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The 31st of January 2022 marked twenty-five years from the day the Arbitration Act 1996 was brought into force. Inspired by the UNCITRAL Model Law but, at the same time distinctly English, the Act has rightly been hailed as an 'exemplary piece of legislation'.[1)] It is a comprehensive, coherent and progressive Act which made it harder for a party to challenge an arbitration award before English courts and accorded parties greater freedom to conduct their arbitration and agree on the procedure that should be followed.

To appreciate the Act's contribution to the development of English arbitration law, the Act should be seen as part of an uninterrupted series of pro-arbitration legislation that goes back to the seventeenth century and the introduction of the 1698 Arbitration Act, one of the first arbitration statutes in the world. The 1698 Act is often referred to as the Locke Act, because it was singlehandedly drafted by John Locke, who was commissions by the Board of Trade to 'draw up a scheme of some method of determining differences between merchants by referees, that might be decisive without appeal'.

Locke, who was familiar with arbitration, understood that merchants would be willing to use arbitration only if an effective legal mechanism was introduced to ensure that arbitration agreements and awards were complied with and enforced. His draft was adopted by the Board, which submitted it to the Privy Council in January 1697, noting that statutory law was necessary to address the 'great obstruction in trade arising from the tedious determination of controversies between merchants and traders concerning matters of accompt or trade in our ordinary methods'. The Board urged the Council to adopt the draft on the grounds of the 'very great advantage to the Trade of this Kingdom'. The bill was finally enacted with minor amendments in May 1698.

The Locke Act expressly introduced a policy favouring arbitration by stating that a legal mechanism for the protection of arbitration agreements was necessary 'for promoting Trade and rendering the Awards of Arbitrators the more effectual in all Cases'. Locke's vision and the pro-arbitration policy, embedded in the 1698 Arbitration Act, was then treasured and further developed in all subsequent arbitration acts. The 1889 Act, for example, enshrined the rule of irrevocability for arbitration agreements and offered statutory protection to arbitration agreements for both

existing and future disputes. Subsequently, the Arbitration Act 1950 accorded arbitrators the power to grant interim relief, while the Arbitration Act 1979 accorded parties the significant power to take their arbitration disputes out of the purview of judicial review for errors of law. Importantly, the Act abolished the power of the courts, which they had since the 1854 Act, to order arbitrators to refer ('state') a question of English law arising in the course of an arbitration or an award in the form of a special case for the decision of the High Court.

Starting with the Locke Act and currently with the 1996 Act, English law has in the last three centuries given effect to a clear policy favouring arbitration as a means of promoting business. It is a remarkable legal tradition that has proved to be the catalyst for London's reputation as one of the most important arbitration places worldwide and has inspired pro-arbitration legislations in other parts of the world.

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

ARTICLES

Ben Waters, *Alternative Dispute Resolution and Civil Justice: A Relationship Resolved?*

At a time when there was a perceived civil justice crisis, The Modern Law Review of May 1993 published an article written by Simon Roberts in which he reasserted the importance of party control over dispute processes and their professional management, and between negotiated outcomes and imposed decisions. The article presented here revisits Roberts's view that the strained relationship between civil justice and alternative dispute resolution (ADR) (particularly mediation) could be mitigated by introducing three models designed to encourage extrajudicial dispute resolution. The author reassesses the relationship between ADR and civil justice, and the extent to which Roberts's models have been incorporated is evaluated. To understand how civil justice reform in England and Wales has and will affect the way in which those who use the civil justice system engage with it, this article provides an analysis of the developing relationship between ADR and the civil justice system and suggests its future direction.

Peter E. O'Malley, *A New 'UNCITRAL Model Law on International Commercial Adjudication': How Beneficial Could It Really Be?*

The United Nations Commission on International Trade Law (UNCITRAL) has promoted Alternative Dispute Resolution (ADR) as an alternative to litigation, being the traditional method of resolving disputes. ADR has been primarily facilitated by UNCITRAL through two Model Laws, namely the UNCITRAL Model Law on International Commercial Arbitration (1985) and the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018). The Commission has discussed, and continues to discuss, the development of an additional UNCITRAL Model Law on International Commercial Adjudication, primarily for the international construction industry. This article seeks to discuss and consider what real benefit the introduction of a new UNCITRAL Model Law for International Commercial Adjudication could provide.

