Kluwer Arbitration Blog

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There are certain moments in the lifetime of an academic journal that prove to be critical for its future. For this Journal, which has been successfully published for more than 100 years now, moving to the publishing house of Wolters Kluwer will undoubtably prove to be a moment of great significance. There are three main reasons that I believe this is the case.

First, in the last two years, the editorial board of the Journal took the conscious decision to focus on articles which take an international and comparative approach and deal with topics which go beyond domestic legislation and practice. We feel strongly about this editorial direction, not least because we believe that the scope of the Journal should reflect the Journal's global membership of more than 18,000 members who work in the field of international arbitration and, more generally, alternative dispute resolution. Wolters Kluwer is the leading publisher in the field of international dispute resolution, publishing, among other titles, the ICCA Congress Series and the International Arbitration Law Library which is the oldest and most successful academic series on international arbitration. The move to Wolters Kluwer is the natural course of evolution for the Journal and a clear sign of its commitment to academic excellence and international scholarship.

Second, much as I personally love to hold and read manuscripts and print journals, in today's digital age, expanding the scope of the Journal's readership requires the use of digital means of distribution. From this issue, the Journal enters a new era of being fully digital and available through Wolters Kluwer Online, in addition to being available to our CIArb members. Importantly, the Journal will now be available through KluwerArbitration.com, which is the world's foremost resource for research on international arbitration and an indispensable tool for both practitioners and academics. The Journal will also be able to make good use of the Kluwer Arbitration Blog to promote its content and highlight some of its articles.

Third, and possibly more importantly, moving to Wolters Kluwer means that we are creating digital space to host the Journal's glorious history. While this is still work in progress, Wolters Kluwer is currently creating digital copies of the entire archive of the Journal which stretches back to 1914. Once this enormous task of digitisation is completed, all 375 previous issues of the Journal will be available online creating an unprecedented database not only for arbitration

academics and practitioners but also scholars from other fields, such as historians and political scientist, with an interest in the field of international arbitration.

I am as much delighted as excited for the Journal's new era and look forward to working with Wolters Kluwer in the years to come.

Stavros Brekoulakis, General Editor

Gustavo Gaspar Nogueira, The Protection of Public Interest in Contract- Based Arbitration with Public Entities:?A Comparative Analysis of the English and Brazilian Legal Systems'.

In light of the phenomenon known as government by contract, States and state entities often outsource the rendering of public services to private agents. This has led to a rise in the number of disputes, particularly arbitrations, between private and public parties. Against the background of a comparison between the English and Brazilian legal systems, this article argues that both procedural and substantive mechanisms are warranted to adequately safeguard the public interest which is implicated in such disputes. This article further explores the procedural and substantive mechanisms which have been implemented under English and Brazilian law, to find that Brazilian law has implemented procedural mechanisms which are more progressive than those provided under English law in terms of protecting the public interest. Nonetheless, this article concludes that both jurisdictions could improve their procedural and substantive frameworks applicable to arbitration proceedings involving public entities in order to achieve a more comprehensive protection of public interest.

Peter O'Malley, The Irish 'Construction Contracts Act 2013': Adjudication – What Has Happened and Where Next?

Three years have now passed since 'The Construction Contracts Act 2013' (the Act) came into force in the Republic of Ireland (referred to as Ireland in this article) on 25 July 2016. This article seeks to investigate what impact the Act has made in the stated objective of supporting a swift resolution of payment disputes in the Irish construction industry, with particular emphasis on adjudication. Referring to research, evidence, authoritative commentary, and comparison with other jurisdictions, this article discusses what has influenced the adoption of the adjudication provisions in the first two years from enactment. The article then proceeds to consider adjudication activity in the third year to July 2019 in the wider context of dispute resolution activity before discussing what the future direction of adjudication in Ireland under the Act might be.

Enuma U. Moneke, The Quest for Transparency in Investor-State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?

