

International arbitration report

Issue 8 | June 2017

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International arbitration report

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Editorial

Welcome to issue 8 of Norton Rose Fulbright's *International arbitration report*.

In this issue, we feature a number of articles on investor-state dispute settlement (ISDS). Lawyers from across our global firm review various developments in this area, including requests for reconsideration in ICSID and UNCITRAL arbitration, whether the doctrine of precedent could or should apply in investment arbitration and the trends in investor-state disputes that can be identified from recent ICSID statistics. We also have the pleasure of interviewing Meg Kinnear, Secretary-General of ICSID, to get her thoughts on key developments in ICSID arbitration during her term, challenges facing ISDS and how we might see it evolve over the next 50 years.

In addition, we look at frequently asked questions about ISDS (including common criticisms of ISDS) and discuss alternatives to ISDS such as the EU's proposed investment court system and investor-state mediation.

We give an update on US international trade policy under the new Trump administration, review recent reforms to South Africa's commercial arbitration and investment arbitration regimes, consider whether Brexit might affect the UK's investment regime, and also look at the new Russian guidelines for bilateral investment treaties and changes to the dispute settlement mechanisms.

We offer a round up of new arbitral rules and discuss recent developments in both the Middle East and England. Plus we offer a brief comparative guide to state immunity in key common law jurisdictions.

Our case law updates analyze a landmark Singapore Court of Appeal decision on investment arbitration, key recent English arbitration law developments and offer a Chinese case study of how compromise arbitration agreements might increase risks for parties.



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About the cover

Our front cover for this issue features the Martin Luther King Jr. Memorial located in West Potomac Park in Washington, DC. Washington, DC is the home of the International Centre for Settlement of Investment Disputes.



Developments and reform of investor-state dispute settlement

Q&A with Meg Kinnear, Secretary General, ICSID

Written by Mark Baker and Cara Dowling

We speak with Meg Kinnear, Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) about the evolution of her role with ICSID as well as investor-state dispute settlement (ISDS) itself; the changes she has seen over the last eight years and challenges during her new term. We also discuss common misconceptions about ISDS and how the arbitration community should be responding to criticisms of ISDS.

How has your role changed during your eight years as Secretary-General of ICSID?

I was fortunate to be the first stand-alone Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID), and so I had a lot of scope to define how to fulfil my role. My first months were spent learning how things were done within the ICSID Secretariat and talking to internal and external stakeholders to get their views on what our priorities ought to be. The next step was to ensure the Centre was properly organized, resourced and staffed to deliver the best service possible. This included a lot of work that likely was not visible from outside the Centre but which has had an immense impact on our operation. We did a significant amount of staffing, adding expert lawyers, paralegals, administrative legal assistants, dedicated hearings organizers, and financial administrators:

indeed, we have doubled our staff from 34 people in 2009 to 70 staff today. We accompanied this increase in staff with internal training and development of best practices for every step in an ICSID case. We also adopted automated internal case tracking, financial and case management systems, and have upgraded the technology and rooms used for cases. These continue to have an enormous effect on our practice.

The next step was to ensure stakeholders knew the changes that had been made and understood what ICSID could do. For example, many counsel did not realize that we administer UNCITRAL cases as well as ICSID Convention and ICSID Additional Facility cases, or that we host hearings for cases under non-investment rules and between states under trade treaties such as the Canada-US Softwood Lumber Treaty. We also developed a number of knowledge projects, notably the new website which

is now trilingual, the statistics report, a revamped ICSID Review, and a quarterly newsletter. Another example is the “ICSID 101” training program that we have now given across the world. Today I often hear back from arbitrators and counsel who see the positive impact of all these steps and are really impressed with the quality and variety of services ICSID can provide and the top calibre of our staff. That has been very rewarding – to see that our efforts are noticed and have a positive effect on the cases.

We are participating in the discussion led by the EU and Canada about the potential for a multilateral standing court on investment

You were recently re-elected for a further six year term; what do you see as your main challenges during this new term?

The priority is always to provide the highest level of service in the most cost and time effective manner, so we continue to focus on that. However, there are several ongoing projects that contribute to investment arbitration on a more systemic level. The most important of these is the project to amend the ICSID rules. I do not know how far-reaching these will be, but we have sought state, private sector and public comment, so I am certain this will be a useful process. Second, we are participating in the discussion led by the EU and Canada about the potential for a multilateral standing court on investment. This is a decision to be taken by sovereigns, but if states want such a system, it seems obvious that ICSID could best provide it in the most expert and cost effective manner, so we will see how that discussion evolves. Third, we have been named as the Secretariat for the investment chapter of the Canada-EU FTA, and we are ready to offer these services when the relevant provisions go in force. We have also advised other treaty negotiation partners that we are glad to provide a similar service for their agreements.

We have seen some anti-investment arbitration sentiment in the global press; what are the main misconceptions about ISDS?

There are a number of fundamental misconceptions. For example, there is a prevailing belief that investors always win their cases, when in fact the empirical evidence consistently shows that states win slightly more than half of the cases. Another misconception is that ISDS is only for the Fortune 500 Company. In fact, many small and medium sized companies and individuals use ISDS, and it is a very valuable remedy for them.

There is a real need to explain what the ISDS system is and isn't, and to make accurate and balanced information available as a basis for the public dialogue on the topic. This was one of the reasons we started publishing our statistics – to provide an empirical basis for the on-going discussion.

How should the arbitration community be responding to these criticisms and addressing the concerns raised about ISDS?

There is a real need to explain what the ISDS system is and isn't, and to make accurate and balanced information available as a basis for the public dialogue on the topic. This was one of the reasons we started publishing our statistics – to provide an empirical basis for the on-going discussion. It is also one of the reasons we favor transparency, and have made a point of getting information about ISDS into the public domain. Perhaps the best example of this effort is web-casting hearings, which are available for every case. Many of these webcasts are on our ICSID website and I always encourage those who critique the system to have a look at these videos before they come to a conclusion about the system. What they will see is a professional adjudication addressing complicated factual and legal matters in an impartial manner.

In addition, we should be open to continuously improving the ISDS system as we get practical experience. I think that the current system is a very impressive and effective one, and is unique in international dispute settlement. One of the most notable features is how rapidly ISDS has evolved in a short period. So, for example, we have seen increasing acceptance of open hearings, third party submissions, summary process to dismiss cases for lack of legal merit and the like. On the substantive side, we have seen states drafting increasingly clear and detailed treaties to better express their purpose and object. This is exactly as it should be. ICSID has been a leader in the evolution of the ISDS system, for example with the transparency initiatives and summary dismissal provisions in the 2006 rules. Another opportunity for evolution is currently available in our amendment process and I am excited to see this unfold.

ICSID has been a leader in the evolution of the ISDS system, for example with the transparency initiatives and summary dismissal provisions in the 2006 rules. Another opportunity for evolution is currently available in our amendment process.

Last year marked the 50th anniversary of the ICSID Convention; which to your mind, have been the key developments in investment arbitration during that time?

The key development in international investment arbitration has been the increased availability of treaty-based arbitration. Interestingly, the drafters of the ICSID Convention anticipated that contractual disputes would be the mainstay of its services. However, over 75 per cent of ICSID cases today are based on consent in an investment treaty and the promises undertaken in those agreements. This has created a very specialized international investment law and has grown public international law at an unprecedented rate.

How do you see investment dispute settlement evolving over the next 50 years?

My sense is that ISDS will become increasingly tailored to its context, with specialized provisions that recognize the particular needs of investors and states involved in a case. We have already seen this with draft texts in the current generation of investment treaties which allow for notes of interpretation, encourage mediation, especially for small and medium sized enterprises, or build in mechanisms for the dismissal of cases without legal merit.

There has been discussion about setting up some form of investment court or appellate body for investment arbitration awards. How do these nascent appellate proposals contrast with the ICSID annulment procedures?

The discussion about a multilateral investment court has arisen at various times since the early 2000s. Indeed, in 2004 ICSID proposed the creation of an international appellate facility to

hear appeals from investment tribunals but there was insufficient support for the idea at the time. Generally these proposals vary from the current annulment system in two ways. First, they allow review on broader grounds. These proposals generally suggest review on the grounds of error of law, fact and procedure, whereas ICSID annulment is limited to the grounds in Article 52 of the Convention and was designed to be a limited remedy for serious error, usually of a procedural nature. The second difference is in the adjudicator. Most of these proposals suggest a standing appellate tribunal composed of nationals from the Contracting States plus a national of a third State. The ICSID annulment committees are selected by the Chairman of the ICSID Administrative Council from the Panel of Arbitrators and cannot be a national of either disputing party or of the state of any of the tribunal members whose decision is at issue.

ICSID recently announced its intention to update the ICSID Rules and Regulations; what are the drivers behind the decision to update the rules?

The main factor for taking a look at the ICSID rules is simply to keep them modern and effective. The last rule amendment process was in 2004-6, and so we thought it was time to have another look. We have asked states, the private sector and the public to identify any issues they believe should be addressed, and the Centre has some housekeeping items that we will propose to members as well. Whatever is done, we have stressed that the ICSID Rules will maintain their balanced approach and will continue to be the most effective tool for disputing parties.

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Frequently asked questions about investor-state dispute settlement

Written by Martin Valasek and Alison FitzGerald

What is ISDS?

ISDS, or investor-state dispute settlement, is a mechanism that enables foreign investors to resolve disputes with the government of the country where their investment was made (host state) in a neutral forum through binding international arbitration.

ISDS agreements are most commonly found in international treaties between states but may also be found in domestic legislation and contracts. These instruments typically set out the substantive protections or obligations that foreign investors are entitled to, the breach of which gives rise to a right to bring a claim directly against the host state.

How many treaties include ISDS agreements?

It is not known precisely how many treaties include ISDS agreements. Estimates range from over 3000 to 3400 treaties globally. Many are found in bilateral investment treaties (BITs). Some are included as chapters of free trade agreements (FTAs) such as Chapter 11 of the North American Free Trade Agreement (NAFTA). Others form part of sector specific treaties such as the Energy Charter Treaty (ECT).

Historically, foreign investors had no choice but to seek to resolve disputes with host states before the state's own local courts. However, they often found themselves unable to obtain full – or indeed any – recovery.

What is the purpose of ISDS and why is it needed?

Without ISDS, many foreign investors would be left with no meaningful remedy in the face of arbitrary, capricious or other unfair treatment by a host state.

