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On Arbitrobots or Robotration

There has been considerable discussion lately on the role that Artificial Intelligence (AI) may play in international arbitration (IA) in the future. While there are some interesting, indeed exciting, prospects of AI's potential contribution to IA, there also exists a degree of hyperbole in what is predicted. Information technology has already been used for the management of big data in international arbitration, including for example, of data concerning production of documents and conflicts of interest. But this is not AI; this is information technology on the management of large data. AI entails a dynamic process whereby intelligent software aims to identify patterns with a view to learning how to mimic human critical thinking. This evolutionary process is what distinguishes AI from ordinary computer programmes of the management of large data.

In this context, AI is predicted to become relevant in a number of arbitration related tasks and more crucially in decision prediction and decision making. The use of AI in decision prediction is already here, with the development of software which (apparently) can approximate the process of decision making and eventually predict the outcome of arbitration disputes.

But the use of AI in decision making is a quite different discussion. In his article, published in this issue, Professor Henk Snijders makes a powerful case against human decision making being replaced by robotic decision making. It is easy to brand concerns on the role of AI in IA as technophobic or regressive. But Professor Snijders is right to ask questions on this important issue.

If I may, I will add mine. AI systems are already being relied upon in various fields of human life to reach the 'optimum' decision on the basis of existing pool of data. The concept of 'optimum' decision in some fields of human life is straight- forward. In medicine, for example, the 'optimum' decision will be the decision which identifies the course of treatment which is more likely to cure or save the patient's life. However, in law the concept of an 'optimum' decision is less clear. 'Optimum' for whom? The claimant, the respondent, the society, the idea of justice more generally? Not easy to say, of course. Even if we substitute the idea of 'optimum' decision with that of the 'right' decision, we will end up with the same sort of difficulties. As we all know, the

law is notoriously indeterminate, and it often speaks to various interpretations all of which can be sustainable.

This is not to say that AI is, as a matter of principle, unfit to substitute human decision-making in legal adjudication including in arbitration. By contrast, this is to suggest that if we are serious about developing a system of legitimate AI decision making (in the near or distant future), we first need to be able to agree on what exactly will be the aim and quality of the outcome of this process.

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We are happy to report that the latest issue of *Arbitration* is now available and includes the following:

ARTICLES

Renato Stephan Grion & Thiago Del Pozzo Zanelato, *Historical Aspects of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Perspectives on the Resolution of International Commercial Disputes*

The present work aims at analysing the role of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in the development of international commercial arbitration as the most suitable method for resolving international commercial disputes. In doing so, it focuses on the historical background of the Convention, which was preceded by the 'Geneva Treaties', its drafting history and the debate that lead to its current wording. Moreover, it analyses the current use, as well as future perspectives of the New York Convention and international commercial dispute resolution. This creates the basis to comprehend the Convention's current application and impacts, as well as future perspectives for international disputes settlement. For instance, the possible development brought by the recent approval of conventions on the fields of mediation and court decisions may very well indicate a trend towards the circulation of international court decisions and settlements, in the footsteps laid by the New York Convention.

Caroline Kenny, *A Comparison of Singapore and Hong Kong's Third-Party Funding Regimes to England and Australia*

Singapore and Hong Kong have both recently reformed their international arbitration statutes to permit third-party funding of international arbitration, albeit subject to regulation. Meanwhile, the United Kingdom and Australia have operated as mature third-party litigation funding markets for many years with little regulation. This article considers the historical objections to third-party funding and compares the regulatory framework for third-party funding in England and Australia to Hong Kong and Singapore. It also examines relevant provisions in the rules of the major arbitral institutions in each of these jurisdictions. It concludes that Singapore and Hong Kong have proceeded cautiously, preferring greater regulation for third-party funding than England and Australia. This is a welcome development for an industry often thought to profit too generously at the expense of funded clients.

