Kluwer Arbitration Blog

Empirical Analysis of National Court Judgements in Commercial Arbitration: What Do the Data Tell Us?

Monique Sasson · Monday, June 13th, 2022

On June 6, 2022, the **Journal of International Arbitration Special Issue on Empirical Work in Commercial Arbitration,** was released, edited by Dr Monique Sasson, Dr Crina Baltag, Roger P. Alford, Matthew E.K. Hall, under the general editorship of Prof. Dr Maxi Scherer. The **Special Issue** also includes articles authored by Prof. Loukas Mistelis, Prof. Dr Maxi Scherer, Dr Ole Jensen, Giammarco Rao, Laurence Shore, Vittoria De Benedetti, Mario de Nitto Personè, Cecilia Carrara, Elina Mereminskaya, Ioana Knoll-Tudor, Arthur Dong, and Alex Yuan.

The empirical research featured in this **Special Issue** is based on the Kluwer Arbitration Database ("Database") and relies on a data set that includes all national court decisions on recognition, enforcement and setting-aside of international commercial arbitration awards available in the Database and rendered from January 1, 2010, to June 1, 2020. The empirical research comprises 504 vacatur actions and 553 recognition and enforcement actions. National courts in 74 different jurisdictions issued these decisions.

The research coded every argument raised by respondents in opposing the recognition and enforcement of awards under Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as every argument raised by respondents in attempting to set-aside awards based on the grounds in Article 34 of the UNCITRAL Model Law on International Commercial Arbitration. Several other grounds, outside the two instruments mentioned above have been identified in the Database.

This type of empirical research is routinely done in investment arbitration, but it is rarely attempted in commercial arbitration. Understanding success in enforcement and setting-aside proceedings is usually left to reliance on anectodical evidence, which is unsatisfactory. Moreover, it is necessary to consider the data from several jurisdictions to understand the extent to which the general impression that commercial arbitral awards are ultimately upheld by the courts is correct.

The empirical research concerned court judgments involving 104 claimant nationalities (50% of the cases were from 16 nationalities; the US was the largest percentage at 8.8%) and 107 respondent nationalities (50% of the cases were from 14 nationalities; the US was the largest percentage at 9.8%).

The majority of these court judgements arose from administered arbitrations. There were 110 different arbitral institutions (9 institutions administered 48% of the relevant awards) mentioned in

the court judgments. The probability of an award being enforced was 78% in all actions filed in proceedings administered by the nine most represented arbitral institutions. In vacatur proceedings, 75% of the applications filed by respondents seeking to set-aside the award were rejected (thus, a 75% success rate in preserving the award).

The research first analyzed the general data and then addressed certain specific issues:

(i) *Invalidity of Arbitration Agreements and Applicable Law* — Professor Scherer and Dr. Jensen analyzed the challenges to the validity of arbitration agreements, which were at issue in almost one-fifth of the database court decisions.

(ii) *Non-Signatories* — Professor Mistelis and Dr. Rao addressed the 'extension' of the arbitration agreement to non-signatories threatened the enforcement of the award.

(iii) *Pathological Clauses* — Mr. Shore, Dr. De Benedetti and Dr. De Nitto Persone looked at this jurisdictional objection, which was raised in 21% of the Database enforcement cases and successful only in 23% of the cases.

(iv) *Conflicts of Interest* — Dr. Carrara considered the issue of conflicts of interest, impartiality and independence of arbitrators.

(v) *Enforcement of Annulled Awards* — Professor Baltag analyzed the enforcement of awards vacated at the seat.

(vi) *Public Policy* — Dr. Sasson analyzed the decisions on public policy. Objections based on public policy were raised in 44% of recognition and enforcement proceedings and in 38% of setting aside proceedings. The success rate of these objections was low: 19% and 21%, respectively.

(vii) *Annulment, Recognition and Enforcement Proceedings in Latin America* — Dr. Mereminskaya addressed the most recent jurisprudential approaches to international arbitration in Latin America, specifically Argentina, Colombia, Costa Rica, Chile, Dominican Republic, Mexico and Peru.

