

EDITORIAL

Welcome to the second edition of Volume 6 of *The Vindobona Journal of International Commercial Law and Arbitration*.

The following is a brief overview of the contents of this edition of the VJ:

- ‘The UNCITRAL Model Law and the parties’ chosen arbitration rules – Complementary or mutually exclusive? The Singapore Case of *Dermajaya Properties*’. In this article, *Gordon Smith, Mark Lim and John Choong* discuss the recent case of *Dermajaya Properties*¹, in which the Singapore High Court held that even though parties to an international arbitration had (purportedly) adopted the UNCITRAL Arbitration Rules², those Rules did not apply. Instead, it was held that the parties were bound by the UNCITRAL Model Law³ and the Singapore International Arbitration Act (Cap 143A, 1995 Ed)⁴. This surprising decision is the latest in a series of recent cases from Singapore which have raised interesting issues regarding the nature of the relationship between the Model Law, the enacting legislation and the parties’ chosen arbitration rules. This article considers the implications of these decisions, examines the underlying policy issues, suggests some solutions and concludes by proposing that *Dermajaya Properties* should be legislatively overruled.
- *Pilar Perales Viscasillas*’ commentary entitled ‘Battle of the Forms and Burden of Proof: An Analysis of BGH 9 January 2002’ provides an analysis of the impact of the CISG where a contract consists of conflicting provisions by virtue of the parties’ ‘battle of the forms’. This article considers the divergent views expressed on this issue among scholars and in the case, as well as looking at the relevant international and domestic legal rules, in light of the Federal Supreme Court of Germany (Bundesgerichtshof) decision of 9 January 2002. Reference is also made to the issue of burden of proof. A copy of the case translation for this decision, undertaken

¹ *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd & ANOR* [2002] 2 SLR 164.

² United Nations Commission on International Trade Law Arbitration Rules 1976, General Assembly Resolution 31/98.

³ United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, General Assembly Resolution 40/72, adopted on Dec 11, 1985; 40 GAOR Supp. No. 53, A/40/53, 308.

⁴ Statutes of the Republic of Singapore.

by Alston & Bird LLP, William M. Barron and Birgit Kurtz, is also included in this edition.

- *Roberto Bergami* examines the insurance requirements on cargo in transit in ‘The Importance of Defining the Level of Cargo Insurance Coverage in International Contract under Incoterms 2000’. Under Incoterms 2000 contracts, only two terms require the seller to provide the buyer with evidence of insurance by way of a policy or certificate for the consignment in question. Although three different levels of insurance exist for carriage of goods by sea, Incoterms only stipulate the minimum requirements. This paper briefly examines the changes to cargo insurance since 1980 and comments on the various levels of insurance protection available today. Specific reference is made to the onus placed on the buyer to ensure insurance protection provided is adequate for the needs of particular consignments.
- *Hilmar Raeschke-Kessler* provides a very informative and practical overview of the use of arbitral tribunals as an efficient and economical way to terminate an arbitration in ‘Making Arbitration More Efficient: Settlement Initiatives by the Arbitral Tribunal’. This article considers the conflicting views on settlement initiatives by an arbitral tribunal, and how an arbitral tribunal should proceed with a settlement initiative while avoiding endangering its position of impartiality. Raeschke-Kessler concludes this analysis by providing a checklist of ‘dos and don’ts’ for arbitrators during settlement negotiations.
- Our first special feature in this edition of the VJ includes four comparative analyses of some of the provisions of the CISG and PECL by *Ulrich Schroeter*, *Allison Butler* and *Christopher Kee*. ‘Freedom of Contract (Art. 6 CISG)’ and ‘Interpretation of “Writing” (Art. 13 CISG)’ by Schroeter, ‘Interpretation of “Place of Business” (Art. 10 CISG)’ by Butler and ‘Remedies for Part Performance (Arts. 51 and 73 CISG)’ by Kee have been written as part of an initiative by the Institute of International Commercial Law of the Pace University School of Law to provide interpretive aids for the use of the CISG - now part of the domestic laws of 61 countries for up to 22 years. The project is edited by Dr John Felemegas of Australia. This comparative law project, in considering the non-organic form of the CISG since its inception, aims to maintain a currency in its application and interpretation through the use of recent restatements of the law of sales, including the PECL.

