
Kluwer Arbitration Blog

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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:

Roger P. Alford, Crina Baltag, Matthew E.K. Hall and Monique Sasson, *Empirical Analysis of National Courts Vacatur and Enforcement of International Commercial Arbitration Awards*

The empirical research in this article relies on a data set including all national court decisions on recognition, enforcement and setting aside (vacatur) of international commercial arbitration awards available in the Kluwer database that were rendered from 1 January 2010 to 1 June 2020. Within the time parameters of this study, there were 504 vacatur actions and 553 offensive recognition and enforcement actions. Those decisions were rendered by national courts in 74 different jurisdictions. The research coded every argument raised by defendants challenging the recognition and enforcement of awards based on grounds set forth in Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as well as every argument raised by claimants to challenge awards based on the grounds set forth in Article 34 of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. In addition to these grounds, several others, outside the two instruments mentioned above, have been identified in the data set. The results of the research are presented in the article below. An overarching conclusion would be that courts overwhelmingly enforce foreign arbitration awards, in 73% of the cases in the data set, without significant variations between courts in various jurisdictions, and, respectively, overwhelmingly refuse to vacate arbitral awards, with courts vacating in only 23% of cases, again without significant variations between courts in various jurisdictions.

Maxi Scherer and Ole Jensen, *Empirical Research on the Alleged Invalidity of Arbitration Agreements: Success Rates and Applicable Law in Setting Aside and Enforcement Proceedings*

This article is based on a data set of over 1,000 judicial decisions in setting aside, recognition and enforcement proceedings. Although sometimes cited as one of the most common grounds for

setting aside an award or refusing its recognition and enforcement, the invalidity of the arbitration agreement was raised in less than one-fifth of those decisions. It was confirmed in under one-third of those cases. This article examines which arguments for invalidity were more successful than others and how courts have determined the law applicable to the (in)validity of the arbitration agreement. Notably, less than half of the courts in this data set have engaged in a meaningful conflict of laws analysis. Where they have done so, there does not appear to be a consensus on how the law applicable to the arbitration agreement should be determined and what significance a choice of law clause in the main contract has in this regard.

Loukas Mistelis and Giammarco Rao, *The Judicial Solution to the Arbitrator's Dilemma: Does the 'Extension' of the Arbitration Agreement to Non-Signatories Threaten the Enforcement of the Award?*

This article contributes to the debate on non-signatories by relying on the Kluwer Research project. In particular, through the raw data underlying the Kluwer Research, we have identified cases at the enforcement stage, in which courts had to decide whether, despite the apparent lack of consent, non-signatories were correctly brought into arbitration proceedings. In our view, the analysis of those courts' decisions is perhaps a reminder that when considering non-signatory issues, the relevant facts of the case are always what matters the most. Non-signatories' involvement in the relationship underlying the dispute is essential, absent a clear expression of it in the contract. We believe that the results show the judicial solution to the arbitrator's dilemma, that is, the due consideration of the circumstances of any case, disregarding the rigid application of any theories.

Laurence Shore, Vittoria De Benedetti and Mario de Nitto Personè, *A Pathology (Yet) to Be Cured?*

Fifty years ago, Frédéric Eisemann coined the expression 'pathological clause' to refer to arbitration clauses that substantially deviate from the essential requirements of a model clause. However, arbitration practitioners have not yet learned their lesson; the matter of pathology is far from being outdated. Arbitration clauses may be pathological if they do not provide for mandatory referrals to arbitration proceedings, or do not meet certain other requirements to provide for a workable arbitration procedure, or contain a reference to non-existing arbitral institutions and/or arbitral rules, or provide for a proceeding administered by an arbitral institution pursuant to different institutional rules. In most instances, the competent supervisory court (or the arbitral tribunal or institution dealing with a defective clause) seeks to cure these pathologies. Arbitral tribunals and national courts generally try to ascertain whether the parties' real intention is to arbitrate, and, if that to arbitrate is apparent, to give effect to and enforce an otherwise invalid arbitration clause. In any case, parties should not blindly rely on tribunals' and courts' tendency to uphold such clauses; the only safe approach is to avoid pathology.

Cecilia Carrara, *Conflicts of Interests*

The Kluwer Research comprises over 1,000 cases in the period 2010-2020. These cases do not include challenges in particular, but include vacatur and enforcement actions. Out of a total of 504

vacatur cases, in approximately eighty cases arguments related to the composition of the arbitral authority have been made. As regards enforcement, out of a total of 589 enforcement actions, in sixty-one cases these arguments have been made.

The effectiveness of arbitrators' impartiality and independence is ensured by an ex ante positive obligation of transparency, i.e., the duty to disclose any circumstances that may give rise to independence and impartiality, and an ex post sanctioning mechanism, which enables the parties to challenge an arbitrator who doesn't comply with those requirements. Disclosure allows parties to verify the arbitrators' compliance with the requirements of independence and impartiality. The challenge, however, remains the necessary procedure to establish the lack of such requirements. In most countries, the test of the arbitrators' impartiality and independence is based on the criterion of justifiable doubts.

