NORTON ROSE FULBRIGHT

International arbitration report

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Norton Rose Fulbright

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International arbitration report
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Editorial

Long-time readers of the IAR will notice a stylistic change for this edition (at least we hope you do); we see this brighter, modern branding as the embodiment of our emergence from the period of great change and transition in which we've all found ourselves over the last few years. We are hopeful in terms of what this change means for our practice and economic cooperation in the global business community but, as we all know, there are no magic cures and the world is still a troubled place.

In this issue we explore a wide variety of hot topics in international arbitration from around the world, made possible as a result of our unparalleled global footprint and deep sector knowledge. We provide updates from Singapore on recent developments in the legislation governing conditional fee arrangements, and consider proposals for a new model of arbitration in the Australian aviation industry to resolve tension in the negotiation of prices for aeronautical services.

We are joined by India Johnson and Eric P Tuchmann from the American Arbitration Association to hear about their experience of the pandemic, and how the use of technology has brought lasting change to the way international arbitrations are conducted. Later in this edition, we explore how parties can use international arbitration to resolve IP disputes arising from the rapid developments in technology that we've seen over the last few years.

Our lawyers have looked at a range of issues that continue to gather momentum in investor-state dispute settlement, including how foreign investors can protect themselves against expropriation, the increasing interplay between international human rights law and investment arbitration and the importance of tax planning for international investment. In light of the tragic events in Ukraine, we also consider how sanctions legislation can impact parties' ability to conduct international arbitration, from the appointment of legal counsel and the arbitral tribunal, to complex enforcement and jurisdictional challenges.

Our climate change series continues in this edition with an update on the modernisation of the Energy Charter Treaty, which seeks to more closely align the ECT with the Paris Agreement and United Nations Framework Convention on Climate Change whilst balancing green objectives with the protection of investors.

The more things change, the more things stay the same however, and we also revisit some of the perennial issues within our practice in this edition of the IAR. The choice of which institutional arbitral rules to adopt and competing approaches to enforcement in different national courts remain key issues for our global clients.

Finally, I leave you on a bittersweet note as we say goodbye to my long-time co-editor of the IAR, Pierre Bienvenu, who is retiring from the firm and joining a boutique practice to sit as an arbitrator. Pierre and I have been friends for 30 years, over which we've worked on many project together, including many IBA projects like the IBA Rules on evidence, under which almost every modern arbitration now proceeds. Pierre will be greatly missed by us but we wish him the best of luck in the next chapter of his career.

C. Mark Baker **Pierre Bienvenu, Ad. E**

Global co-heads of international arbitration,
Norton Rose Fulbright

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President and Senior Vice President of the American Arbitration Association

Interview by C. Mark Baker

We speak with India Johnson, President and CEO, and Eric P. Tuchmann, Senior Vice President, General Counsel and Corporate Secretary, of the American Arbitration Association (AAA) about the AAA's experience of the COVID-19 pandemic, the future of virtual hearings and remote technology, and key challenges on the horizon.

Please can you tell our readers a little about the key elements of each of your roles?

India: As CEO, I am both a board member and Officer of the corporation. The AAA is a large and complex for a not-for-profit organization, with over $350 Million in turnover each year now. I am lucky to have a great team at the AAA — the executives, the staff, the panels, the board and the council members. I am grateful every day for these great people where I work. We have to think continuously about customers, strategies, compliance, governance, talent—a host of great opportunities as well as great challenges. It is very energizing for all of us!

Eric: As General Counsel and Corporate Secretary, and Senior Vice President over our international division (the International Centre for Dispute Resolution (**ICDR**), I'm fortunate that my work is extremely varied, interesting and challenging. For the ICDR, I oversee operations and strategy, where there is always a steady supply of novel legal and case issues, and where there is an ongoing need to innovate and stay on top of the many developments in the field. As General Counsel, I manage the legal department that manages litigation arising out of the cases we administer where the AAA-ICDR or arbitrators may be a party. Much of that litigation has become increasingly complex in recent years. The department also handles all the issues a typical in-house legal department would handle, including contracts, IP, employment and a range of other issues.

What would you say the AAA-ICDR's top priorities are at this moment?

India: Well, because I am retiring at the end of the year, we have a Search Committee working on finding a new CEO, so that is a big governance priority this year. We also are bringing back more staff to our 29 office locations and helping parties carry out in-person hearings from coast to coast. Helping us go from most people working from home to most people working some days every week in the office is our current phase. We also have in-person hearings heating up — there is pent up demand to get back in the hearing room.

> ***We have in-person hearings heating up — there is pent up demand to get back in the hearing room.***

> ***We would like to see the usefulness of virtual hearings remain popular***

What are the main challenges that the AAA-ICDR faces at present?

India: The pandemic and various surges that took place have caused a lot of starts and stops, both in hearings themselves and in return to office planning. Some staff and some arbitrators are still concerned about their safety for in-person work or hearings. We would like to see the usefulness of virtual hearings remain popular, and some of our caseload streams have gone to exclusively virtual hearings. At the same time, we have to remember that parties with significant risk or business issues at stake are likely going to want to have in-person hearings.

Do you think the AAA-ICDR's role has changed or expanded over time?

India: The basic role of administering cases - helping parties, lawyers, arbitrators and mediators get all the way through the process - is probably the same except for all the tools available. Because of our size, we have been a "go to" organization for state and Federal governments with large groups of disputes to resolve: hurricane damage cases, foreclosure cases, the cases Congress ordered to arbitration in the Great Recession, the Privacy Shield arbitration program of the Commerce Department.

> ***This was a profound benefit of administered arbitration during the pandemic; organization, not chaos.***

When the pandemic hit and people needed to move to virtual hearings, we established teams of Zoom Champions who could run the technology for a case all day, all week or just get the proceedings going - whatever the arbitrators and parties needed. We helped everyone execute payments online, file everything online: basically do everything possible online. This was a profound benefit of administered arbitration during the pandemic; organization, not chaos. We considered it our job to figure out the best ways to make the tools available so that filings could continue, picking arbitrators could take place, hearings could go on, and we just did it.

Has the COVID-19 pandemic changed the typical shape of AAA and ICDR arbitration, or affected what parties expect proceedings to look like?

India: Yes, more time goes into organizing the logistics of having the hearing. In-person meetings have varying protocols from state to state and city to city. There are differences among arbitrators and parties about how they are going to use or not use virtual hearings or in-person hearings; if they hold in-person hearings they may do many different things, from requiring proof of vaccination, to limiting people in the room, to using Plexiglas partitions and portable air filtration systems.

In your opinion, what are the most important lessons for the arbitration community resulting from the pandemic?

India: Virtual hearings may not be ideal for all cases but there were certainly high-value options made available so that cases could move forward. So, never say never. Pre-hearings may always be virtual hearings in the future, even if evidentiary hearings go back to in-person hearings. Smaller claims will also be cases where virtual hearings are more attractive.

Eric: The technology that made it possible to conduct arbitrations, including large and complex disputes, virtually over the past two years existed for many years prior to the pandemic. However, it was the pandemic which forced parties, arbitrators and institutions to adapt and use it. Our field needs to challenge itself to adopt additional technological tools and practices that could result in additional time and cost efficiencies.

> ***The technology that made it possible to conduct arbitrations, including large and complex disputes, virtually over the past two years existed for many years prior to the pandemic.***

What steps has the AAA-ICDR taken to address current issues in arbitration, for example efficiency and costs, and the use of technology?

India: We have rolled out a new cybersecurity capability that our panel can opt for, called AAACaseShield. It provides a cloud based 'desktop' experience so that the arbitrator does not have to worry about security patches and other risks.

***CaseShield* by AAA-ICDR℠** enhances the security of panel members' records with enterprise-grade technology and cybersecurity protections generally not available on an individual or consumer level. These include email spam-filtering, web-content filtering, advanced firewall protections, anti-virus/anti-malware software, multi-factor authentication, and more.

We know that complex management of documents in a virtual hearing world, or even in live hearings, is important and we have worked with experts to try to provide a document management service.

We continue to publish our consumer and employment case information on the website. And we publish a lot of data and statistics about our cases in Infographics because we want to share our knowledge.

Do you see any trends with respect to settlements, and has mediation played a role in this?

India: No. We looked at this recently and although each caseload is different I don't believe the pandemic had a significant impact on the overall settlement rate. Most cases settle, and that has not changed. We have been in the 65 percent to 75 percent range for as long as I can remember. Employment cases have a much higher settlement rate, but that also has been the case for years.

> ***Most cases settle, and that has not changed. We have been in the 65 percent to 75 percent range for as long as I can remember.***

How can diversity in arbitral appointments be encouraged, and what is the AAA-ICDR doing to encourage this?

India: We have a roster of arbitrators and mediators and we have annual goals for recruiting diverse panelists, and getting them through our core arbitrator training program and active on cases. We measure our success in both recruiting new panelists who are diverse, and in getting diverse panelists on each and every list we provide on cases. We also track how we use diverse speakers on all of our education programs, and provide the Higginbotham Fellows program to bring new, diverse lawyers into the ADR field either as advocates or as panelists.

If you could give one piece of advice to lawyers who are just starting out as arbitrators, what would it be?

India: The sure-fire way to end up with some success as an arbitrator is to excel at the practice of law or other professions in industries that use contracts with arbitration clauses, and be known as a steady hand. Practicing immigration law for decades and then wanting to be an arbitrator is not very useful. On the other hand, being a widely respected construction arbitration and litigation specialist for decades, seen as a wise and excellent manager of process, able to make hard decisions, capable of award writing — these are ingredients for success in construction ADR, which is one of the larger areas. Arbitrators are generally going to be very experienced in their fields. If the experience is in a field that does not arbitrate, you should not expect all that experience to translate into desirability as an arbitrator.

Eric: Having a reputation as an expert in their practice area with the appropriate temperament is definitely a prerequisite to becoming established as an arbitrator, but it also requires a bit more time and commitment than many expect. A lawyer needs to become known as someone whose subject matter expertise includes arbitration law and process itself. Sometimes that follows from the lawyer's practice if they frequently represent parties in arbitrations. However, for many others it requires more, and involvement or leadership positions with trade groups

> ***The sure-fire way to end up with some success as an arbitrator is to excel at the practice of law or other professions in industries that use contracts with arbitration clauses***

or bar committees that focus on dispute resolution can provide visibility that is helpful. Becoming visible and interacting with the types of lawyers who select arbitrators, to the extent it is possible to do so as we hope to emerge from the pandemic, can be very helpful as well.

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Expropriation: a strategic review

How to respond to and mitigate expropriation risk

By Alison FitzGerald and Aman Tandon

Expropriation risk for foreign investors is on the rise due to a confluence of factors, such as resource nationalism, the energy transition from fossil fuels to clean energy, and a sustained rise in populism and nationalist sentiment, globally. How to respond to and mitigate that risk is an increasingly pressing concern for foreign investors. Having a playbook ready when red flags first begin to appear can make the difference between preserving a company's value – and protecting its people – and losing everything.

What is expropriation?