Historically, foreign investors had no choice but to seek to resolve disputes with host states before the state's own local courts. However, they often found themselves unable to obtain full – or indeed any – recovery. Obstacles included an absence of protections under the local law, domestic sovereign or crown immunity rules and/or a lack of judicial independence. Diplomatic intervention on behalf of the foreign investor, to the extent available, was inconsistent and not always appropriate

to resolve the dispute. State-to-state dispute resolution mechanisms would politicize otherwise private disputes. ISDS emerged in part from a desire to depoliticize disputes by removing them from the realm of diplomacy and inter-state relations.

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 favored nation treatment, no expropriation without full (and prompt) compensation and 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. Interim relief whilst proceedings are ongoing may also be available, including interlocutory measures to compel or restrain a party from certain conduct (such as might aggravate the dispute or render the dispute nugatory).

Depending on the host state’s legal regime, ISDS protections and remedies can be more favorable than local law protections.

Do ISDS protections/remedies differ from those available to domestic investors under national laws?

Depending on the host state’s legal regime, ISDS protections and remedies can be more favorable than local law protections available to domestic investors. For example, the local law of the host state may permit the state to expropriate property without providing any compensation or for less than full compensation. A domestic investor would therefore have no recourse against state expropriation. A foreign investor, however, may have additional rights where an applicable treaty provides for full (and prompt) compensation, and may therefore pursue compensation under the treaty regime through international arbitration.

Who can bring an ISDS claim?

The ISDS agreement will set out who has standing to bring a claim. Most define who is an “investor” and what is a qualifying “investment”. Generally, a claimant may be either an individual or an organization.

Claimants typically must satisfy nationality criteria by demonstrating that they: (a) are a national of a state that is a party to the treaty containing the ISDS agreement; and (b) have an investment in the territory of another state that is a party to the treaty.

How does ISDS work?

The specifics of ISDS agreements will vary, however most tend to follow a pattern. There will be a notice provision requiring a claimant to notify the host state in writing of a dispute. Some impose a “cooling off” period in which the claimant and host state must attempt to resolve the dispute amicably. A claimant may also be required during this period to exhaust local remedies. Once this period has expired, and assuming no other pre-conditions apply (e.g. mediation), the claimant may commence arbitration.

The ISDS agreement will typically stipulate the rules that will apply to the proceedings or permit the claimant to elect between certain rules which the host state has consented to in advance. Common rules include the ICSID Arbitration Rules, ICSID Additional Facility Rules, UNCITRAL Arbitration Rules and ICC Rules of Arbitration.

The seat of the arbitration may be defined in the ISDS agreement. If it is not, it may be determined by the tribunal, once constituted, in accordance with the applicable rules. The seat is important because it establishes the supporting legal framework for the arbitration, including how and when the courts of the seat may intervene and the grounds for challenging any award. Arbitrations under ICSID Arbitration Rules do not require a seat as they are considered “de-localized” and domestic courts have no supervisory role.

Generally the tribunal will be constituted of three arbitrators, as opposed to a sole arbitrator. Typically, each party may nominate an arbitrator to the panel and a president is chosen by the two party-nominated arbitrators, in consultation with the parties.

Once the tribunal is constituted, it will set the procedure and timetable. Usually there is a written phase (legal briefs with supporting evidence) and an oral phase (hearing for cross-examination of witnesses and legal argument). The arbitration may take a number of years, from commencement through to final award.

How are ISDS awards enforced?

Anecdotal evidence suggests that voluntary compliance with awards is not unusual. However, where an award is not voluntarily complied with, there are two main regimes for enforcement.

If the award is an ICSID award, it may be enforced under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). That convention provides that ICSID awards are to be treated as final court judgments of Contracting States. There are 153 Contracting States to the ICSID Convention.

In the case of non-ICSID arbitrations, the award may be enforced under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). There are 157 Contracting States to the New York Convention. The New York Convention facilitates award compliance by constraining the grounds on which a court may refuse to recognize or enforce a foreign award.

Sovereign immunity may be an obstacle to execution against a state’s assets. Some ISDS agreements contain waivers of sovereign immunity, including from execution against assets.

How much does ISDS cost and who bears the cost?

The cost varies from case to case. There are a number of factors influencing cost, including the complexity of the claim, whether preliminary defences are raised (such as a jurisdictional objection), the extent of documentary production, and whether the proceedings are conducted in one or multiple languages, to name but a few factors.

There is no universal principle as to who bears the cost of ISDS. The ISDS agreement may stipulate how costs will be allocated. If it is silent, the applicable rules may stipulate a principle of costs allocation, such as “loser pays”. More often than not, the allocation of costs is left to the discretion of the arbitral tribunal, which may take into account factors such as the relative success of the parties and their conduct during the proceedings. Arbitration costs, such as the cost of the tribunal’s fees, any institutional fees, hearing centre rental costs etc. are often treated separately from the costs of prosecuting or defending a claim, which typically include legal fees, expert fees, travel costs etc.

What are the major criticisms of ISDS?

The most common criticisms levelled at ISDS in recent years include: the risk of foreign investors challenging legitimate domestic regulation; a lack of transparency in ISDS proceedings; a lack of consistency in arbitral decision-making; a lack of appellate authority to correct substantive errors and ensure consistency of outcomes; perceptions of arbitrator bias and/or lack of independence resulting in decisions that allegedly tend to favor investors; and the cost and time associated with ISDS.

Although ISDS is not perfect, many of the criticisms levelled at it are not supported by the empirical evidence.

Although ISDS is not perfect, many of the criticisms levelled at it are not supported by the empirical evidence. In 2015, the IBA issued a statement correcting misconceptions and inaccurate information around the debate on ISDS. For example, data shows that states have won a higher percentage of cases than investors.

What happens when a country withdraws from a treaty with an ISDS agreement?

Most treaties containing ISDS agreements provide that the treaty protections (including ISDS) will continue to apply for a certain period (typically 10-15 years) after a country withdraws from the treaty. Such a “sunset clause” will protect only those investors and investments that qualify for protection at the time the withdrawal becomes effective. NAFTA Chapter 11 is a notable exception, as it does not contain a sunset clause. A notice of withdrawal under NAFTA becomes effective within six months, and any investor claim would need to be brought within that period.

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The EU's proposed reform of ISDS

Investment court systems: the future or a fiasco?

Written by Paul Stothard, Katie McDougall and Cloudesley Long

The European Commission (EC) has proposed the establishment of “a new and transparent system for resolving disputes between investors and states”, citing the need to reform existing investor-state dispute settlement mechanisms (ISDS). The EC claimed ISDS “suffers from a fundamental lack of trust”. We discuss the detail of the EU’s proposal, as well as highlighting potential barriers to its development.

The EU’s proposal

The European Commission (EC) is, in fact, running two parallel proposals in its mission to reform investor-state dispute settlement. First, it aims to establish investment courts – in place of international arbitration tribunals – which would preside over bilateral EU investment agreements currently being negotiated or negotiated in the future. Such provisions are written into the EU-Canada Comprehensive Economic and Trade Agreement (CETA), as well as the EU-Vietnam Free Trade Agreement (EVFTA). Under these agreements, disputes will be referred to permanent tribunals with fixed numbers of members appointed from the EU and Canada/Vietnam, together with members from neutral countries. Members of the tribunal will be paid monthly retainers to ensure availability and will be required to conform to specific standards of independence. Both agreements also contain an appellate mechanism, with an appellate tribunal formed in a similar manner to the lower tribunal.

More significantly, both CETA and EVFTA envisage the formation of a permanent multilateral forum for investor-state dispute resolution. CETA, for example, provides that Canada and the EU “shall pursue with other trading partners the

establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes” and provides for this new system, once implemented, to have jurisdiction over disputes arising from CETA. This has been described by the EC as the “ultimate aim” and this investor-state court system (ICS) would be open to all countries. In December 2016, the EC and the Canadian Government co-hosted the first talks with government representatives from around the world on the establishment of this multilateral forum. A series of meetings are planned throughout 2017 to further develop the idea.

The ICS proposals can be seen as a response to criticisms (founded or otherwise) of the current ISDS system. Concerns around ISDS include alleged lack of transparency, oversight and due process and a perception that ISDS is weighted in favor of Western companies and states. Critics also cite the potential for conflicts of interest and corruption as tribunals are often formed of individuals whose professional background, critics allege, make their opinions predictable and may make them sympathetic to certain arguments. This plays into the concern that the current system favors foreign investors over states and impedes sovereigns’ rights

to legislate and regulate in the interests of their citizens. These perceptions persist, despite not being supported by the empirical evidence. For example, the majority of cases referred to ISDS have been successfully defended by states.

The key elements of the proposed ICS include removing party autonomy as regards who will decide upon the dispute in favor of the permanent appointment of publicly appointed judges (who will be unable to act as counsel on other investor-state disputes) with comparable qualification requirements to those of other permanent international courts such as the International Court of Justice and the WTO Appellate Body.

Proceedings would be transparent, with open hearings and a right of intervention for third parties with an interest in the case. The system would preclude the ability to forum-shop and will tightly define and limit the ability of investors to bring cases to instances such as “discrimination on the basis of gender, race or religion, or nationality, expropriation without compensation, or denial of justice”. Crucially, the proposed system would enshrine and guarantee states’ right to regulate. It could be argued that these proposals, if enacted, would shift the balance of ISDS in favor of states.

Barriers to development of the ICS

The proposal for a permanent-multilateral forum for investor-state dispute settlement is in its infancy, but there will certainly be some key barriers that the EC and its partners will have to clear before it becomes reality. Foremost among these, and perhaps the most obvious, is that in order to have authority to act as the overarching forum for disputes, the proposal will need to be agreed to by a majority of countries around the world. The current system of ISDS is a product of almost 3000 separate bilateral investment treaties together with international trade treaties and international investment agreements. Accordingly, establishing a common international view on the terms of the new ICS proposal is likely to be a difficult and drawn-out process.

In the context of the ongoing TTIP negotiations, for example, the American Bar Association (ABA) produced a report on the ICS proposal in October 2016 which raised a number of fundamental concerns. The ABA's concerns go to the very nature of the proposed system by asking whether the ICS will be recognized as an arbitral body or as a court; a question that will have significant implications in relation to enforcement of its awards. Whilst the ABA stops short of reaching a definitive conclusion, it highlights that the hybrid nature of the ICS proposal could lead to uncertainty, citing the hypothetical scenario of a successful claimant being faced with the suggestion that the ICS is not an arbitral body and its awards therefore unenforceable under the New York Convention.

