Issues

Volume 5 (2018-2019)
[vc_accordion style="boxed_accordion" collapsible="yes"][vc_accordion_tab title="Susan Franck - INTERNATIONAL ARBITRATION - BETWEEN MYTH AND REALITY - 9th John E.C. Brierley Memorial Lecture "][vc_column_text]
The first woman to deliver the John E.C. Brierley Memorial Lecture in November 2016, Susan Franck explores common but flawed accounts of international arbitration based on anecdotes and myths while encouraging the audience to pay more attention to scientific facts. While acknowledging the challenges of living in a ?post-factual? society, she argues that international arbitration, whether commercial or investment-based, is caught within a larger geo-political maelstrom which includes a backlash against globalization, the popularization of populism, and a turn toward nationalism. Rather than permitting decisions to be affected by an emotive torrent of intuitive forces that facilitate decisions based upon fear or easily accepted cognitive narratives, she recommends proceeding based upon rationality, data analysis, and with an eye towards evidence-based reform. In an effort to connect data and normative choices, Professor Franck explores existing empirical research on international arbitration, with a focus on cognitive illusions and how intuitive decision-making impairs the quality of both decision-making and the implementation of appropriate reform of international arbitration. She ultimately challenges stakeholders to move past ideological debates in an effort to find common ground in the valuation of vetted facts and rule of law values.**/vc_accordion**

Volume 4 (2017-2018)
[/vc_column_text][vc_accordion style="boxed_accordion" collapsible="yes"][vc_accordion_tab title="Othmann Layati - Arbitrage commercial international et le *UK Bribery Act 2010*"][vc_column_text]
À l'instar du U.K. Bribery Act 2010, l'apparition de nouveaux standards répressifs internationaux caractérisés par leur sévérité accrue a engendré une jurisprudence nouvelle, relative à l'interférence entre arbitrages commerciaux internationaux et procédures pénales internationales. Si cette confrontation entre justice commerciale privée et justice pénale internationale n'est pas un phénomène naissant, les champs d'application matériel et territorial du U.K. Bribery Act 2010 ont par leur étendue, favorisé les points d'impact entre ces deux univers juridiques a priori hermétiques. Nombreuses et variées, les questions théoriques et pratiques qui découlent de cette cohabitation forcée sont par exemple celles de la prise en compte par les arbitres des décisions pénales passées en force de chose jugée, du sursis de l'instance arbitrale dans l'attente de l'issue de l'enquête pénale ou encore de l'exécution des sentences arbitrales lorsque la procédure pénale concurrente questionne l'ordre public international. Cet article propose une revue théorique de ces problématiques, qu'elles soient existantes ou à venir, et suggère des solutions concrètes et stratégiques à destination des praticiens de l'arbitrage commercial international, arbitres et conseils.**vc_accordion_tab title="Lucy Reed - INTERNATIONAL DISPUTES RESOLUTION COURTS : RETREAT OR ADVANCE? - 10th John E.C. Brierley Memorial Lecture - "**

In the 10th John E.C. Brierley Memorial Lecture, Professor Lucy Reed explores the hybrid dispute resolution mechanism of domestic ?international commercial courts?. The lecture starts with a description of the current debate of ?Arbitration versus Domestic Courts versus Investment Courts', to frame the question of whether proposed reforms in international arbitration and new court structures represent advances or retreats in international dispute resolution. After surveying the existing international commercial courts, Prof. Reed describes the new Singapore International Commercial Court (?SICC') and its promising early case law. In her view, the SICC is uniquely international among comparable offerings, and hence is an important new option ? and an advance ? in international commercial justice, at least in the Asia-Pacific region.
vc_accordion_tab title="Pedro J. Martinez-Fraga & C. Ryan Reetz - THE STATUS OF THE LIMITATIONS PERIOD DOCTRINE IN PUBLIC INTERNATIONAL LAW: DEVISING A FUNCTIONAL ANALYTICAL FRAMEWORK FOR INVESTORS AND HOST-STATES"

Customary international law is seemingly irreconcilably conflicted on the fundamental issue of whether it recognizes an international law equivalent to national-domestic statutes of limitations. By way of example, only 132 of the approximately 3000 bilateral and multilateral investment protection treaties in force have a limitations or prescription period. The balance would theoretically allow for the filing of stale claims in perpetuity or otherwise engraft random limitations periods on an ad hoc basis. Thus, the lack of uniformity and governing standard has given rise to uncertainty and insecurity: the very policy objectives that the limitations period doctrine itself seeks to eradicate. The authors argue that the fragmented status of public international law with respect to the limitations period doctrine is attributable to (i) the wholesale importation of national-domestic law on limitations into

public international law without having considered the policies and aspirations of international law, and (ii) the economic agendas of industrialized states to the exclusion of the interests of developing states and economies in transition. A descriptive and prescriptive methodology is applied in the development of this proposition.

