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IN Memoriam Derek Roebuck (1935 – 2020) by Neil Kaplan

With the passing of Derek Roebuck on 27 April the world of arbitration has lost its current and much-loved chronicler. Although Derek was a prolific author of legal texts he will long be remembered for his outstanding volumes on the history of arbitration from earliest times until almost the present.

Michael Davar & Ioana Bratu, 'Recognition and Enforcement: Brussels V. Arbitration'.

This article focuses on the enforcement of arbitral awards, particularly within the European Union ('EU'), the impact of EU policy measures, EU case law, and Brexit on the recognition and enforcement of arbitral awards. The article also touches upon the interplay between the New York Convention and the Brussels regime, in order to explain the role of the Court of Justice of the European ('CJEU') and the English courts in the evolution of EU law.

Karl Hennessee, 'Change for the Sake of Change: Does the Explosion of Recent Arbitral Innovations Actually Deliver on the User's Expectations?'.

The arbitration community of institutions, practitioners, arbitrators and academics compete for attention with frequent announcements of 'innovations' and related claims of increased efficiency and other inchoate benefits. This article calls for a standardised definition of innovation and its application to proposals for change in the world of commercial arbitration, seeking an assessment based on outcomes and increased relevance for the ultimate commercial users that arbitration is meant to serve. Examples of recently announced innovations are reviewed from an empirical perspective, by comparing similar initiatives and then drawing the author's personal conclusions on how well the exemplars meet the expectations set by their proponents and the objective standard proposed by the author.

Daniel LING Tien Chong, 'Institutional Leadership or Institutional Overreach?: Overriding the Parties' Agreement for the Number of Arbitrators in Expedited Proceedings'.

The institutions of international arbitration have played an increasingly active role in arbitral governance. The claim that they merely provide administrative services no longer holds water. With the ability to amend institutional rules, update practice guidelines, and revise institutional practices, they wield the power to efficiently effect change – a power which no other actor in international arbitration comes close to having. However, it has been said that in their quest to lead change, some institutions have overstepped their mandate and overreached their powers. Based on a variety of primary and secondary sources, this article examines the situations in which institutions have overridden the parties' agreement for the number of arbitrators appointed in cases of expedited proceedings. Thereafter, it seeks to analyse whether institutions, in a bid to push progress have overstepped their authority.

Suraj Sajnani, 'Emergency Arbitration in Asia: Threshold for Grant and Enforcement of Emergency Relief'.

This article explores the origins of urgent relief in legal proceedings and how this laid the groundwork for the advent of modern emergency arbitration. It then conducts a review of the different thresholds for grant adopted by arbitration institutions in the Asia Pacific region, commenting on the value of codification of a test for grant and on key elements common to the different thresholds adopted. It also then discusses the legislative framework for enforcement adopted by jurisdictions within the Asia Pacific region, and relevant emergency arbitration enforcement case law to date.

Lim Siyang Lucas, 'Rules of Procedure and the Blurred Lines of the 1958 New York Convention'.

In proceedings for recognition and enforcement of international arbitral awards, national courts are allowed to apply their own rules of procedure, pursuant to Article III of the New York Convention. However, the application of some of these procedural rules may lead to the award being denied recognition and enforcement, including rules on personal jurisdiction, limitation periods, and forum non conveniens. This comes into conflict with the widespread belief that the grounds for refusing recognition and enforcement that are listed in Article V of the New York Convention are exhaustive. This article challenges the conventional wisdom that the grounds listed in Article V are exhaustive, and argues that a domestic rule of procedure may be used to deny recognition and enforcement where either: the rule in question is widely applied in Contracting States to the New York Convention; or some interest or policy of the forum State would be significantly furthered by the application of that rule.

Mary Howard, 'International Arbitration and Cross-cultural Issues.

This article highlights and explores the impact of denial and lack of awareness of the issues related

to social cultural differences in the context of international arbitration. Research shows that some arbitrators deny Cultural Difference Issues (CDI) or act as if public or private international law in the cases exist in a vacuum. There is evidence of cases where arbitrators ignore that CDI have significant impacts on the outcome of international arbitration. Furthermore, some international arbitrators believe that the only cultural differences are differences between the legal systems and technical understanding, denying the existence of CDI in the context of international arbitration, and yet, evidence shows that culture affects a person's world view, understanding of law, business norms, emotions and expectations.

