

7-1-2011

## International Investment and Commercial Arbitration: An Industry Perspective

Lauren Willis

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Lauren Willis, *International Investment and Commercial Arbitration: An Industry Perspective*, 3 542 (2011).

This Student Submission - Book and Literature Review is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

INTERNATIONAL INVESTMENT AND COMMERCIAL ARBITRATION:  
AN INDUSTRY PERSPECTIVE

By  
Lauren Willis\*

I. INTRODUCTION

Commercial and investment arbitration comprise a significant portion of international arbitration. It is important for practitioners to understand the intricacies of both types because, although they are similar in several ways, they differ significantly in important areas as well. To give a detailed synopsis of the similarities and differences between these two areas Eleven International Publishing has recently printed *Investment and Commercial Arbitration – Similarities and Divergences*.<sup>1</sup> This book is a collection of essays from international members of the arbitration community who spoke at the Vienna International Arbitration Forum.<sup>2</sup> The book focuses on four topics relevant to investment and commercial arbitration: consolidation, party autonomy, annulment, and arbitrator impartiality. The book is structured into eight chapters with two chapters on each topic: one chapter relates to the topic of investment arbitration followed by a chapter on the same topic in the context of commercial arbitration. Each chapter's organization of the topics varies significantly, which could be a product of having so many different contributors. This organizational structuring of some of the chapters make it difficult for the reader to place the material into perspective. Many contributors' articles are very well organized and straight-forward while others are difficult to piece together and become repetitive at times. There is also almost no clear cross-comparison in the chapters between investment

---

\* Lauren Willis is a 2012 Juris Doctor Candidate at the Pennsylvania State University Dickinson School of Law.

<sup>1</sup> INVESTMENT AND COMMERCIAL ARBITRATION – BILILARITIES AND DIVERGENCES (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010). [hereinafter INVESTMENT AND COMMERCIAL ARBITRATION].

<sup>2</sup> *Id.* at ix.

and commercial arbitration. Instead, each essay focuses on one of the two types of arbitration and how each topic relates to that area of arbitration.

Overall the book has great information for practitioners in the fields of international investment and commercial arbitration. This is not a book for someone unfamiliar with the areas of arbitration discussed because there is very little introductory information on the topics and the authors write in a manner that assumes the reader has background knowledge, not just in arbitration, but specifically in investment and commercial arbitration. This book would be useful to a practitioner in the field looking for a quick summary on the current state of either investment or commercial arbitration as it relates to each of the four topics covered.

## II. CONSOLIDATION OF PROCEEDINGS IN INTERNATIONAL INVESTMENT ARBITRATION<sup>3</sup>

The book begins with an essay by Christina Knahr,<sup>4</sup> who discusses the first topic of consolidation and how it relates to international investment arbitration. First, Knahr gives a brief introduction to consolidation and what the reader can expect in her article. The author defines consolidation as the joining of two or more arbitration proceedings into a single proceeding with one consolidated tribunal.<sup>5</sup> Next, the author points to the largest advantage of consolidation of arbitration proceedings, the avoidance of duplicate proceedings and conflicting outcomes.<sup>6</sup>

The first topic of discussion by the author is the reasons arbitration proceedings, in certain situations, need to be consolidated. The avoidance of

---

<sup>3</sup> Christina Knahr, *Consolidation of Proceedings in International Investment Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – BILARITIES AND DIVERGENCES 1 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010).

<sup>4</sup> Christina Knahr is a Post-Doctoral Researcher at the University of Vienna, Austria. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

<sup>5</sup> Knahr, *supra* note 3, at 1.

<sup>6</sup> *Id.* at 1-3.

inconsistent awards is a problem that has been considered recently in the field of investment arbitration; however, inconsistency in awards is rare.<sup>7</sup> Two other significant reasons for consolidation are the avoidance of duplicative proceedings and an increase in procedural efficiency.<sup>8</sup> Even without inconsistent results, having two separate arbitrations that could be combined into one is inefficient.<sup>9</sup> Consolidating two proceedings saves time and money; however the author emphasizes these advantages must be considered on a case-by-case basis to determine if they truly are present.<sup>10</sup>

Knahr next discusses how consolidation fits into the practice of international arbitration. The author emphasizes consolidation's relevance in North American Free Trade Agreement, NAFTA, Chapter 11 arbitrations, and she cites NAFTA Article 1126 as example of an express consolidation provision.<sup>11</sup> United States Bilateral Investment Treaties and Free Trade Agreements also provide options for consolidation. However, Chapter 11 is the most significant and common consolidation provision in the world of arbitration.<sup>12</sup> The author lays out the three elements of Article 1126 which must be met in order to consolidate proceedings: 1) consolidation must be upon the request of one of the disputing parties; 2) there must be a "question of law or fact in common," and 3) consolidation must be "in the interest of fair and efficient resolution of claims."<sup>13</sup>

To help the reader understand consolidation as it relates to Article 1126, the author uses two cases in which consolidation was required under Article 1126. The first case, *Canfor, Tembec and Terminal Forest v. United States*,<sup>14</sup> is an action

---

<sup>7</sup> *Id.* at 1-2.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Knahr, *supra* note 3, at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.*

<sup>14</sup> *Canfor Corp. v. U. S., Tembec v. U. S. & Terminal Forest Prod. Ltd. v. U. S.*, Order of the Consolidation Tribunal, (NAFTA Sept. 7, 2005), <http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf>.

