

# Kluwer Arbitration Blog

## **The Contents of Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Volume 88, Issue 4 (December 2022)**

Stavros Brekoulakis (General Editor International Journal of Arbitration, Mediation and Dispute Management; Queen Mary University of London), Mary Mitsi (Queen Mary University of London), Mercy McBrayer (Chartered Institute of Arbitrators), and Ahmed El Far (Three Crowns) · Sunday, January 1st, 2023

### **Review of the Arbitration Act 1996: Responses to the Law Commission Consultation Paper**

Earlier this year, the Arbitration Act 1996 celebrated twenty-five years from the day it was brought into force. On 22 September 2022, the Law Commission issued its Consultation Paper on the Review of the Arbitration Act 1996. The Law Commission considered the Act's 25th anniversary a good opportunity to revisit the Act and ensure that the Act remains 'state of the art [ ... ] and in support of London as the world's first choice for international commercial arbitration'.

The Consultation Paper offers a lengthy and rigorous, yet clear, analysis of the provisions of the Act which has been informed by consultation with a wide range of stakeholders. The Consultation Paper concludes that the Act still works 'very well' and, therefore, instead of 'extensive reform', it provisionally proposes a number of focused amendments with a view to modernising the Act. The proposed amendments include the question of confidentiality, arbitrator independence and disclosure, discrimination, summary disposal, the court powers in support of arbitral proceedings, arbitrators' immunity and section 67 on the challenges to substantive jurisdiction of an arbitral tribunal.

The Journal is delighted, and indeed honoured, to have been asked to publish the summary of the Consultation Paper in this issue. By way of further consultation, the Commission has invited responses to the Consultation Paper until 15 December 2022, requesting interested parties to identify any further topics which are worthy of potential reform. The Journal has answered the call of the Commission and has asked a number of leading arbitration commentators, practising in England, to provide their comments on the Consultation Paper. We have received comments (which are published further below after the Summary Consultation Paper) from Clare Ambrose, Ben Giaretta, Ali Malek KC, Christopher Harris KC and Paul Bonner Hughes, Wendy Miles KC and Louis Flannery KC. We are grateful to the commentators for offering their thoughtful and balanced views on the Consultation Paper, which – I am sure – will be very helpful to the Law Commission as they finalise their Review of the Arbitration Act.

We will continue to look closely at the process of the Commission's review of the Act. In the

meantime, we are again grateful to the Law Commission for having asked the Journal to publish the summary of the Consultation Paper and to the distinguished commentators for providing their insightful analysis. I hope that the readers will find the discussion helpful.

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

## ARTICLES

### *Isaac Motunrayo IBIKUNLE, A Critical Review of the Non-arbitrability of Tax Disputes and Recognition and Enforcement of Tax-Related Foreign Awards in Nigeria*

Nigerian Courts have held in several cases that tax disputes are not arbitrable. This article examines whether: (1) the cases are correct in light of applicable tax instruments and emerging trends on arbitrability; (2) the decisions foreclose the arbitrability of all tax disputes in Nigeria; and (3) foreign awards, whose underpinning disputes are tax claims, are no longer enforceable in Nigeria, in view of the decisions. The importance of the foregoing questions cannot be overstated, particularly to foreign investors and Nigeria's trade partners. With the aid of primary and secondary sources and comparator analysis, this article argues that the decisions were reached per incuriam. It also observes that whilst the decisions remain valid until set aside, the decisions neither foreclose (1) the arbitrability of tax disputes arising from certain domestic and international instruments; nor (2) the recognition and enforcement of foreign awards in at least three identified situations.

### *Komninos KOMNIOS, Legal Consequences for Non-compliance With the GDPR in International Arbitration*

Data protection legislation, such as the General Data Protection Regulation (GDPR), aims to protect individuals' personal data from illegitimate processing. As in any dispute resolution mechanism extensive processing of personal data takes place also in the context of arbitration and at various stages thereof. The broad scope of the GDPR has raised important issues concerning international arbitration, the most discussed of which being whether and how the GDPR applies to the latter. This article places the focus on specific legal consequences on international arbitration in case of non-compliance with the GDPR when it is applicable.