- Our second special feature includes four articles from the conference hosted by the Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) and the Moot Alumni Association, ‘Electronic Commerce and its Growing Importance in Law and Business’ which was held in Vienna, Austria on 22 March 2002. *Professor Franco Ferrari*, in his article ‘Brief Remarks on Electronic Contracting and the United Nations Convention on Contracts for the International Sale of Goods (CISG)’, focuses on the issue of whether CISG can be applied and is suited to apply to contracts concluded electronically. Franco Ferrari addresses the applicability of CISG to electronic contracting by examining the internationality of such contracts. He compares electronic contracts for the sale of tangible goods with those for the sale of virtual goods, such as software licenses, and considers whether the CISG is applicable to either or both such types of contract. Having considered the applicability of the CISG, Professor Ferrari also considers the appropriateness of the CISG to the substantive issues in such contracts.

The CISG’s ability to deal with modern electronic business communications such as e-mail and Internet ‘click-wrap’ terms and conditions (which did not exist at the time of the CISG’s drafting) is considered by *Professor Sieg Eiselen* in ‘E-Commerce and the CISG: Formation, Formalities and Validity’. By analysing the CISG and the UNCITRAL Model Laws of 1996 and 2001, Professor Eiselen addresses the requirements for such agreements to be valid and effective, the need for compliance with formalities, and the extent of party autonomy in this regard.

Dr Bruno Zeller examines the complex issue of jurisdiction in cyberspace, and the way in which the CISG principles can be applied to assist in finding a geographical space for a dispute which has no relation to a defined physical area. In ‘Jurisdiction in Cyberspace, Does the CISG “Manage” the Global Communication Medium?’, he considers both the new Brussels Regulations and the Hague Conference on Private International Law, together with US Court decisions, to draw out applicable principles which may identify an appropriate forum for the determination of these ‘floating’ disputes.

Mr Trevor Cox provides us with a practical overview of the law relating to domain names in ‘Issues to Consider When Acquiring a Domain Name’. In this article, Cox considers the intricacies that companies need to understand when acquiring a domain name, including the relationship between trademarks and domain names and the due diligence processes to be undertaken when seeking to obtain a domain name.

- As mentioned above, we also extend our case translation library with the decisions of the Federal Supreme Court (Bundesgerichtshof) of 9 January 2002, the Higher Regional Court of Schleswig (Oberlandesgericht Schleswig) of 30 March 2000 and the Supreme Court of Austria (Oberster Gerichtshof) of 29 June 1999. We are grateful for the efforts of *Alston & Bird LLP*, *William M. Barron*, *Birgit Kurtz*, *Martin Gusy*, *Dr Peter Feuerstein*, *Dr John Felemegas* and *Todd Fox* in preparing these and the kind permission of the Institute of International Commercial Law of the Pace University School of Law to include these in this edition of the VJ.

This edition concludes with a book review of *Practitioner's Handbook on International Arbitration* by *Nigel Blackeby* and *Fiona Gifford*.

Despite the breadth of issues and opinions raised throughout this edition of the *VJ*, upon reading through each of the articles and case translations, various overriding factors concerning commercial relations pervade: the need to build and maintain relationships and act in good faith; the need for clear and effective communication; a requirement for the law to remain organic and keep abreast of changing trade and living conditions so that the rule of law is upheld; and the indispensable value of providing suitable means of resolving unmet expectations (whether or not these expectations were reasonable). Naturally, the need for all of these features is heightened when national boundaries are transcended and we enter into the realm of international trade. We hope this edition provides ample food for thought.

Elisabeth Opie
Editor-in-Chief
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