brought by Canadian lumber companies against the United States for adopting anti-dumping and countervailing duty measures.<sup>15</sup> According to the author, this case identified a number of characteristics relevant to consolidation and was important because it provided a detailed analysis of the elements in 1126.<sup>16</sup> The United States wanted to consolidate all of the proceedings brought by the different Canadian lumber companies into one arbitration against the United States.<sup>17</sup> The lumber companies argued they did not consent to the NAFTA consolidation provision contained in Article 1126.<sup>18</sup> Instead the lumber companies argued they only consented to arbitration under Chapter 11.<sup>19</sup> The court found Article 1126 to be encompassed into Chapter 11 and therefore, in agreeing to Chapter 11 the lumber companies agreed to Article 1126 because as the court stated it is a “package deal.”<sup>20</sup> The *Canfor* court was also able to give guidance about the application of the last two elements under 1126.<sup>21</sup> This guidance was central to the analysis of the next case the author discusses.

Knahr used the second case, *Corn Products, Archer Daniels, Midland and Tate & Lyle Ingredients v. Mexico*<sup>22</sup>, to help the reader get a better perspective of consolidation and its relation to investment arbitration.<sup>23</sup> This case was brought by several US companies against Mexico for allegedly breaching NAFTA provisions on taxation of sodas with high levels of fructose corn syrup.<sup>24</sup> Mexico wanted to consolidate the proceedings under Article 1126.<sup>25</sup> The court looked to two of the

---

<sup>15</sup> Knahr, *supra* note 3, at 6.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 8.

<sup>19</sup> *Id.*

<sup>20</sup> Knahr, *supra* note 3, at 8-9.

<sup>21</sup> *Id.* at 9-10.

<sup>22</sup> *Corn Prod. Int'l Inc. v. Mexico*, Case No. ARB/(AF)/O4/1, *Archer Daniels Midland Co. Tate & Lyle Ingredients Ams. Inc. v. Mexico*, Case No. ARB/(AF)/O4/5, Order of the Consolidation Tribunal, (NAFTA May 20, 2005), [http://naftaclaims.com/Disputes/Mexico/CPI/CPI-ADM-Consolidation\\_tribunal\\_award-20-05-05.pdf](http://naftaclaims.com/Disputes/Mexico/CPI/CPI-ADM-Consolidation_tribunal_award-20-05-05.pdf).

<sup>23</sup> Knahr, *supra* note 3, at 5.

<sup>24</sup> *Id.* at 6.

<sup>25</sup> *Id.*

three elements of 1126 that were developed in the *Canfor* case: the common question of law or fact and whether the consolidation being in the interest of fair and efficient resolution of claims.<sup>26</sup>

The *Canfor* court held that, for two arbitration proceedings to have a common question of law or fact, they must deal with “a factual legal issue that requires a finding to dispose of a claim.”<sup>27</sup> Further, a finding that having the same provision in two proceedings or having similar facts which are not in dispute were both insufficient to meet the common question of law or fact element.<sup>28</sup> This strict standard followed by the *Canfor* court allows for the best results when a dispute is consolidated.<sup>29</sup>

The second element at issue in *Corn Products* and discussed in depth in *Canfor* is that consolidation must be in the interest of fair and efficient resolution. The *Canfor* court found that, for a consolidation to be fair, the interests of all parties must be balanced and there can be no loss of due process.<sup>30</sup> The fairness component is a subjective standard.<sup>31</sup> The court next developed three factors to determine efficiency: time, cost, and avoidance of conflicting decisions.<sup>32</sup> The parties can request consolidation at any time during the process but the court will consider how far along the proceedings are to make sure it would not be too burdensome to consolidate.<sup>33</sup> Lastly, cost was found to make the consolidation inefficient only if the costs of consolidation were excessive.<sup>34</sup>

All of the factors and elements discussed above were considered in both the *Corn Products* case as well as the *Canfor* case; however, another crucial factor discussed in both cases was confidentiality. In *Corn Products*, confidentiality was

---

<sup>26</sup> *Id.* at 6.

<sup>27</sup> *Id.* at 9.

<sup>28</sup> Knahr, *supra* note 3, at 9.

<sup>29</sup> *Id.* at 9-10.

<sup>30</sup> *Id.* at 10.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Knahr, *supra* note 3, at 10.

<sup>34</sup> *Id.* at 12.

not a sufficient reason to not consolidate because the time, cost and efficiency factors weighed too heavily in favor of consolidation.<sup>35</sup> In *Canfor* the court found the opposite and said confidentiality can be a deciding factor only in exceptional cases and should generally not be considered due to the goal of achieving transparency in international investment arbitration.<sup>36</sup>

Finally, Knahr discusses the alternatives to consolidation. Most notably she addresses the alternative she calls composition of the tribunals. She believes that having the same arbitrators or at least the same presiding arbitrator in similar disputes could be a sufficient alternative to consolidation.<sup>37</sup>

This article could be useful to practitioners in the field if they have a strong background in international investment arbitration. The author's method of using cases to give a real life example of the important points of consolidation does not translate well to the reader. This method of writing makes the article seem disorganized and at times repetitive. Overall, the article did not provide the best and most straightforward source for information regarding international investment arbitration.

