

# Kluwer Arbitration Blog

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### **Jennifer Kirby, *Evolution and the Discoverability of In-House Counsel Communications***

This article tracks a keynote speech the author gave at the 2017 conference of the Italian Arbitration Association, which was co-organized by the Italian Forum for Arbitration and ADR. Privilege rules evolve as a function of the threat parties face from discovery. In common law jurisdictions where the threat is high, in-house counsel communications are generally privileged. In civil law jurisdictions where the threat is low, they generally are not. In determining whether in-house communications are discoverable in international arbitration, arbitrators should avoid getting bogged down in questions of applicable law and instead figure out what makes sense – what’s fair. Provided the arbitrator has not lost his fairness instinct, he should manage to get to the right result. Still, there are some basic steps a company can take to protect in-house counsel communications from discovery, just in case.

### **Johannes Koepf & Agnieszka Ason, *An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings***

This article examines how Polish courts have dealt with annulment applications based upon purported violations of substantive public policy and measures the Polish jurisprudence against the standards developed by the national courts in England, France, Switzerland and Germany. It identifies an anti-enforcement bias of the Polish courts which, in sharp contrast to their European counterparts, still favour an expansive interpretation of the public policy exception and have surprisingly little qualms in engaging in a thinly veiled merits review with unclear boundaries. The markedly interventionist approach of the Polish judiciary encourages annulment applications, which both ill-serves the arbitral process generally and undermines recent efforts to promote Poland as a desirable seat for international arbitration specifically. A solution to these ills can only be found in a narrower interpretation of the substantive public policy exception, in harmony with the standards developed by the national courts in the major European arbitration centres.

### **Gordon Smith, *Comparative Analysis of Joinder and Consolidation Provisions Under Leading Arbitral Rules***

A number of leading arbitral institutions, recognizing the significant benefits of joinder and

consolidation provisions, and reflecting parties' demand, have recently amended their arbitral rules either to include joinder and/or consolidation provisions for the first time, or enhance the scope of their existing provisions. The author discusses in this article the benefits of joinder and consolidation, the mechanisms available to parties in international arbitration for joinder and consolidation, the joinder and consolidation provisions contained in leading arbitral rules, and assesses the key similarities and differences among the rules.

***Bas van Zelst, Class Actions and Arbitration: Alternative Approaches Based on the (Ever Evolving) Dutch Experiences with Collective Redress***

This article first aims to contribute to an understanding of the Dutch regime for collective redress against the background of pending discussions on the possibility, desirability, and practicability of the settlement of mass claims by means of arbitration. Secondly, it assesses to what extent arbitration may play a part in the Dutch context. The article proceeds in two sections. After the introduction, section 2 analyses the Dutch collective redress regime. It is concluded that Dutch law does not allow for class action arbitration. This, however, does not mean that arbitration cannot play a part under Dutch law in the context of collective redress. It is submitted in section 3 that Dutch law provides for two options. First, an arbitral tribunal may be engaged to assess whether a collective claim at law exists. This mechanism allows collective claim vehicles and (purported) wrongdoers to assess their position at law in the realm of a confidential arbitration. In this context arbitrators serve as facilitators to a collective settlement that is subsequently brought before the court in order to be declared binding. Secondly, disputes over rights of individual claimants under a settlement agreement that has been declared binding may be settled in arbitration.

***Florencia Villaggi, Recent Developments in the Arbitration Legislation in Argentina***

Argentina has been experiencing a long awaited reform of its arbitration legislation. The first step towards modernizing Argentina's outdated legislation was the inclusion of a chapter relating to the arbitration agreement on a new federal Civil and Commercial Code enacted in 2015. This new legislation did not, however, repeal the existing arbitration provisions of the procedural codes, generating some tension between certain provisions that overlapped providing inconsistent solutions. The new legislation also included some controversial provisions which appear to be at odds with the modernization efforts. During the last year the federal Government promoted a legal reform aim at making the country more arbitration-friendly which address such criticisms and concerns. This article discusses the current legal regime applicable to arbitration in Argentina while addressing the impact that the reform will have if the draft bills that are currently being discussed are adopted.

***Oleg Skvortsov & Leonid Kropotov, Arbitration Changes in Russia: Revolution or Evolution?***

This article is devoted to the analysis of commercial arbitration reform in Russia. The authors explore the reasons for the reform. The effect of the reform is a switch from extremely liberal regulatory pattern of arbitration to moderately conservative pattern. Pros and cons of the reform as well as relevant court practice are reviewed. Forecasts are made on further development of commercial arbitration in Russia.

## BOOK REVIEW

**Valentina Vadi, Cultural Heritage in International Investment Law and Arbitration, Cambridge University Press (by Panayotis M. Protopsaltis)**

**Sigvard Jarvin and Corinne Nguyen, Compendium of International Commercial Arbitration Forms: Letters, Procedural Instructions, Briefs and Other Documents, Kluwer (by Maxi Scherer and Shouvik Bhattacharya)**

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