Andrea Colorio, *Investor-State Arbitration, Human Rights, and Consumer Protection: China's New Challenges in an Era of Globalization*

This paper explores the interconnections among Investor-State arbitration, Human Rights, and Consumer Protection in modern-day China. In particular, the author analyses the relationship between open arbitration in Bilateral Investment Treaties and the development of the ecological reforms launched in order to reach what has been called an 'ecological civiliszation', specifically with respect to the still controversial 'right to water'. It is shown that within the framework of the construction of a consumer policy that might guarantee the safeguarding of environmental protection and consumer rights and, at the same time, the promotion of investment policies, the correct balance between public and private interests will be a crucial issue for China in the coming years.

Yuan Wang, *Extraterritorial Arbitration in China's Pilot Free Trade Zones and Beyond*

Since the end of 2019, the Pilot Free Trade Zones (PFTZs) established around China have adopted an aggressive approach to make reforms in extraterritorial arbitration as well as other international arbitration rules. An arbitration agreement with designation of an institution outside the Chinese Mainland between foreign-invested corporations, which used to be invalid according to Chinese Arbitration Law, became valid for the first time in the Shanghai PFTZ. As other modifications are emerging ever-evident for Chinese courts, arbitration institutions follow an international track to open the arbitration service market and keep pace with mainstream practices.

Hamid Reza Younesi, *The Adequacy of Remedies in International Investment Law: Should the Legal Framework Be Revisited for a Proper Remedy?*

This article aims to examine the subject of remedies in international investment law under two competing theories of contracting which encompass different implications for contractual relationships. It first assesses the available remedies in existing international investment law and then looks at the approach taken by relational contract theory. The article addresses the inadequacy of the remedies suggested by the classical model (existing and dominant law) in maintaining equilibrium and restoring contractual balance in international investment contracts. In light of these analyses, the article attempts to determine and develop the features and availability of remedies suggested by the relational model in international investment agreements. It underlines that the suggested remedy according to relational theory would serve the joint purpose and interests of contracting parties.

Divyansh Sharma, *The Move Towards Multi-Party Interim Appeal Arbitration: How Efficacious?*

The Appellate Body (AB) of the World Trade Organisation (WTO) is in a period of severe crisis. Though generally composed of seven members, the forum's composition has now dropped below three, the minimum number required to hear any new appeal. At its root, this deadlock arises out of

the United States' veto against any further appointments to the AB. However, it is important to understand the potential fallout likely to occur when approaching solution-oriented discussions from this perspective. This article hypothesizes that the crisis is not limited merely to AB members' appointment but originates from a threat to core WTO tenets of mutual trust and multilateralism. In this context, it argues that the Multi-Party Interim Appeal (MPIA) Arbitration Procedure is a mere 'band-aid' solution that promotes complacence within Member States and distracts attention from the structural WTO transformations necessary to escape from the current impasse. Further, the article finds that the legal and practical feasibility of the procedure is suspect, and thus there is an urgent need to explore alternative means to restore a functioning multilateral trade disputes mechanism.

Deyan Draguiev, *Liability for Non-compliance with a Dispute Resolution Agreement*

The use of dispute resolution with a forum selection clause is widespread and continues to grow so that it is now commonplace to have such a clause inserted in an agreement with an international element. One of the salient issues related to such clauses or agreements is what the consequences are if a party avoids compliance. This article aims to provide an anatomy of this matter: first, how a dispute resolution agreement should be perceived, and what obligations it creates for each of the parties (herein termed performance obligations); and second, a taxonomy of the types of liability that may flow from such a breach, both financial (e.g., damages, costs allocation) and non-financial. The article analyses and draws examples from a variety of both common law and civil law jurisdictions to provide a comprehensive mapping of the topic.