This is likely to be even more difficult given the recent ruling of the Court of Justice of the European Union (CJEU) on the EU-Singapore free trade agreement (EUSFTA). The CJEU held that ISDS provisions are not within the EU's exclusive competence and that the EU cannot negotiate and conclude international investment treaties containing such provisions alone. The recent and well-publicized difficulties in concluding CETA provide an instructive example of the potential pitfalls of

obtaining approval from all EU Member States. The Belgian region of Wallonia held up the process by delaying approval; one of its key concerns was the inclusion of ICS provisions. The Walloon parliament was successful in forcing concessions, including that the Belgian federal government would refer the ICS provisions in CETA to the CJEU for a ruling on whether they are compatible with the EU treaties which grant exclusive jurisdiction to the courts of EU member states and, ultimately, the CJEU to preside over challenges relating to EU law. For the moment, CETA is only provisionally applied and the provisions relating to ICS do not form a part of this provisional application. That referral is expected shortly.

Given the possibility that the EC's proposals could shift the balance of investor-state dispute settlement towards states, governments worldwide will no doubt be lobbied by business interests on these reforms.

There is also a risk that the ICS will simply trade one perceived bias for another. Appointments to a permanent court will no doubt become, or at least be seen to be, political choices, perhaps further shifting the balance of power towards states over investors. This is certainly a dramatic move away from the current system of ISDS, in which the parties (both states and investors) have the ability to choose their arbitrators. The examples set by other similar international institutions demonstrate the difficulty of maintaining the perception of impartiality and competence.

Where to next?

The creation of an international multilateral dispute-resolution forum is a long way off. A more pressing concern for the EC, given the difficulties experienced with CETA, is the immediate future of ICS provisions in bilateral treaties between the EU and individual countries. The CJEU may take as long as two years to reach its decision on the compatibility of ICS with EU treaties, meaning that uncertainty will prevail in the immediate future, both

with regard to CETA and to ongoing and future trade negotiations. The inability of the EU to reach agreement should serve as an indicator of the difficulties ahead for the EC in reaching its "ultimate aim" of a permanent multilateral court system to rule on investor-state disputes. Despite criticisms of the current ISDS system, its demise is not imminent.

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Precedent in investment treaty arbitrations

Written by Neil Q Miller, Holly Stebbing and Ayaz Ibrahimov

With the recent proliferation of published arbitral awards in investment treaty arbitrations a body of arbitral decisions is emerging in the sphere of investor-state disputes. This article considers what relevance, if any, the doctrine of precedent (*stare decisis*) has in the context of investor-state arbitrations and whether it can be said that a body of case law is emerging and whether those decisions could, or should, amount to binding precedent in the sphere of investment arbitration.

Precedent in arbitration v court proceedings

Any analysis of the development of precedent in investment arbitration would be incomplete without first examining the legal parameters within which arbitral tribunals are required to operate. This contextualizes the debate and helps to clarify the fundamentally different starting points between those tasked with rendering judgments in the English (and many other national) courts and thereby developing the common law and their arbitral counterparts at the International Centre on the Settlement of Investment Disputes (ICSID).

Article 53 of the ICSID Convention has been cited by tribunals and commentators alike in support of the notion that there is no rule of precedent in general international law nor within the specific ICSID system. Article 53 provides that “[t]he award shall be binding on the

parties ...”. This has been taken to exclude the applicability of precedent in subsequent ICSID cases, i.e. the award binding future users of the system.

The position under the ICSID Convention can be contrasted with the position under the common law where precedent developed by senior appellate courts is generally binding on lower courts (whereas decisions of lower courts are persuasive but generally not binding).

Historically, it was also the case that the highest court in England and Wales (then the House of Lords, now the Supreme Court) was bound by its earlier decisions. However, that is no longer the case. Lord Neuberger set out the limits of the common law doctrine of precedent in the Supreme Court’s decision in *Willers v Joyce* [2016] UKSC 44 which examined the status of decisions of the Judicial Committee of the Privy Council:

“Until 50 years ago, the House of Lords used to be bound by its previous decisions – see e.g. *London Tramways Co Ltd v London County Council* [1898] AC 375. However, that changed in 1966 following the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, which emphasized that, while the Law Lords would regard their earlier decisions as “normally binding”, they would depart from them “when it appears right to do so”.

In this small but significant way, the common law doctrine of precedent is therefore tempered by the caveat that “when it appears right to do so” the Supreme Court may depart from its earlier decisions. Thus even in England and Wales the doctrine of precedent is not absolute.

ICSID tribunals however, have no hierarchy or ranking of seniority. It is difficult therefore to criticise ICSID tribunals for failing to follow decisions of their predecessors.

ICSID tribunals however, have no hierarchy or ranking of seniority. It is difficult therefore to criticise ICSID tribunals for failing to follow decisions of their predecessors. This is particularly the case in investment treaty arbitration which combines complex issues of public international and private law and requires a careful balancing of investor and state interests – which may vary considerably from case to case and depend on the specific substantive treaty protections being invoked by the claimant. This makes identifying precedent difficult. Indeed tribunals who choose to follow previous decisions might be vulnerable to challenge, thus undermining the finality of arbitral awards.

Desirability of precedent in investor-state arbitration

Notwithstanding the difficulties of establishing a system of precedent in the sphere of investment treaty arbitration, there are reasons why it may be desirable. One of the most persuasive champions of the doctrine is L. Ron Fuller. In his writings on the “inner morality of the law”, Fuller listed eight key principles of legality. According to Fuller, adherence to these essential principles was of paramount importance to the creation of substantively fair law. Fuller advocated that law makers

had to strive towards both consistency and predictability when making laws as without these essential virtues law would develop in a wholly irregular and haphazard manner.

It might be argued that there is no better way of securing both consistency and predictability within a legal system than through the observance of past case law. With regard to investment law, there is undoubtedly a need for a consistency in rule creation. This would not only serve to improve the certainty that can be afforded by counsel to clients but also help to shape the legitimate expectations of investors. Arguably this has already started to some extent as counsel consider previous awards when advising clients on prospects and clients no doubt consider that advice when making investment decisions.

Critics of the doctrine such as Irene M. Ten Cate, however, argue that consistency can only be achieved by sacrificing “accuracy, sincerity and transparency”. They suggest that a fixation with precedent is “only concerned with equality of outcomes, not with their merits” and argue that this is unsatisfactory in the public-private arena of investment treaty arbitration.

Notwithstanding the critics, with the growth of ICSID as a forum for the resolution of investor-state disputes a growing body of at least “softly” binding case law seems to be developing. The reasons for this trend are examined briefly below.

Reasons for emergence of soft precedent Greater transparency in investment treaty cases

The emergence of a de facto body of precedent is in no small part attributable

to the greater transparency evident in ICSID arbitration cases compared to commercial arbitration. The general availability of awards and greater reporting of cases has contributed to what Jeffrey Commission has called a “burgeoning corpus of precedents”. Nothing shows the contrast between the confidentiality of commercial arbitration and the openness of investment treaty arbitration better than Article 48(4) of the ICSID Arbitration Rules. Article 48(4) provides that the ICSID Centre “shall ... promptly include in its publications excerpts of the legal reasoning of the Tribunal.”

It is precisely through the publication of such excerpts and awards that tribunals are able to follow in the footsteps of their predecessors.

It is precisely through the publication of such excerpts and awards that tribunals are able to follow in the footsteps of their predecessors and foster greater consistency in investment treaty cases. The tribunal in *El Paso v Argentina* articulated the position as follows:

“It is nonetheless a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.” (ICSID Case ARB/03/15, Decision on Jurisdiction, April 27, 2006, para. 39).

Homogeneity of subject matter and uniformity in the drafting of BITs and MITs

It may also be attributable to harmonization of substantive protections within bilateral and multilateral investment treaties (respectively, BITs and MITs). Such protections, whilst not identically drafted, typically comprise:

- General Standards of Treatment of Foreign Investments
- Protection Against Expropriation and Dispossession
- Compensation for Losses.

Uniformity of form and content allows tribunals to apply a varying fact pattern to a relatively static body of legal issues. Thus awards might contribute to a growing investment treaty jurisprudence in respect of the substantive protections available through investor state arbitration.

Consistency of tribunal members

Two notable factors in the composition of tribunals presiding over investor-state disputes might also play a part: members are often prominent law professors, private practitioners or judges and many are repeatedly appointed. This has led some commentators to argue that there is an ‘emerging judiciary’ within the investment arbitration arena, paving the way for greater consistency of legal reasoning in cases where similar legal and factual issues repeatedly come before tribunals. (Though at the same time, the investment arbitration regime has faced criticism for this very lack of diversity.)

It may be more palatable to both sides of the argument to speak of the development of a *jurisprudence constante* in which successive awards create well-established and persuasive – but not binding – principles which tribunals repeatedly have regard to.

Conclusion

The possible emergence of a doctrine of precedent in investment treaty arbitration is welcomed by those who see a need for greater transparency in the legal reasoning of tribunals and a predictability of outcome more generally. There are those, however, who maintain that it is wrong to speak of precedent in the sphere of investment treaty arbitration and argue that the creation of a doctrine of precedent was never in contemplation during the drafting of the Convention.

It may be more palatable to both sides of the argument to speak of the development of a *jurisprudence constante* in which successive awards create well-established and persuasive – but not binding – principles which tribunals repeatedly have regard to. Like it or not, the emerging body of published investment arbitration awards seems to play some role already, at least informally, in investment treaty arbitration.

The views expressed in this article are the views of the authors and not necessarily the views of Norton Rose Fulbright.

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US international trade policy under the new Trump administration

Written by Kevin O’Gorman and Mark Stadnyk

We offer a concise update on the new Trump administration’s approach to international trade policy, including international trade and investment treaties as well as the key influencers of trade policy in the new administration.

Treaties

- President Trump withdrew the US from the Trans-Pacific Partnership (TPP), a cornerstone of President Obama’s international trade policy. The TPP included the following countries: the US, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. The TPP had not entered into force yet and would in any event have required Congressional approval for the US to accede to it. In the run up to the November election, both presidential candidates announced their opposition to the TPP.
- President Trump has also focused criticism on the North American Free Trade Agreement between the US, Canada, and Mexico (NAFTA) and indicated during his campaign that he may seek to renegotiate or withdraw from it. Recently, he appears to have softened his position with respect to Canada, instead seeking to “tweak” the agreement as it applied to bilateral US-Canada relations. While President Trump has not yet announced specific policy with

respect to US-Mexico trade under the NAFTA, it appears his administration will take a more forceful stance with respect to the trade liberalization measures in the NAFTA insofar as they govern US-Mexico trade. The NAFTA, which entered into force in 1994, was primarily negotiated under President George H.W. Bush and ratified under President Bill Clinton. Its withdrawal provisions require a party, like the US, to give the other states party to the treaty at least six months’ notice of such withdrawal. No such notice has been given yet by the Trump administration.