vc_accordion_tab title="Julia Godolphin - RESOLUTION OF TAX DISPUTES IN INTERNATIONAL ARBITRATION"

Investor-state arbitration plays an important role in protecting the rights of both international investors and host states. With regards to taxation however, the scope of their rights and obligations under international investment agreements (?IIAs') is unclear. Existing instruments provide varying rights for arbitrating taxation disputes. The result is that taxation-based claims in investor-state arbitration have highly uncertain and inconsistent outcomes, and the current framework often leaves investors without effective recourse against abusive state behaviour.

Given the importance of taxation to states and foreign investors alike, establishing a coherent, consistent, and stable investor-state arbitration system for resolving taxation disputes is in the interests of both stakeholders. Investor-state arbitration remains an appropriate forum for tax disputes, but several changes are required. First, the tax veto should be modernized to allow for greater transparency and neutrality. Secondly, IIAs need to separately provide for taxation-based claims to delineate states' obligations and what will constitute a breach thereof regarding taxation matters. These steps would allow all parties to better understand their rights and obligations and improve the investor-state arbitration regime for all stakeholders.**vc_accordion_tab title="Maxence Rivoire - L'ARBITRABILITÉ DU DROIT D'AUTEUR : LE CAS DU DROIT FRANÇAIS"**

Dépassée dans les pays de common law, la question de l'arbitrabilité du droit d'auteur agite la doctrine civiliste. Étant donné les avantages de l'arbitrage pour résoudre les litiges de droits d'auteur, en particulier dans un contexte international, l'auteur plaide pour que la jurisprudence française énonce un large principe d'arbitrabilité de la matière.

Malgré certains doutes théoriques, la pratique arbitrale admet l'arbitrabilité du contentieux des droits d'exploitation. En revanche, dans l'arbitrage interne, la validité des clauses compromissoires portant sur le droit moral demeure très incertaine. En arbitrage international, l'auteur voit dans la jurisprudence de la Cour d'appel de Paris la reconnaissance, d'une part, d'une règle matérielle de droit international privé conférant à la convention d'arbitrage international une validité propre et, d'autre part, le rejet implicite d'une loi de police posant une restriction à l'arbitrabilité. L'article propose également aux tribunaux français de s'inspirer des arguments théoriques de la Cour suprême du Canada pour admettre que les litiges portant sur la validité ou la titularité de droit d'auteur puissent être tranchés par un arbitre.

vc_accordion_tab title="Mevelyn Ong - THE INTERPLAY OF SOVEREIGNTY, PERSONALITY AND CONSENT IN THE EXECUTION OF ARBITRAL AWARD DEBTS AGAINST NON-PARTY STATE-OWNED ENTERPRISES"

The 21st century has seen the continuance of the internationalization of business and trade, and with it the growth in popularity of international arbitration as a mechanism to resolve cross-border disputes. Yet the enforcement of international arbitral awards continues to be one of the key challenges of the international arbitration system, complicated further where the non-complying award debtor is a state. In circumstances where principles of sovereign immunity fetter the ability of an award creditor to execute against the assets of a state debtor, an alternative route that has gained increasing traction has been the possibility of executing against the assets of a State-Owned Enterprise (SOE) through a legal technique known as ?reverse piercing.'

This paper analyzes the English judiciary's various approaches to answering the question of whether an SOE can be held liable for the award debts of a state via reverse piercing, and undertakes what most other commentary has not. It endeavours to identify the underlying assumptions of the reverse piercing concept. It demonstrates that it is predicated on particular conceptions of the role of the state, sovereignty, personality, and consent, as well as the relationship and interplay between these. It finds that holding SOEs liable for the award debts of a state can only be supported if an absolutist conception of sovereign personality continues to be adopted and the importance of the notion of consent as a foundational basis for arbitration continues to diminish. Accordingly, it challenges such conceptions by proposing that if one adopts non-absolutist and non-monolithic conceptions of sovereignty and legal personality, and that if one acknowledges that consent is the foundational basis for arbitration, then there can be no basis for supporting the proposition that an SOE can be held liable for the award debts of a state and its assets executed against in satisfaction of such debts. Perhaps of greater significance, this articles notes that the paradox of an increasingly evanescent notion of consent as the foundational basis for arbitration has been the blurring of the boundaries of legal personality. This has aggravated difficulties with delineating the boundaries of sovereignty. The law respecting the execution of arbitral award debt therefore continues to struggle to reconcile itself with the realities of the role of the modern state in the 21st century.