Peter Ashford, 'Is an Asymmetric Disputes Clause Valid and Enforceable?'

Asymmetric clauses are a regular feature of commercial contracts, especially in finance transactions. The apparent unfairness reflected by one party having different, and often 'better', rights than the counterparty has given rise to a number of reactions. In many courts, party autonomy, in agreeing to the asymmetry, is upheld. There are sound policy reasons to do so. Elsewhere, the principle of equal treatment is invoked to challenge the asymmetric clause. Several major decisions upholding the equal treatment challenge have been handed down. Many of these have either been misunderstood, misapplied or have subsequently been clarified in favour of broad party autonomy.

Case Note:

Sam Luttrell & Peter Harris, 'Confronting the Incredible: Revisiting the Applicability of the Rule in Browne v. Dunn in International Arbitration'.

Taking its name from an old English case, the rule in Browne v Dunn refers to the principle that if a party wishes to have the evidence of the other party's witness disregarded or discredited, it must challenge the relevant witness on their evidence in cross examination. The applicability of this rule in international arbitration is controversial, not least because of the tension between, on the one hand, requiring a party to exhaustively cross examine a witness on every contested point of their evidence and, on the other hand, the requirements for procedural economy. International arbitration must also allow for different legal traditions, many of which do not have a similar to practice to those that follow the rule in Browne v. Dunn. This controversy reached a new height in 2019 when, in P v. D, the English High Court refused to enforce an arbitral award, in essence, because there had been a failure to cross examine the witness on a factual point which was pivotal to the tribunal's deliberation (and therefore, in the Court's mind, a breach of the rules of natural justice, based on the rule in Browne v. Dunn). This article reviews the applicability of the rule in Browne v. Dunn to international arbitration and makes suggestions for wording that may be included within procedural orders to create clarity and reduce the risk of challenges to the enforceability of an arbitral award.

Book Reviews:

Mika Savola: Roman Khodykin – Carol Mulcahy (Consultant editor Nicholas Fletcher QC), A

Guide to the IBA Rules on the Taking of Evidence in International Arbitration, Oxford University Press (2019), 584 pages ISBN 978-0-19-881834-2. Nathan D. O'Malley, Rules of Evidence in International Arbitration: An Annotated Guide, (Second Edition, Informa Law from Routledge 2019), 397 pages ISBN 978-1-138-67473-8.

Two comprehensive commentaries on the IBA Rules on the Taking of Evidence in International Arbitration ('the IBA Rules') were published last year. This is a joint review of both of them. The authors and titles are mentioned above; in the following, I shall refer to one of the books as 'Khodykin – Mulcahy' and the other one as 'O'Malley'.

Gordon Blanke: Arbitration in Malaysia: A Commentary on the Malaysian Arbitration Act, by Thayananthan Baskaran, (Wolters Kluwer, 2019), 433 pp., EUR 177, ISBN: 978-90-411-8665-2

This book is one of the most recent publications in the Kluwer series of commentaries on the world's national arbitration laws. It has been authored by an English- qualified barrister of Malaysian origin with particular practical experience in the field. The subject of this Commentary is the Malaysian Arbitration Act, which was adopted in 2005 and primarily applies to arbitrations seated in Malaysia.

Gordon Blanke, The ICSID Convention, Regulations and Rules: A Practical Commentary, edited by Julien Fouret, Remy Gerbay, Gloria M. Alvarez, with Denis Parchajev (Edward Eldgar Publishing, 2019), 1,499 pp., £ 375, ISBN: 978–17-86-4352-1

The coverage of this work is comprehensive, comprising both (1) the provisions of the Washington Convention, which the reader will know in long hand under the title of the Convention on the Settlement of Investment Disputes between States and Nationals of other States or simply the ICSID Convention, and (2) the ancillary ICSID instruments, that is the ICSID Administrative and Financial Regulations, the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, and the ICSID Rules of Procedure for Arbitration Proceedings.

The Editor welcomes the submission of articles for consideration for publication in the Journal. All prospective contributions should be in accordance with the guidelines set out here.

Profile Navigator and Relationship Indicator

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