### III. CONSOLIDATION OF PROCEEDINGS IN INTERNATIONAL COMMERCIAL ARBITRATION<sup>38</sup>

The next contribution is an article by Julia Mair<sup>39</sup> which contains an analysis of consolidation as it relates to international commercial arbitration. Mair begins the piece by explaining that consolidation is a relevant issue to commercial arbitration because several of the cases brought before the International Chamber

---

<sup>35</sup> *Id.* at 13, 15.

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Id.* at 16.

<sup>38</sup> Julia Mair, *Consolidation of Proceedings in International Commercial Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 21 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010).

<sup>39</sup> Julia Mair is a Research Assistant at the University of Vienna. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

of Commerce involve multiple party disputes; it is common for multiple parties to be involved in international business transactions.<sup>40</sup> The author makes an important distinction in the beginning between joinder and consolidation. Joinder is defined as the participation or introduction into the arbitration of related issues from third parties, while consolidation is the process of combining different pending and initial arbitrations into one proceeding.<sup>41</sup>

After a brief introduction the author begins the article by detailing some advantages of consolidation in international commercial arbitration. The first advantage is the avoidance of inconsistent awards which plays an important role in ensuring trust in the system of arbitration.<sup>42</sup> Another advantage is an increase in procedural efficiency because consolidation saves the parties time and money, plus all facts and evidence are presented at once, giving the tribunal a well-rounded knowledge of the issues at hand.<sup>43</sup>

The author also points to the fact that there are few if any disadvantages to consolidation of disputes between the same parties who are members to multiple contracts; she cites the lack of confidentiality issues as a huge advantage when compared to disputes between multiple parties to one contract.<sup>44</sup> The author then gives a general background on national arbitration legislation and the rule addressing consolidation between identical parties. The first of these is the Swiss Code of Civil Procedure that allows for consolidation of claims so long as claims are factually related.<sup>45</sup> The ICC Arbitration Rules are also discussed but the author states that these rules on consolidation are rarely applied and often criticized.<sup>46</sup> The consolidation provision of the ICC Rules is in Article 4 (6) and contains four requirements before consolidation will be permitted: 1) a pending arbitration and

---

<sup>40</sup> Mair, *supra* note 38, at 21-22.

<sup>41</sup> *Id.* at 22.

<sup>42</sup> *Id.* at 24.

<sup>43</sup> *Id.* at 25.

<sup>44</sup> *Id.* at 25-26.

<sup>45</sup> Mair, *supra* note 38, at 26.

<sup>46</sup> *Id.* at 26, 28.

the request must contain the same parties, 2) at least one party must request consolidation, 3) arbitrations must concern the same legal relationship, and 4) the terms of reference must not have been signed.<sup>47</sup> The Stockholm Rules are almost identical to Article 3(6) of the ICC Rules but both parties and the arbitration tribunal must be consulted before consolidation can occur.<sup>48</sup>

Mair then discusses consolidation as it relates to proceedings between different parties that arises from the same contract, or an arbitration clause binding multiple parties, or multiple parties without the same contract or arbitration clause.<sup>49</sup> The author notes that there is little issue consolidating claims of multiple parties to one contract or arbitration clause because when the parties agreed to the terms of the contract they were on notice of the other parties' interests and should be aware that consolidation may be a possibility.<sup>50</sup> When there are multiple parties to multiple contracts consolidation becomes complex and is generally only appropriate where all parties have expressed or implied consent.<sup>51</sup>

Next the author identifies international legislation or rules that provide for consolidation of multiple parties. Rules such as the Netherlands Code of Civil Procedure, the Hong Kong Arbitration Ordinance, the Australian International Arbitration Act, and the Swiss Rules of International Arbitration all provide for consolidation of multiple parties as long as a common question of law or fact are at issue, with the Swiss Rules being the most far reaching and permissive.<sup>52</sup> The UNCITRAL Arbitration Rules and Model Law are different in that they generally leave consolidation up to the parties.<sup>53</sup>

Mair then discusses the obstacles to the consolidation of international commercial arbitration proceedings. The most notable obstacles discussed are

---

<sup>47</sup> *Id.* at 27.

<sup>48</sup> *Id.* at 28-29.

<sup>49</sup> *Id.* at 29.

<sup>50</sup> Mair, *supra* note 38, at 30.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 32-34.

<sup>53</sup> *Id.* at 35.

consent, composition of the arbitral tribunal, confidentiality, and cost.<sup>54</sup> The author discusses the composition of the arbitral tribunal in the most depth because it is a major concern for parties who are facing consolidation because one of the cornerstones of arbitration is the parties' ability to select the tribunal.<sup>55</sup> Mair feels this is not an issue when the controlling arbitration clause only provides for a single arbitrator panel, but, if it is a tribunal of three, issues arise in making sure the participation in the selection of the tribunal is equivalent among all parties involved.<sup>56</sup> The author's solution to this obstacle is to have the consolidation tribunal appoint all the arbitrators and therefore all parties equally lose their rights to appointment.<sup>57</sup>

Lastly, the author discusses alternatives to consolidation such as holding concurrent but separate proceedings which are conducted by the same arbitrator. This is the approach employed by the London Maritime Arbitrators Association.<sup>58</sup>

This article would be useful to educate professionals in the field of international commercial arbitration on the intricacies of consolidation. The article is organized in a clear manner that made the author's message easy to comprehend for a reader.

