

Kluwer Arbitration Blog

The Contents of Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Volume 89, Issue 3 (2022)

Stavros Brekoulakis (General Editor International Journal of Arbitration, Mediation and Dispute Management; Queen Mary University of London), Kateryna Honcharenko, Mercy McBrayer (Chartered Institute of Arbitrators), Mary Mitsi (Queen Mary University of London), and Ahmed El Far (Three Crowns) · Sunday, November 26th, 2023

‘What makes a good arbitrator?’ asks Christopher Vajda KC in his Chartered Institute of Arbitrators Keynote address which we are delighted to publish at this issue. It is not a straightforward question to answer. Practicing as an arbitrator does not necessarily make someone a good arbitrator, even if their practice is busy.

Drawing on his extensive experience and illustrious career in various forms of dispute resolution, as an advocate at Bar, as a recorder (part time judge) of the Crown Court, as a judge at the Court of Justice of the EU and now as an arbitrator, Christopher offers excellent insight in the requisite qualities of a good arbitrator.

The main thrust of Christopher’s thesis is that a good arbitrator has to take an active role in both directing and managing the arbitration proceedings. This is not always the case currently in international arbitration. Underpinned by an inflated notion of party autonomy, a well-documented sense of due process paranoia and an adversarial understanding of arbitration, the prevailing practice of arbitrators is to allow the parties a very broad scope to drive the process and develop their cases with practically no input from the tribunal. Indeed, many (if not the majority of) arbitrations proceed without any case management stage throughout the arbitration process. As a result, arbitrators are often faced at the time of the hearing with cases which are under-developed or ill-aligned with the evidentiary record. By that time, directing a party to restate their case or invite parties to produce additional evidence might be impractical, unfair or both.

Thus, Christopher is quite right to suggest that it is ‘important that arbitrators ‘get to grips’ with an arbitration at an early stage, particularly where the arbitration is complex, and do not simply allow the parties to make the running’. Sadly, he is equally quire right to observe that ‘this is not always the case’.

To be fair, the issue of early and on-going active management is not a new issue in international arbitration. It has been the subject of extensive discussion for some time, and we are all well familiar with techniques for effective case management such as early identification of issues, mid-stream case management conferences, incorporating mediation windows into procedural

timetables, pre-hearing conference between arbitrators and counsel. Nevertheless, it is unclear whether (if not doubtful that) these techniques are actively practiced in the thousands of arbitration cases which are conducted every year.

In this regard, Christopher's keynote speech may serve as a timely and welcome reminder that a good arbitrator must continue to innovate their practice. While it might previously be considered sufficient for arbitrators to act mainly as neutral referees, today arbitrators should assume a proactive role seeking to assist parties in resolving their dispute.

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

ARTICLES

Peter HARRIS & Mohsun ALI, *Better Never Than Late? Timing Considerations for Filing Legal Authorities in International Arbitration*

This paper considers the rules and principles governing the timing for the submission of legal authorities by parties in international arbitration proceedings. It also considers how rules around legal authorities interact with general considerations of procedural fairness and legal principles concerning the arbitral tribunal's knowledge of the applicable law (including the principle of *iura novit curia*).

Soumil JHANWAR, *The Fragmented Consent Framework to Understand Consolidated Arbitrations*

The existing theories pertaining to joinders and consolidations in arbitration present two contrasting schools of thought for examining multi-party and multi-contract arbitration requests. This article critically analyses the two opposing schools' examination of joinders and consolidations to demonstrate the inadequacy of both. After highlighting the dire need for development of a fresh theoretical framework for assessing requests for joinders and consolidations, this article builds on consent-based theories to develop a 'fragmented consent framework' to understand consolidated arbitrations. This framework breaks down a party's consent to arbitrate into consent for four major elements of arbitration and highlights various reasons why 'consent to opposing/other arbitrating parties' ought to be considered irrelevant for multi-contract arbitration-related questions. It concludes by highlighting the relative superiority of the fragmented consent framework as a method of assessing joinder/ consolidation requests, as compared to the existing theories.

