Not Seeing the Wood for the Trees? Empowering Buyers by Standardising Mandated Disclosure in the Franchise Context

Michala Meiselles *LLB (Man) LLM (Man) LPC (MMU) SFHEA*
Senior Law Lecturer, Law School, University of Derby
Richard H. McLaren Visiting Professor in Business Law (Univ. Western Ontario, Jan. 2019)
Visiting professor of Private International Law
(Université Jean Moulin, France)
m.meiselles@derby.ac.uk

Abstract

The *decision-making ability* of a buyer to make use of mandated information depends not only on their ability to *access* this information, but also their ability to *make effective use* of such information. One way of ensuring a more effective use of mandatory information disclosed is to simplify the comparison process from the point of view of the buyer, so that she is better able to benchmark and compare the various products and contracts on offer in the marketplace. For this reason, the author argues that the imposition of a standard content, layout and time of disclosure optimises the full value of the mandatory pre-contractual disclosure process and goes a long way towards guaranteeing a more effective use of mandated information for comparative purposes by buyers, arguably helping generate a - *lingua franca* - common disclosure language which is more accessible and user-friendly from the point of view of buyers.[i]

To demonstrate this point, the author considers two distinct regulatory instruments used by lawmakers in the context of EU consumer regulation to facilitate the decision-making process, namely standardisation of content and layout of mandatory information. The author argues that together these regulatory instruments could help enhance decision-making in the franchise context, providing would-be buyers looking to buy or renew a franchise with information that is, at once, *easy* to *access*, *understand*, *locate* and then *compare*.

The author also argues that *standardisation* of mandated information (content and layout) not only goes a long way towards mitigating certain difficulties linked to mandatory disclosure in the franchise sector, but also plays a central function in optimising decision-making by potential buyers faced with the purchase or renewal of the franchise. To this end, this paper assesses the role and problems associated with mandatory pre-contractual disclosure generally and in the franchise sector specifically (part 1) before considering the part played by such *standardisation* in the protection of consumers under EU law (part 2), and assessing the function of *standardised content and layout* in the franchise context, during the pre-contractual mandatory disclosure (part 3).

July 2022
M Meiselles

[i] Easterbrook and Fischel 1984: 700-3.

THE ROLE OF DOMESTIC COURTS IN INVESTOR-STATE DISPUTE SETTLEMENT- EXPLORING THE PRACTICE OF JUDICIAL EXPROPRIATION OF ARBITRAL AWARDS

Gautam Mohanty[1] & Arnav Doshi[2]

The concept of expropriation and the underlying principles of the standards of expropriation have been the subject of much deliberation in investor-state dispute settlement (ISDS) jurisprudence. However, a topic that has not been addressed is the role of domestic courts in the context of ISDS i.e., judicial expropriation of ISDS awards. To that extent, the present article at the outset, aims to examine the proposition as to whether arbitral awards qualify as investments in the investor-state dispute settlement framework. Further, a central question that the article explores are the circumstances that qualify as expropriation of an arbitral award. Additionally, the article will also focus on whether interference by the host state's judiciary in the enforcement of the arbitral award can constitute can qualify as expropriation. The modus operandi of the paper is that the paper commences by ascertaining whether arbitral awards qualify as investments within the ISDS regime. Thereafter, the paper encapsulates the practice of expropriation in ISDS and the relevant principles related to the same. Following the above narration, the paper will adumbrate the factual matrix of specific cases while highlighting the general principles and factors contributing to expropriation in international arbitration. Notably, the paper will examine the cases of Saipem v Bangladesh, ATA v. Jordan, Swisslion v. Macedonia, Tatneft v. Ukraine, Middle East Cement v. Egypt and the recent case of Devas Multimedia Private Limited v. Antrix Corporation Limited to examine the factual scenarios that might be interpreted as judicial expropriation and to cull out the relevant underpinnings that tantamount to judicial expropriation.

Keywords: judicial expropriation, ISDS awards, investment

[1] Gautam Mohanty is currently a doctoral student at Kozminski University, Warsaw, Poland. He is also an advocate enrolled at the bar in India and an Assistant Professor (on leave) at Jindal Global Law School India (JGLS) and an arbitration consultant with Arbitrator Justice Deepak Verma, Former Judge of Supreme Court of India. He can be reached at gautam.mohanty1414@gmail.com.