#### IV. LIMITS OF PARTY AUTONOMY IN INVESTMENT ARBITRATION<sup>59</sup>

In an article by Stephan Wittich,<sup>60</sup> the next topic in this compilation is party autonomy and its relation to international investment arbitration. The author

---

<sup>54</sup> *Id.* at 36-40.

<sup>55</sup> Mair, *supra* note 38, at 37.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 38.

<sup>58</sup> *Id.* at 43-44.

<sup>59</sup> Stephan Wittich, *The Limits of Party Autonomy in Investment Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 47 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010).

first discusses the two separate categories of party autonomy: procedural and substantive.<sup>61</sup> Substantive party autonomy is when the parties are free to agree to the law that will be applied to the arbitration and contract.<sup>62</sup> Procedural autonomy is the parties' ability to choose arbitration as a dispute resolution system and to determine how the arbitration proceedings will take place.<sup>63</sup> According to Wittich, both forms of party autonomy are similar and generally, in practice, there is no need to draw a distinction. Therefore the chapter is limited to a discussion of party autonomy as it relates to the International Convention on the Settlement of Investment Disputes (ICSID) because 63.5% of investment arbitration falls under the ICSID.<sup>64</sup>

Freedom of contract is the most important and well-known form of party autonomy because it allows parties to act in a manner that will promote their best interest but prevents parties from changing their minds on a whim.<sup>65</sup> The author emphasizes that party autonomy is crucial to international arbitration as compared to adjudication proceedings because one of the main advantages of arbitration over adjudication is the parties' control in selecting procedures.<sup>66</sup>

Next, the author describes how party autonomy fits into international investment arbitration laws and rules. The ICSID does not contain a provision relating to the general scope of party autonomy because it is necessary to determine on a case-by-case basis.<sup>67</sup> ICSID Article 44 is the provision governing the conduct of proceedings and unless the convention specifically states otherwise all provisions are mandatory, which is a limit to party autonomy.<sup>68</sup> The Arbitration

---

<sup>60</sup> Stephan Wittich is an assistant professor at the University of Vienna. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

<sup>61</sup> Wittich, *supra* note 59, at 47.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 48.

<sup>65</sup> *Id.* at 49.

<sup>66</sup> Wittich, *supra* note 59, at 50, 52.

<sup>67</sup> *Id.* at 53.

<sup>68</sup> *Id.* at 53-54.

Rules are not mandatory and can be adapted by the parties, allowing for sufficient party autonomy when combined with Article 44.<sup>69</sup>

Finally, the author explains the limitations to party autonomy in international investment arbitration based on four categories of systematic limitations: functional limitations, fair trial limitations and due process limitations, and public interest limitations.<sup>70</sup> First, Wittich discusses the systematic limitation which is explained as the mandatory character of the ICSID which is due to the quasi-public law nature of investment arbitration and the closed system of the ICSID.<sup>71</sup> The ICSID procedures are closed because courts may not review awards, stay proceedings, or compel arbitration.<sup>72</sup> Next, the author discusses the functional limitation that the parties must account for *Kompetenz-Kompetenz* which allows for the arbitral tribunal to have jurisdiction to decide if the case should be arbitrated further, reaffirming the closed nature and immunity of ICSID proceedings.<sup>73</sup> The requirement that there be a fair trial and for allowance for adequate due process is cited by the author as another limitation to party autonomy. Due process is based on the fundamental rules of procedure: a fair hearing, an equal opportunity to present a case, and an impartial tribunal.<sup>74</sup> Only serious departures from these fundamentals will result in annulment of arbitral awards.<sup>75</sup> The last limitation to consider is the public interest because generally, in investment arbitrations, the public interest prevails over individual interests.<sup>76</sup> This is a sharp contrast to international litigation and other genres of arbitration in which normally only private interests are concerned.<sup>77</sup> The author explains that public interest arises because investment arbitration originates from the exercise of

---

<sup>69</sup> *Id.* at 54.

<sup>70</sup> *Id.* at 58-67.

<sup>71</sup> Wittich, *supra* note 59, at 58.

<sup>72</sup> *Id.* at 59.

<sup>73</sup> *Id.* at 60.

<sup>74</sup> *Id.* at 62.

<sup>75</sup> *Id.* at 63.

<sup>76</sup> Wittich, *supra* note 59, at 63.

<sup>77</sup> *Id.* at 64.

public authority.<sup>78</sup> An example of the exercise of public authority would be states applying discriminatory measures against foreign investors.<sup>79</sup> Many investment arbitrations concern public services which affect the general public and give the arbitration a public interest element.<sup>80</sup> The public interest limitation can be seen in the push for transparency in investment arbitration under ICSID.<sup>81</sup> The author discusses one final limitation to party autonomy in investment arbitration, ICSID Article 47, which allows the arbitration tribunal to make provisions binding on the parties to their arbitration.<sup>82</sup>

This article clearly explains to the reader what party autonomy is generally and then relates it in a concise and understandable way to international investment arbitration. This piece would be helpful to practitioners as well as someone with a general interest in party autonomy and international investment arbitration.

#### V. LIMITS OF PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION<sup>83</sup>

The second article on party autonomy, by Franz Schwarz,<sup>84</sup> describes party autonomy in relation to the field of international commercial arbitration. The author notes that he will only discuss the issue of procedural autonomy and will not focus on substantive party autonomy.<sup>85</sup>

The author begins by generally discussing what purpose party autonomy serves in international commercial arbitration (ICA). First, ICA recognizes that

---

<sup>78</sup> *Id.* at 65.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 66.