### *Peter Nahmias REISS, Into the Future With Eyes Wide Open: International Arbitration in the Digital Age*

Technological developments have long had a major impact on the practice of international arbitration. The progression of technological advances in this practice has already provided indisputable benefits, empowering panels and lawyers to handle increasingly complex disputes more quickly and efficiently. However, important issues arise, particularly with regard to procedural fairness and due process. Major institutions such as the International Chamber of Commerce (ICC) and Chartered Institute of Arbitrators (CIArb) have developed guidelines and

recommendations designed to help the international arbitration community address potential risks in these areas. This article considers Marshall McLuhan's analytical method to dig deeper into the impact of technological advances. The future promises more breakthroughs, and professionals are advised to remain aware of how they can inadvertently adapt their thinking and behaviour to risks in procedural fairness and due process.

**Daniel ROSENBERG, *A Wolf in Sheep's Clothing: Overlooked Procedural Deficiencies in ICSID's Annulment Structure***

Over the past several decades, the International Centre for the Settlement of Investment Disputes' annulment procedure has proved an object of consternation for states and investors alike. The substantive principles of Article 52 of the ICSID Convention are commonly criticized as either too expansive or too narrow. The author contends that this criticism is misplaced, however, and that it is procedural deficiencies which will plague ICSID's annulment proceedings in this time of broad investor-state dispute reform. Overconcentration of annulment committee appointment and challenge power in the hands of the Chairman of the ICSID Committee and ICSID Secretariat, compounded by continued problems of 'double-hatting' at the annulment level, threaten the due process rights and autonomy of parties to ICSID annulments. The author proposes a feasible restructuring of annulment appointment and challenge procedure under the ICSID Arbitration Rules as a potential rectification of these procedural flaws, including a dispersal of appointment power, a new pool system for annulment panel members, and the creation of an independent review body to consider challenges to annulment panel members.

**Colin CHERIAN, *A Lapse of Grace: Encryption Bans as Potential Expropriation Claims***

Regulatory interventions to prevent perceived harms of emerging technologies may likely pave the way for tech-related disputes between a host state and a foreign corporation. One such emerging technology whose harms and widespread use features in recent debates is end-to-end encryption (E2EE). This article examines an outright ban of end-to-end encrypted instant messaging platforms, based on the 'going dark' concerns of governments, as a potential expropriation claim. This article attempts to answer whether there has been a substantial deprivation, and whether non-compensation is justified for such a deprivation by carrying out effects-based, purpose-based, and balancing analyses. The findings of this study demonstrate that although the effects of the ban may be tantamount to expropriation, such a finding is not evident in a purpose-based or proportionality analyses.

**Peter ASHFORD, *The Putative Law of the Putative Contract***

If the contract itself is disputed, including whether there is an agreement to arbitrate which in turn is dependent on whether standard terms were incorporated, what is the proper approach to answering those questions (including the proper law)? Does the analysis start with the putative law or the putative contract? The better view is to start with determining the putative law and, applying that, determine whether the putative contract exists.

Olu OJEDOKUN & Dominic Obilor AKABUIRO, *The Concept of the Seat in International Arbitration: Unlocking the Judicial Challenge of Interpretation of Conflict of Laws*

The continuing growth of international commerce has inevitably led to a situation where more and more countries, via their state entities and private companies, find themselves parties in disputes to be resolved through international arbitration. In Africa, particularly following the African Union Free Trade Agreement of 2018, the growth in cross-border and international investment and the maturity of the transaction landscape has led to a proportionate increase in dispute resolution proceedings. In this context, the arbitration ‘seat’ is especially important because previous studies have found that the reasons for preferring any one seat over others are strongly related to observed judicial attitudes toward arbitration and the legal infrastructure in that jurisdiction. In India, for instance, despite the country’s importance as a juridical seat of arbitration given under the 1996 Act, the jurisdiction of the courts over arbitral proceedings has remained with the civil court and high court. Considering international arbitration in general, the conflict between juridical seat and court jurisdiction has persisted because the roles of arbitral seat and venue (as decided by conflict of laws) have not been properly distinguished. This article examines how, in the absence of a clear and unambiguous clause specifying applicable law, the Nigerian courts and indeed other courts have adopted a seat-driven approach to resolving these difficulties. In conclusion, the article outlines the room for improvement that may exist.