Aditi Tripathi & Vaibhav Vidhyansh, *The Quest for an Appropriate Dispute Resolution Method in the Oil and Gas Sector in India*

As a core sector, the oil and gas industry plays a significant role in shaping the Indian economy. Companies are given license to undertake exploration activities under different forms of granting instruments such as Concessions, Production Sharing Contracts ['PSC'], and Revenue Sharing Contracts ['RSC']. The government initially adopted a relatively complex granting instrument (PSC) for engaging private players in exploration activities. Experience has shown that due to their complex structure, PSCs are prone to giving rise to a wide array of disputes. Twenty-two out of the 310 PSCs entered into by the government of India have been referred to arbitration and, should the trends hold, many more will be referred in the future. Although the government has switched from the PSC model to the RSC model, the nature of disputes remains essentially the same under both instruments. In this article, after discussing the nature of disputes that arise in the oil and gas industry, the regulatory framework in the sector, and aspects such as the volume of investment and the long-term engagement between the parties, the authors put forth a case for replacing arbitration with a non-confrontational mode of dispute resolution (i.e., mediation), so as to preserve the business relationship between the parties after disputes while avoiding the plethora of pitfalls surrounding arbitration.

CASE NOTES

Dr Sam Luttrell & Larissa Welmans, *Jumping the Gun: Federal Court of Australia Declines Enforcement of Qatari Award on the Basis of Defective Constitution of Court- Appointed Arbitral Tribunal*

In a recent decision, the Full Court of the Federal Court of Australia has confirmed the commitment of Australian courts to the primacy of party agreement in the enforcement of foreign arbitral awards. The court refused enforcement in Australia because the award was issued by a Qatari-seated arbitral tribunal that was not constituted in accordance with the parties' agreement. The court's decision engages with issues of comity because the arbitral tribunal had been appointed by a court of the seat in Qatar. The decision also clarifies the nature of the burden of proving grounds for non-enforcement of arbitral awards under Australia's international arbitration legislation. In addition, in finding that the jurisdictional nature of the defective tribunal appointment precluded the exercise of any residual discretion to enforce, the decision elucidates the nature of Australian courts' discretion to order enforcement of a foreign arbitral award notwithstanding a ground for non-enforcement being established.

Alexandre Rivière, *Acceptance of DCF in Expropriation Claims*

Under international investment law, and as specified in most investment treaties, States should compensate investors who suffered from a direct or indirect expropriation. Most investment treaties explicitly indicate that the compensation should correspond to the fair market value ('FMV') of the expropriated investment immediately before the expropriation became known. The choice of the appropriate valuation approach to calculate the FMV of the investment is left to the appreciation of the parties, and ultimately is for the tribunal to determine. One recurring issue in investment treaty cases concerns the choice of the applicable valuation approach for assessing FMV, and in particular whether a discounted cash flow ('DCF') analysis is appropriate based on the case facts.

Daze C. Nga & Peace O. Adeleye, *The English Supreme Court's Decision in Halliburton V. Chubb: An Examination of the Issues Arising from Arbitrators' Acceptance of Multiple Appointments in Related Arbitrations and Arbitrator's Duty to Disclose*

Independence, impartiality, and the existence of an environment devoid of bias are key elements that define the integrity of any dispute resolution process. The absence of these key elements in any dispute resolution process cast doubt on due process notwithstanding the formality adopted in such process. Like every dispute resolution process, it is an ideal and a requirement in the arbitral process for every arbitrator to be impartial and independent. Arbitrators are obliged to disclose circumstances that may cast doubt on their impartiality upon acceptance of the arbitration and during the arbitration. This requirement is explicitly contained in most institutional arbitration rules and in most country's arbitration rules. The requirement for arbitrators to disclose circumstances that may give rise to their partiality is opaque and uncertain. In the case of Halliburton v. Chubb, the English Supreme Court pronounced on the impact of the acceptance of multiple appointments by arbitrators in arbitration with the related subject matter and on the corresponding duty of an arbitrator to disclose. This article analyses the arbitrator's duty of independence and impartiality considering the decision rendered in Halliburton v. Chubb and critically examines the arbitrator's

acceptance of multiple appointments with a related subject matter or common party, the appearance of bias, unconscious bias, and the duty of disclosure.

BOOK REVIEW

Gordon Blanke, *Roman Khodykin and Carol Mulcahy, A Guide to the IBA Rules on the Taking of Evidence in International Arbitration (2019)* (2019)

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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References

?1 Merkin and Flannery on the Arbitration Act 1996 (6th Edition Informa Law Routledge).

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