- The future of a bilateral investment treaty (BIT) between the US and China is now in doubt. As recently as 2015, the treaty was in the early stages of negotiations, with both parties “reaffirm[ing] [it] as a top economic priority.”¹ In light of the positions of Trump’s trade representatives on trade with China (see below), passage of that BIT—at least in the form envisaged under the Obama administration—may be unlikely.

- The Trump administration has taken no official position on the Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU. Between the recent US presidential election and various national elections in the EU in 2017, the future of the TTIP – the text of which is not final and which has not yet entered into force – is in flux.

Trade representatives/leadership

- Trump selected Peter Navarro as Assistant to the President and Director of Trade and Industrial Policy. In this position, Navarro heads the National Trade Council, a group created in 2017 under the auspices of the executive branch that is tasked with “advis[ing] the President on innovative strategies in trade negotiations, coordinat[ing] with other agencies to assess US manufacturing capabilities and the defense industrial base, and help[ing] match unemployed American workers with new opportunities in the skilled manufacturing sector.”² Navarro, an academic and economist, has

¹ <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-us-china-economic-relations>.

² <https://greatagain.gov/navarro-national-trade-council-c2d90c10each#.rqwgdkc90>.

published extensively on China-US economic relations.

- President Trump has nominated Robert Lighthizer to lead the Office of the US Trade Representative (USTR). The USTR, which was created in 1962, “negotiate[s] directly with foreign governments to create trade agreements, to resolve disputes, and to participate in global trade policy organizations.” Lighthizer, who previously served as deputy trade representative under President Ronald Reagan, has criticized China’s economic policies towards the US and prior US administrations’ approach to US-China economic relations. Lighthizer is awaiting legislative hearings and approval before formally joining the Trump administration.
- Other US government agencies, including the US Department of Commerce, may also influence international trade policy under the Trump administration. Wilbur Ross, Trump’s nominee to head the Department of Commerce, recently stated that amending NAFTA would be his top priority if confirmed to that position.

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Landmark Singapore judgment on Chinese bilateral investment treaties

Sanum Investments Limited v Laos

Written by KC Lye and Katie Chung

In a closely-watched landmark judgment, the Singapore Court of Appeal has allowed a Macanese investor to proceed with expropriation claims against the Lao Government under a 1993 People’s Republic of China-Laos bilateral investment treaty (PRC-Laos BIT). In *Sanum Investments Ltd v Government of the Lao People’s Democratic Republic* [2016] 5 SLR 536, the Court of Appeal unanimously upheld the arbitral tribunal’s decision on jurisdiction, finding that the PRC-Laos BIT applies to Macau notwithstanding that Macau was not under PRC sovereignty when the treaty was entered into.

From 2007, Sanum (a Macanese investor) began investing in the gaming and hospitality industry in Laos through a joint venture with a Laotian entity. Disputes later arose between the Lao Government and Sanum which culminated in Sanum starting arbitration against the Lao Government in 2012 pursuant to the People’s Republic of China-Laos Bilateral Investment Treaty which entered into force from June 1, 1993 (PRC-Laos BIT). The PRC-Laos BIT is silent on its applicability to Macau which, as of 1993, was under the administrative control and sovereignty of Portugal. Following the handover in 1999, the PRC resumed sovereignty over Macau and established it as a Special Administrative Region. Although not an issue in this case, the PRC-Laos BIT is also silent on its applicability to Hong Kong.

Among other claims, Sanum alleged that the Lao Government had deprived it of the benefits to be derived from Sanum’s investments through the imposition of unfair and discriminatory taxes. Sanum’s expropriation claim was brought under Article 8(3) of the PRC-Laos BIT, which provides that “if a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of [Article 8]”, the dispute “may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in paragraph 2 of this Article [i.e. Laotian courts]”.

Before the tribunal, the Lao Government raised two jurisdictional objections

- The PRC-Laos BIT did not extend to Macau.
- Because Sanum sought both a determination as to (i) whether an expropriation had occurred; and (ii) the amount of compensation therefore falling due, Sanum’s claim was not arbitrable as it was beyond the permitted subject matter prescribed under Article 8(3) of the PRC-Laos BIT.

The tribunal, which designated Singapore as the seat of arbitration in consultation with the parties, found that it had jurisdiction to hear the claim because (i) the PRC-Laos BIT applies to Macau, and (ii) the subject matter of

Sanum’s claim fell within Article 8(3) of the PRC-Laos BIT.

Applying the Moving Treaty Frontiers Rule (explained below), the tribunal found that there was nothing in the text of the PRC-Laos BIT and on the facts that otherwise established and thus displaced the presumption that the PRC-Laos BIT applies to Macau. Reading Article 8(3) in context, the tribunal also concluded that Sanum’s expropriation claims (i.e. (i) whether an expropriation had occurred; and (ii) the amount of compensation therefore falling due) fell within Article 8(3) as a narrow interpretation (i.e. that only disputes involving the amount of compensation for expropriation would be arbitrable) would leave Article 8(3) without effect.

The Lao Government challenged the tribunal’s jurisdiction in an application under s 10(3) of the International Arbitration Act (Cap. 143A, 2002 Rev Ed) (IAA) before the Singapore High Court. Where Singapore is the seat of arbitration, Singapore courts are obliged under s 10(3) of the IAA to conduct a de novo review of a tribunal’s jurisdiction in deciding any jurisdictional challenge – in this respect, there is no difference in the treatment of jurisdictional awards in commercial arbitration and investment treaty arbitration.

The High Court admitted two diplomatic communications (Notes Verbales), both post-dating the Award, which the Lao Government introduced as new evidence to show that both the PRC and Laos considered that the PRC-Laos BIT did not apply to Macau (2014 Notes Verbales) and held that the tribunal had no jurisdiction.

Sanum appealed against the High Court’s decision on jurisdiction and Laos sought to admit two further Notes Verbales to confirm the authenticity of the prior 2014 Notes Verbales (which was disputed in the lower court).

Court of Appeal – substantive judgment

In a carefully finessed judgment, which examined many investment treaty cases and academic writings and demonstrated an understanding of diplomacy, the five-member Court of Appeal held that the PRC-Laos BIT applied to Macau and that Sanum’s claim fell within Article 8(3) of the PRC-Laos BIT. In addition to the parties’ respective expert witness reports, the Court of Appeal was assisted by two court-appointed amici curiae well-versed in public international law.

Two international law principles formed the lynchpins of the Court of Appeal judgment with respect to why the PRC-Laos BIT applied to Macau

- The Moving Treaty Frontiers Rule (MTF Rule) under Article 15 of the Vienna Convention on Succession of States in respect of Treaties (VCST) read with Article 29 of the Vienna Convention of the Law of Treaties (VCLT) establish a customary international law rule that presumptively provides for the automatic extension of a treaty to a territory as and when it becomes part of that state.
- The “critical date” doctrine, an evidentiary rule under public international law that excludes evidence that is generated after a certain “critical date” beyond which the parties’ actions cannot impact on the dispute.

The High Court had glossed over the critical date doctrine and incorrectly relied on Article 31(3)(a) VCLT to find that, on the basis of the 2014 Notes Verbales, there was a subsequent agreement between PRC and Laos that the PRC-Laos BIT did not apply to Macau.

In the Court of Appeal’s view, the critical date crystallized on August 14, 2012 (Critical Date), the date on which Sanum commenced the arbitration. The Court of Appeal noted that states may by agreement elect to derogate inter se from customary international law when entering into a treaty, but held on the facts that there was insufficient pre-Critical Date evidence to find that it had been otherwise established that the MTF Rule would not apply to the BIT.

The Singapore Court of Appeal confined its decision to the facts and elegantly left open the possibility that the PRC and Laos may enter into an express agreement to modify the PRC-Laos BIT

The Court of Appeal held that the 2014 Notes Verbales are post-Critical Date evidence adduced to contradict the pre-Critical Date position that the PRC-Laos BIT applies to Macau. The 2014 Notes Verbales rely on the PRC’s internal legislation concerning Macau which, under Article 27 VCLT, cannot be invoked to justify non-performance of a treaty. In relying on the MTF Rule and critical date doctrine to exclude the 2014 Notes Verbales, the Court of Appeal

confined its decision to the facts and elegantly left open the possibility that the PRC and Laos may enter into an express agreement to modify the PRC-Laos BIT whilst ensuring that Sanum could pursue its claims against Laos.

The Court of Appeal then applied a purposive interpretation to the fork-in-the-road provision in Article 8(3) of the PRC-Laos BIT by considering the context of the BIT and held that the tribunal had subject-matter jurisdiction over Sanum's claims.

Key takeaways

The significance of the Court of Appeal's judgment can be seen in the swift response of the PRC Ministry of Foreign Affairs, about a month after the Court of Appeal rendered its judgment, criticizing the decision and reiterating that PRC treaties do not apply to Macau or Hong Kong. The judgment could have significant ramifications given that the PRC is a party to some 120 BITs. It remains to be seen if the Court of Appeal judgment will be relied upon in future investor-state disputes involving Macanese or Hong Kong foreign direct investment under other PRC BITs. It may be that the PRC will seek to pre-empt the issue by entering into express agreements with the respective states irrefutably confirming that PRC treaties do not apply to Hong Kong and Macau.

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Trends in investor-state dispute settlement

ICSID case statistics 2016

Written by Sherina Petit and Daniel Jacobs

We analyze the 2016 ICSID case statistics to identify recent trends in investor-state dispute settlement, including the state parties and economic sectors involved, success rates of states versus investors and changes to the composition and diversity of ICSID tribunals.

The International Centre for Settlement of Investment Disputes (ICSID) is an intergovernmental organization established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. ICSID offers a specialised arbitration forum for international investor-state dispute settlement (ISDS). 2016 marked ICSID's 50th anniversary.

According to ICSID's 2016 annual report, it has administered approximately 70 per cent of all known investor-state cases and in the past 50 years 570 cases have been registered at ICSID, 265 awards have been rendered by ICSID tribunals and 52 decisions on annulments have been issued by ad hoc committees. As can be seen from the statistics below, in 2016, ICSID remains an important institution for settlement of investor-state disputes. A review of ICSID's case statistics is therefore a useful indicator of recent trends in ISDS.