Isabel PHILLIPS, *Ciarb ADR Competence Frameworks, Competence Statements, and Membership Levels*

This article presents the results of the original research and design conducted on behalf of Chartered Institute of Arbitrators (Ciarb) to create an integrated set of competence frameworks for Alternative Dispute Resolution (ADR), and the individual ADR disciplines of Arbitration, Adjudication and Mediation. It argues that ADR as a field needs to be clearer on the competence it is providing to users, in line with other professions such as law or medicine. The competence frameworks are presented together with a summary of the underlying premises of the work, the work process – including consultation – and some of the expected challenges in operationalizing the frameworks.

## BOOK REVIEW

Michael HWANG, *Blanke on UAE Arbitration Legislation and Rules: A Multi-volume Article-by-Article Commentary, Volume 1 by Dr Gordon Blanke, Second Edition 2021, Sweet & Maxwell*

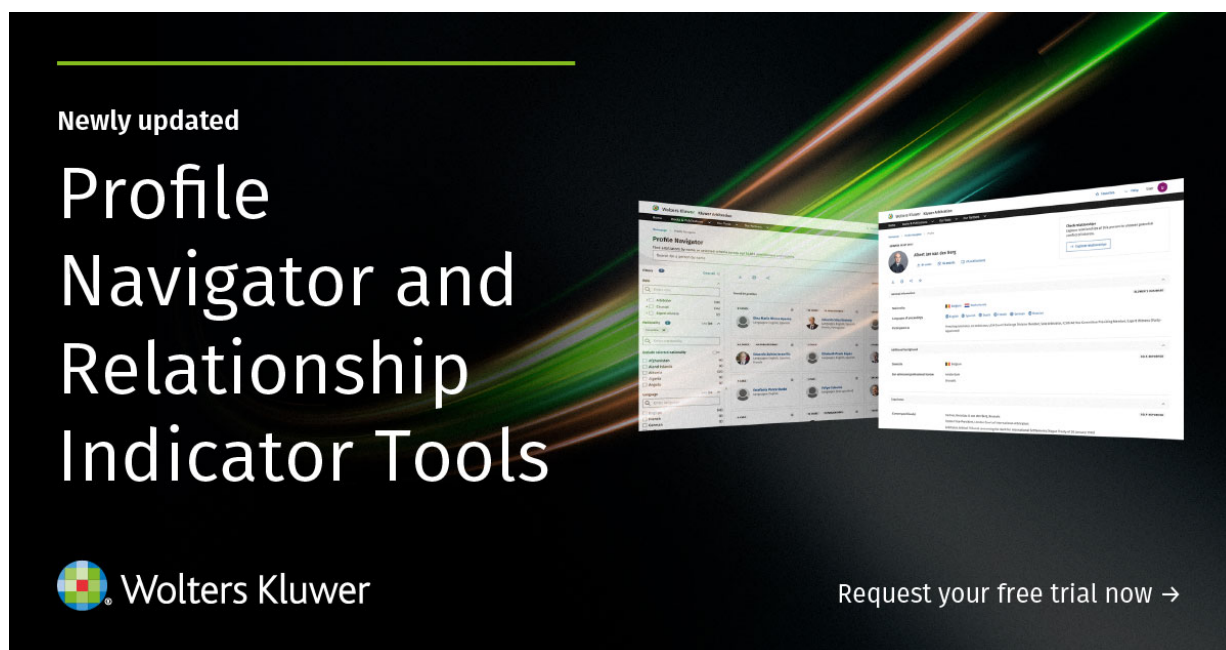
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