Faisal Gbadegbe, *African Continental Free Trade Area: Forging?a New Investment Dispute Settlement Model*

Without doubt, the Agreement establishing the African Continental Free Trade Area (AfCFTA) has the potential of projecting the new model of what the future of investment dispute settlement should look like. The author, capitalises on the unique timing of the establishment of the AfCFTA as well as the structure of the Agreement and delves into how forward looking the AfCFTA is, the history of the current investor state dispute settlement system, its flaws, how states are currently mitigating the flaws and proposes a new model for the future of investment dispute settlement that may be brought to life by the AfCFTA.

Ihab Amro, *The Use of Online Mediation in the Resolution of Civil and Commercial Disputes in Theory and in Practice*

The current Coronavirus pandemic shows, and possibly proves, that the use of online techniques for solving disputes arising out of both civil and commercial transactions is useful in practice. The pandemic crisis dictates using online dispute resolution (ODR) techniques, including online mediation, for facing both the legal and the practical challenges resulting from the absence of the physical meeting between parties, counsels, and mediators. This article mainly deals with online mediation as an ODR technique because of its practical importance, on the one hand, and because of the increasing importance of electronic commerce (e-commerce) transactions as an integral part of the digital economy and the need to solve any disputes that may arise between consumers and traders to protect the consumer as a weaker party vis-à-vis the trader. This article highlights online mediation from both domestic and international perspectives, focusing on the pertinent legislations and the best practices of online mediation, including provisions of various legislations, and practical examples from different jurisdictions that support the main hypothesis. This article concludes with findings regarding the main salient issues of the topic as well as with pertinent recommendations for a better understanding of state-of-the-art developments of online mediation at the legislative level; i.e., provisions that might be considered in the future for improving the legal framework of online dispute resolution generally, and online mediation in particular, either at the national level or at the international level, i.e., *de lege ferenda* as opposed to *de lege lata*.

Henk Snijders, *Arbitration and AI, from Arbitration to 'Robotration' and from Human Arbitrator to Robot*

This piece considers the interplay between arbitration and artificial intelligence (AI). It includes a general overview of the applicability of AI to arbitration proceedings. It questions the development from arbitration to 'robotration' and from human arbitrator to robot arbitrator. The author defines AI and focusses on the opportunities of its application in legal practice and in arbitration in particular. He acknowledges that Al does play an important and justified role in arbitration. It is impossible to imagine legal practice without legal tech nowadays and it will undoubtedly become increasingly sophisticated and helpful in the future; we all should be eager to participate in this process. However, by its nature, AI cannot decide law cases properly, as is argued by the author in a step-by-step analysis of the legal decision-making process in detail. This also applies to so-called

'simple cases'. The author warns that cases can rarely be qualified in advance as being 'simple'. Even dealing with default cases, for example, can be a delicate and complex matter: many technical legal issues may arise, especially in an international setting, and these require particular attention from a judge or arbitrator, sometimes even *sua sponte*. The detailed step-by-step analysis of the legal decision-making process in this article underlines that a judge or arbitrator never should be replaced by a robot, not even in simple cases.

Allison Goh, *Framework for the Resolution of Disputes Under the Belt and Road Initiative*

This article proposes a decision-making framework for the selection of a dispute resolution mechanism within the context of Belt and Road Initiative (BRI) projects. While arbitration remains the default choice for the resolution of international disputes, there is increased appetite for other mechanisms. Bolstered by the Singapore Convention on Mediation, the use of mediation, including in hybrid procedures like Med-Arb, is increasing. Dispute boards, such as under the Singapore Infrastructure Dispute-Management Protocol, are also a valued option as they are well-suited for large-scale infrastructure projects, which are the backbone of the BRI. Among international commercial courts, the China International Commercial Courts is likely to become a favourable destination for Chinese parties to site BRI disputes due to its flexibility and status as part of the Supreme People's Court. Against the myriad of options available to parties, the decision-making framework aims to assist parties to choose an appropriate dispute resolution mechanism for their BRI contract.

BOOK REVIEW

Gordon Blanke, *DIFC Courts Practice*, by Rupert Reed QC & Tom Montagu-Smith QC (eds) (Edward Elgar, 2020)

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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