ICSID has administered approximately 70% of all known investor-state cases.

Cases in 2016

45 new ICSID cases were registered in 2016. Whilst this is slightly less than the record high of 52 in 2015, it is a return to the historical average. ICSID administered 247 cases in 2016, the largest number of cases ever administered by ICSID in a single year. This is clear evidence that foreign investors continue to pursue the resolution of disputes with host states through international arbitration.

Interestingly, 2016 saw a very slight shift away from the trend that states have proved successful in the majority of cases brought against them. In 2016, tribunals upheld investors' claims (in part or in full) in 56 per cent of cases.

State parties and economic sectors

The trend of cases being brought against developed countries continued in 2016, with the greatest number of newly registered cases brought against Western European states.

Spain was involved in the largest number of disputes (with ten new cases registered), followed by Italy (with four new cases registered). Egypt (with three new cases registered) was the only other country involved in more than two new cases.

2016 saw a very slight shift away from the trend that states have proved successful in the majority of cases brought against them.

The number of cases registered against South American states more than doubled in 2016, perhaps reflecting increasing instability in the region.

The cases involved a broad spread of economic sectors. The highest number of cases involved the electric power and other energy sector, representing 35 per cent of cases. This reflects the continued reliance by foreign investors on protections under the Energy Charter Treaty. The next most common sector involved in investment disputes was the oil, gas and mining sector, which was involved in 20 per cent of cases. Other sectors included construction, which was involved in nine per cent of cases, and information and communication, finance and transportation, which were each involved in seven per cent of cases.

Basis of consent

Bilateral investment treaties (BITs) remained the most common basis of consent used to establish ICSID jurisdiction, representing 51 per cent of cases. This was followed by the Energy Charter Treaty, which represented 31 per cent of cases.

Constitution of tribunals

There was a marked increase in the diversity of appointees in terms of nationality. 119 individuals from 40 different countries of origin were appointed to tribunals which, according to ICSID, represented the most diverse spread of nationalities in its history. However, despite progress, the fact remains that 61 per cent of appointees were from a Western European or North American origin.

In terms of gender diversity of arbitral appointments, 23 per cent of first time appointees were woman, which at first blush suggests that gender diversity may be improving. However, only 13 per cent of those appointments involved first time appointees. Extrapolating these figures, the total number of female appointees is only about three per cent which shows that ICSID has a long way to go before gender parity is achieved.

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Requests for reconsideration in ICSID and UNCITRAL arbitrations

Is your international arbitration award really final and binding?

Written by Paul Stothard and Jenna Anne de Jong

Generally, parties to international arbitrations assume that decisions are final and binding and that tribunals will not (or indeed, cannot) revisit decisions once made. However, circumstances may arise, such as where new evidence is discovered, that prompt parties to call for a tribunal to reconsider its prior determinations, having regard to the appropriate balance between finality and flexibility. We consider the validity of requests for reconsideration under the ICSID Rules and the UNCITRAL Rules and analyze examples of the approaches taken by tribunals formed under those rules.

ICSID

The ICSID Rules of Procedure for Arbitration Proceedings (ICSID Rules) and the ICSID Convention, provide for several remedies – albeit limited in scope and application – where a party considers a final award to be unsatisfactory in some respect. A party can apply for interpretation of an award where it considers it to be unclear. If a party later discovers some fact that was not known to the applicant party or the tribunal at the time the award was rendered, despite due diligence, and the fact would have “decisively” affected the award, the party can apply to have an award changed through a process known as revision. A party also has the right to apply for annulment of an award on procedural grounds.

However, neither the ICSID Rules nor the ICSID Convention specifically address whether a tribunal has the power to reconsider its own decisions made in

the course of an arbitration. Absent a specific provision, a tribunal’s power to reconsider a decision would seemingly be founded in its inherent jurisdiction to control its own process. This question is controversial. Whether a tribunal constituted pursuant to the ICSID Rules may reconsider otherwise final decisions has been the subject of two significant new decisions in the past two years.

Perenco v Ecuador, ICSID Case No. ARB/08/6, Decision on Ecuador’s Reconsideration Motion, April 10, 2015 (Perenco)

In *Perenco*, Ecuador gave notice it intended to submit a motion for reconsideration of a Decision on Remaining Issues of Jurisdiction and on Liability by the tribunal. The tribunal permitted the motion to proceed, but emphasized “that only in exceptional circumstances would it be open for the Tribunal to reconsider its prior reasoned

decisions” and directed Ecuador “to focus its Motion on the existence of those exceptional circumstances which would justify the reconsideration of the Tribunal’s Decision.”. The tribunal’s directions were notable because they appeared to accept that a tribunal would have jurisdiction to reconsider its own decisions, in at least some circumstances. This point of jurisdiction had been something commentators and other tribunals had previously cast doubt over.

Ecuador argued that the tribunal had repeatedly omitted to determine issues put to it, violating fundamental rules of procedure, manifestly exceeding its powers and failing to state the reasons on which the decision at issue was based. Ecuador argued that these errors would be grounds for annulment, but that in any event, a lower standard of review applied pre-award.

The tribunal found that in the circumstances of the case, it was not open to it to reconsider its prior decision. It held that a decision that contains no errors making it subject to annulment should stand. Furthermore, it would generally be undesirable (and not in accordance with the scheme of the ICSID Convention) for an arbitral panel to simultaneously act as a tribunal and an annulment committee. Accordingly, a basis for a tribunal power to reopen, amend or reverse its decisions could not be inferred from the existence of an annulment procedure. The tribunal also emphasized that the power to revise an award only existed in one very specific instance – where new evidence is discovered. As a result, the tribunal concluded that once a tribunal decides with finality any of the factual or legal questions put to it by the parties, such a decision becomes *res judicata*.

Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited (Tanesco), ICSID Case No. ARB/10/20, Award, September 12, 2016 (Standard Chartered)

In *Standard Chartered*, the claimant presented a request for reconsideration to the tribunal following the receipt of new information. The tribunal found that it did have jurisdiction to reconsider a prior decision concerning jurisdiction. The tribunal opined that it is incorrect to characterize decisions of ICSID tribunals – as opposed to their awards – as *res judicata*. The circumstances of that case, however, were unique. The tribunal concluded that not only had new evidence come to light but that information provided to the tribunal by the respondent had been misleading. It remains to be seen whether other panels will extend the Standard Chartered panel’s reasoning to cases where new evidence is discovered but no misleading testimony or evidence has been given to the panel.

UNCITRAL

Like the ICSID Rules, the UNCITRAL Arbitration Rules (UNCITRAL Rules) provide a number of safeguards against awards that are ambiguous, contain typographical or other unintentional errors, or are incomplete. However, none of these mechanisms offer a means for reviewing or challenging a tribunal’s reasoning, the substance of an award or the adequacy of the evidence upon which the award was based. The UNCITRAL Rules do not provide for an annulment procedure. If a party believes that an award ought to be set aside for a lack of jurisdiction on the part of the tribunal or procedural unfairness, then that party must apply for relief from a court where the arbitration was seated.

Possibly for these reasons, requests for reconsideration under UNCITRAL Rules arise in the context of final awards, as well as orders and decisions.

The UNCITRAL Rules provide that an award is “final and binding”, and grant no explicit authority to a panel to reconsider its award, or for that matter, any final decision (tribunals do have express authority under Article 26 to modify, suspend or terminate interim measures).

The general consensus at present is that tribunals composed under the UNCITRAL Rules lack a general power to reconsider final awards. However, like tribunals formed under ICSID Rules, it is possible that they may have a *limited* power to reconsider awards and decisions which are the product of false testimony or fraud, on the basis of a tribunal’s inherent powers.

This possibility was recognized in *Biloune v Ghana*, a 1989 arbitration where the tribunal stated that it “would not hesitate to reconsider and modify its earlier award were it shown by credible evidence that it had been the victim

of fraud,” but concluded that no such evidence had been produced.

More recently in 2005, the NAFTA tribunal in *Methanex Corporation v United States of America* refused to consider a request for reconsideration of an earlier partial award. It found there was nothing in the UNCITRAL Rules to suggest that a tribunal has jurisdiction to reconsider a final and binding award that it has already made, though it acknowledged a “possible exception for fraud by a party”, though this was not relevant on the facts of this case.

In view of the *Standard Chartered* panel’s recent affirmative ruling on this point, it is not unreasonable to hypothesise that a tribunal constituted pursuant to the UNCITRAL Rules might follow the *Standard Chartered* line of reasoning if presented with new evidence that had been deliberately concealed by a party. However, it is to be hoped (and expected) that such occurrences will be rare.

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Interest in investor-state mediation is growing

Is mediation a viable investor-state dispute settlement mechanism?

Written by Mark Baker and Cara Dowling

Recent trends indicate a growing interest in investor-state mediation. In the past, the intermittent dialogue around investor-state mediation has been speculative but more often sceptical. Successful mediation hinges on voluntary, good faith participation and the perception was that compulsory mechanisms would be necessary for any dispute resolution process involving states to be effective. However, governments, investors and institutions now seem to be considering mediation (usually as an adjunct to arbitration) as a viable tool for resolving investor-state disputes.

Mediation is being more frequently incorporated into investment treaties, often as a preliminary step to arbitration. The EU-Canada Comprehensive Economic and Trade Agreement contains a mediation clause as does the Trans-Pacific Partnership. The EU negotiating text of the Transatlantic Trade Investment Partnership contained a mediation mechanism “to help solve disputes amicably”. Reportedly, mediation was discussed in the South East Asia/Australasia Regional Comprehensive Economic Partnership negotiations.

A number of institutions have adopted bespoke rules for investor-state mediation. The first released was the IBA Investor-State Mediation Rules in 2012. These were followed, in 2014, by both the ICC Mediation Rules and SCC Mediation Rules. (These mediation-specific rules are in addition to pre-existing rules for conciliation proceedings.)

The Energy Charter Conference has endorsed a Guide on Investment Mediation (Guide) as “a helpful, voluntary instrument to facilitate the amicable resolution of investment disputes”. The Conference actively encourages parties to consider mediation on a voluntary basis at any stage of the dispute. The Guide was prepared with the support of the International Mediation Institute (IMI), ICSID, the SCC, the ICC, UNCITRAL and the PCA. The Guide explains the mediation process, offers tips on its use and explains the role of the Energy Charter Secretariat, other institutions and the various available rules.