(viii) *Annulment, Recognition and Enforcement Proceedings in France* — Dr. Knoll-Tudor examined NY Convention and annulment cases in France.

(ix) *Recognition and Enforcement Proceedings in China*. Dr. Dong and Dr. Yuan analyzed judgements by the Chinese courts.

General Conclusions to be Drawn From the Data

i) *The Low Vacatur Application Success Rate*: 23% (19% in the nine largest jurisdictions) without significant variations between courts in various jurisdictions.

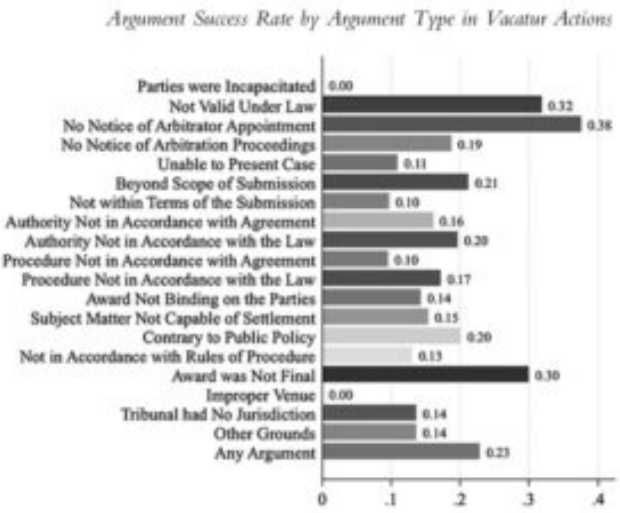
ii) *The High Enforcement Success Rate*: 73% (71% in the nine largest jurisdictions), again without significant variations between courts in various jurisdictions.

It is noteworthy that, despite the lack of uniformity in the setting-aside legislative acts across the world, the percentages of confirmations of awards under national arbitration acts, and of recognition and enforcement of foreign awards under the New York Convention are very similar (77% and 73%). This indicates that the general impression that setting-aside proceedings are parochial and not especially arbitration-friendly, because of a lack of an international convention regulating them, is misguided.

Second, there is no statistically significant evidence that the choice of arbitration institution will measurably affect enforcement outcomes. The ICC represented over 20% of cases in the data set; there was no evidence that this institution fared better than others in terms of enforcement or vacatur action outcomes. This database also highlights the widespread use of arbitration institutions from around the world, from Albania to Zambia.

Third, international commercial arbitration is overwhelmingly a private affair. Government parties features in only 6 % of the cases in the Database. Moreover, regardless of whether or not there was a government party in the arbitration, there is little evidence of a "home field" advantage. That is, there is no direct evidence connecting the nationality of the parties and the outcome of the vacatur or enforcement proceeding.

Fourth, the most common grounds for challenge are not the most successful. Arguments based on public policy or invalid arbitration agreement are most frequently raised by respondent in enforcement proceedings, but are relatively unsuccessful. Similarly, arguments based on public policy and inability to present one's case are most frequently raised in the vacatur context, but are relatively unsuccessful ("no notice of arbitrator appointment" was the most successful).



This empirical analysis is only a starting point. There are many unanswered questions that flow from this study. We have not analyzed, for example, questions such as the cost or duration of arbitration, the composition of tribunals or demographics of arbitrators, the enforcement of arbitration agreements. Further research is needed to answer these and other questions.

Finally, the articles in the **Special Issue** offer a detailed empirical analysis of national court enforcement of international commercial arbitration awards. But, it is not comprehensive, and many questions require further research. We focused on analysis of cases since January 1, 2010, and coded national court proceedings that were included in the Database. There is an inherent selectivity bias in analyzing these cases, because the reporters and editors chose to include in that database only those cases that are likely to be relevant to the international commercial arbitration community.

There is no other equivalent database relating to international commercial arbitration decisions in national courts. One must therefore draw conclusions and extrapolate from these cases, recognizing the limitations of the database. We hope that the enthusiasm with which practitioners and scholars have embraced legal empiricism in the investment arbitration context will translate to the world of international commercial arbitration

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uncover potential conflicts of interest.

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