vc_accordion_tab title="Relja Radovi? - PROBLEMATIZING ABACLAT'S MASS CLAIMS INVESTMENT ARBITRATION USING DOMESTIC CLASS ACTIONS"

The 2011 decision on jurisdiction and admissibility in Abaclat and Others v Argentina has started a discussion about mass claims processes in investment treaty arbitration. The tribunal concluded that although proceedings were initiated in aggregate, the continuance of the case contained a representative feature. This determination led them to declare that the applicable procedure could and had to be adapted. Today, the legacy of Abaclat and the availability of mass claims procedural devices in investment treaty arbitration remain questionable: can mass claims investment arbitration be qualified as ?class-like'? If so, does it satisfy the fundamental principles of arbitration (particularly the principle of consent)? This article takes a comparative approach to answering these questions by putting mass claims investment arbitration procedures and United States class actions processes side-by-side. It argues that mass claims arbitration as construed in Abaclat cannot satisfy fundamental arbitration principles because it fails to observe the inextricable link between the parties' consent, representative procedure, and representative relief. It is therefore wrong to view mass claims arbitration as an available device for investors in investment treaty arbitration.

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Volume 3 (2016-2017)
[/vc_column_text][vc_accordion style="boxed_accordion" collapsible="yes"][vc_accordion_tab title="Tomoko Ishikawa - Restitution as a ?Second Chance' for Investor-State Relations: Restitution and Monetary Damages as Sequential Options"][vc_column_text]

The availability and appropriateness of non-pecuniary remedies in investor-state arbitration has been a matter of controversy, at the centre of which is the concern over the infringement of sovereignty by restitution. This article aims to demonstrate that there are situations where restitution should be regarded as a preferable remedy for the host state, rather than as a threat to its sovereignty, for it gives the state the opportunity to re-establish and maintain long-term investment relations with the relevant investor and, more importantly, to demonstrate its continuing commitment to the international investment and arbitration agreement (IIA) by complying with the restitution order. On the other hand, even in such situations, practical restrictions on ordering restitution, that is, the nec ultra petita principle and non- enforceability of non-pecuniary remedies, could effectively prevent the tribunals from ordering restitution. As a way to address this issue, this article proposes a ?two-options' approach, under which arbitral tribunals order restitution as the first option, and compensation as the second option, enabled when the first option fails. It argues that this approach is an effective way to give a ?second chance' for the host state to demonstrate its continued commitment towards a long term and stable investment environment in conformity with the IIA, while providing compensation as a safety net for the investors against the risk of non- enforceability of restitution. It concludes by proposing the inclusion of this approach in future IIAs as a way to put this approach into practice.

vc_accordion_tab title="Daniel R. Bennett, Q.C. and Madeleine A. Hodgson - Confidentiality in Arbitration: A Principled Approach"

Confidentiality is often considered one of the benefits of arbitration. However, although arbitrations are generally private, parties would be wise not to consider them confidential, absent a confidentiality agreement. This paper examines the approaches to confidentiality in other jurisdictions, and the approach taken by Canadian courts, and concludes by proposing a principled approach to confidentiality in arbitration in Canada.

vc_accordion_tab title="Shannon Salter and Darin Thompson - Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal"

This article deals with the new British Columbia Civil Resolution Tribunal (?CRT?). First of its kind in the world, the CRT will focus on early online dispute resolution as a tool to improve access to justice in BC. The authors will begin by examining public access problems with the current civil justice system. They will then challenge some of the common assumptions underlying the status quo, with the aim of opening a dialogue about which facets of the civil justice system are foundational to the rule of law and which ones ultimately detract from it. The article will conclude by offering some principles of user-centred justice design, and illustrating them through their application to the CRT.

vc_accordion_tab title="Kyle Richard Olson - The Appeal of the Right to Appeal: The ICDR Adopts Optional Appellate Arbitration Rules to Advance the Availability of Appellate Rights in International Commercial Arbitration"

The author tackles the role of appellate rights in international commercial arbitration. After a discussion on the relevance of this topic in ICSID arbitration, the article turns to the new ICDR rules, which contain an opt-in set of appellate rules. While the analysis focuses on key aspects of this optional procedure, it also considers general objections and concerns often raised against the use of appeal mechanisms. The author concludes by pointing out that flexibility is a key element in international commercial arbitration and, as such, the ICDR rules provide an effective tool that parties can choose if it best serves their needs.