Expropriation is the taking of private property by a government acting in its sovereign capacity. In some circumstances, and subject to important conditions and limitations, states have the right to expropriate. Expropriation can be direct or indirect. Direct expropriation occurs when the state seizes title or ownership of the asset. Indirect expropriation can occur when the state deprives the investor of the substantial value of its investment.

Nationalisation is a form of direct expropriation and involves a state-owned entity or the state itself directly taking control of the asset. Regulatory changes, such as an increase in tax, the imposition of a new tax, or the suspension of a license for a project may lead to an indirect expropriation.

Lawful expropriation must generally be for a public purpose, non-discriminatory and accompanied by fair and prompt compensation. All states have powers to legislate for the public good. A state may invoke its legislative, regulatory or police powers as justification for a measure that is said to be expropriatory. The debate in such instances tends to centre on the nature and purpose of the state's action — did the measures constitute a taking without prompt, adequate and effective compensation (thus, an illegal expropriation) or were they a legitimate exercise of the state's powers in a time of economic crisis, or otherwise measures taken within the proper scope of governmental discretion, and potentially not an expropriation at all?

Expropriation is the taking of private property by a government acting in its sovereign capacity.

What is driving the rise in expropriation risk?

Many governments in countries with large natural reserves in commodities that are high in demand, such as oil, copper and lithium, are seeking to increase revenues for the state directly or indirectly through state-owned companies by squeezing out foreign investors and changing the legal landscape to rebalance the economics of the investment. Many states are also reasserting control over natural resources in order to fight climate change and inequality concerns. This trend is particularly visible in the Americas.

In Mexico, President López Obrador, elected on a populist platform in 2018, immediately stopped all oil auctions following his election and recently awarded control of the country's biggest oil discoveries to state-owned Pemex. Last year, Mexico also cancelled fuel import permits held by Pemex competitors on the basis of alleged corruption, a strategy deployed by Mexico to reduce private sector investment and boost Pemex's revenues.

Chile's newly elected president, Gabriel Boric, has pledged to end the country's neoliberal economic model and to introduce significant reforms to its mining sector, such as creating a new state company for lithium extraction and increasing royalties paid by extraction companies. In parallel to Boric's assumption of the presidency this year, a new constitution is being drafted that is expected to focus on greater protection for the environment.

Similarly, in Peru, Pedro Castillo, who won Peru's 2021 presidential election on the slogan *"no more poor people in a rich country"*, has promised to re-write the country's constitution with the aim of addressing inequality, including the express aim to retain in Peru 70 percent of profits generated within the country, with only 30 percent allowed to go to private investors.

Expropriations can threaten the very existence of a company.

How can foreign investors manage expropriation risk?

Expropriations can threaten the very existence of a company. At times the company's people can also be at direct risk. The playbook for how to manage expropriation risk almost invariably begins with local engagement and ends, where local engagement fails to produce a satisfactory outcome, with international recourse. While the detailed strategy will vary according to the specific circumstances facing a foreign investor, the following basic protective steps can assist in preserving an investor's rights.

As highlighted above, the political and economic climate in a host country can change rapidly. Beyond the initial due diligence conducted prior to making an investment and any commitments secured in the nature of legal stability or other similar guarantees, it is critical to monitor changes in political leadership, economic conditions and government policies to identify patterns emerging that may pose a threat to the investment and people on the ground.

Clear channels of communication internally, especially where investments are held through intermediary companies and/or joint venture vehicles, are also critical to ensure that information is circulated and escalated to the right people charged with assessing risk and, in the case of public companies, making material disclosures at appropriate intervals.

It is important, even in the face of increasing hostility, to develop and maintain open channels of communication with local authorities, either directly or through trusted interlocutors, such as local counsel, government affairs professionals or diplomats, particularly if people and evidence are at risk. Documenting the source of any such hostility, and any connection to the state, contemporaneously with the occurrence of acts of hostility is important to ensure that attribution can be made out in any claim and can, in some instances, serve in itself as a deterrent against escalation.

Identifying and preserving key records in respect of the investment outside of the jurisdiction is important to ensure the availability of documentary evidence in support of claims brought either locally or before an international tribunal. This entails both diligent record keeping of licenses, agreements and other pertinent documents as well as regularly backing up any in-country servers to a server outside of the host country to insulate, in extreme cases, against the seizure or destruction of evidence by the state.

Where an expropriation has occurred or is in progress, obtaining advice from competent local counsel is critically important to understand the legal status and implications of the measures taken, as well as any available avenues of recourse locally. Local counsel are also often a first line resource to connect with local leaders and facilitate dialogue where possible to achieve an understanding, a renegotiation or mutually agreeable resolution of a formal dispute.

In parallel to retaining local counsel, it is also advisable to retain competent international counsel at an early stage to advise on the foreign investors' options to have the dispute with the state resolved in a neutral forum, and in accordance with international standards. This is likely to entail a review of the main investment or project agreements as well as any applicable investment treaties that provide for international arbitration as a dispute resolution path.

Where the investor has political risk insurance, the policy must be carefully reviewed to determine whether expropriation risk is covered and, if so, to ensure that any notices and notice periods are respected. Typically, a company must be able to show that the loss was a result of the government's conduct, rather than the company's own violation of a local law. Additionally, most political risk policies require that the triggering event or conduct by the government of the country remain in effect for a certain period of time before a loss is covered.

Conclusion

Resource nationalism has always been a source of expropriation risk for foreign investors, but the energy transition, the shift to a greener global economy and the resurgence of populism and nationalism all bring new risks. Foreign investors need to remain diligent during the course of their investment. Taking the above steps will not necessarily prevent an expropriation, but it will help position the investor to preserve its rights.

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Recognition, Enforcement and Recovery of Investment Treaty Awards: Part I

A summary of the enforcement framework for investment treaty awards under the two most important conventions governing this subject

By Tamlyn Mills and Andrew Battisson

As the number of investor-state disputes and resulting awards continues to grow, the existence of an effective enforcement regime remains critical to ensuring the legitimacy and utility of investment treaty protection for both states and investors. Part 1 of this two-part article begins with a concise summary of the enforcement framework for investment treaty awards under the two most important conventions governing this subject: the 1965 Convention on the Settlement of Disputes between States and Nationals of Other States (the ICSID Convention), and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Before examining these conventions, it is worth recalling what makes investor-state dispute settlement unique in the enforcement context. Investor–state dispute settlement provides foreign investors with a right to commence arbitration directly against a host state for a breach of investment protections afforded by bilateral or multilateral investment treaties entered into between states. In doing so, investor–state disputes are governed by international rather than domestic legal norms. However, when it comes to enforcement and recovery, arbitral awards must be incorporated into domestic legal systems for award creditors to avail themselves of the coercive power of states and recover against state property. It is therefore at the point of enforcement and recovery that national laws most clearly intersect with investor–state dispute settlement.

Because investment treaty awards are typically rendered against states, sovereign immunity is commonly raised in recognition or enforcement proceedings to prevent the exercise of subject matter jurisdiction against states, or to protect certain types of state property from measures of execution. The interaction between sovereign immunity laws and regimes providing for the recognition and enforcement of investment treaty awards will be considered later in Part 2 of this two-part article.

> ***Investor–state disputes are governed by international rather than domestic legal norms.***

Enforcement of ICSID awards

Recognition and enforcement of ICSID awards is dealt with in Section 6 of the ICSID Convention. There are five key principles set forth in that section:

1. Contracting states are obliged to recognise an ICSID award as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that state (Article 54(1)).
2. ICSID awards are not subject to any appeal or review except as provided for under the ICSID Convention itself (which permits requests for interpretation, revision and annulment in certain circumstances) (Article 53). This is a distinguishing feature of the ICSID Convention, often referred to as the 'closed-loop' or 'self-contained' system. It means there is no scope for national courts to refuse recognition of ICSID awards that have not been annulled, including on jurisdictional, procedural, public policy or merits-based grounds.
3. All that is required to seek recognition is to furnish to the competent court or other authority a copy of the award certified by the Secretary-General of ICSID (Article 54(2)).
4. Although there is no scope for a national court to refuse recognition of ICSID awards, an ICSID tribunal or annulment committee may provisionally stay enforcement under the ICSID Convention. For

example, an annulment committee may stay execution if an application for annulment is made. Otherwise, ICSID awards are immediately binding and enforceable (Article 53).

5. Execution is governed by national laws concerning execution of judgments (Article 54(3)). The application of national laws relating to immunity of foreign states from execution is preserved and therefore may still apply (Article 55).

> ***ICSID awards are not subject to any appeal or review except as provided for under the ICSID Convention itself.***

Controversy has arisen due to differences in language between the equally authentic French, Spanish and English versions of the ICSID Convention. In the French and Spanish language versions, the same word is used for 'enforce' or 'enforcement' in Articles 53 and 54(1)–(2) and for 'execution' in Articles 54(3) and 55, whereas the English language text appears to denote three distinct juridical concepts: recognition, enforcement and execution.

> ***Controversy has arisen due to differences in language between the equally authentic French, Spanish and English versions of the ICSID Convention.***

This issue, and the juridical content of the terms 'recognition', 'enforcement' and 'execution', were recently considered by the Federal Court of Australia in *Kingdom of Spain v. Infrastructure Services Luxembourg Sàrl* [2021] FCAFC 3. In that case, the Full Court of the Federal Court considered whether the Kingdom of Spain, against which an ICSID award had been issued in favor of a foreign investor, had waived sovereign immunity by reason of its ratification of the ICSID Convention. The Full Court held that the ICSID Convention drew a distinction between 'recognition' on the one hand and 'enforcement/execution' on the other. However, it characterized the proceedings before it as merely an application for recognition only, not for enforcement/execution. The Full Court therefore held that the preservation of foreign state immunity in Article 55 of the ICSID Convention did not bar the application for recognition.

Enforcement of non-ICSID awards

Not all investor–state arbitrations are conducted under the ICSID Convention and its related arbitration rules. Investor–state disputes are also commonly determined under different rules (such as the UNCITRAL Rules) or under the auspices of the Permanent Court of Arbitration (**PCA**), the International Chamber of Commerce (**ICC**) or the Stockholm Chamber of Commerce (**SCC**). Non-ICSID awards can be enforced in national courts either under the New York Convention (where it applies) or the national law of the forum where enforcement is sought (where it does not).

The New York Convention is not designed specifically to deal with awards rendered against states. It therefore does not contain any express provision with respect to awards to which a state is party. Even so, it has been applied to such awards.

There are four key principles to enforcement of a non-ICISD award under the New York Convention:

1. Contracting states are obliged to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where enforcement is sought (Article III).
2. To seek enforcement, the award creditor must supply an authenticated original or certified copy of the award and the original or a certified copy of the arbitration agreement (Article IV), and where necessary, a certified translation.
3. There are prescribed grounds on which recognition and enforcement of a non-ICSID award may be refused (Article V), such as public policy grounds or if the award has been set aside at the seat. The New York Convention's prescribed grounds for refusing recognition and enforcement are exclusive, which means national courts cannot refuse recognition and enforcement on any other grounds.
4. A decision on enforcement may be adjourned or deferred if an application for setting aside of the award has been made in the courts of the place of arbitration (Article VI).

