

# Kluwer Arbitration Blog

## The Contents of Journal of International Arbitration, Volume 37, Issue 3

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We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

### **Christoph Liebscher, Teamwork Approach in Arbitration: A New Perspective**

Attempts to increase the efficiency of case management in arbitration have been around for some time. They were mainly focused on the design and use of certain procedural rules and tools. It is beneficial that this work was undertaken, but it seems to reach its limits to improve case management. More recently, the arbitration community has started to discover the wealth of psychological knowledge to better understand and manage certain aspects of the arbitration process. However, this curiosity was limited to specific issues, such as psychology of witness evidence or of decision taking. This article proposes to take a bird's eye view based on organizational psychology and management science and asks the question: Can the established knowledge about successful teamwork be applied to arbitration? The article reviews, if such a holistic teamwork approach leads to avenues for improving the efficiency of case management in arbitration. The answer is clearly affirmative. To view the interactions between the arbitral tribunal, the parties (It is common to speak about 'party'. However, most of the time a 'party' is rather a complex organization, usually being a team consisting of at least two sub-teams, the inhouse team involved in the arbitration and the team of the external counsels. In order to facilitate reading, the article subscribes to the colloquial use of 'party', except where the difference between the two sub-teams is pointed out.) and other participants in the arbitration as teamwork provides new perspectives and can lead to new attitudes as well as to new tools for managing cases. Arbitrations guided by a teamwork approach promise to be more efficient, involve parties and arbitral tribunals more intensely – and to be more enriching for the participants.

### **Hamish Lal & Brendan Casey, Ten Years Later: Why the 'Renaissance of Expedited Arbitration' Should Be the 'Emergency Arbitration' of 2020**

While the last decade will be remembered for the splash created by the invention of Emergency Arbitration and its subsequent wide adoption across institutional rules, this article proposes that the

next decade should be known for the Renaissance of Expedited Arbitration. There is little doubt that Emergency Arbitration responded to certain user needs and sought to fill a void in international arbitration related to interim relief ordered by an arbitrator prior to the constitution of the tribunal. However, the label Emergency Arbitration ‘over-promised’ by suggesting to some users that under this innovation they could achieve a quick final resolution of their dispute. Now that the ability for parties to obtain pre-tribunal-constitution interim relief is settled, the arbitral community must respond to the user’s desire to obtain swifter final resolution. This article proposes that the best way to achieve that end is through the expansion of the parameters associated with the applicability of the ‘expedited track’ in arbitral rules. By expanding the default application of these rules, users would have the ability to obtain swifter final resolution of more disputes while retaining safeguards in situations where the arbitral tribunal found that the expedited track would move ‘too fast’ for the dispute at hand.

### **Giorgio Riso, Portfolio Investment in ICSID Arbitration: Just a Matter of Consent?**

The constant evolution of the ways in which foreign capital is invested in the marketplace has urged the need for defining the boundaries of the notion of investment, as Article 25 of the International Centre for Settlement of Investment Disputes (ICSID) Convention is silent on this point. Against this background, the question of whether the category of portfolio investment, which generally consists of intangible capital flows, can be classified as protected investment under the ICSID Convention has gained momentum due to some high-profile ICSID cases. This article examines to what extent portfolio investment can be included in the notion of investment under Article 25(1) of the ICSID Convention and, consequently, the substantive protections granted thereto can be enforced within the ICSID framework. It is argued that the increasing sophistication of financial instruments makes it difficult to find a one-size-fits-all solution, thereby requiring a case-by-case assessment of the relevant financial instrument vis-à-vis the typical characteristics of an investment identified by the case law. In this analysis, the requirement of the ‘contribution to the economic development of the host state’, which has often been overlooked, is subject to reconsideration.

### **Manasi Kumar, The ‘Composite Transaction’ and Extension of Arbitration Agreements in India**

In 2013, the Indian Supreme Court penned an innovative judgment in *Chloro Controls v. Severn Trent Water Purification*, where it appeared to fashion a new basis for extending arbitration agreements to non-signatories – a ‘composite transaction’ doctrine. This article argues that the ‘composite transaction’ is in fact a two-tiered analysis. The first part addresses whether the arbitration agreement may be extended to a non-signatory that is an affiliate company of one of the signatories, using the somewhat controversial ‘group of companies’ doctrine. Meanwhile, the second part addresses whether the arbitration agreement that is invoked may be extended to disputes arising within a group of contracts. This article demonstrates that while the Indian Supreme Court is developing a consent-based ‘group of companies’ doctrine, its ‘group of contracts’ jurisprudence is losing sight of parties’ intent due to a misreading of the ‘composite transaction’ test. This article concludes that in order to develop a modern and versatile, consentbased analysis into extension of arbitration agreements, the Indian Supreme Court must

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recast the ‘composite transaction’ test as the two-tiered analysis it represents.

### **Ibrahim Shehata, The Ministerial Approval Requirement for Arbitration Agreements in Egypt: Revisiting the Public Policy Debate**

The Egyptian Arbitration Law No. 27/1994 (the ‘Egyptian Arbitration Law’) was enacted without delineating the subject of arbitrability of administrative contracts. This was one of the hottest pre-existing debates preceding the promulgation of the Egyptian Arbitration Law, yet the latter has succinctly mentioned that arbitration is valid between public and private entities. The Legislature did not find such wording sufficient to settle this debate and decided in 1997 to introduce a specific amendment elaborating this issue.

The 1997 amendment might have settled the arbitrability of administrative contracts debate, however, it initiated another debate when it required that arbitration agreements under administrative contracts be approved by the competent minister. Until now, there are some unsettled issues concerning this ministerial approval requirement. For instance, which party is liable to procure such ministerial approval: the administrative authority or its private counterparty? Could this ministerial approval be implied? For example, what if the competent minister has attended the contract signing ceremony, would that be enough? Another recurring question is whether such a ministerial approval pertains to public policy or not. This article tries to answer these questions in light of the recent decisions rendered by the Egyptian courts and arbitral tribunals.

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