<sup>81</sup> Wittich, *supra* note 59, at 66.

<sup>82</sup> *Id.* at 68-69.

<sup>83</sup> Franz Schwarz, *Limits of Party Autonomy in International Commercial Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 73 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010).

<sup>84</sup> Franz Schwarz is a member of the International Arbitration Practice Group. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

<sup>85</sup> Schwarz, *supra* note 83, at 74.

parties are in the best position to determine what procedures will suit their claim and in exchange the parties agree to limit review of the awards rendered.<sup>86</sup> Secondly, the author states that all commercial arbitration conventions fully support the concept of party autonomy.<sup>87</sup> Specifically, Article II of the New York Convention allows the parties' agreement to control, and, if the agreement is not followed the award can be vacated under Article V(1)(d).<sup>88</sup> Another notable convention provision which recognizes party autonomy in commercial arbitration is the European Convention Article IV(1)(b)(iii).<sup>89</sup> Also, the UNCITRAL Model Rules, Austria, Germany, and neighboring jurisdictions also have rules or laws recognizing party autonomy in commercial arbitration.<sup>90</sup>

Next, the author discusses what procedural discretion the arbitral tribunal has as compared to traditional judges. Judges are given great discretion and control to ensure efficiency and equality while arbitrators control is limited by party autonomy because it is a basic principle that that agreement of the parties overrides the arbitrator.<sup>91</sup> The ICC Rules, Vienna Rules, Austrian ZPO, and German Rules all place the arbitrator's discretion at the bottom of the hierarchical structure when compared to the parties' agreed-upon procedures.<sup>92</sup>

The author explains that problems arise when the arbitrator finds the selected procedures of the parties inappropriate.<sup>93</sup> In the majority of these situations the arbitrator is still bound by the parties' agreement, but can choose to resign if the parties entered into the procedural agreements after the arbitrator was appointed.<sup>94</sup> When the agreed-upon procedures are unfair or adversely affect due

---

<sup>86</sup> *Id.* at 75.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 76.

<sup>89</sup> *Id.*

<sup>90</sup> Schwarz, *supra* note 83, at 76-77.

<sup>91</sup> *Id.* at 79-80.

<sup>92</sup> *Id.* at 80.

<sup>93</sup> *Id.* at 83.

<sup>94</sup> *Id.*

process then the arbitrator can refuse to implement them and may even impose their own procedures to ensure fundamental procedural safeguards.<sup>95</sup>

In the following section, the author discusses the extent to which national laws supersede party autonomy. Overall, the author points out that international standards strongly favoring party autonomy override national standards in the area of commercial arbitration.<sup>96</sup> The author states that national law should not limit party autonomy, and if it does it should do so in a narrow and infrequent manner.<sup>97</sup> The author also points out that national laws which are arbitrary or discriminatory to arbitration will violate international standards.<sup>98</sup> Specific to party autonomy, national laws can limit party autonomy only when it is necessary in the interest of the public. Any law that achieves this disproportionately will violate applicable international standards.<sup>99</sup>

This chapter was at times difficult to understand because of its organizational structure. However, the information contained in the article was useful to obtain a general understanding of party autonomy and international commercial arbitration.

## VI. ANNULMENT OF ICSID AWARDS<sup>100</sup>

Irmgard Marboe<sup>101</sup> is the author of the first article discussing the topic of annulment as it relates to investment arbitration and the ICSID specifically. Contrary to typical arbitration awards which are subject to challenges in the courts of the seat of the arbitration or in the enforcement court, ICSID awards are not

---

<sup>95</sup> Schwarz, *supra* note 83, at 84.

<sup>96</sup> *Id.* at 91.

<sup>97</sup> *Id.* at 92.

<sup>98</sup> *Id.* at 93-94.

<sup>99</sup> *Id.* at 94.

<sup>100</sup> Irmgard Marboe, *The Annulment of ICSID Awards*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 97 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010).

<sup>101</sup> Irmgard Marboe is a Professor of Law at the University of Vienna. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

subject to review by courts, which is why the author believes ICSID arbitration is successful.<sup>102</sup> The awards of ICSID arbitration can be annulled only by an ad hoc committee nominated by the chairman of the ICSID.<sup>103</sup> Finality is often considered more important in this form of arbitration than substantive correctness, making annulment an extraordinary remedy reserved only for unusual cases.<sup>104</sup>

The author next explains the exhausted, limited number of grounds for annulment under ICSID Article 52. The first two grounds for annulment are that the tribunal was not properly constituted, meaning they were not formed in an appropriate manner, and that corruption has affected an arbitrator.<sup>105</sup> These first two grounds are insignificant in practice and are not discussed in detail in the article.<sup>106</sup> The third ground for annulment is manifest excess of powers which occurs when the tribunal goes beyond the powers given to them in the agreement or when the arbitrator fails to act in a way the agreement provides.<sup>107</sup> This ground is broken into three separate categories by the author: failure to apply the proper law, which is rare; lack or excess of jurisdiction; and failure to exercise jurisdiction.<sup>108</sup> The interpretation of manifest is unclear; however, courts have employed its plain meaning of obvious or evident.<sup>109</sup>

Further, the author provides the additional grounds for annulment. The first additional ground is when there is a serious departure from a fundamental rule of procedure, which ad hoc committees have not found to be a successful ground for annulment.<sup>110</sup> The second additional ground for annulment is the failure of the tribunal to state the reasons for the award, which is mandatory under ICSID Article

---

<sup>102</sup> Marboe, *supra* note 100, at 97.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 98.