> ***The New York Convention's prescribed grounds for refusing recognition and enforcement are exclusive, which means national courts cannot refuse recognition and enforcement on any other grounds.***

Recognition of investor–state awards in the European Union

The position of investor–state awards under EU law has undergone considerable, albeit controversial, development in recent years. In *Slovak Republic v. Achmea BV* Case C-284, EU:C:2018:158 (***Achmea***), the Court of Justice of the European Union (**CJEU**) in March 2018 denied the arbitrability of 'intra-EU' investment disputes, meaning, disputes between EU Member States and investors from EU states which may concern the application or interpretation of EU law. Whether or not correctly decided, *Achmea* greatly upset the expectations of EU users of the investor-state dispute settlement system.

Achmea arose in the context of a bilateral investment treaty between two EU Member States. Therefore, for a time, it was thought possible that *Achmea's* prohibition against 'intra-EU' investor-state dispute settlement might not apply to <u>multilateral</u> investment treaties such as the Energy Charter Treaty. However, the CJEU dispelled this possibility in September 2021 in its ruling in the *Republic of Moldova v. Komstroy* Case C-741/19 (2019/C 413/41) (***Komstroy***). The CJEU concluded that, as a matter of EU law, Article 26 of the Energy Charter Treaty is not applicable to 'intra-EU' disputes.

The position of investor–state awards under EU law has undergone considerable, albeit controversial, development in recent years.

Although tribunals in investor-state arbitrations have thus far refused to decline jurisdiction on the basis of the rulings in *Achmea* and *Komstroy*, any intra-EU investor–state award will likely face questions regarding recognition and enforcement before courts in EU Member States.

(See also our article on important developments in the application of the Energy Charter Treaty within the EU, in the December 2021 edition of the International Arbitration Report.)

The legal foundations of investor-state dispute resolution in respect of recognition, enforcement and recovery reflect a complex intersection of international law and national laws.

Conclusion

The legal foundations of investor-state dispute resolution in respect of recognition, enforcement and recovery reflect a complex intersection of international law and national laws. Jurisprudence continues to develop in relation to key concepts such as recognition, enforcement and execution. This area of the law is dynamic and businesses involved in, or contemplating commencing, an investor-state dispute would be well advised to anticipate enforcement and recovery issues at an early stage.

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Tax and investor-state dispute settlement

A look at when investor-state dispute settlement can be a helpful tool for investors

By Martin Valasek and Alison FitzGerald

Taxes and tax incentives can either enable international investment or destroy it, and in some cases do both over time. For this reason, structuring of foreign investment is often driven by tax planning. Securing protections to preserve the value of an investment as a part of that planning is critical to the long term success of projects that are exposed to changes in laws and policies around taxation over time, and to the possibility of abusive taxation. In appropriate cases, investor-state dispute settlement (ISDS) can be a helpful tool to allow investors to counter the power wielded by states in the field of taxation.

Taxation: the good, the bad and the ugly

As a general matter, taxation is unobjectionable. An advanced society could not exist without some level of taxation to fund the community's needs and achieve its objectives. *"Taxes are what we pay for civilized society,"* wrote US Supreme Court Justice Oliver Wendell Holmes, Jr. However, a rapid and unexpected increase in tax rates, or the imposition of new and surprising tax laws, can be highly disruptive, and in some cases undermine an investor's reasonable and legitimate expectations. At the extreme end of the spectrum, the tax power of a state can be wielded abusively to inflict harm on an enemy of the state, or to weaken a target to facilitate a takeover.

Resource nationalism and the obsolescing bargain

Taxation is an increasingly popular form of resource nationalism, in part because it is more subtle than an outright taking, and therefore less likely to attract immediate denunciation. Many countries want to assert greater control over decisions shaping the development of their natural resources and are insisting on a greater share of the benefits flowing from such development. This pressure exists for any capital-intensive investment (notably for large-scale infrastructure or manufacturing projects), and not just for projects in the traditional resource sectors of mining and energy.

The tax measures that a state might use in this context can take a variety of forms, including any one of the following (alone or in combination):

- an increase in taxes or the imposition of new taxes, including windfall profit taxes
- changes to royalty regimes
- legislative reforms to reduce or eliminate incentives that were passed to encourage investment
- the revocation of tax exemptions, or the withdrawal of subsidies
- initiation of tax investigations or tax audit proceedings
- large one-time tax assessments, often including significant penalty components
- aggressive collection of taxes, customs duties or other liabilities allegedly due

Taxation is an increasingly popular form of resource nationalism, in part because it is more subtle than an outright taking, and therefore less likely to attract immediate denunciation.

These measures will typically be imposed after a significant investment has already been made, and may well ignore the initial terms of the investment. Such cases are a manifestation of the 'obsolescing bargain': once a significant investment has been sunk in the development of a particular project in a country, the relative bargaining power switches in favour of the host government, who can then try to increase its fiscal take by changing the terms of the original deal. In such circumstances, assuming the investment has been properly planned, one tool that could be available to an investor to start to level the playing field is ISDS.

What is ISDS?

ISDS is a mechanism that enables foreign investors to resolve disputes with the government of the host country in a neutral forum through binding international arbitration. ISDS is most commonly offered in international investment agreements (**IIAs**) but may also be included in domestic legislation and investment contracts. These instruments typically set out certain substantive protections to which foreign investors are entitled, the breach of which gives rise to a right to bring a claim directly against the host state.

What protections and remedies does ISDS offer?

Arguably, the most important procedural protection is the right to have disputes resolved in a neutral forum, before impartial adjudicators and in accordance with transparent rules. Common substantive protections (breach of which may give rise to an ISDS claim) include:

- fair and equitable treatment
- full protection and security
- national treatment
- most favoured nation treatment
- no expropriation without full (and prompt) compensation
- free transfer of capital

Monetary compensation is the most common remedy, however, in certain cases other remedies, including declaratory relief and restitution, may be available.

Tax and ISDS

While certain tax measures might violate the substantive protections usually found in IIAs, a first hurdle to be considered is whether the treaty in question contains a tax carve-out (i.e., a provision that excludes tax measures from the scope of the IIA). Most existing IIAs do not exclude taxation from their scope, which means that investors can be protected from tax-related measures that violate the IIA's substantive protections. Recent UN data reveals that some 140 ISDS cases based on IIAs out of a total of more than 1000 have challenged tax-related measures.

Many more recent IIAs do, however, contain tax carve-outs, although they are not all the same. Some IIAs allow a claim to proceed only after certain procedural steps have been satisfied with the governments of both the home country and the host country. Some IIAs also stipulate that only certain substantive protections apply in respect of taxation measures (e.g. the protection against expropriation), thereby significantly narrowing the protection available under the treaty. Ultimately, however, it is up to the arbitral tribunal hearing the case to decide whether the measures in question are taxation measures and, if so, what protections in the IIA apply.

Many more recent IIAs do contain tax carve-outs, although they are not all the same.

Assuming there is no tax carve-out, or certain protections nevertheless apply in respect of the tax measures, the arbitral tribunal then determines whether the tax measures violate the IIA and have caused compensable loss. At one end of the spectrum, a tax measure may be found to be a legitimate exercise of the state's regulatory powers, resulting in the dismissal of the claim. At the other end, an investor's loss may result from an abusive state measure designed to destroy the value of the investment, and result in an award of full compensation. Often, tax measures reflect a desire by the state to rebalance the economics of the investment or advance revenues from the investment in a manner that may or may not be lawful under international law. The outcome of a case will depend on the specific facts at issue and the particular language of the applicable treaty.

The importance of planning and advice

Ideally, every investment should involve not just tax planning, but also planning for the possibility that the tax plan might fall apart. This involves a review of the IIAs to which the host country is a party, and an assessment of the optimal investment structure from both a tax and ISDS perspective. For their part, host countries should consider their responsibility under IIAs for tax measures that violate international law. If unexpected tax measures are imposed, investors should seek advice in order to understand what redress is available before local courts and in ISDS.

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Going green? Modernizing the Energy Charter Treaty

We look at one of the key challenges of the modernization process: balancing the goals of net zero with the protection of international investment

By Holly Stebbing, India Furse and Aman Tandon

Dating from 1994 and with over 50 signatories, including the UK, EU and Japan, the Energy Charter Treaty (ECT) is a multilateral investment treaty which aims to promote security, competition and cross-border investment in the energy sector. In recent years, however, the Treaty has been criticised as 'anti-climate', posing a threat to the energy transition by protecting fossil fuel investment and acting as a buffer for climate action. It is perceived as being too investor-friendly and infringing states' right to regulate to combat climate change. The EU, in particular, has advocated for change to make the ECT 'greener' and has produced a draft proposal for its modernization (the Proposal). One of its objectives is to align the ECT more closely with the goals of the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement in order to support the energy transition. So far, there have been eleven rounds of negotiations, with more to come.

In this article, we look at one of the key challenges of the modernization process: balancing the goals of net zero with the protection of international investment. Striking this balance will be essential to securing the enormous investment of financial capital required to facilitate the energy transition.

Climate policies and the ECT

The ECT is seen by climate activists as an obstruction to the energy transition, giving fossil fuel companies the power to sue states when climate policies are perceived to be inconsistent with their investments. Like other investment treaties, the ECT contains a mechanism for dispute resolution which allows investors to commence arbitration directly against states for alleged breaches of the ECT. The confidentiality of these claims has exacerbated the perception that the ECT protects private investment whilst exposing states to potentially large damages claims arising from green policy-making.

The ECT is seen by climate activists as an obstruction to the energy transition

This is not a theoretical threat, examples of climate related claims against states under the ECT include:

- In May 2017, the British-Italian oil and gas company Rockhopper commenced ICSID arbitration under the ECT against Italy, following Italy's decision not to award the company a production concession in the Ombrina Mare field due to the state's ban on oil and gas exploration and production along its coastline. The proceedings are ongoing.
- More recently in 2021, two energy companies have commenced ICSID arbitrations under the ECT against the Netherlands following its announcement that it will be phasing out coal power plants by 2030. Together they are claiming billions of euros in compensation from the Netherlands.
- Numerous claims have been brought against Spain, Italy and the Czech Republic when feed-in tariff regimes to support renewables investment were withdrawn in the early 2010s. As states try to encourage the investment that will be essential to meeting the challenges of the energy transition, renewables claims may well keep pace with those arising out of traditional fossil fuel investments.

The proposal

The ECT is seen by climate activists as an obstruction to the energy transition, giving fossil fuel companies the power to sue states when climate policies are perceived to be inconsistent with their investments. Like other investment treaties, the ECT contains a mechanism for dispute resolution which allows investors to commence arbitration directly against states for alleged breaches of the ECT. The confidentiality of these claims has exacerbated the perception that the ECT protects private investment whilst exposing states to potentially large damages claims arising from green policy-making.