vc_accordion_tab title="Ben Giaretta - Project Management in International Arbitration"

?Saving time and costs? is a common demand in international arbitration. However, this can be a problematic goal to aspire to, as it can fail adequately to take into account all aspects of an arbitration, in particular the adaptive or change-driven lifecycle of the arbitration and the requirement for a high standard of quality. This paper proposes that the focus in international arbitration should instead be on project management. An arbitration should be viewed as a project that requires a full assessment of the objectives of the parties and other stakeholders, and proper project management in order to achieve those objectives. Arbitrators can draw on a considerable body of knowledge about project management from other industries. Applying project management skills to arbitration includes appropriate planning, identifying and managing work scope, engaging with stakeholders, organising issues and evidence, and closing the arbitration properly.

vc_accordion_tab title="Giorgio Sassine - There Should be an Answer to § 1782(a) ? as to whether its scope includes private arbitral tribunals"

USC § 1782 grants standing to ?a foreign or international tribunal? to obtain an order from a US federal district court compelling the production of evidence from uncooperative parties. Whether this provision extends to private arbitral tribunals has been the subject of controversy, with both sides of the argument pointing to the plain meaning of the term, the legislative history of § 1782, and

principles of international arbitration in order to reach opposite conclusions. Federal courts, too, have reached different conclusions on the issue since 2004. While it is the author's opinion that private arbitral tribunals are likely not within the scope of § 1782, this article highlights the need for a clear answer to the question in the face of ambiguous evidence, and provides avenues to finally settle the issue.

vc_accordion_tab title="Nicolas Bremer - Seeking Recognition and Enforcement of Foreign Court Judgments and Arbitral Awards in the GCC Countries"

Successfully obtaining a judgment or arbitral award may not be the final step in asserting a claim. Extra enforcement measures may be required when the losing party refuses to abide by the terms of a ruling. In international commerce, rulings must often be enforced in a jurisdiction other than the one where it was made. In this case, the ruling will have to be recognized by the competent authority of the country where enforcement is sought (the ?requested country'). Obtaining recognition of a foreign ruling in a country that is part of the Gulf Cooperation Council (the ?GCC') can be laborious. Despite the ambitious strategies of the GCC countries regarding the recognition and enforcement of foreign arbitral awards, their local courts still have many reservations about foreign rulings. This article provides an overview of existing regulations pertaining to foreign rulings in the six GCC countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates [the ?UAE']), and offers suggestions on strategies to deal with the challenges posed by these regimes.

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Volume 2 (2015-2016)
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[/vc_column_text][vc_accordion style="boxed_accordion" collapsible="yes"][vc_accordion_tab title="Maxime Hanriot - Online Dispute Resolution (Odr) As a Solution to Cross Border Consumer Disputes: The Enforcement of Outcomes"][vc_column_text]
Online Dispute Resolution (ODR) is an interesting means of giving online consumers efficient remedies in cross-border disputes. While the effectiveness of ODR is sometimes problematic, ad hoc solutions can be implemented depending on whether the ODR procedure is adjudicative or non-adjudicative, and whether the outcomes are binding or non-binding. This allows parties to seek enforcement before a court or a public authority, or to rely instead on private enforcement mechanisms. The analysis of each of these situations shows that the enforcement of binding outcomes obtained through ODR should be sustained by public regulation. However, important instruments such as the Rome I, Brussels I and Brussels I recast European Regulations prohibit pre-dispute ODR agreements, but this scenario might rapidly change thanks to the European ADR Directive. Efforts of this kind pave the way for greater trust in engaging in cross-border transactions and should be encouraged.**vc_accordion_tab title="James Ng - When the Arbitrator Creates the Conflict: Understanding Arbitrator Ethics through the IBA Guidelines on Conflict of Interest and Published Challenges"**
Arbitrator ethics is one of the most underdeveloped areas in international arbitration. Arbitrators are generally required to meet a baseline level of neutrality by disclosing any potential ethical conflicts and remaining independent and impartial throughout the arbitral process. Unfortunately, not all arbitral practice has met these ethical requirements. The ?Application Lists? of the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration provide a theoretical basis for

considering such ethical conflicts. This paper takes the ?Application Lists? one step further: by matching them with published records of arbitrator challenges from the London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID), the author will provide a practical scheme to gauge whether an ethical conflict merits disclosure or disqualification.**vc_accordion_tab title="Interview with Chiann Bao, the Secretary-General of the Hong Kong International Arbitration Centre"Download PDF[/vc_accordion_tab**

