# Kluwer Arbitration Blog

## The Contents of Journal of International Arbitration, Volume 37, Issue 2

Maxi Scherer (WilmerHale & Queen Mary University of London) · Sunday, March 29th, 2020

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

**Sundaresh Menon, *Technology and the Changing Face of Justice***

The problem of unequal access to justice, also known as the justice gap, has been worsened by rising levels of inequality over the past half-century. The denial of due compensation and the inability to enforce rights in turn perpetuates and widens the wealth gap, initiating an ever-deepening spiral of inequality that threatens social cohesion and erodes public confidence in the courts. By empowering individuals, organizations and governments, technology and peaceable methods of dispute settlement have the potential to close each dimension of the justice gap and address the large volume of unmet justice needs that do not surface before the justice system. These unmet needs are generally straightforward but require urgent resolution, and therefore require quick and affordable solutions that focus on amicable settlement. In thinking about how we can redesign our justice system to promote solutions of this nature, we need a broader vision of justice: one that seeks to produce just outcomes through practical and proportionate means, and that aspires not merely towards keeping the peace but also building lasting peace. In this manner, our justice system will better promote effective equal access to justice, restore and strengthen communities that are riven by conflict, and help to tilt an unequal society closer towards equilibrium.

**Moritz Keller & Eric Leikin, *A Taxing Endeavour: Addressing the Tax Consequences of Investment Arbitration Awards***

The authors proceed from the theoretical rule that where a claimant establishes that the value of its award will be taxed in excess of what its profits would have been taxed absent the respondent state's breach, it may be entitled to a 'tax remedy' in order to prevent under-compensation. They then analyse tribunal practice, with some interesting (and surprising) results. First, despite the taxation of awards often amounting to tens of millions of dollars, tribunals have devoted very little attention to this issue. Second, tribunals have tended to make a distinction between those potential

award tax burdens imposed by the respondent state and those imposed by a third state. Whilst requests for tax remedies regarding tax liabilities to third states have been refused in all publicly available decisions, some tribunals have been sympathetic to requests for tax remedies regarding tax liabilities to the respondent state; although importantly, such awarded remedies have been non-monetary in nature. Finally, looking forward, the authors propose that tax remedies be categorized as 'future losses', a well-established concept. Mindful of the hurdles such arguments would need to overcome, including the requirements of reasonable certainty and proximate causation, the authors point to existing law and practice to provide a corresponding legal framework, in the hope of moving towards consistent and objective future practice on this point.

**Yasin Alperen Kara?ahin,** ***Contractual Time Limits to Commence Arbitration***

Arbitration and multi-tier dispute resolution clauses may contain a time limit to commence arbitration. The expiry of such a time limit could have different legal results. First, it could make the arbitration clause ineffective. Second, it could extinguish the claim or prevent its enforcement through legal proceedings. In the latter case, the contract provision about the time limit would have to be examined with regard to its compliance with mandatory provisions of the law applicable to limitation periods. Even the determination of the law applicable to limitation periods causes considerable difficulty. It is another difficult issue to determine which provisions of the law applicable to limitation periods are mandatory and, if so, whether the contract provision complies with the limits of the law. Once it is established that the contract provision is valid, the acts necessary to prevent the expiry of the time limit would have to be examined.

**Eloïse Glucksmann & Rüdiger Morbach,** ***Hot-Button Issues in International Arbitration: A Survey Among Arbitrators***

International Arbitration has been in the focus of public attention following the fierce debate on the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA). A broad public has questioned whether arbitral tribunals should be entrusted with issues of public interest. Some of these issues are particularly controversial. These 'hot-button' issues include international sanctions, corruption, money laundering and, to a somewhat lesser extent, antitrust law. The authors wanted to know how arbitrators deal with these issues, should they come up in an arbitration. They set up a survey in the form of a short online questionnaire and invited more than 2,500 arbitrators, listed as members of different European arbitral institutions, to participate. The participants were asked whether they have already encountered hot-button issues in an arbitration, whether they felt prepared to deal with them and whether they have been approached by parties who wanted a hot-button issue to be disregarded in the arbitration. Further questions addressed possible proactive measures to prevent public policy violations, such as a cooperation with public authorities and state courts. The authors compare the results of their survey with recent developments in International Arbitration.

**Oluwafikunayo D. Taiwo,** ***The Restrictive Approach to Legal Representation in Arbitration Proceedings and Its Unintended Consequences in Nigeria***

The issue of legal representation in arbitration proceedings accounts for one of the sub-factors of 'formal legal structure' and 'national arbitration law' that disputing parties consider before choosing a seat of arbitration. Indeed, the ability of disputing parties in arbitration to freely select their desired representatives is embedded in the foundational principle of party autonomy. In Nigeria, a literal interpretation of the national arbitration rules prevents parties from selecting persons not admitted to the Nigerian bar as their representatives in arbitration proceedings. This article examines the impact of this restrictive approach on the attractiveness of Nigeria as a seat of arbitration. The article identifies scope for reform in the law and makes suggestions to create a more liberal legislative and judicial framework in order to promote Nigeria as a preferred seat for arbitration.

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