<sup>105</sup> *Id.* at 101.

<sup>106</sup> *Id.*

<sup>107</sup> Marboe, *supra* note 100, at 101.

<sup>108</sup> *Id.* at 101, 105-06.

<sup>109</sup> *Id.* at 101-02.

<sup>110</sup> *Id.* at 106.

48(3).<sup>111</sup> This is one of the most successful grounds for granting an annulment, but the ad hoc committee will usually allow the arbitral tribunal an opportunity to correct the lack of reasoning.<sup>112</sup>

In the following section, the author describes the ad hoc committee's application of the annulment regime in three generations. The first generation did not respect the principle that annulment is only appropriate in extraordinary cases, but the second generation was more respectful and corrected some of the previous era's enlargement of the scope of ICSID annulment.<sup>113</sup> The final generation's goal was to weigh both finality and correctness equally.<sup>114</sup> Since 1986, almost all requests for annulment have been denied but the procedure of seeking annulment is popular and appears to have become routine for unsuccessful parties. The author suggests that the ad hoc committee could implement financial disincentives to discourage this new practice, but most committees have continued to equally distribute costs between both parties.<sup>115</sup>

This chapter is useful to a practitioner seeking information on annulment while participating in investment arbitration under ICSID. The author's narrow focus does not give sufficient background on any other form of international investment arbitration and its relation to annulment. Overall, the chapter does a good job of giving the reader a general background and detailed explanation of annulment in ICSID arbitration.

---

<sup>111</sup> *Id.* at 107.

<sup>112</sup> Marboe, *supra* note 100, at 107, 109.

<sup>113</sup> *Id.* at 111-13.

<sup>114</sup> *Id.* at 113.

<sup>115</sup> *Id.* at 123-25.

VII. ANNULMENT OF ARBITRAL AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION<sup>116</sup>

The second piece on annulment, written by Vladimir Pavic<sup>117</sup>, discusses how annulment occurs in the world of international commercial arbitration. After giving a general background on the subject of annulment, Pavic discusses the preliminary issues that arise before annulment. First, the parties must determine the country of the award's origin because that is where it is appropriate to bring annulment proceedings.<sup>118</sup> This determination can be made in one of two ways: by determining the procedural environment, which is the place the award is rendered (this is rarely used); or by designating that the origin of the award is the territorial location in which the award was made, which is the Model Law method.<sup>119</sup>

Next, the author discusses the grounds for annulment based on the Model Law because they represent an almost uniform list internationally with a few possible additions by certain states.<sup>120</sup> The author explains the structure of the Model Law as '4+2' because four grounds are brought by the Plaintiff and examined by the court and two grounds are examined at the court's discretion *ex officio*.<sup>121</sup>

The first ground that can be raised by the Plaintiff is the validity of the arbitration agreement, which can be deemed invalid if the party was incapacitated when they agreed to arbitrate or the agreement is invalid under the law.<sup>122</sup> The

---

<sup>116</sup> Vladimir Pavic, *Annulment of Arbitral Awards in International Commercial Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 131 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010).

<sup>117</sup> Vladimir Pavic is an Assistant Professor at the University of Belgrade. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

<sup>118</sup> Pavic, *supra* note 116, at 133.

<sup>119</sup> *Id.* at 134.

<sup>120</sup> *Id.* at 135.

<sup>121</sup> *Id.* at 136.

<sup>122</sup> *Id.*

second ground in this category is a lack of due process which does not constitute automatic annulment, but instead the lack of due process must have prevented the party from presenting their case.<sup>123</sup> The third ground for annulment is that the arbitrator(s) exceeded their jurisdiction, meaning they acted beyond the terms of the agreement or decided issues that were not submitted to arbitration.<sup>124</sup> The last ground that can be raised by the Plaintiff is an irregular procedure or irregular constitution of the tribunal because selection of the procedure and tribunal is crucial to arbitration and the parties' interest in participation in arbitration rather than litigation.<sup>125</sup>

The first ground potentially examined at the discretion of the court is the ever-expanding category of arbitrability which dictates whether the dispute is capable of being submitted to arbitration based on an objective standard.<sup>126</sup> The second *ex officio* ground for review is the public policy concept which allows for annulment when the award rendered is considered contrary to the basic foundations of society.<sup>127</sup> Public policy is construed narrowly so as not to become what the author calls an "unruly horse."<sup>128</sup>

Some jurisdictions change the grounds in the Model Law. For example, the Philippines Act does not include any grounds in the Model Law plus states like France, the UK, and the US are not Model Law states.<sup>129</sup> Some states even permit merits review which is in direct conflict with the Model Law provisions.<sup>130</sup>

The author then addresses the procedural aspects of annulment such as time limits and court competence. If the time limit for challenging an award, which normally begins to run when the party is notified of the award, expires, a party can

---

<sup>123</sup> Pavic, *supra* note 116, at 138.

<sup>124</sup> *Id.* at 139.

