

Kluwer Arbitration Blog

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Maxi Scherer (WilmerHale & Queen Mary University of London) · Tuesday, December 8th, 2015

Volume 32 (2015) Issue 6 contains:

ARTICLES SECTION

Bernard HANOTIAU, Non-signatories, Groups of Companies and Groups of Contracts in Selected Asian Countries: A Case Law Analysis

Abstract: More than one-third of all international arbitration cases filed these recent years have involved issues of non-signatories, groups of companies or groups of contracts. The scenarios are diverse, but they frequently involve one of the following questions: is it possible to join and decide together in one arbitral procedure all the disputes which arise from the various contracts relating to the same project or to decide under the arbitration clause contained in one contract disputes arising under one or more related agreements; or in the context of a group of companies, whether one or more entities which belong to the group may be properly considered to be parties to the arbitration agreement even though they have not signed formally the contract containing the arbitration clause. The present article analyses published decisions rendered on these issues in selected Asian countries, namely, Singapore, Mainland China, Hong Kong, India, South Korea, Malaysia, and Japan.

Kateryna BONDAR, Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review

Abstract: Annulment of investment awards is a safeguard mechanism and a threat to the enforcement of awards. It is an interesting and important topic from the point of view of comparison between awards rendered under the Arbitration Rules of the International Centre for Settlement of Investment Disputes (ICSID) and non-ICSID investment awards. The purpose of this article is to analyse how the annulment of ICSID awards compares with the annulment of non-ICSID investment awards. In the author's opinion, the choice between the two systems should be equally informed in terms of rules and applicable standard of review. The article discusses the key distinctive features of the two mechanisms, the practice of annulment, and the differences in the scope and standard of review by ICSID annulment committees and the national courts. It aims to analyse whether the extent of review is more expansive in one system compared to the other, as well as the reasons for the differences. While describing the evolution of the standard of review, closer attention is paid to the more recent annulment decisions.

David KWOK, Pro-enforcement Bias by Hong Kong Courts: The Use of Indemnity Costs

Abstract: This article discusses the approach taken by Hong Kong courts to award indemnity costs against applicants who were unsuccessful in resisting enforcement of New York Convention awards. Under general principles, an indemnity costs order is penal in nature and is usually awarded in exceptional circumstances. In the case of *A v. R*, the High Court of Hong Kong held that the unsuccessful application to resist enforcement of an award warranted the indemnity costs order. This approach was justified on the basis of Hong Kong's Civil Justice Reform (CJR) and its implications, and was given endorsement by Hong Kong's Court of Appeal in a subsequent decision. Meanwhile, the Court of Appeal of the Supreme Court of Victoria, Australia, had considered, but rejected, the Hong Kong approach of awarding indemnity costs. This article questions whether applications in respect of Convention awards belong to a special class, compared to other civil applications to court, so that an indemnity costs order against the unsuccessful applicant should be the norm. It is argued that whilst the awarding of indemnity costs in such circumstances is controversial, it can nonetheless be justified based on the court's 'pro-enforcement' bias in relation to Convention awards.

NOTES SECTION

Jennifer KIRBY, Efficiency in International Arbitration: Whose Duty Is It?

Abstract: This article tracks a talk the author gave at Helsinki Arbitration Day 2015. The author notes that the issue of efficiency in international arbitration is often misunderstood to be a matter of time and cost, when it is really a question of the relationship between time, cost, and quality. Anyone who thinks that arbitration can be fast, cheap and good should think again. While parties, their counsel and arbitral institutions can help to reduce time and cost, it ultimately falls to the arbitrator to make arbitration more efficient. But any effort to increase efficiency amounts to nothing more than tinkering with a well-oiled prosperity machine.

Damien NYER, The Investment Chapter of the EU-Canada Comprehensive Economic and Trade Agreement

Abstract: Born out of the considerable Canadian experience with investor-state arbitration, and the no less considerable European scepticism towards that process, the Investment Chapter of the Comprehensive Economic and Trade Agreement (CETA) is a uniquely balanced and innovative document, which could serve as template for modern investment agreements, including the Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated by the European Union (EU) and the United States.

BOOK REVIEW

Reinmar WOLFF, Book Review – Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration, by Klaus Peter Berger

Ali Moghaddam ABRISHAMI, Book Review – Resistance and Change in the International Law on Foreign Investment, by M. Sornarajah

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