[2] Arnav Doshi is currently a penultimate year student at Jindal Global Law School, India. He can be reached at 19jgls-arnav.jd@jgu.edu.in.

The Theoretical Tangle of Implied Contract Terms: Can the Gordian Knot be Cut?

Recent years have witnessed great interest in theoretical clarification of the nature of the practice of implication of contract terms. Whilst the discussion thus far has elicited some answers, the subject remains notoriously 'elusive'. This paper offers new hope of a breakthrough. I argue that underlying recent debates are deeper issues that must be brought to the surface. These include fundamental theoretical incoherence regarding the nature/purpose of implication tracing back to The Moorcock (1889). They also include analytical indeterminacy in applying the established 'tests' for implication, as courts vary between conflicting instrumental and non-instrumental approaches. Feeding both issues is inconsistent linguistic use of core terminology. This paper helps clarify the theory and practice of implication of terms in contracts by untangling two 'theses' well-supported by the authorities, and elaborating their details and significance. Whilst the divided state of the authorities precludes instant resolution, the paper further contributes a reflection on possible ways forward. This includes the bold suggestion that implication may in fact comprise two different exercises matching the two theses described, which should be severed into distinct doctrines.

Dr. Marcus Moore
https://allard.ubc.ca/about-us/our-people/marcus-moore
https://www.law.ox.ac.uk/people/marcus-moore

The English Floating charge and the reform of French personal property law: contribution to the conceptualisation of a French global security

Muriel Renaudin
Senior Lecturer, Cardiff School of Law and Politics, Cardiff University

The aim of a security interest is to confer rights in the debtor's assets to the secured creditor as security for the performance of an obligation or for the repayment of a debt. Secured creditors enjoy a priority of repayment on the secured assets over other unsecured creditors. It is well established that an efficient personal property security law fosters economic development and that without it, it would be almost impossible for a national economy to develop. The aim of an efficient personal property security law regime is to facilitate the granting of credit at low costs thanks to clear, certain and accessible rules. In addition, it should permit the debtor to use all categories of assets as security whilst remaining free to use them, such as with the English floating charge. It is a type of non-possessory security which is said to 'hover' over the debtor's changing fund of assets until it 'crystallises' upon certain events, at which point, it becomes fixed.

The concept of a global security, such as the floating charge, does not exist in France but its features have aroused academic interests. Given that French law does not recognise the concept of equity, a true equivalent security mechanism to the English floating charge does not exist. Yet, several French law reforms have adopted some of the features of the floating charge suggesting that French law is beginning to develop the conceptual foundations of a global security. A global security would bring many advantages to debtors and creditors including the possibility for the debtor to charge all of his assets, hereby increasing access to credit opportunities whilst remaining free to use the assets in the course of business. Many argue that adopting the concept of a global security would contribute significantly to a more comprehensive rationalisation and modernisation of French law.

Many international initiatives have actively fostered the adoption of this kind of global security by incorporating the concept into model laws (for example those of the European Bank for Reconstruction and Development (EBRD) or the United Nations Commission on International Trade Law (UNCITRAL)). Many jurisdictions, including the Civil law jurisdiction of Quebec, have been influenced by these international initiatives and reformed their laws accordingly. Comparative analysis of both Civil and Common law models of global securities can therefore make a useful contribution to any attempt to conceptualise a French global security.

The aim of this paper is twofold. It contributes to a better understanding of the nature of the English floating charge by drawing out and analysing its key characteristics in order to identify possible functional equivalents in French law. Given the absence of a true equivalent to the floating charge in French law, this paper also discusses the experience of Quebec which adopted the concept of a global security and which may contribute to the conceptualisation of a French global security for future legal reforms.

