Finality and Justice in ICSID Arbitration

by Professor Tai-Heng Cheng

Recent decisions on annulment of ICSID awards have revived old complaints and provoked new criticisms about ICSID investor-state arbitration. Observers have concluded, somewhat contradictorily, that annulments of ICSID awards by ad hoc committees show either that ICSID awards are poorly reasoned, or the ad hoc committee decisions themselves are badly decided. They have claimed that obiter dicta by ad hoc committees about errors in awards that remain legally binding prove that there are inadequate remedies to correct unjust awards, or they have charged that other decisions that annulled awards establish that the review system is too expansive and delays finality. Yet other observers have thrown their hands up in frustration at inconsistent decisions of ad hoc committees annulling some awards but keeping others intact, arguing that they have damaged the coherence of international investment law and the legitimacy of the ICSID system.

This article suggests many of these criticisms stem from misunderstandings about content and balance between the competing policies of finality and justice underlying the system of review of investor-state arbitration awards. Although it is widely-accepted that ICSID arbitrations seek to promote finality and justice, commentators have paid insufficient attention to what these two policies actually entail. Contrary to what some scholars assert, finality refers to finality of award and not necessarily of dispute resolution. Contrary to what some observers claim, justice refers to "procedural" justice and not necessarily reaching a substantively just outcome. As a matter of policy, finality of awards should only be compromised where procedural justice is so absent in arbitration that it must be rectified by setting aside an award. The Article instantiates these meanings of finality and justice by examining scholarly jurisprudence about international arbitration generally and applying them to investor-state disputes specifically. It also verifies whether the proposed meanings of justice and finality find support in the primary materials of the negotiating history of the ICSID Convention.

Testing recent ad hoc committee decisions against these meanings of finality and justice reveals that that many purported flaws in the ICSID system are more apparent than real. Where, however, arbitrators who serve on ad hoc committees misunderstand the policy balance between finality and justice, they may interpret too broadly the narrow procedural grounds for annulment. Consequently, they may annul awards that should have remained final. The article suggests that arbitrators in ICSID disputes can minimize these risks by adopting the practice of some arbitrators in Energy Charter Treaty disputes of circulating the draft awards to the parties for comment before finalizing the award. This practice could allow tribunals to anticipate the arguments that the parties may make on an application on annulment, and to either correct their award before it is final or explain why those arguments fail. Circulating a draft award would also go a long way to immunizing the award from charges that the tribunal failed to give the parties an adequate opportunity to be heard on dispositive findings of fact or conclusions of law, or that they decided the dispute on an issue not raised by the parties, both of which could expose an award to the risk of annulment.