# Kluwer Arbitration Blog

## The Contents of Journal of International Arbitration, Volume 38, Issue 2 (April 2021)

Maxi Scherer (WilmerHale & Queen Mary University of London) · Tuesday, April 13th, 2021

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

**Richard Garnett, *Article 5 of the Model Law: Protector of the Arbitral Process?***

The question of judicial intervention remains highly significant in international commercial arbitration. Article 5 of the Model Law was included in the text both to identify those matters in which intervention is permitted and to define the nature and manner of such intervention. While Article 5 has been largely effective in regulating judicial intervention in matters expressly governed by the Model Law, the issue of abuse of process raised by the presence of concurrent court and arbitration proceedings has been more contentious. This article contends that this issue should also fall within the scope of the Model Law as a matter concerning court intervention in arbitral jurisdiction. While Article 5 does not directly apply to foreign-seated arbitrations, the policies of limited court intervention and respect for arbitral jurisdiction should still be influential.

**Beata Gessel-Kalinowska Vel Kalisz, *Admissibility of Electronic Awards in the UNCITRAL Model Law Jurisdiction: Polish Law Example***

The author examines whether an award signed electronically can be deemed to constitute an award in writing as provided for in Article 31 of the UNCITRAL Model Law, which is reflected verbatim in article 1197 of the Polish Civil Code. The conclusion is that an electronic signature as such is functionally equivalent to the written signature. Having said that, not all types of electronic signature can be admitted in this respect. The eIDAS Regulation (Regulation 910/2014 of the European Parliament and of the Council on electronic identification and trust services) provides for three types of electronic signature: regular, advanced, and qualified, stating that the qualified signature should be deemed as equivalent to the written signature. The author is of the opinion that both the advanced and qualified electronic signatures fulfil the requirements of the form 'in writing', ensuring the safeguards as listed in article 26 of the Regulation. Specifically: it is uniquely linked to the signatory; it is capable of identifying the signatory; it is created using electronic signature creation data that the signatory can, with a high level of confidence, use under

his sole control; and it is linked to the data signed therewith in such a way that any subsequent change in the data is detectable.

### **Gerhard Wagner & Jan Philipp Koester,** ***Originalism Meets International Arbitration: The US Supreme Court's Interpretation of the New York Convention***

The subjection of non-signatories to arbitration agreements under the New York Convention is one of the fundamental issues of international arbitration, raising questions that touch upon the very concept of an arbitration agreement laid down in Article II. In the case of GE Energy Power Conversion v. Outokumpu, the US Supreme Court took a stand on that matter. It held that the New York Convention does not conflict with domestic law doctrines such as equitable estoppel which may bind third parties to arbitration agreements signed by others. Engaging only in an originalist interpretation of the Convention, the judgment fails to explore the normative depth of the problem.

### **John David Branson,** ***The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration***

The abuse of process doctrine is a recognized principle of public international law that prohibits the exercise of a procedural right in contravention of the purpose for which that right was established. This doctrine has been applied in context of investment arbitration where investors manipulate their corporate structure to gain access to jurisdiction after a dispute has become foreseeable. However, while abuse of process has become synonymous with corporate restructuring in investment arbitration, the doctrine is by no means limited to that application. Indeed, more recently, the doctrine has gained momentum as a mechanism to address the problem of multiple and successive arbitrations filed by investors against Sovereigns. This trend culminated in the Orascom v. Algeria decision, recently affirmed by an ad hoc Committee on annulment, that dismissed an investor's claim 'in relation to the same investment, the same measures and the same harm'. The application of abuse of process in this context, however, remains unsettled. After review, this article concludes that when an investor initiates multiple arbitrations for the sole purpose of maximizing the chances of success, investment tribunals should consider abuse of process as a means to protect the legitimacy of their proceeding and the Investor-State Dispute Settlement system as a whole.

### **Samy Rais & Kabir Duggal,** ***The Evolution of Brazilian CFIAs from 2015 to 2020: Like Wine, Does It Get Better with Time?***

This article undertakes an in-depth analysis of the evolution of Brazil's Cooperation and Facilitation nvestment Agreements (CFIAs) since the publication of the Brazilian Model CFIA in 2015. It studies the tumultuous history of investment treaties in Brazil and how it may have shaped Brazil's response to the investor-State arbitration regime through the current model CFIA. It assesses how the reception of Brazil's Model CFIA among Brazilian stakeholders and commentators may have influenced the trends and evolutions of the fourteen CFIAs signed by Brazil from 2015 to 2020. It argues that the Brazilian CFIAs have improved with time through the progressive narrowing and strengthening of their jurisdictional, substantial, public policy and

dispute resolution clauses. At the same time, they may not have fully implemented the criticisms and comments of academia and Brazilian civil society, and some provisions remain to be clarified in the future.

**Allison Goh,** ***Digital Readiness Index for Arbitration Institutions: Challenges and Implications for Dispute Resolution Under the Belt and Road Initiative***

Post-COVID-19, a paradigm shift has occurred in the adoption of technology in arbitration. Leading arbitral institutions have adapted quickly, highlighting the foresight of institutions who have existing technological infrastructure in place. This article proposes a 'Digital Readiness Index', which aims to evaluate arbitral institutions on their level of digital readiness based on five evaluative indicators. Crossreferenced against Institute for Management Development (IMD's) 2019 World Digital Competitiveness Rankings, the findings reveal synergies between an economy's digital competitiveness and the adoption of technology in dispute resolution. To further the development of dispute resolution processes under the Belt and Road Initiative, strategic cooperation is required under the Beijing Joint Declaration of the 'Belt and Road' Arbitration Institutions, to advance best practices and protocols in the use of technology in arbitration, and address challenges such as cybersecurity and data protection.

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