Ilias Ioannou, PhD Candidate, Centre for Commercial Law Studies, Queen Mary University of London, 67-69 Lincoln's Inn Fields, London, WC2A 3JB, UK, ORCID 0000-0001-5301-1684

Governance of digital platforms in seaborne trade: The dual role of platform rulebooks

Abstract

In the aftermath of the Covid-19 pandemic, the international trade community has witnessed a proliferation of digital platforms, most of them blockchain-based, aiming to facilitate communications and transactions among the multitude of actors involved, including merchants, ocean carriers and logistics providers, financers, insurers and customs authorities. This working paper analyses the functions of platform rulebooks governing the operation of such global trade platforms. It distinguishes between the gap-filling role of rulebooks and their function to provide mechanisms governing the commercial relationship of the various parties involved.

Regarding their first role, platform rulebooks provide a workable solution to the problem that digital functional equivalents of some trade documents are not accepted as legal equivalents to their paper counterparts across jurisdictions. Platform rulebooks establish a contractual nexus between (1) the platform provider and each member and (2) between members among themselves. The parties agree to treat digital records within the system as the functional and legal equivalent of paper trade documents and undertake not to challenge the validity of any transaction made on the ground that it was made in electronic, instead of in paper form.

Nonetheless, rulebooks do not entirely replicate the effects of the so-called 'documentary intangibles,' such as bills of exchange or bills of lading, because contractual rights are enforceable only towards counterparties, while documentary intangibles can be used to transfer property rights which are enforceable erga omnes. For this reason, many jurisdictions have undertaken or are currently undertaking legislative initiatives at the national level to recognise digital functional equivalents of documentary intangibles in alignment with the Model Law on Electronic Transferable Records, which was commissioned by the United Nations Commission on International Trade Law (UNCITRAL) in 2017. This working paper analyses these law reform initiatives to distil what facilitative legislation can achieve and when regulation needs to step in.

Ilias Ioannou, PhD Candidate, Centre for Commercial Law Studies, Queen Mary University of London, 67-69 Lincoln's Inn Fields, London, WC2A 3JB, UK, ORCID 0000-0001-5301-1684

The second function of platform rulebooks is to provide a governance mechanism regulating the behaviour of the various parties transacting over the platform. The rulebooks provide the 'terms of use' that document participants' obligations and rights. All members agree contractually to participate in a global trade platform providing one or more commercial applications, such as the exchange of digitalised documents, information sharing or automation of transactions via smart contracts, and commit to adhering to the governance mechanism set out in the platform rulebook. This working paper assesses whether these governance mechanisms, in their current form, facilitate the digital onboarding of smaller actors in the supply chain or constitute a hurdle to digital transformation beyond the large players.

This working paper analyses the relevant issues through a combination of theoretical analysis drawing upon the principles of law and economics, doctrinal analysis of ongoing national and international law reform initiatives and case studies involving the examination of specific global trade platforms' terms and conditions. Empirical insights suggest that English law tends to be chosen by commercial parties as applicable substantive law to govern their relationships, therefore this working paper examines platform rulebooks primarily through the prism of English law. This paper would fit within the 7th Annual London Centre for Commercial and Financial Law Conference's theme under the sub-topic The Future of Commercial Contract in Scholarship and Law Reform: Business organisations as a nexus of contract from a digital perspective.

Abstract for The Future of the Commercial Contract in Scholarship and Law Reform, 7th Annual Conference

Title: The importance and role of AI in arbitral decision making

Dr Reza Beheshti[1]

Marjan Fazeli[2]

Legal reasoning is essential in the arbitral decision-making process. Article 31 of the UNCITRAL Model Law states that arbitrators' decisions should be in the form of a reasoned award. By requiring arbitrators to state the reasons, the purpose is to determine whether the arbitrator has appropriately applied and interpretated the applicable laws and substance of the dispute in their decision-making process. A crucial aspect of arbitral decision making in international commercial disputes is interpreting contractual terms and conditions. Different approaches to contractual interpretation derived from different legal systems have created practical and theoretical difficulties for arbitrators. These divergences may not only concern the interpretive methods for ascertaining the parties' intentions but also the interlink between interpretation and legal principles or doctrines. Nevertheless, it appears that prominent legal systems, such as the English law, American law and UNIDROIT Principles of International Commercial Contracts, have adopted an objective standard in interpreting a commercial contract. Lord Hoffman in the remarkable case of *Investors Compensation Scheme v West Bromwich Building Society*, explained that the objective interpretation, as an acceptable and modern method for ascertaining the intention of parties in a commercial contract, requires taking account of all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. This interpretive approach shifts away from literalism in contract interpretation towards a broader contextualist approach. This method involves reference to the 'background' or 'factual matrix' of the contract text, the 'reasonable expectations' of the parties, the 'commercial purposes' of the agreement, or 'business common sense'. The arbitral tribunal would thus have a difficult and uncertain, although surmountable, task of implementing this modern method. At the same time, it should be noted that the arbitrator's mind, like a normal person, has limitations in logical/rational thinking and is not immune from being affected by cognitive errors during the interpretation of the contract based on the objective method. This is because the arbitrator's minds perceive the information through their own experiences and preferences. The possibility of deploying AI in the interpretation of contracts is generally explored by legal scholars, but they have not specifically addressed whether the AI can aid the arbitrators in their task of making reasoned decisions, while adopting an objective standard of interpretation. This paper strives to fill this gap and address the extent to which AI could be beneficial for

