

EDITORIAL

Welcome to the second edition of Volume 8 of *The Vindobona Journal of International Commercial Law and Arbitration*.

- We are privileged to begin this edition with an article by *Professor Joseph Lookofsky* on the United Nations Commission on International Trade Law (UNCITRAL) Digest on case law on the United Nations Convention on the International Sale of Goods (CISG) - 'Digesting CISG Case Law: How Much Regard Should We Have?'. The Digest, just recently released, has been produced to further promote uniformity in the application of the CISG through the sharing of information on case law relating to its interpretation. The result of this major project, which should prove to be an invaluable resource for courts, business people, practitioners, academics and students, is available on the UNCITRAL website at <http://www.uncitral.org/english/clout/digest_cisg_e.htm>.
- 'The Convention Strikes Back: Enforcement of International Commercial Arbitration Awards Annulled Elsewhere' by *Professor Nicholas Pengelley* looks into the application of the New York Convention. Article V(1)(e) of the Convention provides that annulment of an award of a court at the seat of arbitration is one of the limited grounds for challenge to enforcement. Nicholas Pengelley discusses how it had been widely accepted that, as with the other grounds for challenge, this did not prevent the enforcement a court from conducting its own assessment, and enforcing regardless. *Chromalloy* was the first common law decision to confirm this, as well as ruling that Article VII of the New York Convention mandated recourse to even more favourable domestic enforcement law. Decisions of the United States' Second Circuit in 1999 ran counter to this view, however, favouring almost automatic deference to the foreign court's ruling and ignoring Article VII. More recent decisions from the United States and Hong Kong in the *Pertamina* cases have tilted the balance back in favour of a second look by the enforcing court.
- In 'The Role of the African State in International Commercial Arbitration', *Gwenann Seznec* provides a brief description of the role of arbitration as practised in the international commercial sphere, its effects on foreign direct investment (FDI) in sub-Saharan Africa, along with an outline of the legal infrastructure for international commercial arbitration as constructed by African nations during the past forty years. Seznec submits that the primacy of the African State in commercial transactions stymies the participation of those States in normal international commercial arbitration, thus hindering both FDI flows and the development of norms of behaviour that cultivate trust in the international community. Section 4 of Seznec's article provides an explanation

for the gulf between the legal infrastructure and practice of arbitration in Africa. It is contended that lack of absorption of international law into the legal culture, particular problems of resource-poor countries, application of procedural and substantive laws in arbitration, the primacy of the State in commercial transactions, and enforcement of awards, are all elements that present problems both to African States and to foreign investors as they seek to resolve their disputes. The conclusion provides some further analysis of these difficulties and proposes how international norms of trust and reliability could develop to alleviate the current problems of arbitration in Africa.

- *Professor Dr. Burghard Piltz* surveys the use of general conditions of contract governed by the CISG in ‘Standard Terms in UN-Contracts of Sale’. Effective incorporation of standard terms can be affected by a number of issues, including: language, accessibility and notice of the terms in addition to any ‘battle of the forms’ which may ensue. This article provides an excellent examination of this area of CISG case law.
- *Christopher Kee’s* ‘Remarks on the manner in which the UNIDROIT Principles may be used to interpret or supplement Article 48 of the CISG’ compares Art. 48 CISG and Art. 7.1.4 of the UNIDROIT Principles as a means of better understanding each of these provisions. In doing so, Kee highlights the key elements of the remedy available to the seller for addressing failures to comply with his or her obligations under a CISG contract.
- ‘The CISG – Another one of Equity’s Darlings?’ by *Colin King* A ‘bone fide purchaser without notice’ has long been termed the ‘Darling of Equity’. This paper considers whether the principles of equity have become embedded in the CISG, to what extent similarities exist between these two systems of law, and whether the CISG is another ‘Darling of Equity’. The author focuses on the concept of good faith in Article 7 and how the equitable principle of estoppel is reflected in the Convention.
- In ‘International Standard Banking Practice (ISBP) for the Examination of Documents under Documentary Credits: Panacea or Confusion?’, *Roberto Bergami* comments on the new ISBP documentary examination principles and their effect on the still controversial issue of documentary compliance with Letter of Credit (L/C) transactions. Central to the question of documentary compliance is the acceptance of documents as tendered to the bank by the beneficiary of a L/C. Because the UCP 500 are subject to interpretation by any of the parties involved in the transaction, with each potentially having their own agenda for interpretation, differences of opinions exist and are often exacerbated by differences in interpretation of

languages and legal requirements of countries. The ISBP was issued in January 2003, representing a way forward in the clarification of what exactly does and does not constitute a discrepancy. This paper assesses its impact on L/C transaction and the error rates of between 60% and 70% experienced by exporters on first presentation of documents.

- China's membership to the World Trade Organization ('WTO') has required many changes to its legislation, including the protection, or more specifically, enforcement, of intellectual property rights in China. 'Not Enough? An Examination of China's Compliance with the Intentions of the TRIPS Accord' by *Jonathon Chu* sets out the history of intellectual property rights in China and describes the reasons leading to China's accession to the WTO. The WTO is both a vehicle for China to gain access to the rest of the world markets, and an instrument by which the rest of the world can better access the Chinese market – the fifth largest trading nation in the world. China's moves to comply with TRIPS are assessed, and the pressures that China faces in order to comply with TRIPS are considered.
- 'Online Dispute Resolution and Business' by *Graham Ross* provides compelling business, psychological and economic reasons in favour of the adoption of online dispute resolution (ODR). ODR systems have been available and discussed in one form or another for a number of years and yet have not, so far, been used by business to any great extent, notwithstanding numerous and significant advantages offered by ODR to business. The reason lies in the challenge to the generating of awareness and detailed knowledge, and to the building up of confidence in its use, that is presented by any new technology. This paper sets out the benefits of ODR for business, discusses the hurdles in the way of rapid uptake and suggests the way forward.
- *Simon Greenberg* analyses the process of deciding applicable law in 'The Law Applicable to the Merits in International Arbitration'. While in most international arbitrations the parties choose the law, and while some cases can be decided solely on the basis of the contract and the applicable trade usages of the parties and the industry, arbitration choice of law issues remain important. An arbitrator faced with a choice of law issue may have to deal with complex arguments; failure to do so properly may have a direct impact on the parties' substantive rights. Despite this, there is surprisingly little consistency in determining choice of law issues. Leading arbitration practitioners writing on the subject claim to report on the common methods, yet each practitioner reports a different method. This paper navigates a path through the doctrine and organises it into one, comparing the methods at a theoretical and practical level. Within this, one particularly grey area covered is the law applicable to non-contractual claims. Greenberg argues that, notwithstanding the protests of

practitioners, there is a need for uniformity in approaches to arbitration conflict of laws issues. With the aim of achieving uniformity, a legislative solution is proposed as a solution to this problem.

- This edition of the Vindobona Journal concludes with a book review of *Legal Problems of Credit and Security* by *Orkun Akseli*.

We hope you enjoy the read.

Elisabeth Opie
Editor-in-Chief
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