The Secretariat of the Energy Community (an international organization dealing with energy policy, established by treaty, which brings together the European Union and countries from the South East Europe and Black Sea regions)

has recently established a Dispute Resolution and Negotiation Centre. The Centre focusses on negotiating and mediating investor-state energy disputes. The Secretariat stated that institutional mediation has an important role to play in the resolution of investment disputes at an early stage.

Unsurprisingly, there is also an increased focus on the skills and qualifications of investment mediators. A unique set of skills is necessary to mediate investor-state disputes.

Unsurprisingly, there is also an increased focus on the skills and qualifications of investment mediators. A unique set of skills is necessary to mediate investor-state disputes. The Investor-State Mediation Task Force of the IMI Independent Standards Commission has introduced competency criteria for investor-state mediators, following a two year consultation involving practitioners, academics, government officials and advisers. The competency criteria will be piloted in 2017 and reviewed by organizations and practitioners involved in investor-state dispute resolution. The aim is to create a pool from which parties can choose mediators with confidence.

Similarly, the Energy Community is forming a panel of mediators “of high moral character and recognized competence in the fields of energy negotiations”. They will assist the Energy Community Dispute Resolution and Negotiation Centre to facilitate negotiations in third-party energy disputes where the staff of the Centre lack capacity and will conduct mediations as part of the Energy Community Treaty dispute settlement procedure.

The growing interest in investor-state mediation may have been sparked by a number of factors, including: a rise in the number of investor-state disputes; high costs of investment arbitration; public criticism of ISDS (warranted or otherwise); or it might simply follow the trend in the commercial sector where mediation is often a preliminary step prior to binding adjudication (whether arbitration or litigation). Mediation is, however, unlikely to wholly replace arbitration or other compulsory procedures. They are better seen as complementary tools, than either-or choices.

Mediation is frequently scheduled to precede arbitration, often in the “cooling-off” process, where even if settlement is not achieved, it may narrow issues or open lines of communication for later negotiation. Timing will, however, impact the effectiveness of mediation – and early intervention is not always successful. Parties could therefore benefit from considering voluntary mediation at other stages.

The elephant in the room is enforceability. Contractual settlement agreements are often not as readily enforceable as arbitral awards.

The elephant in the room is enforceability. Contractual settlement agreements are often not as readily enforceable as arbitral awards which benefit from the enforcement regimes under the ICSID Convention or New York Convention. This has not been an obstacle to mediation in the commercial arbitration context so the mediation in the investment context may prove similar – particularly where parties have ongoing, long term relationships. Alternatively, parties may consider hybrid mechanisms (as are being explored in the commercial context) such as Arb-Med-Arb, which result in an award by consent.

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Brexit and investor-state dispute settlement

What impact will Brexit have on foreign direct investment?

Written by James Rogers, Simon Goodall and Cara Dowling

One of the many questions raised by the UK's pending withdrawal from the European Union is what impact Brexit may have on protections afforded to foreign direct investments in the UK and overseas through bilateral investment treaties (BITs) and, importantly, the availability of investor-state arbitration. We consider Brexit's impact on BITs between the UK and (i) non-EU countries (extra-EU BITs); and (ii) EU countries (intra-EU BITs). Each give rise to different considerations, however, we suggest that ultimately Brexit may improve the UK's ability to attract companies to structure their investments in the UK so as to take advantage of the UK's BIT regime.

The UK's BITs

The UK is a signatory to more than 100 BITs with other countries around the world plus some 55 treaties containing investment provisions. These contain reciprocal undertakings that promote and protect private foreign direct investments made by UK investors overseas and by overseas investors within the UK. They impose obligations on the host state (i.e. the state in which the investment is made) to ensure that foreign investors have certain guarantees as to the treatment of their investment such as: fair and equitable treatment; treatment no less favorable than that provided to investors under other treaties; free transfer of funds without restrictions; and compensation in the event of unjustified expropriation. Typically, they also provide a mechanism for resolving disputes through international arbitration.

The EU's powers in respect of investment treaties

Following the entry into force of the Lisbon Treaty in 2009, the EU assumed exclusive competence over certain areas, including foreign direct investment as part of the EU's "Common Commercial Policy". Where power is exclusively conferred upon the EU, EU Member States (including the UK) are no longer entitled to negotiate and conclude BITs in respect such matters without the EU's approval. Moreover, acting alone, the EU may enter into agreements without requiring individual EU Member State ratification. By contrast, where powers remain exclusively with EU Member States or are shared with the EU rather than exclusively conferred upon either, the EU cannot act alone in respect of those powers.

Until recently, the legal position as to the scope of the EU's powers in respect of trade and investment was not clear cut. The question of the EU's powers in these respects came before the Court of Justice of the EU (CJEU), having been referred in the context of the EU's competence to conclude the EU-Singapore Free Trade Agreement (EUSFTA). EUSFTA is a "new generation" free trade agreement in that it extends beyond matters of customs duties and of non-tariff barriers in the area of trade in goods and services, to address other matters of trade including direct and indirect foreign investment (amongst others). The European Council and most EU Member States asserted that some provisions in EUSFTA concern matters outside the EU's exclusive competence. The EUSFTA is viewed as a test case for other new generation free trade agreements.

The first indicator of the direction the CJEU might take was the opinion of Advocate-General Sharpston on EUSFTA who advised that the EU does not have exclusive competence over all matters in EUSFTA. Advocate-General opinions are not binding on the CJEU but are often followed. On May 16, 2017, the CJEU published its own opinion (opinion 2/15) concluding that whilst most of EUSFTA falls within EU exclusive competence (including foreign direct investment), two provisions, namely, non-direct foreign investment (i.e. “portfolio” investments made without any intention to influence the management and control of an undertaking) and the investor-state dispute resolution regime (ISDS), are within a shared competence. The CJEU stated that EUSFTA cannot be entered into by the EU acting alone; full EU Member State approval is needed (i.e. approval from all 38 EU national and regional parliaments).

This will no doubt hinder the EU’s ability to conclude free trade agreements efficiently and effectively. A high profile example is provided by the comprehensive free trade agreement between Canada and Europe (CETA) which – after seven years of negotiations – faced opposition from the Belgian regional parliament in Wallonia which objected to certain provisions.

The CJEU’s opinion 2/15 did not set out why full approval is needed. In areas of shared competence a political choice is made as to whether the EU or EU Member States will exercise the competence (though in practice the default is usually for both to be involved). If the CJEU’s position is (as it appears to be) that EU Member State approval is required for any agreement in an area of shared competence, this decision potentially has very wide ramifications.

Extra-EU BITs and EU negotiated agreements

The UK is a party to 84 BITs with non-EU countries. Transitional measures allow BITs between EU Member States and non-EU countries (extra-EU BITs) which address matters within the EU’s exclusive competence to remain in force until such time as they are replaced by EU-wide international investment agreements between the EU itself and non-EU countries.

The European Commission (EC) has been gradually seeking to replace extra-EU BITs and has already agreed trade and investment agreements with Canada, Singapore and Vietnam (though these are yet to come into force) and is in the process of negotiating agreements with others including the US and China (though the status of these negotiations is in question given the Trump administration’s stated preference for bilateral rather than multilateral agreements and the UK’s intended withdrawal from the EU).

As with much of the legal fall-out from Brexit, we are in somewhat uncharted territory.

There had been some question over whether existing BITs between non-EU countries and individual EU Member States would automatically terminate and cease to be valid once EU-wide agreements come into force. This has been clarified in the CJEU’s opinion on EUSFTA which found that the EU has the power to enter into agreements with non-EU countries which replace commitments in BITs previously

concluded between individual EU Member States and non-EU states, so long as the provisions in question fall within areas of EU exclusive competence.

There are a number of uncertainties around the impact Brexit will have on EU negotiated international trade and investment agreements. It is unclear whether the UK will automatically cease to be a party to all or parts of such agreements, whether the UK must formally give notice of termination, or whether there are other options. It is also unclear whether or to what extent “sunset clauses” within those agreements, which provide for the continuation of certain provisions for a certain period of time (often decades) after termination, will apply. This lack of clarity is partly due to the fact that whilst many EU negotiated agreements address what happens when states join the EU, none address EU Member States leaving the EU. As with much of the legal fall-out from Brexit, we are in somewhat uncharted territory.

Some commentators speculate that the UK may no longer be bound by any EU negotiated treaties with non-EU countries. However, the Attorney-General’s opinion on EUSFTA noted that “If an international agreement is signed by both the [EU] and its constituent Member States, both the [EU] and the Member States are, as a matter of international law, parties to that agreement. ... [A Member State’s] participation in the agreement is, after all, as a sovereign State Party, not as a mere appendage of the [EU] (and the fact that the [EU] may have played the leading role in negotiating the agreement is, for these purposes, irrelevant).”. The CJEU did not address this question in its opinion on EUSFTA. The position will no doubt need to be considered on a case by case basis and the legal impact of Brexit

will likely depend in part on whether the agreement in question was a mixed agreement, whether it was ratified by the UK and the EU, or whether it was an agreement exclusively within the EU's competence and concluded by the EU alone.

Regardless, the UK's existing 84 extra-EU BITs will remain valid, which could be to the UK's advantage. Firstly, given that most EU international agreements are mixed agreements like EUSFTA, the obligation to involve all EU Member States will necessarily hamper the progress of negotiating and implementing EU-wide international agreements. Secondly, the fact that the majority of the UK's extra-EU BITs include investor-state arbitration provisions could give the UK a strategic advantage from the perspective of investors. A significant feature of the EU's approach to EU-wide international investment agreements is its policy of replacing investor-state arbitration with a two-tiered Investment Court System (ICS). (The EU's ICS proposals are discussed in detail in another article in this issue "The EU's proposed reform of investor-state dispute settlement"). ICS will likely feature in, or at least form a central plank of negotiations in relation to, all of the EU's future BITs. However, those ICS provisions have proved controversial.

The EU argues that the ICS would provide greater transparency and protect investment whilst preserving the rights of governments to regulate. But concerns have been raised (particularly by investors) about the lack of party autonomy, accountability and sustainability of the ICS. The EU's negotiations with the US over the Transatlantic Trade and Investment Partnership (TTIP) stalled partially due to differing views over the EU's ICS proposals. The ICS was also a sticking point to obtaining EU Member State

approval of CETA. Some believe that the EU's ICS proposal is not compatible with EU law – a question which the CJEU was not asked to address in its recent opinion on EUSFTA but which is likely to be referred to the CJEU for determination shortly. The CJEU's finding that ISDS regimes are not within the EU's exclusive competence represents a further set-back to the EU.

