

Kluwer Arbitration Blog

The Contents of Journal of International Arbitration, Volume 38, Issue 4 (August 2021)

Maxi Scherer (WilmerHale & Queen Mary University of London) · Saturday, July 31st, 2021

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

Gary Born, *The 1933 Directives on Arbitration of the German Reich: Echoes of the Past?*

In 1933, the National Socialist government of the German Reich issued a collection of directives regarding the use of arbitration to resolve disputes, focused specifically on disputes between the Reich and private parties. The 1933 Directives made a number of general criticisms of the arbitral process as a means of adjudication, and relied upon these criticisms to significantly restrict the use of arbitration to resolve disputes with German state entities. The Reich Directives provide a neglected, but instructive, historical perspective on arbitration law and practice in Germany, both in the 1930s and before. At the same time, parts of the 1933 Directives also have unmistakable parallels to current debates about investor-state and commercial arbitration. Among other things, the Directives contain recommendations regarding the drafting of arbitration agreements and the conduct of arbitral proceedings which, while in some areas outdated, could in other respects be mistaken for current discussions regarding best practices in international commercial and investment arbitration. More importantly, the Directives' criticisms of the arbitral process, and the National Socialists' rationales for those criticisms, have striking analogues to aspects of contemporary debates about investment arbitration and proposals to abandon or restrict investment arbitration. Those parallels raise important, if uncomfortable, questions about these contemporary critiques and proposals for reform.

Darius Chan & Sidharrth Rajagopal, *To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes*

In the wake of the global Coronavirus disease 2019 (COVID-19) pandemic, a rise in creditor-initiated winding-up proceedings is likely to be impending in coming years (See e.g., *RCMA Asia Pte. Ltd. v. Sun Electric Power Pte. Ltd.* [2020] SGHC 205). At the same time, geopolitical developments, such as the scale and ambition of Belt & Road Initiative projects, have raised questions over the issue of debt sustainability. Given the prevalence of arbitration clauses in

modern international commercial and project agreements, the interplay and relationship between insolvency and dispute resolution, and especially arbitration, requires careful attention. While the intersections between the arbitration and insolvency regimes are numerous and multi-faceted, (Jennifer Permesly *et al.*, ‘[IBA Toolkit on Insolvency and Arbitration](#)’, International Bar Association (March 2021, last accessed 18 April 2021) the impact of an arbitration clause on winding-up petitions has attracted recent case law. The English, Hong Kong, and Singapore courts have each taken differing approaches to the question of how to deal with winding-up petitions presented over disputed debts that are subject to an arbitration clause. On one end of the spectrum, the Hong Kong courts currently appear to prefer a relatively more creditor-friendly approach. On the other hand, the Singapore Court of Appeal recently laid down a relatively more debtor-friendly approach. Undertaking a comparative analysis of the approaches taken by different common law jurisdictions, this article argues that the Singapore Court of Appeal’s approach is preferable. However, at least for courts in United Nations Commission on International Trade Law (UNCITRAL) Model Law jurisdictions (or jurisdictions where the mandatory stay regime of the Model Law is adopted), they ought to find that a disputed debt subject to an arbitration clause falls within the scope of the mandatory stay regime under the Model Law. This article further suggests a possible way in which the approach of the Singapore Court of Appeal can be reconciled with the mandatory stay regime under Singapore’s enactment of the Model Law.

Rekha Rangachari, Kabir Duggal & Peter L. Schmidt, *Evolution of 28 U.S.C. § 1783: An Unexplored Tool to Support International Arbitration?*

In certain disputes, it may be important to acquire evidence from the other party, but it is difficult to do so because the international arbitration process envisions only a limited form of discovery from the opposing party in the form of document production. There is, however, the potential of an unexplored option in US law to help fill this void. 28 U.S.C. § 1783, also known as the ‘Walsh Act’, enables a United States court, under certain circumstances, to subpoena a national or resident of the United States who is in a foreign country to personally appear as a witness before the court, or before someone designated by the court, or to produce specific testimony or documents. Considering the ubiquity of American parties in international disputes, section 1783 has the potential to become an important tool in the arsenal of a disputes lawyer. Indeed, considering how section 1782 has been increasingly applied in international arbitration, it is possible that section 1783 might evolve as an important component in considering strategies for international arbitration. Like section 1782, however, due to its lack of use to date and vague statutory language, its applicability to various forms of international arbitrations remains an unfortunately open question. But it still has the potential to change international arbitration as we know it.

Bianca Böhme, *Recent Efforts to Curb Investment Treaty Shopping: How Effective Are They?*

In recent years it can be observed that states increasingly introduce explicit limitations to the practice of treaty shopping in their investment agreements. Accordingly, substantive *ratione personae* requirements, denial of benefits clauses, and anti-circumvention clauses are often included in newly signed investment treaties. In addition to these new drafting trends, arbitral tribunals have developed an implicit limitation in the form of the abuse of process doctrine to sanction the most egregious forms of treaty shopping. While these drafting trends as well as

arbitral practice can curb undesired treaty shopping to a certain extent, this article argues that only a multilateral reform effort is able to truly prevent this practice from occurring.

Joshua Paine, *Global Telecom Holding v. Canada: Interpreting and Applying Reservations and Carve-Outs in Investment Treaties*

Within investment treaties, reservations and carve-outs perform a crucial role in balancing investment protection and liberalization with competing regulatory interests of States. While carve-outs for taxation matters have been interpreted and applied by a significant number of investment treaty tribunals, carve-outs concerning other issues and reservations have been adjudicated much less frequently. The recent Award in *Global Telecom Holding v. Canada* raises several key questions of treaty interpretation concerning a reservation by Canada in the Canada–Egypt Bilateral Investment Treaty (BIT), and a carve-out, which removed from investor-State arbitration decisions by either Party not to permit the establishment or acquisition of a business enterprise. This case comment critically analyses the approach to interpreting reservations and carve-outs adopted in the Award and the associated Dissenting Opinion. I suggest that it is through the application of the ordinary rules of treaty interpretation that adjudicators will locate the appropriate limits of reservations and carve-outs, and there is little justification for adopting a restrictive interpretation of such provisions. The case also demonstrates that interpretative inferences based on one treaty party’s other investment treaties must be approached with care.

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