Raising arguments related to conflicts of interest after the award is rendered, either in vacatur or enforcement actions, is only successful in order to block the enforcement/vacating the award in very few instances. Thus, parties should timely raise all of their objections at an early stage, rather than after the award is rendered.

Crina Baltag, Article V(1)(e) of the New York Convention: To Enforce or Not to Enforce Set Aside Arbitral Awards?

The recognition and enforcement of arbitral awards which are set aside at the seat continues to be a 'hot' topic, triggered by the increasing number of cases in which the prevailing party in the arbitration attempts to enforce such award in various jurisdictions where the assets of the award debtor are located. Such jurisdictions may have different approaches to the application of Article V(1)(e) of the New York Convention providing for the possibility that courts refuse recognition and enforcement of arbitral awards already set aside. Kluwer Research confirms, that, first, this ground under Article V(1)(e), while the most successfully argued ground under Article V of the New York Convention, is only upheld in 34% of the cases, and that, second, there are diverse approaches of the national courts in assessing such ground, ranging from deference to the courts of the seat of arbitration, to a truly delocalized, transnational approach to the recognition and enforcement of awards.

Monique Sasson, Public Policy in International Commercial Arbitration

This article analyses the decisions on public policy contained in the Kluwer Arbitration database. The database includes more than 1,000 cases. Objections based on public policy have been 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. This article discusses the decisions in which these objections were successful, distinguishing between the three International Law Association categories: (i) 'violation of fundamental principles, procedural public policy, or substantive public policy'; (ii) '*loi de police*'; and (iii) 'violation of international obligations' (though there were no successful objections in this category). The article concludes that the Kluwer Research confirms that public policy should only be applied in a limited set of circumstances, though it also features a few exceptions to the narrow construction of the concept of public policy.

Elina Mereminskaya, *Latin America Isn't 'Going South': A Qualitative Sampling Analysis*

This article analyses a qualitative sample of recent judicial decisions from Argentina, Colombia, Costa Rica, Chile, the Dominican Republic, Mexico and Peru. Almost all decisions in the sample show ordinary courts' deference towards arbitration. As long as the courts operate within the framework established by the UNCITRAL Model Law or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, arbitral awards enjoy a high level of autonomy and protection against unjustified attacks. This allows for conclusion that Latin America isn't 'Going South' on its path into global arbitration realm.

At the same time, in almost all jurisdictions included in the sample, Constitutional courts and Tribunals and constitutional actions for protection of fundamental rights play an extremely – indeed excessively – relevant role. Admittedly, these constitutional actions have been mainly unsuccessful and have not led to amendments of arbitral awards. Nonetheless, its sole availability generates legal uncertainty and undermines the reliability of arbitration as a mechanism of dispute resolution. It seems to be the last hurdle that Latin American countries will have to overcome before they are considered safe and appealing seats for international arbitration.

Ioana Knoll-Tudor, *Recognition or Enforcement and Annulment of Arbitral Awards in France: An Analysis of the Kluwer Research Results*

The results of the Kluwer Research showed that, despite Paris being one of the most popular arbitration seats, French courts were the least likely to recognize and enforce an arbitral award, but also those with the highest number of vacated arbitral awards. The article analyses these results and offers some possible justifications for them.

Concerning the enforcement and recognition procedures, the study only included reasoned decisions. The specificities of the French procedure however result in most of the decisions not being reasoned (the exequatur procedure is an *ex parte* procedure, only orders refusing the enforcement are reasoned) and the decision of the Court of Appeal dismissing an application to set aside an award (for awards rendered in France) has the effect of automatically enforcing the award. Therefore, analyzing only reasoned decisions is not representative of the French courts' approach. The article also analyses the grounds invoked by the claimants and their respective success rates, especially in comparison with other jurisdictions.

Concerning the annulment procedures, France ranks as the country with the highest number of vacated awards. Indeed, while reviewing the number of annulment actions initiated in recent years before the Paris Court of Appeal, we concluded that the number of actions has doubled, with around 25% of successful annulment actions.

As to the grounds for annulment relied upon by the claimants and their respective rates of success, the Kluwer Research revealed that the most relied upon grounds in France (authority not in accordance with the law and violation of public policy) were also the most successful ones.

Arthur Dong and Alex Yuan, *An Empirical Study on Recognition and Enforcement of Foreign, Hong Kong, Macau, and Taiwan Arbitral Awards in Mainland China*

In this report we analyzed publicly available cases decided by courts of Mainland China ('PRC courts') from 2001 to 2021 in which the court refused or rejected party's application for recognition and enforcement of foreign (including Hong Kong, Macau, and Taiwan) arbitral awards, totaling thirty-seven cases. Here we provide factual summary for each case and conducted statistics with respect to their arbitration-related characteristics and PRC court's ground of decision. With this report, one can see that PRC courts are extremely cautious in refusing or rejecting recognition and enforcement of foreign arbitral awards. Lack of valid arbitration agreement, and violation of arbitration agreement/arbitration rules/law of the seat, are the two major causes that led to the PRC Courts' refusal of recognition and enforcement. However, one should note that non-compliance of national laws in Mainland China may undermine recognition and enforcement of foreign arbitral awards.

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