

Other Evolving Issues

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- Counter-claims and Cross-claims
- Multi-party issues
- Joinder and Consolidation
- Non-signatory party
- Seat court and Enforcement review: an alternative or cumulative rights? Res judicata or Issue estoppel
- Courts and Investor-State Arbitration

COUNTER-CLAIMS AND CROSS-CLAIMS

- Counterclaim:
 - Arising out of same transaction
 - Set-off
 - Who is to be Claimant and who Respondent?
 - Who is to proceed first e.g. SOC, order of presentation
- Cross-claims
 - By co-claimant or/co-respondent

Multi-party issues

- Joinder and Consolidation
 - Chain contracts e.g. sale and sub-sales; contractor and sub-contractor
 - Series of transactions – same parties with repeated contracts (similar terms)
 - Related transactions – part of a bigger project
- General rule: Absent consent by ALL parties, joinder or consolidation impermissible.

Institutional Rules for consolidation

ICC 2012,

Art 7 - permits only joinder prior to constitution of tribunal ; a

Art 10 – permits consolidation where claims under same agreement or between same parties with same legal relationship

SIAC Rules 2016

Rule 8 : before constitution of Tribunal, by SIAC; after constitution, by the Tribunal. Similar tests as ICC.

Who are Parties ?

Thomson-CSF v American Arbitration Association (USCA 2nd Cir, 1995)

Non-signatory may be a party if:

- incorporation by reference;
- assumption/estoppel;
- agency;
- veil-piercing/alter ego; and
- third-party beneficiary

Note: Contracts (Rights of Third Parties) Act 2001. See s.9

Wrong joinder or consolidation?

- Compromises privacy/confidentiality
- Ground for refusal of enforcement [Article V(1)(d) New York Convention 1958]

Power to Review (setting aside)

- Only at court of the seat
- Not an appeal, only on procedural grounds – Sec 34 CAA (Art 34 MAL)
- Must be made within prescribed time
- Under MAL, power limited to awards only, not interim measures or procedural orders

POWER TO REVIEW

- **If no application was made to set-aside at seat, the enforcement court remains entitled to consider refusal to enforce -**

See: PT First Media TBK v Astro Nusantara International BV [2014] 1 SLR 372 (CA)

- **Recourse against award or resisting enforcement, an alternative or cumulative rights?**

“awards” set aside at seat – still enforceable?

- If set aside, binding force lost.

[See *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd* USCA (2nd) 1999- award set aside in Nigeria, not enforced in US] {Germany Case 51 YB2001 p717-720, *Spier v Calzaturicio* YB 2000 p 1042 (Italy)}

- French Approach – if an award is international, its existence should not be affected by or integrated with the local legal framework and it is not against international public policy to enforce it. Also adopts ‘more favourable- right provision’ in Article VII of the New York Convention.

[See: *Hilmarton Ltd v Omnium de Traitement et de Valorisation-OTV* - 121(3) J.D.I. 701 (1994) : have enforced award under French domestic law which had been annulled at the place of arbitration (London); *Direction Générale de l’Aviation Civile de l’Émirat de Dubai v. International Bechtel CA* Paris, 29 September 2005, 2005(3) Stockholm Int’l Arb. Rev. 151 - the Paris Court of Appeal upheld an enforcement order of an award rendered in Dubai and subsequently annulled by the highest civil court of the United Arab Emirates (UAE).

“awards” set aside at seat – still enforceable?

- Re Chromalloy Aeroservices 939 F Supp 907 where an award annulled in Egypt was enforced.
- Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (“COMMISA”) v Pemex-Exploracion y Produccion 962 F.Supp.2d 642 (S.D.N.Y. 2013) – plaintiff arbitration proceedings against PEP (a Mexican State-owned entity); During pendency of arbitration, Mexico passed new laws making challenges to administrative rescissions were no longer arbitrable. Award made in favour of PEP was annulled by the Mexican court based on these laws. US court nevertheless enforced the award.

Courts and Investor-State Arbitration

- Seat court's jurisdiction to review
 - Disputes arising from BIT
 - Disputes arising from State-investor contract
- State Immunity
- Submission to jurisdiction