresses the need for orderliness and coherence in international investment law. It does so by reference to Argentina’s various claims to necessity in CMS, LG&E, Continental Casualty Co., Enron and Sempra. After having analysed the various doctrinal positions regarding orderliness of international investment law and the need for coherence in this area of international law (both from the perspective of the consistency among investment awards and from the perspective of the integration of other areas of international law within investment disputes), the work reaches the conclusion that arbitrators should endorse an approach according to which, on the one hand, they should not ignore what is done by other tribunals (we can talk of investment arbitration as a network needing internal coherence) and, on the other hand, they should always take into consideration values protected by other areas of international law and general international law (in which investment arbitration is fully integrated).

ZAUGG, N.: “Objective scope of res judicata of arbitral awards – Is there room for discretion?”, ASA Bulletin, vol. 35, nº 2, 2017, pp. 319–333. In its landmark decision DFT 141 III 229 – also known as the “US law firm decision” –, the Swiss Federal Tribunal confirmed its previously established doctrine on the controlled transfer of a foreign award’s effects (“Kontrollierte Wirkungsübernahme”) when determining the objective scope of res judicata of a foreign arbitral award. The concept implies that the binding effect of a foreign award cannot go beyond the determinations contained in its operative (or dispositive) part. Such narrow approach to res judicata has been criticised by various authors. It is considered inappropriate in the context of international arbitration because arbitrating parties ordinarily wish to have their disputes resolved in a comprehensive manner. Given the lack of any pertinent and authoritative transnational principles, it is further argued that arbitral tribunals should be vested with the power to discretionarily determine the scope of res judicata of a previous award. In doing so, arbitral tribunals are expected to notably take into account the legal traditions and the parties’ expectations involved in a specific arbitration. It is suggested by the author of this article that arbitral tribunals’ entitlement to discretionarily determine the objective scope of res judicata of a previous award not only conflicts with the provisions of the Swiss lex arbitri but also with the parties’ need for legal certainty and, as the case may be, their interest to have certain aspects of a dispute omitted from a final adjudication. The legitimate interest of parties in having a dispute settled in a comprehensive manner should be addressed by enabling them to flexibly decide what aspects of a dispute they wish to submit to a final adjudication, and at what point in time. The respective intentions of the parties should be communicated to the arbitral tribunal by filing or abstaining from filing corresponding applications for prejudicial declaratory relief.