The EU's Proposal is ambitious, covering a wide range of potential amendments, including:

1. **Implementation of the Paris Agreement and enforcement**

   One of the most radical proposals by the EU is a new article requiring contracting states to *"effectively implement"* the UNFCC and the Paris Agreement. It also creates a positive obligation for signatories to cooperate on climate change mitigation and adaptation in order to accelerate the transition towards a low emission, clean energy and resource efficient economy, as well as to climate resilient development. These obligations would become enforceable through state to state dispute resolution, thereby giving the obligations in the Paris Agreement, as between contracting states at least, 'teeth' for the first time. Currently the treaty is self-regulating, relying on states voluntarily meeting their commitments.

2. **Economic Activities in the Energy Sector**

   Article 1(5) of the ECT protects *"Economic Activities in the Energy Sector"*. As part of the modernization process, some have called for treaty protection for fossil fuels to be abolished. The EU's proposed solution is to exclude all future fossil fuel investments from investment protection, with a limited carve out for natural gas-fuelled power infrastructure investments if they either:

   - emit less than 380g of CO2 per kWh of electricity and can use low-carbon gases (these investments are protected until the end of 2030); or
   - replace coal, on the basis that coal is a more harmful pollutant (these investments will benefit from protection for ten years after the treaty amendment takes effect (until the end of 2040 at the latest)).

The Proposal also suggests that newer technologies, such as hydrogen, biomass and others, are expressly covered so as to widen the scope of protected investments in line with green objectives and boost investor confidence.

3. **Impact assessment**

In order to promote transparency and greater stakeholder engagement in the energy transition, the Proposal introduces a requirement to carry out an environmental impact assessment before granting authorization for any energy infrastructure project. The assessment must cover: human health; biodiversity; land; soil; water; air; and, cultural heritage and landscape. The results of each assessment will be publicly available.

4. **Fair and Equitable Treatment**

Fair and Equitable Treatment (**FET**) provisions are a fundamental protection for investors under bilateral and multilateral investment treaties. The ECT provides that states must *"encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties [States] to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment."* The Treaty does not define what constitutes a breach of the FET standard and some argue that FET standards have been interpreted too broadly, protecting investors to the detriment of states' right to regulate. The EU has therefore suggested adopting a narrow list of breaches comprising:

- Denial of justice in criminal, civil or administrative proceedings.
- Fundamental breach of due process, including a fundamental breach of transparency in judicial and administrative proceedings.
- Manifest arbitrariness.
- Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief.
- Abusive treatment, such as harassment, duress or coercion.

When applying the FET standard to the actions of states, tribunals would be able to take into account specific representations made by a state to an investor in order to induce an investment covered by the ECT, that *"created a legitimate expectation, upon which the investor relied in deciding to make or maintain the covered investment, but that Contracting party subsequently frustrated"*. However, this would not be a free standing obligation.

5. **Right to regulate**

One of the challenges of modernizing the ECT is striking the balance between encouraging investment in the energy transition through the protection and promotion of a stable regulatory regime, whilst also affording contracting states the right to regulate to achieve *"legitimate* *policy aims"* without the threat of legal action and large damages awards. In the Proposal, the EU reaffirms the right to regulate to achieve *"legitimate policy aims"* relating to the protection of the environment, and expressly references *"combatting climate change".* This may encourage states to align themselves more closely to the UNFCCC and the Paris Agreement by providing comfort that steps taken to facilitate the energy transition may, when properly taken, not give rise to investor claims.

6. Dispute resolution

The Proposal introduces a new method for tribunal appointments whereby an independent body would create a robust selection procedure and provide a list of arbitrators for the parties to select, with a requirement for those arbitrators to have specific expertise in labour or environmental law.

The Proposal also introduces a two court system to allow for appeals, which has the potential to lengthen already notoriously protracted and costly ICSID proceedings. However, the Proposal also seeks to address the criticism that the ECT's dispute settlement provisions do not adequately safeguard against, or quickly dismiss, frivolous claims by introducing a mechanism allowing for parties to file a preliminary objection allowing for early dismissal of unmeritorious claims, and a statute of limitations clause so that there is a time limit on bringing claims.

The future of the ECT

The modernization process is a balancing act between green objectives and the protection of investors. It is evident from some of the amendments in the Proposal that aligning the ECT with the Paris Agreement and the UNFCCC is not just about restricting the protection of investments in fossil fuels but also about encouraging green investments, thereby ensuring that the protection of investors is still at the forefront of the ECT's objectives.

The modernization process is a balancing act between green objectives and the protection of investors.

The modernization process is ongoing, with the next round of negotiations scheduled to take place in April 2022. The European Commission has made it clear that, although it considers a reformed ECT to be the best outcome, it may consider recommending that the EU and its member states withdraw from the ECT entirely if core EU objectives are not met within a reasonable timeframe. The long sunset provision in the ECT however means that the impact of any withdrawal may not be felt for many years.

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Impact of international sanctions on arbitral proceedings

A look at the key issues in relation to termination of commercial contracts

By Katie McDougall and James Rogers, with special thanks to Freya Reevell

The extensive sanctions imposed following the Russian invasion of Ukraine have led to many companies reassessing business relationships. Companies have ceased performing their contractual obligations, and in many cases have taken steps to terminate contracts, often making decisions quickly in a high pressure situation.

This environment has not always allowed companies the time fully to consider their contractual termination rights prior to exercise, or sanctions risk has been seen to outweigh disputes risk, and there is consequently the potential for a significant volume of commercial disputes to arise in the near future. In many cases the parties will have provided for such disputes to be determined by arbitration. Further, sanctions legislation will impact on the parties' ability to conduct an arbitration (e.g. in the contractual jurisdiction) and to enforce any award.

This article considers some key issues in relation to the termination of commercial contracts and identifies some of the logistical and legal difficulties parties will have to face when seeking to arbitrate a dispute impacted by sanctions legislation.

This article considers some key issues in relation to the termination of commercial contracts and identifies some of the logistical and legal difficulties parties will have to face when seeking to arbitrate a dispute impacted by sanctions legislation.

Sanctions legislation will impact on the parties' ability to conduct an arbitration

The right to terminate – sanctions clauses, force majeure clauses and frustration

Parties seeking to extricate themselves from contractual relationships because of new sanctions should carefully examine their contracts to identify when the right to terminate or suspend performance arises. Apart from obvious sanctions related provisions, illegality or force majeure clauses may provide the right to terminate. The specifics of such clauses will be key and we would recommend parties take sanctions advice if there is any ambiguity as to the applicability of the clauses. Whether a force majeure clause can be relied on in the context of sanctions legislation is a matter of contractual interpretation and the particular wording used in the clause. Some clauses may expressly refer to the imposition of sanctions as a force majeure event; whereas others will specifically exclude this. Some force majeure clauses use broader class-based language, and the different types of force majeure events specified in the clause are likely to be of importance in determining whether the clause covers the introduction and/or impact of sanctions.

In the absence of express contractual provisions, the doctrine of frustration in English common law (or the equivalent concept in other legal systems) could apply to terminate the contract if the sanctions legislation makes the contract impossible to perform or makes performance radically different from what was contemplated.

Even in the absence of a clear contractual or legal termination rights, parties may still seek to terminate contracts to mitigate the risk of breaching sanctions legislation given the stringent penalties that may follow.

Apart from obvious sanctions related provisions, illegality or force majeure clauses may provide the right to terminate.

As a result, parties may find themselves in disputes over the interpretation of contractual provisions and facing claims for repudiatory breach of contract. They may turn to arbitration to resolve such disputes. The arbitration proceedings may in turn be affected by sanctions, as explored below.

Impact on arbitration

When a state or international body introduces sanctions legislation, it must generally be complied with by all persons within the state/body's territory and all nationals of the state/body, wherever those nationals may be. Some sanctions legislation has extraterritorial effect. An arbitration may therefore be impacted by the sanctions regimes applicable owing to:

- the nationality or residence of a party or arbitrator;
- the location in which any relevant business was to be conducted;
- the sanctions applicable to the seat of the arbitration; and
- any legislation that has extraterritorial affect.

A. The arbitration process

Appointment and payment of arbitrators

Sanctions which operate to prevent the provision of services to sanctioned entities may potentially prevent an arbitrator from acting or accepting payment in an arbitration. This is likely to arise where one of the parties is a sanctioned entity and the arbitrator is a national or resident of a sanctioning state. For example, a non-UK arbitrator will need to comply with UK sanctions when the arbitration is seated in London. A UK national sitting as an arbitrator will need to comply with UK sanctions whether the arbitration is seated in London or abroad. Extraterritorial sanctions may also be relevant. Parties and institutions seeking to appoint an arbitrator should be mindful of existing restrictions and any such restrictions that are likely to arise in the foreseeable future.

Many sanctions regimes provide a carve-out to the asset-freeze restrictions for the purpose of providing legal services or payment of legal fees. Such carve-outs usually require an application to the relevant authority for the grant of a licence before any payment can be made. These applications to pay an arbitrator's legal fees may delay the start of arbitral proceedings as the processing of licences is likely to take several weeks. Further, applications may not always be successful. Both the sanctioned entity making the payment and the arbitrator receiving the payment will need a licence. This gives rise to the possibility that multiple licence applications to different national authorities will be required and applications may be required on more than one occasion during the arbitration if the licence is only for the payment of a specific amount.

Sanctions which operate to prevent the provision of services to sanctioned entities may potentially prevent an arbitrator from acting or accepting payment in an arbitration.

Even where a licence application has been successful, a sanctioned entity may face practical barriers to paying an arbitrator. For example, the recent sanctions aimed at Russian banks and the removal of certain banks from the SWIFT payment system may lead to significant difficulties in processing payments involving Russian entities.

Similar issues will arise in relation to a sanctioned entity seeking to pay its legal representatives and the fees of arbitral institutions.

Appointment of legal representatives

Many international agreements are governed by English or US law. Sanctions may impact on the parties' ability to instruct legal representatives qualified in these jurisdictions. For example, US law firms are prevented from acting in arbitrations involving US-sanctioned entities under blocking sanctions unless prior authorisation has been sought from the Office of Foreign Assets Control (**OFAC**), and consent may not be given.

Aside from legal restrictions, international law firms may take their own decision that they will not accept instructions from certain entities or involving certain trade for reputational or other risk related issues.

Arbitral institutions

An arbitral institution based in a particular jurisdiction will need to comply with the legislation of that state/international body. Many leading institutions have previously indicated that they will administer arbitrations involving sanctioned entities. However, as set out above, they will usually need to obtain licences, take additional administrative steps and conduct their own due diligence on the parties. This all adds complexity and time to the arbitration process.

It remains to be seen if arbitral institutions will continue to adopt the same approach to arbitrations involving Russian sanctioned entities following the Ukrainian invasion. The LCIA Rules are one of the few set of institutional rules that address sanctions. Article 24A.10 of these Rules provides the LCIA with the right to refuse to act on any instruction and/or make any payment if it determines (at its sole discretion and without the need to state reasons) that doing so may involve a breach of sanctions or may otherwise expose the LCIA to enforcement action from any law enforcement agency.

