Kluwer Arbitration Blog

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In this issue, Romesh Weeramantry considers whether the rules of interpretation in the Vienna Convention on the Law of Treaties (VCLT) remain fully fit for purpose, particularly in investment treaty disputes. It is both a topical and complex question to ask.

In practice, the VCLT is often of limited use in giving guidance to a tribunal in its interpretive task. The VCLT's rules of interpretation are capable of supporting a wide range of potential interpretations. The fact that both parties to a dispute usually rely on its provisions is a good indication of its inherent flexibility.

Romesh Weeramantry offers an informative overview of the problems with the VCLT rules of interpretation and puts forth some very interesting proposals. Thus, he considers the primary rule of treaty interpretation in Article 31(1) of the VCLT, explains that the language used does not assist in ensuring consistency in treaty interpretation, and that the absence of guidance gives a wide-ranging and unguided discretion to interpreters.

What could be the solution? While many of the VCLT rules are functional and useful and have stood the test of time, it seems that – especially in the context of investor-state disputes – these rules need to be subject to more regular improvement and the practices surrounding treaty interpretation can be made better.

The chances of a VCLT revision are unlikely in the short to mid-future. It is unsurprising that renegotiating multilateral treaties these days is a difficult task – take for example, the difficulties encountered in modernizing the Energy Charter Treaty.

In the meantime, Romesh Weeramantry proposes, *inter alia*, the formulation of guidelines that put flesh on the VCLT rules, with the specific purpose of aiding treaty interpreters in investor-state disputes. He offers nine suggestions as to the content of these guidelines and explains that the ultimate end-product would resemble a succinct and practical guidebook on how to apply the VCLT rules. The interpretation guidelines would be similar to the International Bar Association Guidelines on the Taking of Evidence, and would be used to provide non-mandatory, and practical

guidance.

Ahmed El Far, Associate Editor

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

ARTICLES

Romesh WEERAMANTRY, *Goodnight Vienna? Rethinking Treaty Interpretation*

Articles 31 and 32 of the Vienna Convention on the Law of Treaties constitute the applicable law for interpreting investment treaties. Investor-State arbitrations have shown that application of these provisions can be problematic. This article identifies key problems in Articles 31 and 32 and poses the following three solutions: the use of a treaty interpretation schedule to be completed by each party in relation to a disputed interpretation of an investment treaty (much like a Redfern Schedule), the formulation of guidelines to assist interpreters to understand best practice in the application of the Convention's interpretation rules, and the adoption of approaches formulated by behavioural scientists that may contribute to treaty interpretations becoming wiser.

Mary MITSI, *Transnational Decision-Making: Reasoning, Interpretation and Dialogue in Investment Arbitration Awards*

The article argues that the interpretive principles of the VCLT should be approached as one of the various interpretive methods that arbitral tribunals resort to, rather than as an exclusive means that fulfils all the interpretation needs that arise in the context of an investment arbitration dispute. The dialogical network methodology is a theory that explains legal decision-making responding to the need to take into consideration all the interpretive tasks of the arbitrator, the way in which they interact in the resolution of a specific dispute, and how they are pictured in the award's reasoning. The parties' submissions, the VCLT, precedent, policy, customary international law, and general principles of law play their own part in the decision-making process.

Adolf PETER, *Climate Change and Supply Chain Arbitrations: Impact of EU Law on the BRI and Non-EU Entities*

The article explores the implementation and enforcement of corporate climate policies along international supply chains by means of contractual cascading and international commercial arbitration. The article addresses the joinder of additional parties and the consolidation of several pending climate-related arbitrations and compares various arbitration rules. The article answers the question concerning what arbitration rules allow forced joinders and consolidations against the objection of a party. Last but not least, the article emphasizes some China-related specifics in the context of consolidations and joinders in order to avoid invalid arbitration agreements and the non-

recognition and non-enforcement of foreign arbitral awards in China.

Philip ANTINO, *Is Adjudication Appropriate for Resolving a Dilapidation Dispute?*

This article investigates the provisions within the Housing Grants, Construction and Regeneration Act 1996 (HGCRA) and/or the supplementary provisions to establish if a statutory right exists for a party to adopt adjudication as an alternative dispute resolution (ADR) methodology to resolve a dilapidation dispute and thus avoid costly litigation. The article contributes to the extant law by demonstrating that such lease obligations as repairing, maintaining, and painting are a 'construction operation' under section 105 of the HGCRA and that a lease is an agreement for 'construction operations' under sections 104(1) and (5) – thus creating a construction contract, although primarily not a construction contract. Accordingly, it is therefore open to a party to commence adjudication as an ADR methodology to resolve a dilapidation dispute.

Peter ASHFORD, *Stay of Proceedings When Parallel Criminal Proceedings are under Way*

Allegations of fraud, dishonesty or other criminal behaviour can give rise to both criminal and civil (including arbitration) proceedings. If so, the question often arises whether the civil proceedings should be stayed to await the outcome of the criminal proceedings as there is a risk of self-incrimination (but this can be largely nullified if the summary judgment test can be satisfied). The coercive powers of the prosecuting authorities can reveal greater evidence and the modern requirement is for a criminal defendant to set out his defence. All this is to be balanced with the desire and right of the claimant to have its claim resolved.

Youssef ISMAIL, *Enforceability of Liquidated Damages Clauses and the Extent of Judicial and Arbitral Intervention: A Comparative Study Between the English and Egyptian Jurisdictions*

This article analyses the enforcement of liquidated damages (LDs) under both the English and Egyptian jurisdictions. It identifies the tests applicable to the assessment of LDs and the extent of judicial and arbitral involvement in their amendment. The article reflects on the tests applied in light of the principles of freedom of contract and protection of social order. After analysing the tests applied, and judicial and arbitral attitudes towards LDs, the article moves onto arbitral decision making, and questions whether arbitral tribunals possess the same powers as national courts to amend LDs.

The article suggests that challenges to LDs under English law have become more difficult. However, there remains a lack of clarity as to the threshold of proportionality applied. It further determines that arbitral tribunals applying English law have no room to apply a different test than that applied by English national courts. Conversely, under Egyptian law, the Egyptian Civil Code leaves room for the competent judge to determine the applicable tests for the amendment of LDs. The Court of Cassation has set out clear tests which it has followed. The article questions whether arbitral tribunals are bound by the Egyptian Court of Cassation's case law. It concludes that arbitral tribunals can deviate from the tests set out by the Egyptian Court of Cassation, as there is no strict doctrine of precedent under Egyptian law, but should still pay significant deference to the national

courts' applications.

BOOK REVIEW

Gordon BLANKE & Farhan SHAFI: *International Arbitration in England: Perspectives in Times of Change*, edited by Gregory Roy Fullelove, Laila Hamzi & Daniel Harrison. Kluwer Law International. 2022. 464 pp. £152.00. ISBN: 978-940-352221-0

The primary focus of the book is on international commercial arbitration albeit that some chapters benefit from occasional references to investment treaty arbitration. Given the importance of England as an international arbitral seat, the book will be of interest to a wider global audience with an interest in international arbitration. The title has been edited by veterans of the profession with extensive experience in arbitration. The list of contributors includes a wide range of local and international arbitration practitioners as one would expect for a book of this nature.

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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