The article addresses a central question: did the fair and equitable treatment standard (FET) in investment regimes become a norm of customary international law? To answer this, Dumberry examines FET clauses in bilateral investment treaties and foreign investment laws of numerous states, as well as arbitral decisions involving allegations of breaches of FET obligations. His analysis shows that States have not engaged independently and consistently in the adoption of FET clauses. Consequently, Dumberry concludes that FET clauses cannot be considered customary international law.**vc_accordion_tab title="Daniel Goldenbaum - L'arbitre international face a? la corruption"**

Corruption plagues business relations. The international arbitrator can be confronted by it when parties refer to him or her a dispute concerning either a brokerage agreement hiding the payment of a bribe or the direct payment of a sum of money to the person deciding to award a contract to a company. The arbitrator then faces conflicting interests, raising the issue of the factual proof of bribery and his or her duty to report the facts to state authorities .

Regarding proof, shifting the burden or using a higher standard of proof than usual do not seem to be appropriate solutions to address the difficulty to prove bribery.

Regarding the reporting of bribery to state authorities, imposing this obligation upon arbitrators would be unjustified and counter-productive.

Finally, the international arbitrator must fight bribery while not losing his or her particularities. The difficulties to achieve these goals and the divergent opinions highlight the necessity of guidelines on the issue.

vc_accordion_tab title="Do?an Gültutan - Review and Analysis of Interim Measures Available to Foreign Arbitrators in Turkey"

Do?an Gültutan's piece provides us with a detailed understanding of the legal rules on the granting of court-ordered interim measures in assistance to foreign arbitral proceedings in Turkey. In so doing, he underscores the crucial role played by courts in support of foreign arbitration, while also shedding light on the interactions between arbitral tribunals and Turkish courts. The author focuses on the types of relief available and the mechanisms triggering them, the procedure framing interim measures, counter-arguments that may be brought forth on appeal, enforcement of interim relief orders, and other ancillary issues.

vc_accordion_tab title="Manu Misra - The Necessity Defence & Continental Casualty: Importation of WTO Principles at the ICSID"

In investment arbitration, although several tribunals have dealt with the defence of necessity, a uniform concept of what necessity entails has been elusive and uniformity in the approach of tribunals has yet to be achieved. In contrast, WTO tribunals have a wealth of case law on the concept of necessity from which investment tribunals can seek and have sought guidance. An example is the case of Continental Casualty v Argentina. This article focuses on that cases methodology in the context of other ICSID tribunal rulings. It is argued that a consistent and predictable approach to the defence of necessity in investment arbitration decisions is possible, through which a better balance of investor protection and state sovereignty could be achieved.

vc_accordion_tab title="Oliver Krauss - The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English Law"

Escalation clauses providing for negotiating in good faith have evolved from mere unenforceable agreements to negotiate to agreements that could be enforced under certain conditions. English courts, however, have usually held some of these requirements to be missing which, in turn, precluded the enforcement of escalation clauses. The paper discusses the general idea of these agreements, gives an overview of their treatment before English courts, and emphasises the key elements that warrant their enforceability. Through a comparative analysis of the American and Canadian approaches to good faith, the paper aims to provide clarity on the issue of enforceability. In the author's view, the recent ruling in Emirates Trading v Prime Mineral, as well as judicial positions held in other common law countries, will inspire English courts to be more lenient in enforcing escalation clauses providing for negotiating in good faith.

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Volume 1, Issue 2 (1:2 - 2015)
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[/vc_column_text][vc_accordion collapsible="yes" style="boxed_accordion"][vc_accordion_tab title="Dominique Hascher - Les perspectives françaises sur le contrôle de la sentence internationale ou étrangère "][vc_column_text]In this article, the author focuses on the judicial review of ?international? arbitral awards. He emphasizes the peculiarities of French law, which are essentially grounded on the conception of an autonomous arbitral legal order (Putrabali). The first part of the article deals with the mandatory requirements of arbitral awards (reasons, scope of arbitral jurisdiction, etc.), while the second describes the desirable limits of judicial review. Judicial activism, where really necessary, is encouraged. Notable examples include the revision of an award tainted by fraud, and the rules concerning the extension of the arbitration agreement. Judicial self-restraint is also of paramount importance. However, this self-restraint has been neglected in cases dealing with the arbitrators' duty to disclose relevant circumstances, in matters related to their impartiality and independence.

The author concludes by identifying some important points that French courts should tackle in the future, that is, the admissibility of challenges against decisions rendered by arbitral institutions, and their role in the proceedings concerning challenges against arbitral awards.
vc_accordion_tab title="Antoine Champagne - Moral Damages Left in Limbo"
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