If an institution is unable to administer an arbitration, it would be open to the parties to choose a different institution outside of the jurisdiction. However, that requires a degree of cooperation that is often absent after disputes have arisen and, in that situation, the issues outlined above in relation to the appointment and payment of arbitrators and transfers of funds may still arise (as well as general satellite disputes with respect to jurisdiction).

Witnesses

Individuals impacted by sanctions may not be able to travel to appear in arbitration hearings in person. While they may be able to appear by video link, if they are significant witnesses this may give rise to concerns about the integrity and procedural fairness of the proceedings. Counsel's general availability to deal with the witness may also be impacted, depending on the sanctions imposed.

> ***Even where the parties are able to complete the arbitration process, sanctions may impact on the enforcement of any award.***

B. Enforcement issues

Even where the parties are able to complete the arbitration process, sanctions may impact on the enforcement of any award.

Under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a national court may refuse to enforce an arbitral award where to do so would be contrary to 'public policy.' Sanctions legislation may be held to constitute public policy. For example, sanctions put in place by the UN and the EU could constitute international public policy and a national court may refuse to recognise and enforce an award on that basis.

Practical difficulties may also arise in enforcing an award against a party which is subject to an asset freeze or blocking sanctions (the most draconian form of sanctions implemented by the UK, EU and US). The possibility of applying to the authorities to release frozen funds to satisfy judgment debts has been previously discussed by the English courts in relation to certain Syrian sanctions. Any licence application may only be permitted where limited exceptions apply under the regulations, and would be subject to certain conditions and a consideration by the relevant authorities of the particular facts.

C. Impact of Russian exclusive jurisdiction law

Sanctions can also give rise to jurisdictional issues in any given arbitration. A particularly pertinent example of this is the amendment to the Russian Arbitrazh Procedure Code which came into force in June 2020. The effect of the amendment is that Russian commercial courts can claim exclusive jurisdiction over disputes involving a sanctioned Russian entity (or a non-Russian party which becomes subject to Russia-related sanctions).

The amendment enables a Russian entity to commence proceedings before the Russian courts or, if arbitration proceedings have already started abroad, the Russian entity can apply to the Russian courts for an anti-suit injunction. This means that an arbitration agreement entered into by a Russian sanctioned party providing for arbitration with a seat in a sanctioning country is potentially unenforceable in Russia. Further, the enforcement in Russia of any foreign arbitral award is unlikely.

Key takeaway

Any party involved in a potential dispute arising from the multitude of new sanctions introduced with respect to the invasion of Ukraine should consider the above issues. Any arbitration team should be led by, or include, sanctions specialists.

Should you have any questions regarding sanctions related arbitration issues, we would be happy to assist.

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Human rights and international investment arbitration: a snapshot

A snapshot of the interaction between human rights and international investment arbitration

By Alison FitzGerald, Jo Feldman and Alyssa Glass

International arbitral tribunals in investor-state disputes have been increasingly open to drawing on human rights norms and jurisprudence when interpreting and applying international investment agreements (IIAs), and have even upheld jurisdiction over counterclaims by states against investors based on international human rights law (IHRL). In this article, we provide a snapshot of the interaction between human rights and international investment arbitration, examine recent developments, and consider key implications.

Interaction between human rights and international investment arbitration

Human rights issues arise in international investment arbitration in multiple ways. For example, human rights issues may:

- form part of the underlying factual matrix for the investment dispute;
- inform the content and interpretation of rules of international investment law (**IIL**); and/or
- provide an independent basis for claims or counterclaims.

We consider these types of interaction below.

Human rights as part of the underlying factual matrix

Human rights obligations are an inescapable component of the legal landscape in which foreign investors and host states operate. Rights to health, to water, to a healthy and safe environment, and to be free from torture, forced labor and arbitrary detention are just some of the human rights affected by the circumstances that give rise to investment disputes.

> ***Human rights obligations are an inescapable component of the legal landscape in which foreign investors and host states operate.***

Abuse of human rights, or failure to protect human rights, may factually underlie an investment dispute. An alleged failure by foreign investors to respect the rights of Indigenous peoples, environmental rights, or labor rights may lead to a dispute with a local population that escalates into an international investment dispute (see by way of example, *Glamis Gold v United States*). A host state may also be alleged to violate the human rights of a natural person who is a foreign investor, prompting investor-state proceedings (as demonstrated in *Biloune v Ghana*; *Loewen v United States*).

Alternatively, a host state may adopt measures which it claims protect human rights, but which adversely impact an investor. Under IHRL, a state's obligations include preventing foreign investors operating in its territory from interfering with the human rights of individuals and communities subject to the state's jurisdiction. States have been held accountable for failure to protect individuals' human rights from impacts caused by foreign investors (see for example, *Awas Tingni v Nicaragua*; *SERAC v Nigeria*). Against that background, states may claim that their regulatory measures which adversely affect foreign investors were adopted in an effort to comply with IHRL. For instance, Argentina claimed that it acted to protect its citizens' human rights, which were allegedly imperiled by economic crisis, in defending against investors' claims in *Sempra v Argentina* and *CMS v Argentina*, and relied specifically on the human right to water for its defense in *Azurix v Argentina*.

Human rights as an interpretive guide

Human rights may inform the content and interpretation of rules of IIL. Investor-state tribunals have relied on human rights treaties and case law as authorities on points of interpretation in an ever-increasing number of cases. In *Tulip v Turkey*, the ICSID *ad hoc* Committee noted this trend, and confirmed that human rights are relevant to the interpretation of IIAs. It went on to apply case law from the European Court of Human Rights in assessing and determining multiple grounds asserted by the host state for annulment of the ICSID award being challenged.

The core concepts of investment protection – such as fair and equitable treatment, national treatment, full protection and security, and access to justice – have a natural affinity with human rights norms.

The core concepts of investment protection – such as fair and equitable treatment, national treatment, full protection and security, and access to justice – have a natural affinity with human rights norms. Tribunals have frequently drawn on international human rights treaties and jurisprudence when interpreting IIL standards of treatment (e.g. *Mondev v United States*; *Saipem v Bangladesh*; *Al Warraq v Indonesia*). Tribunals have also drawn on IHRL in interpreting and applying norms invoked by states, such as the proportionality principle, the police powers doctrine, and other public interest or regulatory-based exceptions and defenses (e.g. *Tecmed v Mexico*).

The case for using IHRL to interpret IIL is even stronger under new generation IIAs, which refer expressly to human rights instruments, affirm state parties' commitments to universal human rights, and prescribe frameworks encouraging 'corporate social responsibility' or 'responsible business conduct' by investors, taking into account such instruments as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

Human rights as a basis for claims or counterclaims

Whether an investor can succeed in a claim independently based on human rights violations will, in each case, depend on the provisions of the IIA in question (see for example *Strabag v Poland*). The same is true for a state's prospects of success when advancing a human rights counterclaim, which may face significant hurdles in relation to jurisdiction and admissibility depending on the applicable IIA.

Human rights and environmental counterclaims have been heralded by some as a potential vehicle for recalibrating the relationship between foreign investors, on the one hand, and host states and local communities, on the other. Several states and commentators have identified such counterclaims as one avenue to address what they perceive as a structural bias in investor-state dispute settlement, which they claim favors investors' interests at the expense of public and regulatory interests, including human rights.

However, it is generally accepted that investors do not have direct obligations under IIAs. The extent to which corporations are directly bound by IHRL also remains contested. This raises questions about whether human rights counterclaims can be independently based on IHRL, or must rely on domestic law as a conduit.

The decision in *Urbaser v Argentina* is frequently cited as a landmark case supporting tribunals' jurisdiction over counterclaims based on IHRL. However, the tribunal's reasoning on IHRL is more limited than is often acknowledged. Argentina argued that the claimants' failure to provide the necessary investments relating to a water and sewage concession violated the right to water, which was the purpose of the investment according to the regulatory framework and the concession. The tribunal held that it had jurisdiction over this counterclaim and that IHRL formed part of the applicable law under the relevant bilateral investment treaty. However, the counterclaim failed on the merits. The tribunal considered that positive obligations under IHRL rested not on the claimants but on Argentina, which was obliged to ensure the right to water through its domestic law and in contracts with foreign investors. That is, whereas positive IHRL obligations would be imposed directly on the host state, they would be imposed only indirectly on the investors to the extent provided by a contractual vehicle with the host state.

The extent to which corporations are directly bound by IHRL also remains contested.

Key implications

Key implications of the expanding interaction between human rights and international investment arbitration include:

- Expanded prospects for interpretations of IIA provisions that are informed by states' international human rights obligations. This may strengthen arguments for either investors or states based on proportionality, public interest, and police powers. It may also alter interpretations of core investment protections – for example, states might argue that for investment-backed expectations to be considered 'legitimate', investors must have taken due notice of a state's obligations under IHRL.

- Increased susceptibility of corporations to human rights counterclaims by respondent states.
- Greater openness on the part of investor-state tribunals to permit interventions by civil society organizations and affected communities as *amicus curiae*. Such interventions may bring human rights impacts more squarely into focus before the tribunal.

The way forward

It is increasingly clear that parties to international investment arbitrations cannot afford to overlook IHRL. Human rights norms are expressly drafted into new generation IIAs, human rights jurisprudence is increasingly relied on to inform interpretations of IIL, and in a growing number of cases human rights may ground a claim or counterclaim.

These trends form part of a broader evolution in corporations' susceptibility to human rights-based claims, which is also reflected in the launch of the Hague Rules on Business and Human Rights Arbitration in December 2019 and the development of parent company liability principles in domestic courts (see our Cross-Border Guide to Parent Company Liability for Foreign Subsidiaries for further analysis).


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Choosing the right arbitral rules

The key differences between the rules of the most prominent arbitral institutions

By Sherina Petit, with thanks to Rianna Gohil

The right arbitral rules to choose for any given dispute will depend on a number of factors, including how confidential the parties wish the proceedings to be, how quickly the parties would like the dispute to be resolved, their appetite for cost savings, the importance of being able to scrutinise the award and the importance of geographical neutrality. This article outlines the key differences between the rules of the most prominent arbitral institutions: the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Singapore International Arbitration Centre (SIAC), and the Hong Kong International Arbitration Centre (HKIAC).

Key differences

Confidentiality

Confidentiality is seen as a key benefit to arbitration over litigation, and many might expect all arbitral rules to contain a stringent obligation of confidentiality. However, this is not the case. No express duty of confidentiality is imposed on the parties under ICC Rules, but the disputing parties may agree to keep proceedings confidential, or any one party may request the Tribunal to make an order to the same effect.

This is very different to the general undertaking that automatically applies under LCIA Rules, where parties undertake to keep all awards, materials and documents confidential.

There is a requirement for confidentiality under the Rule 39 of the SIAC Rules, but it only extends to the proceedings and the award, rather than to the materials and documents deployed during the proceedings. Similarly, under the HKIAC Rules, under Article 45, no party may publish, disclose or communicate any information relating to the arbitration or any award made in the arbitration, unless the parties agree otherwise.