In recent years, critics have questioned the legitimacy of international investment law, particularly investor-State arbitration on the grounds, amongst others, that confidentiality and lack of transparency in arbitral proceedings pose a threat to the basic principles of public law and democracy. In response, minimal transparency measures have been introduced by States, regional

international economic organizations and the International Centre for the Settlement of Investment Disputes (ICSID) over the last two decades. More recently, the Transparency Rules and the Mauritius Convention were introduced by the United Nations Commission on International Trade Law (UNCITRAL) for a more far-reaching impact. These instruments have been widely applauded as the much awaited solution for entrenching transparency and enhancing the legitimacy of treaty-based investor-State arbitration. But will they really establish transparency in investor-State arbitration considering the opt-out provisions in Article 1(1) of the Transparency Rules and Article 3(1) of the Mauritius Convention? In attempting this question, the article examined the concept of treaty based investor-State arbitration, its public character and the possible effect the opt-out provisions could have on the quest for transparency. It posited that a mechanism that allows parties – States and foreign investors – a choice whether or not to apply these instruments in a given arbitration will impede the attainment of the objective of entrenching transparency in investor-State arbitration.

Meg Cochrane, Analysing the Overlap Between Arbitration and Human Rights

In the light of the inception of the human rights litigation revolution in the 1980s and its erosion of the traditionally preeminent perspective that arbitration and human rights constitute distinct, mutually exclusive dimensions of legal discourse, the purpose of this essay is to analyse, firstly, whether there is an overlap between arbitration and human rights and, secondly, the extent to which such exists. This essay contends that rather than employ the term 'overlap', arbitration in its modern form is, and has, in fact, shown itself, capable of reinforcing human rights. This contention is examined in relation to the historic scepticism concerning the potential of the arbitration system to undermine human rights protections (Part I), the perceived bias of the arbitration system towards the interests of commercial parties over those of the public (Part II), the general lack of access to effective remedies for victims of business-related human rights violations (Part III), the incorporation of third party beneficiary rights into commercial contracts to ensure compliance with human rights norms (Part IV), and the ease of enforcement regarding arbitral awards as opposed to court judgments (Part V). Nevertheless, despite the substantial progress that has been made thus far, this essay concludes that further progress is still needed.

Gordon Blanke, Semi-Secular Arbitration in Islamic Banking and Finance Disputes: A Proposal

This article explores the resolution of Islamic finance disputes through arbitration. It discusses in some detail the reason for which national courts meet natural limitations in the application of the Islamic Shari'a and are as such an imperfect forum for the resolution of Islamic finance disputes. Arbitration more specifically allows a more flexible approach to the governing law, admitting the application of the Islamic Shari'a as a body of legal rules. In order to accommodate Western users of Islamic finance products, the article proposes the introduction of a hybrid form of arbitration, namely semi-secular arbitration that allows the combination of mandatory requirements of the Islamic Shari'a with features of international commercial arbitration whilst ensuring a Shari'a-compliant outcome.

Phil Lord, Case Comment: Garcia V. Church of Scientology Flag Service Organization

This piece analyses the decision rendered by Judge James D. Whittemore of the United States District Court for the Middle District of Florida in the case of Garcia v Church of Scientology Flag Service Organization. It goes beyond the face of the decision, which upholds an arbitration award, to argue that the decision has significant implications for freedom of religion in the United States. More specifically, it argues that the decision narrows the grounds upon which a religious arbitration award can be vacated by a court. The decision allows religious legal systems to, in some circumstances, exist with no oversight from the court system. It exemplifies and supports the thesis that the protections afforded to religious freedom in the United States create room for religious legal systems that are inconsistent with the mainstream legal system to exist. Finally, this piece considers, in light of the obvious issues raised by Judge Whittemore's decision, whether it might be time to rethink judicial review of religious arbitration awards.

Gordon Blanke, English Arbitration and Mediation in the Long Eighteenth Century, by Derek Roebuck, Francis Boorman & Rhiannon Markless (Holo Books 2019), 336 pp., £40, ISBN: 978-0-9572153-3-7

This is the latest in a series of books on the history of dispute resolution in England, authored, edited and directed by someone who – over the years of research and academic writing – has become one of the first and foremost English legal historians on the subject: Prof. Derek Roebuck.

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.

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