<sup>125</sup> *Id.* at 140.

<sup>126</sup> *Id.* at 141.

<sup>127</sup> *Id.* at 142.

<sup>128</sup> Pavic, *supra* note 116, at 142.

<sup>129</sup> *Id.* at 143-44.

<sup>130</sup> *Id.* at 144.

be prevented from bringing annulment proceedings.<sup>131</sup> The time period varies from twenty-eight days to six months but the average is somewhere in the middle.<sup>132</sup> Court competence seeks to ensure the judge is familiar with arbitration law and in some countries only certain courts are allowed to hear arbitration annulment cases.<sup>133</sup>

Lastly, the author discusses the fate of an annulled award, which shockingly does not always result in recognition of annulment in other jurisdictions other than where it was annulled due to pro-enforcement arbitration policies.<sup>134</sup> However, there is a very slim chance the award will be enforced in another jurisdiction once it has been annulled.<sup>135</sup> Also, rather than annulment, the award can be subject to remission or new proceedings.<sup>136</sup>

This chapter effectively explains the circumstances in which an award will be annulled in an international commercial arbitration. The structure of the chapter was clear and helpful to the reader's comprehension. Overall this would be a useful chapter to a recreational reader as well as a practitioner in the field of international commercial arbitration.

#### VIII. INDEPENDENCE, IMPARTIALITY AND DUTY OF DISCLOSURE IN INVESTMENT ARBITRATION<sup>137</sup>

Noah Rubins<sup>138</sup> and Bernhard Lauterburg<sup>139</sup> collaborate in the first piece concerning the topic of impartiality, independence and duty of disclosure.

---

<sup>131</sup> *Id.* at 146-47.

<sup>132</sup> *Id.* at 147.

<sup>133</sup> Pavic, *supra* note 116, at 147.

<sup>134</sup> *Id.* at 149.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 150.

<sup>137</sup> Noah Rubins & Bernhard Lauterburg, *Independence, Impartiality, and Duty of Disclosure in Investment Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 153 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010).

Independence and impartiality are of great importance in investment arbitration due to the far-reaching political and economic impact of decisions.<sup>140</sup>

Impartiality is the absence of bias or prejudice in favor of one party which has both subjective and objective elements.<sup>141</sup> Independence, the lack of relations between an arbitration and a party which could influence an arbitrator's decision, is evaluated using an objective standard.<sup>142</sup> Impartiality is key because the arbitrator can violate independence if fully impartial, but if they are in any way partial, they do not qualify to serve as an arbitrator.<sup>143</sup> The ICSID Rules only mention independence as a requirement while the UNCITRAL Rules and the SCC Rules demand both independence and impartiality.<sup>144</sup>

The key to enforcing independence and impartiality is the duty of disclosure.<sup>145</sup> Originally the ICSID Rules required only that past and present professional business or other relationships be disclosed.<sup>146</sup> Now, after revisions, the duty has expanded to require continuous, prompt disclosure of relationships, even those arising after appointment. The SCC and UNCITRAL Rules are similar in that the arbitrator must disclose circumstances that may give rise to justifiable doubt. The aforementioned rules also require that the arbitrator has a general duty to reasonably find possible conflicts that might exist even if the arbitrators are not immediately aware.<sup>147</sup>

Lastly, the author details the problem areas in investment arbitration with regard to impartiality, independence, and disclosure. The first problem is the

---

<sup>138</sup> Noah Rubins serves as Counsel at the International Arbitration and Public International Law Groups. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

<sup>139</sup> Bernhard Lauterburg works in the Department of Public Prosecution of the Canton of Bern in Switzerland. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

<sup>140</sup> Rubins & Lauterburg, *supra* note 137, at 153.

<sup>141</sup> *Id.* at 155.

<sup>142</sup> *Id.* at 154-55.

<sup>143</sup> *Id.* at 155-56.

<sup>144</sup> *Id.* at 157.

<sup>145</sup> Rubins & Lauterburg, *supra* note 137, at 153.

<sup>146</sup> *Id.* at 158.

<sup>147</sup> *Id.* at 160.

omnipresence of state, which is the idea that the state and the arbitrator in investment arbitration are likely to be related in some way.<sup>148</sup> There is an argument by some that the arbitrator should not be from the host state, but in investment arbitration these arbitrators could be the best option because they are the most concerned with the national and economic implications of investment arbitrations.<sup>149</sup> The salaries of the majority of educated people in certain countries are paid by the government, making financial independence in investment arbitration situations impossible, at times.<sup>150</sup> Similarly, another issue in investment arbitration which courts have reasoned is that the pool of qualified arbitrators is limited and arbitrators, unlike judges, are typically tied in some way to business.<sup>151</sup> Lastly, there are problems when an arbitrator may have issue conflicts among arbitrations. Some examples are when arbitrators serve as both an arbitrator in some cases and counsel in others, when the arbitrator has already decided a similar issue in another case, or when the arbitrator may have published in the area at issue.<sup>152</sup>

This chapter was insightful; however, the organization was not as clear as some of the other contributions. Overall, the author gives a general understanding of the topic but it may not be useful reading to someone who is not well versed in arbitration and international arbitration specifically.

---

<sup>148</sup> *Id.* at 169.

<sup>149</sup> *Id.*

<sup>150</sup> Rubins & Lauterburg, *supra* note 137, at 169-70.