It is also worth noting that arbitral proceedings are generally private even if not confidential. In court proceedings, members of the public often have a right to view proceedings and have access to some materials, such as statements of case, under the principles of 'open justice.' But in arbitration, as it is a contractual process, generally only the parties to the arbitration can attend hearings and view documents filed in the proceedings.

Expedited Procedures

In an attempt to become more streamlined and offer a viable alternative to summary judgment procedures, several of the leading institutions have adopted procedures designed to offer expedited proceedings in suitable cases.

For example, under Rule 5 of the SIAC Rules 2016, there is an expedited procedure available where the parties agree to its use, where the value of the claim does not exceed S$6m, or in cases of exceptional urgency. The expedited procedure under the HKIAC Rules is available in identical circumstances, save that the value of the claim must be below HK$25m. There is no 'exceptional urgency' provision in the ICC Rules, and the expedited procedure can only be invoked where the value of the dispute is less than US$2m (where the arbitration agreement under the ICC Rules was concluded after March 1, 2017 but before January 1, 2021), or US$3m (where the arbitration agreement under the ICC Rules was concluded after January 1, 2021), or where the parties agree.

There is no separate expedited procedure under the LCIA Rules, and instead the LCIA Rules integrate powers of early determination, expedited formation of the tribunal, and the appointment of emergency arbitrators into its standard procedure, which leaves relatively more up to the appointed arbitrator's discretion. This is also the case with consolidation and joinder of claims, where the LCIA rules are less prescriptive than those of other institutions.

Timeline

The reality in any significant arbitration conducted outside of an expedited procedure is that the Tribunal can be expected to take time to render an award.

The institutions take different approaches to this in their rules. Under Rule 32 of the SIAC Rules, the Tribunal must provide a draft award within 45 days following the closure of proceedings. However, the award must be approved by the registrar before it is handed down.

Under Article 31 of the ICC Rules, the Tribunal must render its final award within six months, and this is three months in the case of the LCIA and HKIAC Rules. Notably however, the LCIA Rules provide at Article 15.10 that the Tribunal should make its award as soon as reasonably possible. In practice, these timelines should be regarded as a guideline rather than a deadline, as they will often be extended by the institution.

Terms of Reference

Terms of Reference (**ToR**) set out the scope of the arbitration by setting out the basic claims and defences, the relief sought, and the issues to be determined. The ICC Rules are unique in that they require ToR to be produced for every dispute. By contrast, the LCIA, SIAC, and HKIAC Rules do not require any formal ToR to be produced.

For many parties, ToR will help to narrow the issues in dispute early in the process and delimit the scope of the dispute, promoting settlement as well as more efficient proceedings. However, this additional administrative requirement can feel unnecessary and cause delay in prosecuting claims; in particular, it can lead to disputes over the scope of the ToR that distract parties from the arbitration itself and have the effect of prolonging proceedings further.

Institutional scrutiny of the award

The ICC Rules provide for the scrutiny and approval of the draft award by the ICC Court before it is issued to the parties. The ICC Court may lay down modifications as to the form of the award and may also draw its attention to points of substance, albeit scrutiny does not usually extend to the substance of the decision. Like the ICC Rules, the SIAC Rules provide for scrutiny of the award on the same grounds, with the difference that the award is scrutinised by the Registrar.

The LCIA and HKIAC Rules do not allow for any institutional scrutiny of the award, which has the effect of reducing the time taken for an award to be handed down, but the parties lose the benefit of two-stage scrutiny.

Institutional scrutiny of the award will be of varying importance to the parties depending on the experience and background of the Tribunal, the value and complexity of the dispute, and the speed at which they wish the dispute to be settled.

Costs

In many arbitrations, costs are an important consideration when deciding whether to commence or to continue an arbitration. Different institutions offer different fee rates and structures, for example, the ICC's administrative fees are calculated on the basis of the amount in dispute and the number of arbitrators. Although this provides predictability, and parties can forecast their costs in advance using a cost calculator on the ICC website, the ICC's administrative fees are typically higher than those charged by other arbitral institutions. Fees charged by SIAC and HKIAC are also calculated on the basis of the amount in dispute, and parties can similarly forecast their administrative costs using the Schedule of Fees provided by each of these institutions.

The LCIA administrative fees are, by contrast, charged at an hourly rate, regardless of the value or complexity of the dispute. The LCIA also caps its tribunal fees at £500 per hour. However, there is no cap or maximum to the costs, and as hourly rates are used, these fees can be less predictable, although for cases with a value of US $100m , the LCIA has suggested that its fees are, on average, more than 50 percent cheaper than alternative institutions.

Which arbitration rules should you choose?

The reality of most commercial contracts is that the arbitral rules chosen are based not on any particular nuance of the rules or procedures available under the different institutions, but instead on the familiarity of the parties with the particular procedure, past precedent in similar contracts, and geographical affinity. Institutions that are linked to a single jurisdiction (LCIA, SIAC, HKIAC) are less likely to be viewed as neutral where disputing parties are from other jurisdictions. Regional arbitration centers are also increasingly being launched to compete with the global institutions described in this article. However, whilst the key distinction will always be between court litigation and arbitration, and then between different seats of arbitration (which provide different legal systems to govern the arbitration), the choice of institution is, as we have highlighted, important and the differences between the rules and approaches are real.

Parties should take the advice of counsel familiar with the different options globally to ensure that their disputes are referred to the institutions most likely to be suitable for them, with any nuances of the different procedural rules to be taken into account and addressed from the outset of any proceedings.

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Protecting intellectual property rights through international arbitration

We consider the benefits of international arbitration as a dispute resolution mechanism for intellectual property disputes

By C. Mark Baker and Mark Robertson

The rapid development of new technologies and processes in sectors such as pharmaceuticals, biotechnology, life sciences, aerospace, energy, telecommunications, and information technology has led to an exponential increase in the number of patents and trademarks issued and domain name registrations around the globe. The increase is unlikely to slow with ongoing events like the COVID 19 pandemic, the fourth industrial revolution, and the scramble to address climate change—all of which are driving further innovation.

With IP disputes common, companies and governments should make sure to choose the right dispute resolution mechanism.

The rapid development of new technologies and processes in sectors such as pharmaceuticals, biotechnology, life sciences, aerospace, energy, telecommunications, and information technology has led to an exponential increase in the number of patents and trademarks issued and domain name registrations around the globe. The increase is unlikely to slow with ongoing events like the COVID 19 pandemic, the fourth industrial revolution, and the scramble to address climate change—all of which are driving further innovation.

To harness and capitalize on these advances, many companies and governments are seeking strategic partnerships with international business partners (both public and private), particularly in emerging markets. Business arrangements are increasingly cross-border and complex, often involving multiple parties in high-value, long-term arrangements. Because intellectual property (**IP**) is often an important asset in many of those arrangements, the transaction documents often include provisions addressing the use of IP, such as licensing, cooperation, or technology transfer agreements. In most cases, these seek to protect IP rights across a number of jurisdictions. With IP disputes common, companies and governments should make sure to choose the right dispute resolution mechanism.

Advantages of international arbitration for IP disputes

Parties are increasingly choosing international arbitration to resolve disputes that might arise in arrangements that involve IP in more than one country. International arbitration is well suited for such complex, cross-border disputes.

Ability to select an expert arbitrator

Although some jurisdictions have specialized IP courts, many do not. In some regions, IP disputes are resolved by jury trials, with laypersons deciding important factual issues. This raises concerns over whether those deciding the dispute have sufficient relevant skills to make the right decision. If parties include an arbitration clause, they can require that the tribunal have the appropriate expertise.

Private and confidential

International arbitration is a private and often confidential process, unlike most court proceedings. This offers benefits, from reducing the risk to proprietary or commercially sensitive information to avoiding airing disagreements between parties in open court.

Less formal and adversarial

Arbitration is less formal than litigation and, although not always less contentious, it can offer a less adversarial process than litigation. When combined with the confidential nature of most arbitrations, the less adversarial nature can help preserve a long-term or strategically important business relationship, which may be the most beneficial outcome.

Neutrality

Arbitration provides an impartial forum with neutral decision makers under acceptable law and in a language with which the parties are comfortable. It allows parties to avoid being before foreign courts, which can be particularly important where disputes involve jurisdictions, including emerging markets, where parties have less confidence (a) in the local rule of law or (b) that local courts will decide cases independently, fairly, impartially, and timely. Concerns over neutrality may be compounded where states, state-owned entities, or nationally strategic matters are involved.

One forum for all disputes

Where companies operate internationally, IP disputes often involve more than one jurisdiction. Because many IP rights protections are territorial in nature, the resolution of a dispute may require parallel litigation in courts in different countries. This can lead to conflicting judgments with the scope of the parties' rights interpreted differently by different courts. Litigation in multiple fora may also complicate settlement. International arbitration can offer a single forum where multiple disputes can be resolved holistically, before one tribunal. This offers greater consistency of outcome and often presents better opportunities for a global settlement.

Flexible process with good procedural safeguards. Major arbitral rules are designed to work flexibly and accommodate the practices of parties from different legal traditions. Parties can tailor proceedings to their needs and that of the specific dispute. When leveraged properly, this is a powerful tool. As one example, discovery in IP litigation, particularly in the United States, can be extremely expensive. In arbitration, parties can agree on a limited scope of discovery, or agree that evidence will be on paper only and hearings be held virtually, saving significant time and cost. But, parties must actively seek to leverage procedural flexibility. That is where it becomes critical to hire experienced arbitration counsel. Too often these benefits are missed where, for example, proceedings are run by litigators who simply treat the arbitration as they would a lawsuit brought before a court.

That is not to say that it is a procedural 'free-for-all.' Arbitration rules provide procedural safeguards. Some are mandatory, while others function through agreement and at the request of the parties. For example, interim relief (often of critical importance in IP disputes) can be sought in the arbitration, although parties often can seek interim relief from the courts in support of the arbitration. Expedited procedures may also be available, from appointment of an emergency arbitrator to accelerating the procedural timeline, curtailing disclosure, or imposing a shorter deadline for issuance of the award.

Cost and time efficiencies

Because parties and the tribunal can tailor the process, arbitration has the potential to reduce the costs and time of proceedings. As explained above, it does not always live up to this promise, but where counsel leverage procedural flexibility and utilize tools available to minimize costs (such as technologies to drive efficiencies in case management, disclosure, and document review), time and cost savings can be significant. This is magnified when arbitrators are experienced and possess excellent case management skills.

Finality

Arbitration awards are typically expressed as final and binding. Most arbitral rules and laws limit rights to appeal or challenge awards. While the ability to challenge an award on grounds of procedural unfairness, bias, or want of jurisdiction is usually available, most jurisdictions limit the right to appeal an award to multiple levels of senior courts. Outside the United States, this generally avoids protracted challenges to the decision.

Enforcement

Arbitration offers significant benefits when it comes to enforcement where disputes are cross-border. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 'New York Convention,' offers a regime for enforcement of awards that is accepted in almost all countries. It restricts the ability of domestic courts to reconsider the merits of awards and limits challenges to enforcement to a limited set of grounds (largely, serious procedural irregularities or lack of jurisdiction). There is no equivalent regime for enforcement of foreign court judgments, so it is often harder to enforce court judgments from one country in another country.

