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ICC Institute Newsletter - Issue 13

Editor: Michael Polkinghorne, White & Case LLP



INTRODUCTION FROM THE EDITOR



Dear members,

This edition features many great articles from a number of recurring and new contributors, highlighting developments relating to international arbitration in India, Argentina and Spain, and providing an overview of the results of the Commonwealth study on international arbitration and the works of the UNCITRAL Working Group on ISDS reform.

It also includes an article assessing the various approaches to legal privilege in international arbitration, and interesting reflections from members on the duty of arbitral tribunals in situations where counsel adopt an “all or nothing” approach. And finally there is a piece on the challenge to start a practice as an arbitrator.

WORD FROM THE CHAIRMAN



As mentioned in the last edition of this newsletter, your Institute is 40 years old in 2019. Being one of those who participated in its creation in 1979, as Secretary General of the ICC Court of Arbitration, and who never ceased to be a member of its Council since then, this anniversary has a very special importance for me.

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ARTICLES

Jesús Almoguera: “Arbitration clauses, supply and distribution agreements, trademarks and unfair competition”

SUMMARY: This case summary focuses on two recent decision of the Barcelona Court of Appeals relating to the scope of arbitration clauses referring to disputes arising out of or related to “the interpretation or performance of the agreement”. In both cases, the Barcelona Court of Appeals ruled that the dispute was not covered by the (limited) scope of the arbitration clause and that the commercial court was accordingly the “competent” forum (the claims arose under competition law in the first case, and trademark and competition law in the second).

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Petra Butler: “The Commonwealth International Commercial Arbitration Study”

SUMMARY: The Commonwealth International Commercial Arbitration study, which was conducted between January and August 2019, looked at the international commercial arbitration landscape, focusing on various stakeholders in all Commonwealth jurisdictions. This article details the goals, scope, and results of the study on a variety of current topics.

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Leandro Caputo and Inés Sola: “Argentinean Federal Supreme Court Applies the New York Convention”

SUMMARY: This case commentary describes a recent decision of the Argentinean Federal Supreme Court relating to the recognition of a foreign award. The award was issued against an Argentinean State-owned company that was in liquidation at the time the exequatur was decided, based on which the State claimed that recognition of the award would violate Argentinean public policy. In response, the Supreme Court undertook a broad and flexible interpretation of the Convention in favour of the recognition of the foreign award.

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Ugo Draetta: “An arbitrators’ dilemma: the arbitral tribunal has to decide the case as presented by the Parties or has to render justice to them beyond their presentation?”

SUMMARY: The author comments on whether the duty of arbitrators is to decide cases based strictly on the parties’ arguments and claims or to render justice to the parties, even if it involves going beyond the arguments and claims advanced. Both views are prevalent among arbitrators and this is often a dilemma for tribunals. The author develops on an example showing how “all or nothing” approaches can be risky for counsel and that alternative claims are often a good idea.

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José-Miguel Júdece and Ana Coimbra Trigo: “Dealing with Privilege Claims in International Arbitration A Pragmatic Approach” *

*Article submitted by ICC Institute Members and selected by the ICC Institute Selection Committee for publication in the ICC Dispute Resolution Bulletin

SUMMARY: Legal privilege is one of the few grounds that parties can raise to object to document production. Although globally applied, legal privilege is regulated locally where lawyers are qualified. Different expectations might therefore arise from parties in international arbitration despite parties’ equality being a key principle in evidence production. As the parties’ arbitration agreement is usually silent on this issue, arbitrators must decide how to deal with privilege claims. This article explores the different ways to achieve the best possible balance between parties’ expectations and procedural fairness.

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Olivier Monange: “Amendment of the Indian Arbitration law: Arbitration and Conciliation (Amendment) Act, 2019”

SUMMARY: This contribution provides an update on the 2019 amendments to the Indian arbitration law, which follow a number of recent reforms aiming at reducing the involvement (many might say interference) of the Indian courts in the international arbitration process.

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Piotr Nowaczyk: “it is not easy to start as an arbitrator”

SUMMARY: The author comments on the challenge in starting a practice as an arbitrator for young lawyers and queries what are the factors which draw new lawyers down (or up?) this path.

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Timur Ibrahim Sen: “Takeaways from the work of UNCITRAL Working Group III 38th Session”

SUMMARY: This note gives a summary of the work of UNCITRAL’s Working Group III on possible ISDS reform at the 38th session in Vienna, which took place from 14 to 18 October 2019. The following reforms are being considered: the establishment of an advisory center on ISDS, the adoption of a code of conduct for ISDS tribunal members, and the regulation of third-party funding.

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INTERVIEW WITH JOSE MIGUEL JUDICE

Each edition carries an interview with a well-known arbitration personality. We continue our series with José Miguel Júdece.

Q: What was your first job?

A: When still a law school student, I had a 3-month part-time job to hand-write the contents of 50 identity cards per day (the Portuguese registry was still moving towards a mechanic system). I am not sure whether the unfortunate citizens were able to be sure of their own names from then on, due to my awful handwriting. After that experience, at 22 years old and having finished law school in Coimbra, I worked as a junior professor of Political Science and Constitutional Law.

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NEWS FROM MEMBERS



David Arias has joined the arbitration practice of Herbert Smith Freehills as partner based in Madrid.



Stefano Paolo Catelani has left DuPont de Nemours to set up his own boutique in Geneva in international business law. He also teaches International Business Law at Webster University.



Julien Fouret and **Gaëlle Le Quillec** have joined Eversheds Sutherland in Paris as partners coming from Betto Seraglini.



Guillaume Feld published the book 'Droit et Pratique des Grands Projets à l'International. Une perspective civiliste'.

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Jacob Grierson has left McDermott Will & Emery to join Asafo & Co, a lawfirm specialized in African matters; he is based in Paris.



Maria Milburn has been appointed member of the World Bank Sanctions Board, with effect from July 2019. She has also been appointed as a Judge at the Administrative Tribunal of the European Bank for Reconstruction and Development.



Carmen Núñez-Lagos has left the partnership at Hogan Lovells to set up her own boutique in Paris, Núñez-Lagos Arbitration focusing on her practice as arbitrator.



Galina Zukova has founded her own boutique in Paris, Zukova Legal. She remains Professeur Associé à l'Université Paris-Saclay (Université de Versailles Saint-Quentin).

As an ICC Institute Member, please keep in mind that you may benefit from a 5% discount on the following upcoming events using your discount code **IIM-9345**:

- [ICC/FIDIC Conference](#) (Sao Paulo, 10-11 Feb 2020)
- [MENA Conference](#) (Dubai, 16-17 Feb 2020)
- [European Conference](#) (Paris, 30 March / 1 April 2020)



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