[1] Assistant Professor in International Commercial Law, University of Nottingham; reza.beheshti@nottingham.ac.uk

[2] Ph.D. in Oil and Gas Law, University of Shahid Beheshti, Iran.

arbitrators when writing a reasoned decision. It is questionable whether expert systems or machine learning could be and should be employed during the process of decision making by the arbitrators. Finally, the paper will address whether the current international legal regimes concerning arbitration, such as the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, have the necessary flexibility to allow arbitrators to benefit from AI.

Investment Arbitration and the Autonomy of EU's Legal Order: A Rule of Law Perspective

Dr. Radosveta Vassileva, Visiting Research Fellow at Middlesex University, United Kingdom

-interested in submitting a paper for the edited collection-

Since the 2010s, there has been a ping pong game between EU institutions aimed at suffocating intra-EU investment arbitration. In 2015, the Commission launched infringement proceedings against some EU members to have intra-EU BITs repealed. Since 2018, the CJEU has also started closing the door to intra-EU investment arbitration via a series of judgements, invoking the autonomy of EU's legal order. With similar concerns, in 2020, 23 EU members signed the Agreement for the Termination of Bilateral Investment Treaties between EU members.

EU's recent steps towards putting an end to intra-EU investment arbitration have attracted much criticism. It ranges from accusations of legal imperialism, through findings that EU's stance impedes EU integration, to conclusions that the notion of autonomy is not part of EU's primary law and is extremely vague in CJEU's case law. Nevertheless, those supporting EU's stance have argued that in a legal community like the EU, it is expected to litigate against state authorities before national courts.

This paper purports to inform the debate on intra-EU investment arbitration from a rule of law lens. Its main argument is that EU institutions' concerns for EU's legal order with respect to investment arbitration resonate dual standards and possibly undermine Article 2 TEU (namely, the equality, rule of law and respect for human rights limbs).

First, some EU members face unprecedented rule of law backsliding, which has necessitated the activation of Article 7(1) TEU as well as the development of new mechanisms of rule of law monitoring. Their courts can hardly be trusted, which means that a priori some investors will have access to impartial courts while others will be forced to defend their rights in captured courts. The CJEU itself has recognised exceptions to the principle of mutual trust in criminal matters in view of court capture. Moreover, when confronted with captured national courts, especially in Eastern Europe, intra-EU investors will be primarily left with the questionable remedy of seizing the ECtHR, which is not only notoriously slow in delivering its judgements, but which itself has been under fire for tampering with admissibility.

Second, this paper examines several ICSID cases, which arose from controversial final judgements seemingly violating EU law by national courts of EU members. Had these intra-EU investors been deprived of access to investment arbitration, they would have been left without an effective remedy for the breaches of their rights. Furthermore, in some of the cases that will be examined in the paper, disputes arose between the host State and non-EU investors on the same facts. Hence, we could have been confronted with the sad conclusion that non-EU investors have more and better protected rights than intra-EU investors in identical circumstances.

Finally, considering EU's efforts to build a Multilateral Investment Court adjudicating disputes between the EU and third countries, is it not high time to consider developing impartial adjudicative mechanisms for intra-EU disputes or even disputes between local investors and their State, instead of dooming these investors to the mercy of non-independent, albeit national EU courts?