Limitations of international arbitration for IP disputes

Pure IP rights disputes can arise between parties with no prior relationship. Arbitration is a consensual process, and the right to go to arbitration is rooted in the parties' agreement to arbitrate. Where there is no contractual relationship, an arbitration cannot occur except by agreement after a dispute has arisen. If parties can subsequently agree to arbitrate the dispute, they can avoid litigation and reap the benefits of arbitration.

Because arbitration is a form of private dispute resolution, an award that is binding on the parties to the arbitration will not be binding against the whole world. Similarly, the award may not amount to binding precedent. That said, for strategic reasons, these points may sometimes be an advantage rather than a disadvantage.

Some national laws prohibit arbitration of certain fundamental IP rights. For example, questions of the validity of IP rights (such as the validity of a patent) may not be arbitrable. This varies globally so it is important to consult experienced arbitration counsel when choosing the dispute resolution forum.

> ***Actions by governments can impact the profitability or even viability of commercial arrangements.***

Parallel rights under investment treaties

Where a dispute involves a state and a foreign investor, the investor may have additional rights under a bilateral investment treaty, including the right to sue the state in international arbitration. Such rights often run parallel to rights under domestic law or the law of the contract. Treaty rights can offer important protections, particularly in current times where governments are taking steps to address complex issues of national strategic importance - COVID 19, national health, climate change, the energy transition, energy security, the fourth industrial revolution, trade disputes, rising nationalism - to name but a few. Actions by governments can impact the profitability or even viability of commercial arrangements. In those circumstances, foreign investors may find they have little-to-no recourse before domestic courts. Where they have rights under an investment treaty, however, those rights offer powerful legal protections and a stronger negotiating position.

Concluding thoughts

As companies and governments seek to leverage opportunities arising from rapid developments in technologies and processes, it is critical that they think about protecting IP assets. A right is only valuable if it is enforceable, and a crucial element of enforceability is having an effective dispute resolution mechanism. Choosing international arbitration to resolve IP disputes offers significant benefits over litigation. However, when deciding on the dispute resolution mechanism, parties should assess the dynamics of the business and contractual arrangements. The best dispute resolution proceedings are tailored to the specific circumstances. An ounce of prevention has always been worth more than a pound of cure.

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Baseball arbitration pitched to level the playing field in aviation

Why Australian airlines are calling for 'baseball arbitration'

By Dylan McKimmie, Daniel Allman, Alan de Rochefort-Reynolds and Caterina Presutti

Australian airlines are increasingly calling for 'baseball arbitration' in a bid to rebalance bargaining over prices for airport services in Australia. This article considers why that proposal was made, how the arbitration model would work, and what can be done to make the process most effective.

Background – negotiating prices for aeronautical services

Prices for aeronautical services, such as runway access, at Australia's major airports are currently set through direct negotiations between airports and individual airlines. According to many airlines however, major airports in Australia, including Sydney, Melbourne, Brisbane, and Perth, have outsized bargaining power, leading to imbalanced negotiations and higher prices for airport services. Australian airlines contend that they lack the countervailing market power to successfully negotiate a reduction in high prices for airport services, and that this disparity in bargaining power is causing economic harm.

Countervailing market power for an airline would mean the ability to credibly threaten withdrawal or a substantial reduction in its operations at an airport if it is unsatisfied with a negotiated price for services. This, however, is difficult in the Australian context for a number of reasons. Most fundamentally, airlines depend on airports for their services, there is no alternative option for landing or accessing services if an airline disagrees with an airport's prices. Compounding this further, the major Australian airports have geographic monopolies, by virtue of the fact that there is usually only one airport per major city, and, at best, secondary airports are typically in a location that cannot directly compete for the bulk of airline traffic into the city. The commercial reality is that if an airline stops flying to a major airport, a competitor will quickly fill the gap.

> ***Most fundamentally, airlines depend on airports for their services, there is no alternative option for landing or accessing services if an airline disagrees with an airport's prices.***

Meanwhile, the effectiveness of the current regulatory regime is under question. Aeronautical service prices are regulated under the Competition and *Consumer Act 2010* (Cth) (**CCA**), with monitoring by the Australian Competition and Consumer Commission (**ACCC**) providing the main protection against misuse of market power. Despite this, in the recent case of *Perth Airport Pty Ltd v Qantas Airways Ltd (No 3)* [2022] WASC 51 the Supreme Court of Western Australia held that Perth Airport was a "*monopoly supplier*" of aeronautical services and exercised "*substantial market power*". Although the airport largely succeeded in the action, Le Miere J awarded a lower rate for freight and non-passenger services than the airport sought.

Arbitration before the ACCC provides another potential check to this power imbalance, but in reality it is considered difficult to access and is often time-consuming. Part IIIA of the CCA provides that only services *"declared"* under the National Access Regime are arbitrable, such services being declared on a case-by-case basis which is a slow, uncertain process, and subject to judicial or administrative review once complete. In one case, an airline's application to have certain domestic services at a major airport *"declared"* spurred five years of litigation.

A call for change – introducing compulsory 'baseball' arbitration

Responding to an Australian Government inquiry in 2018, the peak body for Australian and New Zealand airlines proposed a new model for setting service prices. The airlines suggested amending the current regulatory regime to create a negotiate-arbitrate model, involving so-called 'baseball arbitration' or 'final offer arbitration' (FOA). FOA was first developed by Major League Baseball in the United States of America (hence the name 'baseball arbitration') in response to the League's 'reserve system.' FOA was seen as a means of enabling fairer salary negotiations and increasing player wages in the face of a system that was stifling salaries and prohibiting players from moving freely between teams.

> ***According to the airlines and the ACCC, baseball arbitration would represent a real barrier to misuses of market power that drive prices to an unreasonably high level.***

In essence, the FOA process requires each party to put forward its final offer for a service, and an independent arbitrator then decides which offer is more reasonable. FOA differs from conventional arbitration insofar as the arbitrator lacks discretion to craft their own award; instead, the arbitrator must simply pick one of the offers put forward by the parties. Under this model, arbitration would be compulsory where a major Australian airport and an airline reached an impasse in negotiations over service prices. According to the airlines and the ACCC, baseball arbitration would represent a real barrier to misuses of market power that drive prices to an unreasonably high level.

The Productivity Commission, which is the Australian Government's independent research and advisory body, has rejected this proposal. The Commission disagrees in principle that the major Australian airports have misused their market power, and has expressed concern that the FOA model would not permit administrative or judicial review of decisions. The Commission has also warned that the model is likely to favour airlines, because an airline dissatisfied with the outcome of the arbitral process could modify its operations to mitigate the impact of a lower price, whereas an airport would have no option but to accept the ruling.

Despite being rejected by the Productivity Commission, the FOA proposal continues to attract support from airlines, and the recent decision in Perth Airport means the model is likely to be considered again in the Government's next inquiry into regulation of airport services. For that reason, it is worthwhile to consider how a negotiate-arbitrate mechanism could operate in practice.

Final offer arbitration in practice

Advocates of the FOA model highlight two key benefits of the process. Firstly, it encourages parties to put forward reasonable offers for airport services in the first place. A complaint sometimes levelled against conventional arbitration is that arbitrators simply "*split the difference*" between the parties, and this perception in turn incentivises extreme positions. In contrast, FOA removes that incentive as, if one party's offer is clearly unreasonable, the arbitrator will likely side with the more moderate offer put forward by its counterpart.

> ***FOA is generally faster and less expensive than conventional arbitration or litigation.***

Secondly, this incentive to moderate offers should bring the parties closer together at an earlier stage in the dispute resolution process, increasing the prospect of a negotiated settlement before arbitration is even commenced. An early settlement reduces costs and can help maintain positive business links, which is particularly important in sectors like aviation where, by virtue of the small number of players in the industry, entities typically have long-term relationships.

Even where settlement is not possible, FOA is generally faster and less expensive than conventional arbitration or litigation. Indeed, a variety of sectors in other countries already rely on FOA, notably the US Federal Communications Commission, which has imposed FOA as a condition for vertical merger clearance in the broadcasting sector, and the Canadian transport industry, where it is available to shippers for the resolution of disputes with carriers and also in railway disputes.

In Australia, too, FOA is already used in the gas industry, with the Australian Energy Regulator acting as arbitrator. This form of FOA was introduced into the National Gas Law and National Gas Rules in 2017 in an effort to address unequal levels of bargaining power and access to information faced by shippers when seeking access to pipeline services. The News Media and Digital Platforms Mandatory Bargaining Code, enacted in 2021, also provides for FOA to determine the amount which *"designated"* digital platforms must pay news businesses for using their content online.

Key design features

The airline industry has its own specific characteristics that differ to the sectors in which FOA has been used previously, FOA is nevertheless a flexible process and there is no reason, in principle, that it could not be tailored to meet the needs of aviation parties. This could be done either by statute or through standard rules that parties would select to govern the finer details of their arbitration.

Certain design choices are likely to enhance efficiency and improve the quality of outcomes in FOA:

- **Limiting the types of disputes referred to FOA**. It has been common in other sectors to strictly limit the types of disputes that are amenable to FOA. For example, the News Media and Digital Platforms Mandatory Bargaining Code involves arbitration only to resolve the remuneration paid by a digital platform that makes covered news content available. Similarly, limiting FOA to the setting of prices for services at major airports narrows the issues for determination, helps focus the dispute resolution process and protects other aspects of the parties' relationship from the dispute. It also reduces the circumstances in which arbitration may be initiated.
- **'Package offers' or 'issue-by-issue'.** This feature addresses how the disputing parties' 'offers' should be made. 'Package offers' address all of the disputed issues, with the arbitrator choosing one of those packages in its entirety. 'Issue-by-issue' offers, in contrast, involve the arbitrator choosing the most reasonable final offer on each issue. This allows each aspect of the parties' dispute to be addressed individually and can be useful in circumstances where some of the issues are closely related. However, if there are several distinct issues – for example, the price of runway access and terminal usage – 'issue-by-issue' offers can start to resemble conventional arbitration. In that situation, 'package offers' may be more appropriate for ensuring efficiency of the process.
- **Multiple final offers**. Allowing multiple rounds of final offers can narrow the distance between the parties' positions. A key benefit is that this better facilitates negotiated settlements. Where settlement occurs, the arbitration can be discontinued.
- **Identity of the arbitrator.** The use of independent commercial arbitrators is preferable, rather than designating a permanent authority such as the ACCC to perform that role, and has in fact been called for by the ACCC. Experienced commercial arbitrators are well placed to focus on the commerciality of the issues in dispute.
- **Time for decisions**. Under the current regime, the ACCC as arbitrator must issue a decision within 180 days. There is no reason why this period – or a shorter one – could not be used with FOA. Leading arbitration rules like the ICC Rules also require awards handed down within 6 months from the initiation of the dispute (although that period can be extended).