Takunda T. GUMBU, *A Behavioural Approach to Confidentiality Rules and Practices in International Arbitration*

Confidentiality is a central aspect of international arbitration meant to protect interests, mostly economic, which are ordinarily not deemed confidential in litigation. As a result, several rules and procedures have been adopted in international arbitration to promote and enforce confidentiality. These rules and procedures involve behavioural aspects which this article identifies using behavioural law and economics (BLE). BLE recognizes that people display bounded rationality, bounded willpower and bounded self-interest which explains why parties favour certain arbitration rules and procedures on confidentiality. An examination of leading arbitration rules such as the London Court of International Arbitration (LCIA) Rules, as well as separate procedures generally practiced by arbitration practitioners, show that BLE principles play a critical role in shaping party approaches to confidentiality in international arbitration. Bounded rationality is the most prominent BLE principle in both arbitration rules and procedures relating to confidentiality.

Nelson Edward TIMKEN, *A Proposal to Establish an International Commercial Arbitration Ethics Panel and Hotline to Resolve Disclosure and Conflicts Issues*

Guidelines called ‘soft laws’ applicable to international arbitrator ethics provide a basis for self-regulation in the avoidance of conflicts. They assume an ability on the part of the arbitrator to impose upon himself or herself an aspirational set of ethical guidelines in the face of an increasingly complex commercial world and lucrative financial incentives. These guidelines are intended to preserve and promote the arbitrator’s independence, the absence of bias, public confidence in and the continued viability of the arbitration process.

This article suggests that an International Commercial Arbitration Ethics Committee or Panel be established like professional ethics panels that govern attorney conduct. Such a body could assist arbitrators in interpreting the various codes, rules, and national laws used in making determination of disclosure and conflict in particular situations rather than leaving arbitrators to their own devices and consciences to make these difficult determinations. It will demonstrate the shortcomings in various static guidelines that could be avoided by the concerted consideration of such committee or panel.

Christopher VAJDA KC, *Chartered Institute of Arbitrators, London Keynote address 27 April 2023 What makes a good arbitrator?*

The author considers the issue of the independence and impartiality of arbitrators in the light of his experience as a Judge of the Court of Justice. He goes on to examine the selection of arbitrators in trade and investment Treaties and other public law disputes. He then looks at how arbitrations can be case managed, the role of the Tribunal at an oral hearing, the drafting of awards, how far arbitrators should develop the law, and training of arbitrators.

Gordon BLANKE, *Arbitrating in a Modern World: Challenges and Opportunities*

This lecture was delivered as the 2023 International Dispute Resolution Institute (IDRI) Annual Lecture in Abuja, Nigeria, on 28 April 2023. It discusses the major challenges and opportunities of arbitrating in a modern world. In doing so, it addresses the increasing digitalization of arbitration,

the introduction of two main new types of arbitration, i.e., digital/online arbitrations on the one hand and free zone arbitration on the other, as well as the arbitration of new types of disputes, i.e., disputes involving economic sanctions and disputes related to human rights (HR). In this sense, this lecture offers a *tour d'horizon* of the changing face of arbitration in the 21st century, testifying to its innate procedural flexibility and adaptability. Arbitrators and arbitral institutions, in turn, are advised to adapt in order to stay relevant in the modernizing discourse of arbitration.

CASE REVIEW

Divya KESAR, *Alverly and Germen v. Romania*, ICSID Case No. ARB/18/30, Award, 16 Marc 2022 (unpublished)?

The issue of nationality of juridical persons remains unsettled long after the decision of Barcelona Traction five decades ago. In the past decade, successive International Centre for Settlement of Investment Disputes (ICSID) awards involving Cypriot corporate investors have added fuel to an already contentious and highly debated issue of nationality of juridical persons. Suffice it to say that several theories devised over a period of time have left ample room for different interpretations. A combination of criteria is used in modern BITs and FreeTrade Agreements (FTAs) for determining the nationality of companies, such as referring to the state of incorporation, management (seat) of the company, or control. It is pertinent to note that Article 25 of the ICSID Convention deliberately does not define what constitutes an investor and leaves it to the contracting parties to determine the nationality of an investor. Simply stated, the ICSID Convention does not specify what should be understood as the seat of a legal entity.

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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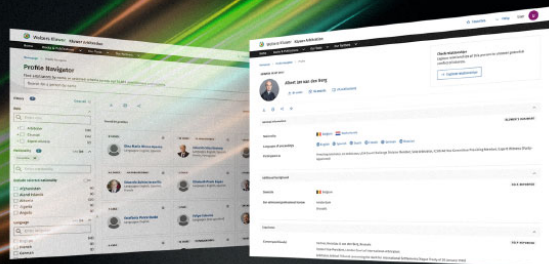
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