<sup>151</sup> *Id.* 173-74.

<sup>152</sup> *Id.* at 175-78.

IX. JUDICIAL APPROACH TO ARBITRATOR INDEPENDENCE AND IMPARTIALITY IN INTERNATIONAL COMMERCIAL ARBITRATION<sup>153</sup>

Christopher Kee<sup>154</sup> contributes the last piece of the book that discusses the concepts of impartiality and independence as they relate to international commercial arbitration. The author begins the piece by explaining that the articulation of a test of independence and impartiality has been challenging and should be done on a case-by-case basis instead.<sup>155</sup> Issues of independence and impartiality arise in all stages of arbitration; therefore these issues are of increased importance.<sup>156</sup>

Independence and impartiality are used interchangeably but are different from one another.<sup>157</sup> Independence employs an objective standard which makes independence easier to establish because no actual effect on the arbitrator needs to be proven; proof of the existence of a relationship is all that is necessary.<sup>158</sup> Impartiality is a subjective standard more difficult to prove because more blatant favoritism is necessary. In some cases it is acceptable to allow parties to conform to a justifiable doubt standard.<sup>159</sup>

The author of this contribution takes a unique approach to explain the intricacies of this topic by using a cross-country comparison. The first country discussed is England, which originally implemented a “reasonable apprehension test of bias” and “a real likelihood of bias” test.<sup>160</sup> To reconcile the two tests, the

---

<sup>153</sup> Christopher Kee, *Judicial Approach to Arbitrator Independence and Impartiality in International Commercial Arbitration*, in INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES 181 (Christina Knahr, Christian Koller, Walter Rechberger & August Reinisch eds., Eleven International Publishing 2010).

<sup>154</sup> Christopher Kee is a Lecturer at Deakin University and a Senior Research Assistant at the University of Basel. INVESTMENT AND COMMERCIAL ARBITRATION, *supra* note 1, at vii.

<sup>155</sup> Kee, *supra* note 153, at 181-82.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 183.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 184.

<sup>160</sup> Kee, *supra* note 153, at 185-86.

court in *R. v. Gough*<sup>161</sup> developed the “Gough test” which asks “whether there was a real danger of unconscious bias,” to be determined by the court’s perspective of the facts.<sup>162</sup> The *Porter*<sup>163</sup> case followed the *Gough* test with the slight modification that the perspective of the facts would be that of an outside observer rather than the court.<sup>164</sup> In Hong Kong, the *Porter* test is followed, but uses a “well informed outside observer” rather than an “outside observer”.<sup>165</sup> In Australia, a reasonable apprehension of bias is the test applied to determine independence and impartiality, which was based on a case concerning a judge but is applied equally to arbitrators.<sup>166</sup> In New Zealand the leading decision in this area is *Muir v. Commissioner of Inland Revenue*, which rejected the *Gough* test and applies a reasonable apprehension test.<sup>167</sup> In the United States evident partiality is the terminology in place of independence and impartiality. Evident partiality applies only to the vacating of an award, therefore, there is considerable confusion as to the actual standard that applies to evident partiality.<sup>168</sup>

The domestic court decisions are important to the author because even though most arbitrations are governed by rules of an arbitration institution, the arbitration decision can still ultimately be determined by domestic courts.<sup>169</sup> Some believe arbitrators should actually be held to lower standards of independence and impartiality compared to judges because arbitrators are usually required to be a part of the financial world and are not required to take an oath.<sup>170</sup> Others believe arbitrators should be held to a higher standard in this area because they are more

---

<sup>161</sup> *R. v. Gough*, [1993] AC 646 (H.L.).

<sup>162</sup> Kee, *supra* note 153, at 186.

<sup>163</sup> *Porter v. McGill*, [2001] UKHL 67, [2002] 2 AC 357 (H.L.).

<sup>164</sup> Kee, *supra* note 153, at 186.

<sup>165</sup> *Id.* at 187-88.

<sup>166</sup> *Id.* at 188.

<sup>167</sup> *Id.* at 188-89.

<sup>168</sup> *Id.* at 190.

<sup>169</sup> Kee, *supra* note 153, at 192-93.

<sup>170</sup> *Id.* at 193-94.

exposed to temptations.<sup>171</sup> The courts typically take a middle ground approach between these two viewpoints.<sup>172</sup> The author believes a subjective case-by-case determination should be used in place of the standards because this determination will provide for consistency in the awards by courts and arbitrators.<sup>173</sup>

This chapter was organized in a clear and helpful manner. The method of using practices around the world to explain to the reader the relevant and prevailing standards of impartiality and independence was interesting and effective. Overall this chapter would be most beneficial to a reader looking for general background knowledge but a practitioner in the field could also find useful information throughout this article.

## X. CONCLUSION

Overall, with the exception of a few essays, this book was informative and useful to both practitioners in the fields of international commercial and investment arbitration and a reader seeking a general background on the topics discussed. The four topics that the book discussed were relevant and crucial to a person's understanding of the subject matter. The structure of individual contributions could have been improved to increase the reader's comprehension of the material presented, but the information offered was important for several classes of readers and was presented in several interesting and useful manners throughout the book. In sum, the book's value varied from chapter to chapter but was a useful collection of contributions by educated authors that will give a variety of readers a strong understanding of the material presented.

---

<sup>171</sup> *Id.* at 194.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 197.