FOA is nevertheless a flexible process and there is no reason, in principle, that it could not be tailored to meet the needs of aviation parties

Conclusion

If FOA is to become part of the regime for setting prices of aeronautical services in Australia, careful consideration should be given to designing the mechanism in a way that best suits aviation parties. Lessons drawn from other sectors and from overseas offer a useful starting point, however input by local industry participants would be critical to establishing an effective process for disputes between airlines and the major airports.

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A tale of two cities – one award, two enforcement courts

UK Supreme Court reinforces *Enka v Chubb* principles to determine what law will govern an arbitration agreement where no such law is expressly provided

By James Rogers, Martin Valasek, Katie Chung and Madeline Hallwright

Applying the principles set out in its seminal judgment in *Enka v Chubb*, the UK Supreme Court has confirmed in *Kabab-Ji SAL v Kout Food Group [2021] UKSC 48* that if the parties to a contract have not stipulated which law will govern their arbitration agreement, the governing law of the contract will apply (if specified). The decision is important in that it clarifies that the approach set out in *Enka v Chubb* is relevant at all stages of the arbitral process, including at enforcement (i.e. even if an award has already been made).

However, while the English law approach to this question is now settled, uncertainty remains at an international level. The case is currently being considered by the French Court of Cassation and a contradictory judgment to that of the UK Supreme Court is expected (though a decision is still pending). These potentially divergent approaches to the law governing the arbitration agreement (and therefore the issues that turn on that question) highlight the importance of expressly identifying the governing law of both the underlying main contract and the arbitration agreement so as to avoid any uncertainty and protracted legal proceedings.

Background

In 2001, Kabab-Ji SAL (**Kabab-Ji**) entered into a franchise development agreement (**FDA**) with Al Homaizi Foodstuff Company (**AHFC**). Under the FDA, Kabab-Ji granted a licence to AHFC to operate one of Kabab-Ji's restaurant franchises in Kuwait.

Any dispute was to be referred to an ICC arbitration seated in Paris; however, the FDA itself was to be governed by English law. There were no express provisions regarding the governing law of the arbitration agreement.

After a dispute arose under the FDA, Kabab-Ji commenced proceedings at the ICC in Paris against AHFC's parent company, Kout Food Group (Kout Food), on the basis that a novation of the FDA to Kout Food was to be inferred by the conduct of the parties. By majority decision, the ICC tribunal concluded that Kout Food was indeed bound by and in breach of the FDA, despite the FDA containing a number of no oral modification clauses.

Kout Food applied to the Paris Court of Appeal to have the arbitral award set aside on the basis that, amongst other things, it was not a party to the arbitration agreement. Kabab-Ji then issued proceedings in England for the enforcement of the award.

Both the Commercial Court and the Court of Appeal in England held that the governing law of the arbitration agreement was English law and that under English law, Kout Food was not a party to the FDA. The ICC tribunal therefore had no jurisdiction to issue an award against Kout Food. On that basis, the Court of Appeal refused to recognise and enforce the arbitral award.

The Supreme Court agreed with the lower courts and held that:

i. In the absence of an express provision regarding the governing law of the arbitration agreement, the parties' choice of the governing law of the main contract (English law) applied (per *Enka v Chubb*).
ii. Under English law, Kout Food could not be said to be a party to the arbitration agreement.
iii. The Court of Appeal was justified in refusing to recognise and enforce the arbitral award.

In contrast, the Paris Court of Appeal refused to set aside the award on the basis that French law applies to the arbitration agreement (as the law most closely connected with the seat), and under French law Kout Food was considered to be a party to the FDA.

Comment

Kabab-Ji v Kout Food illustrates the importance of specifying the governing law of the arbitration agreement for three key reasons:

i. Not doing so exposes the parties to the risk of protracted and costly litigation.
ii. Even if the courts in one jurisdiction uphold the arbitral award, in another the courts may refuse to enforce it.
iii. Should a party to the arbitration agreement want to bring proceedings against a non-party, it is likely that English courts will apply the governing law of that agreement to determine whether that is possible.

On the latter point, the French courts have made clear that a non-party can be bound by an arbitration agreement by reason of the parties' conduct or, as in the 2010/2011 case of *Dallah v Government of Pakistan*, if it can be proved that it was the common intention of the parties that the non-party be bound.

As in *Kabab-Ji v Kout Food*, in *Dallah v Pakistan* the UK Supreme Court declined to enforce an ICC award on the basis that the Government of Pakistan was a non-party and therefore was not bound by the arbitration agreement. Interestingly though in that case, the UK Supreme Court applied French, not English, law principles. In doing so, it came to the opposite conclusion of the ICC arbitrators and that of the Paris Court of Appeal.

In *Kabab-Ji v Kout Food*, it remains to be seen whether the French Court of Cassation will uphold the Paris Court of Appeal's decision or come to a similar conclusion to that of the UK Supreme Court in *Dallah v Pakistan*. It is likely that the English and French courts will continue to diverge on this issue.


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Singapore allows conditional fee arrangements

An update on the amendments to the Legal Profession Act 1966, allowing conditional fee arrangements in certain proceedings for the first time under Singapore law

By Katie Chung, Sherina Petit, Andrew Battisson, Johnson Teo and Edward Low

On 12 January 2022, Singapore announced amendments to the Legal Profession Act 1966 (LPA), allowing Conditional Fee Arrangements (CFA) in certain legal proceedings (Amendments). Prior to this, CFAs were prohibited under Singapore law. The Amendments bring Singapore law in line with other major common law jurisdictions such as Australia and England & Wales, and is a significant development in the Singapore Government's continued efforts to maintain Singapore's position as an attractive dispute resolution hub. Although CFAs may be entered into for ongoing proceedings, the Singapore Government has not yet announced when the Amendments will come into effect. It is likely that lawyers practising in Singapore may offer CFAs for international arbitrations and related court or mediation proceedings.

What are CFAs

CFAs are arrangements whereby a lawyer receives payment of the whole or part of his/her legal fees only in stipulated circumstances. For example, a CFA can stipulate that if a particular claim succeeds on the merits, an uplift fee would be paid to the lawyer. Alternatively, a CFA can take the form of a 'no win, no fee' or 'no win, less fee' agreement. CFAs are not contingency fee agreements, which are arrangements where the lawyer receives an agreed percentage of the damages awarded. Such agreements remain prohibited under Singapore law.

CFAs are arrangements whereby a lawyer receives payment of the whole or part of his/her legal fees only in stipulated circumstances.

CFAs in Singapore

At present, many of the critical elements which would govern the new CFA regime in Singapore have yet to be finalised - these include:

a. the type of legal proceedings in which CFAs are permissible;

b. the required terms and conditions in CFAs;

c. requirements relating to maximum limits on the remuneration or costs (including the uplift fee) that may be charged under a CFA;

d. requirements relating to prescribed information that must be provided to a client before any CFA is entered into; and

e. the type(s) of Parties that are permitted to enter into CFAs.

During the second reading of the bill enacting the Amendments (**Bill**), the Second Minister of Law, Mr Edwin Tong, stated that the CFAs could first be allowed for *"proceedings where litigants tend to be more commercially sophisticated".* These proceedings include: (i) international and domestic arbitration proceedings; (ii) certain legal proceedings in the Singapore International Commercial Court (**SICC**); and (iii) related court and mediation proceedings. These are the exact same categories to which the recently extended third party funding framework in Singapore applies, demonstrating the Singapore Government's appetite for innovation in these areas. We expect the Singapore Government to provide further details of the type of proceedings for which CFAs are permitted through subsidiary legislation in the coming months.

There are several noteworthy features of Singapore's CFA regime:

a. A CFA will not affect the recovery of costs from the client by another party (Section 115C of the Bill).

b. It specifically provides that the uplift fee cannot be recovered as part of an adverse costs order against a losing party (Section 115C(2) of the Bill).

c. In any event, a client cannot recover from the losing party more than the amount payable by the client to the client's lawyer (Section 115C(3) of the Bill).

These provisions were enacted to minimise any additional disputes and satellite litigation relating to adverse cost orders in legal proceedings where one or more parties may have CFAs in place. For example, these provisions would eliminate the situation where parties in an arbitration disagree on whether an arbitral tribunal has the power to award the "uplift fee" of a winning party in an adverse cost order. These provisions are sensible and are similar to the regime in England & Wales and the proposed outcome-related fee structures (**ORFS**) regime in Hong Kong.

Singapore's CFA regime is a sensible one. It would enhance access to justice, in particular, for parties who may have a meritorious claim but are experiencing cash-flow difficulties due to the pandemic. Moreover, the framework would level the playing field for Singapore lawyers vis-à-vis their counterparts in other jurisdictions such as England & Wales and Australia, who are already able to offer such agreements. In this respect, Singapore's CFA regime has finally caught up with England & Wales and Australia, where CFAs have been legal since the 1990s.

> ***Singapore's CFA regime is a sensible one. It would enhance access to justice, in particular, for parties who may have a meritorious claim but are experiencing cash-flow difficulties due to the pandemic.***

How is Singapore's CFA regime different from other common law jurisdictions?

By way of comparison, the Hong Kong Law Reform Commission published a detailed report in December 2021 recommending that lawyers practising in Hong Kong be allowed to use ORFS for arbitrations, administered or *ad hoc*, seated in or outside of Hong Kong, emergency arbitrator proceedings, as well as court and mediation proceedings under Hong Kong's Arbitration Ordinance. At the time of writing, those recommendations have yet to be crystallised into draft legislation.

CFAs as well as contingency fee agreements are presently prohibited in India under Rule 20, Chapter II, Part VI, Bar Council of India Rules on Professional Conduct. Indian lawyers practising in India are therefore not be able to offer CFAs in international arbitrations or domestic litigation.

Despite the Amendments, the Singapore CFA regime is still more restrictive than England & Wales, Australia and the proposed regime in Hong Kong in two key aspects, namely:

a. the continued prohibition of contingency fee agreements; and
b. the comparatively limited applicability of CFAs.

Contingency fee agreements have been permitted in England & Wales since 2013. Additionally, unlike the anticipated position in Singapore, CFAs (and contingency fee agreements) are permitted in most legal proceedings in England & Wales (including litigation), with limited exceptions, such as criminal and family proceedings. Similarly, CFAs are also permitted in most legal proceedings in Australia (including litigation), with limited exceptions, such as criminal and family proceedings. However, whilst contingency fee agreements remain illegal in most Australian states, there have been some developments in Victoria allowing for claimants in class action proceedings to apply to the Victoria Supreme Court for an order allowing lawyers to utilise contingency fee agreements, although the Victoria Supreme Court has denied one of the first applications for such an agreement. Lastly, the proposed ORFS regime in Hong Kong is wide enough to cover contingency fee agreements.

Conclusion

As with the introduction of third party funding in Singapore, the implementation of the CFA regime in Singapore and any expansion as to its scope is likely to be incremental and dependent on the take-up of CFAs and the viability of the accompanying safeguards to protect clients from the potential abuse of CFAs. The availability of CFAs in Singapore may prove to be beneficial for corporate clients pursuing high stakes claims and would be a way in which lawyers can align with the clients' commercial objectives and share in the upside of a successful outcome.

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