An interesting conundrum results from the EU having exclusive competence over foreign direct investment but sharing competence with the EU Member States over ISDS.

An interesting conundrum results from the EU having exclusive competence over foreign direct investment but sharing competence with the EU Member States over ISDS. EU Member States cannot enter into foreign direct investment treaties (save with EU permission). The EU may enter into foreign direct investment agreements alone, but those would be toothless without some form of ISDS mechanism which it EU cannot unilaterally impose on EU Member States. As a result, the EU and all the EU Member States will need to reach agreement on these matters if they wish to avoid a deadlock. At this point, how they will reach agreement is not clear. If the EU insists on EU Member States adopting ICS provisions, it is likely to face serious opposition. Conversely, if the EU's ICS proposals are not widely adopted by all EU Member States, it could render the EU's ICS ambitions largely redundant.

After Brexit, the UK will also fully regain its powers to negotiate and conclude new investment agreements with non-EU countries, and in this respect it may benefit from being able to conclude deals with non-EU countries more efficiently and effectively than the EU. According to the UK government, a number of countries have already expressed an interest in concluding agreements with the UK once it has exited the EU. The Trump administration has gone as far as to suggest that an agreement with the UK could be concluded within months of Brexit. It remains to be seen if this enthusiasm continues and the UK is able in practice to quickly secure new investment agreements. But the opportunity is certainly there. Obviously however, in light of the CJEU's opinion on EUSFTA, any mixed competence UK-EU trade agreement will necessarily entail more difficult, time-consuming negotiations given it will require full EU Member State participation.

Intra-EU BITs

There are currently more than 150 BITs between different EU Member States (intra-EU BITs). The EC is opposed to intra-EU BITs and views them as superseded by and/or incompatible with EU law.

In the arbitration cases of *Eastern Sugar v Czech Republic* and *Eureko v Slovakia*, challenges were made to the tribunal's jurisdiction on the basis that the BITs under which proceedings had been commenced, namely BITs between the Netherlands and (respectively) the Czech Republic and Slovakia, ceased to be applicable once the Czech Republic and Slovakia joined the EU. In each instance the EC intervened to object to the applicability of the intra-EU BITs. In both cases the tribunals decided that they had jurisdiction to determine the disputes under those BITs, but the

EC's objections highlight the extent of its opposition to intra-EU BITs. The EC argued that intra-EU BITs should be terminated as most of their provisions are superseded by EU law and applying them could lead to discrimination between EU Member States. It stated that it intended to urge all EU Member States to take "concrete steps" to terminate intra-EU BITs and would not rule out resorting to infringement proceedings. The EC claimed that investor-state arbitration mechanisms within intra-EU BITs raised "fundamental questions" about compatibility with EU law and undermined the principle of mutual trust in the administration of justice within the EU. It rejected the idea of making investor-state arbitration available to investors from all EU countries, stating that it was firmly opposed to "outsourcing" disputes involving EU law.

The EC has now asked all EU Member States to terminate intra-EU BITs. So far Italy, Ireland and the Czech Republic have terminated all or some of their intra-EU BITs. Romania has agreed to submit to draft legislation approving the termination of its intra-EU BITs. Poland and Denmark have considered taking similar steps. The EC has brought infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden alleging that some of their intra-EU BITs violate EU law. Those cases will likely be referred to the CJEU. In the meantime, the CJEU is set to determine a dispute between Dutch insurer Achmea BV and Slovakia concerning the validity of the BIT between the Netherlands and Slovakia. If the CJEU rules that it is incompatible with EU law, it could undermine the enforceability of any award rendered under an intra-EU BIT.

The EU's policy of seeking termination of intra-EU BITs notwithstanding that there is currently no adequate alternative in place (particularly in respect to investor-state dispute resolution mechanisms) could give post-Brexit UK a competitive advantage over other EU countries and increase its attractiveness to investors wishing to invest in Central and Eastern Europe. The UK currently has 12 intra-EU BITs (with Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia). Once the UK leaves the EU, there will be no uncertainty regarding the validity of its BITs with EU Member States. Until such time as the UK enters into an investment agreement with the EU, those BITs will remain in force and will continue to offer both states and foreign investors important protections including the ability submit disputes to investor-state arbitration.

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South Africa to overhaul its international arbitration regime

Will new legislation facilitate foreign direct investment?

Written by Jeffrey Kron and Rachel Mazower

Recent legislative and policy changes to the protection of foreign direct investment in South Africa have been the source of some concern to the international business community. The International Arbitration Bill and proposed amendments to the process for recognition and enforcement of foreign international arbitration awards may ease these concerns and help attract foreign direct investment.

Protection of Investment Act

In issue 4 of this report, we discussed South Africa's changing approach to international investment protection. We highlighted South Africa's termination of several bilateral investment treaties (BITs) and the development of legislation – the Promotion and Protection of Investment Bill – to regulate the protection of investment, including international investment, in South Africa. That Bill raised a number of red flags to prospective international investors. It set out to promote and protect investment in a manner “which reflected public interest and which struck a balance between the rights and obligations of all investors”. However, foreign investors were apprehensive that the protections afforded to foreign investors under the Bill would be less favorable than those under the BITs, including what would amount to expropriation and how equitable compensation for any such expropriation would be determined.

As a result of public comment, in 2015 a revised Bill was released and later promulgated as the Protection of Investment Act. The commencement date for this Act is yet to be announced.

The definition of expropriation and the quantification of compensation for expropriation have been removed entirely from the Protection of Investment Act and instead form the subject of a new Expropriation Bill also released in 2015.

The Protection of Investment Act however continues to elicit concern. Many perceive it as less favorable to international investors than the BITs it is intended to replace because it provides foreign investors with less certainty as to how their rights will be safeguarded. Those concerns centre on the need for effective investor-state dispute settlement mechanisms.

South Africa's cancellation of BITs means that (save for grandfather clauses) the Government of South Africa is no longer bound to submit to investor-state international arbitration. The Protection of Investment Act instead provides that the South African Government consents to state-state international arbitration in respect of investments covered by the Act, subject to the exhaustion of domestic remedies. As such, investors are losing a right of direct action against South Africa. Instead, arbitration would be conducted between the Republic of South Africa and the home state of

Investors are losing a right of direct action against South Africa. Instead, arbitration would be conducted between the Republic of South Africa and the investor's home state

the applicable investor. There is only a provision for mediation between an investor and the Government of the Republic of South Africa. Draft rules for the proposed investor-state mediation process have recently been published for public comment.

International Arbitration Bill

Presently all arbitrations in South Africa, whether domestic or international, are governed by the Arbitration Act of 1965. The Arbitration Act has been in force for over 50 years and is long overdue for revision. It is widely considered to be inadequate, outdated and unsuitable for international commercial arbitrations.

A new Arbitration Bill was introduced to parliament on 21 April 2017. The Arbitration Bill removes international commercial arbitrations from the ambit of the Arbitration Act and incorporates most of the main provisions of the UNCITRAL Model Law as the cornerstone of the international arbitration regime in South Africa. This brings the South African international arbitration regime in line with the international system and should offer international investors more certainty as to the dispute resolution process to be followed in South Africa.

It is envisaged that aspects of the UNCITRAL Model Law will be further adapted to accommodate local circumstances, as provided in Part Two of the Model Law.

South African courts have generally upheld arbitration agreements, however, the anticipated new legislation further circumscribes the role of the courts in relation to setting aside arbitration agreements or arbitral awards, in line with the UNCITRAL Model Law (which is more restrictive than the Arbitration Act).

The Arbitration Bill provides anew for the recognition and enforcement of foreign arbitral awards by repealing the current Recognition and Enforcement of Foreign Arbitral Awards Act of 1977 and enshrining a new process which closely mirrors the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in terms of the procedure for enforcing foreign arbitral awards and the grounds for refusing recognition and enforcement of such awards.

The Arbitration Bill also amends the Protection of Business Act of 1978 insofar as it applies to foreign arbitral awards. That Act is also considered to be outdated, including by requiring prior permission, in certain circumstances, from the Minister of Trade and Industry to enforce a foreign arbitral award in South Africa. This permission will no longer be necessary.

The Arbitration Bill is to have retrospective application to international commercial arbitration agreements concluded before its enactment, although it will not apply to proceedings already instituted.

The proposed changes to the international arbitration regime should give comfort to the international investment community that South Africa is a safe place to do business

The proposed changes to the international arbitration regime should give comfort to the international investment community that South Africa is a safe place to do business and is a jurisdiction where international investors can expect to have their disputes swiftly dealt with and with limited interference by the local courts. Indeed in a keynote address at an international arbitration seminar in October 2016, Deputy Minister John Jeffery of the Department of Justice and Constitutional Development expressed the hope that the Bill would establish South Africa as a regional arbitration centre and encourage direct international investment in South Africa.

The Bill has been a long time in the making and is a very welcome addition to the South African legislative process insofar as international investment protection is concerned.

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Russia's new guidelines on future bilateral investment treaties

Foreign direct investment after *Yukos Shareholders v Russia*

Written by Yaroslav Klimov and Andrey Panov

The Government of the Russian Federation has adopted a new Regulation on Entering into International Treaties on the Encouragement and Mutual Protection of Investments (Regulation). This replaces the Russian Model Bilateral Investment Treaty. The Regulation contains non-binding guidelines for drafting and negotiating future investment protection treaties (Guidelines). This article looks at key aspects of the Guidelines, including investor-state dispute settlement provisions.

The Guidelines cannot be used to interpret existing investment treaties but they usefully demonstrate the likely shape of future Russian bilateral investment treaties (BITs). It is apparent that the Guidelines build upon lessons learnt from recent investment treaty disputes involving Russia, including the arbitration brought by former shareholders of Yukos against the Russian Federation.

A few key provisions of the Guidelines are set out below

Any new investment treaty should apply only to investments made after the treaty came into force unless the contrary is expressly agreed in the treaty itself. In any event, any new treaty should not apply to claims that arose before it came into force. As a result, it is likely that future BITs with Russia will contain declarations or reservations to exclude provisional application of the treaty (one of the key issues in recent Energy Charter Treaty disputes involving the former Yukos shareholders).

New investment treaties would likely make it difficult for investors to structure investments solely for the purposes of gaining protection under a Russian BIT (i.e. “treaty shopping”).

Protections under any new investment treaty should not be granted to investments made by citizens of the host state. Furthermore, any new investment treaty should not apply to investments made by companies which do not have significant business activity in the country of their incorporation or companies which are controlled by the beneficiaries from the host state or a third country. Accordingly, new

investment treaties would likely make it difficult for investors to structure investments solely for the purposes of gaining protection under a Russian BIT (i.e. “treaty shopping”).

Any new investment treaty should contain a so-called “clean hands” clause that excludes protection of foreign direct investments which are not in compliance with the laws of the host state.

The Guidelines suggest that new treaties should provide for quantification of compensation for expropriation or other loss based on the market value of the investment, taking into account any decrease of value due to the news of anticipated expropriation becoming public. This provision appears aimed at preventing the acquisition of investments at a discount on the eve of expropriation solely for the purpose of bringing a claim under an investment treaty for its full value once expropriation occurs.

In respect of the investor-state dispute settlement (ISDS) provisions, any new investment treaty should contain a mandatory 180-days “cooling-off period” and detailed requirements on notification of disputes. It should also state that if negotiations are not successful, the investor would be able to commence arbitration as stipulated by the relevant treaty but only with respect to claims made in the notice of dispute.

The Guidelines do not specify which international arbitration rules are to be included in new investment treaties however they do provide that certain amendments to the chosen rules should be included. In particular, any new investment treaty should

- State the place and language of arbitration (generally existing Russian BITs do not specify this).
- Expressly exclude the UNCITRAL Rules on Transparency and establish a duty of confidentiality with respect to any information about the dispute, extending to any participant of the arbitration.
- Require mandatory bifurcation if a challenge to the tribunal’s jurisdiction is made.

Finally, any new treaty should provide for a limitation period of two years after the events giving rise to the dispute for the claimant to send the notice of dispute to the host state, and arbitration must be commenced with three years from the date of that notice.

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An overview of new rules of international arbitration

New Year, New Rules

Written by Pierre Bienvenu

Arbitral institutions are constantly seeking to update their rules to keep in line with current trends and to distinguish themselves amongst their peers. In early 2017, new or amended rules come into force for three of the most prominent global arbitral institutions: the International Chamber of Commerce (ICC), the Singapore International Arbitration Centre (SIAC), and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC). Important changes include the introduction of expedited procedures in ICC and SCC arbitrations, and new SIAC rules for investment arbitrations. We provide a brief overview of key features of these updated rules.

ICC Rules 2017

Following a consultation process in 2016, the ICC published proposed amendments to the ICC Rules of Arbitration in November 2016. These new rules (the ICC Rules 2017) came into force on March 1, 2017.

The most significant amendment to the ICC Rules is the introduction of an expedited procedure under Article 30 (as supplemented by Appendix VI: Expedited Procedure Rules). The expedited procedure was introduced in response to a growing demand from users, in particular in Asia, and in order to bring the ICC Rules in line with those of other major arbitral institutions.

The most significant amendment to the ICC Rules 2017 is the introduction of an expedited procedure.

The expedited procedure will apply for cases in which the amount in dispute does not exceed US\$2 million. This limit appears relatively low by comparison to SIAC's expedited procedure, under which the threshold for the amount in dispute was raised in 2016 from SG\$5,000,000 to SG\$6 million (approximately US\$3.5 million to US\$4.2 million). However, while the average amount in dispute for ICC

arbitrations in 2015 was US\$80 million, 33 per cent of ICC cases were under US\$2 million and 25 per cent of cases were under US\$1 million. Therefore a significant proportion of ICC cases will fall within the new ICC expedited procedure.

The ICC Rules 2017 also provide that parties may agree to opt-in to the expedited procedure if the amount in dispute exceeds the threshold. Conversely, parties may opt-out of the expedited procedure or the ICC Court may determine that the expedited procedure is inappropriate for a particular case. The expedited procedure will only apply to arbitration agreements entered into after March 1, 2017, unless the parties agree to opt-in.

The main features of the expedited procedure are as follows: notwithstanding the arbitration agreement, the ICC Court may appoint a sole arbitrator; the requirement for Terms of Reference has been removed; the tribunal has discretion not to allow document requests and to limit written submissions and evidence, as well as to decide the matter on documents only; the final award is to be made within six months of the case management conference. All ICC awards, including cases conducted under the expedited procedure, will continue to be subject to scrutiny by the ICC Court.

The ICC Rules 2017 have also reduced the time limit within which the Terms of Reference are to be signed, from two months to 30 days following transmission of the file to the tribunal (Article 23(2)). The purpose of this amendment is to reduce time in the initial phases of the arbitration and encourage tribunals to avoid unnecessarily delay. The ICC Court may (as is the case presently) extend the deadline in appropriate cases.

The prohibition on communicating reasons for the Court's decisions to the parties has been removed (Article 11(4)). This amendment is in line with the ICC Court's current practice to provide, in appropriate cases, reasoned decisions for challenges, for decisions to initiate replacement proceedings, as well as for decisions on prima facie jurisdictional decisions and consolidations. The Court has been providing reasons for some of these decisions since October 2015, but due to the previous language in the ICC Rules 2012, provision of reasoned decisions was subject to the agreement of all parties.

SIAC Investment Arbitration Rules

The SIAC Investment Arbitration Rules (SIAC IA Rules) came into force on January 1, 2017. Unlike the approach taken by the SCC, described below, the SIAC has promulgated a comprehensive set of rules specifically for investment arbitration.

The preamble of the SIAC IA Rules states that the rules may apply to disputes involving "a State, State-controlled entity or intergovernmental organization, whether arising out of a contract, treaty, statute or other instrument." This provides a relatively broad scope for disputes which can be referred to the SIAC under these rules.

The SIAC IA Rules, however, do require the parties to have expressly referred their disputes to the SIAC under its investment rules. There appears to be no mechanism (aside from subsequent agreement) by which parties in appropriate cases can be transferred from the Arbitration Rules of the SIAC (SIAC Rules) to the SIAC IA Rules.

The SIAC IA Rules are largely based on the SIAC Rules, with specific amendments to cater for investment disputes. The tribunal is granted broadly the same powers and discretion under both sets of rules. Key provisions of the SIAC IA Rules are set out below.

Rule 1.3 of the SIAC IA Rules provides for waiver from immunity with respect to the arbitration proceedings before the SIAC, while expressly stating that such waiver does not apply to any immunity from enforcement which a party may have.

The tribunal may order the disclosure of the existence of a third party funder (including the identity of the funder).

Also of interest is SIAC IA Rule 24(l), which grants the tribunal the power to order disclosure in relation to third party funders, which is particularly relevant in light of Singapore's recent legislative amendments to allow for third party funding for international arbitrations. Pursuant to this provision, the tribunal may order the disclosure of the existence of a third party funder (including the identity of the funder) and, where appropriate, details of the funder's interests in the outcome of the proceedings and/or whether the funder has committed to cover adverse costs liability.

The SIAC IA Rules also permit submissions by a non-disputing third party (on their own initiative or by invitation of the tribunal) who is a party to the treaty under which the arbitration was commenced (Rule 29.1). However, such submissions are limited to "a question of treaty interpretation that is directly relevant to the dispute." Rule 29.2 also permits any non-party to the arbitration to make submissions, upon application to the tribunal, provided that such third party is found to have "sufficient interest in the arbitral proceedings and/or any other related proceedings" (Rule 29.3).

Pursuant to SIAC IA Rule 38, the parties are deemed to consent to the publication of the nationality of parties, identity and nationality of arbitrators, the treaty/statute/other instrument under which the dispute was commenced, and the date of commencement of proceedings and whether they have terminated. The SIAC may also publish redacted excerpts of the reasoning of the tribunal and redacted decisions of the SIAC Court on challenges.

Other points to note include: the increased time limit for the Response to the Notice of Arbitration and for constitution of the tribunal (Rules 4.1, 6.2 and 7.2); the default number of arbitrators is three instead of one (Rule 6.2); the SIAC Court, and not the President, shall appoint arbitrators under the Rules (Rules 6.2, 7.2, 7.3 and 9); appointments by the SIAC Court for sole arbitrator or presiding arbitrator shall be done in accordance with a list procedure (Rule 8); the submissions, unless otherwise agreed, are to be in memorial style (Rule 17); and the emergency arbitrator provisions are optional (Schedule 1).

SCC Rules 2017

The SCC Rules 2017 came into force on January 1, 2017, to coincide with the centenary celebrations of the SCC. The revised rules introduce a number of relatively minor amendments to the institute's rules. The SCC also released a separate set of Rules for Expedited Arbitration (SCC Expedited Rules), effective from the same date.

Following ICSID and UNCITRAL, the SCC Rules are the most frequently used arbitration rules for investment disputes. The provisions relating to treaty based investment disputes are found at Appendix III to the SCC Rules 2017, and apply to cases under the SCC Arbitration Rules “based on a treaty providing for arbitration of disputes between an investor and a state.” The 2017 revisions have introduced procedures for submissions from third parties, broadly similar to the new provisions introduced by SIAC, discussed above.

The SCC Rules have also introduced a summary procedure pursuant to which parties may request the tribunal to determine one or more issues of fact or law by way of summary procedure.

The SCC Rules 2017 have also introduced a summary procedure under Article 39, pursuant to which parties may request the tribunal to determine one or more issues of fact or law by way of summary procedure. New provisions have been introduced for multi-party and multi-contract disputes, including provisions for the joinder of parties (Articles 13 and 14). Following other arbitral institutions (such as the HKIAC, the ICC and SIAC), the SCC has introduced specific guidelines on the appointment of Tribunal Secretaries (Article 24).

The SCC Expedited Rules apply only in the event that the parties have agreed to their application (Article 11), which may result in a more limited use than the provisions for expedited procedures of other institutions which apply by default to claims under a certain value.

While the SCC Expedited Rules contain relatively standard provisions, Article 30 provides that the Request for Arbitration and the Answer to the Request for Arbitration will constitute the parties' primary submissions for the arbitration, permitting only one “supplementary written submission” unless the tribunal decides otherwise.

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International arbitration developments in the Middle East

Written by Deborah Ruff and Julia Belcher

In the last year, a number of important developments in international arbitration took place in the Middle East region. New arbitral institutions were established in the Kingdom of Saudi Arabia and the United Arab Emirates. Local arbitration institutions revised and updated their rules of arbitration. New arbitration laws were issued in Qatar and the United Arab Emirates. We review these key international arbitration developments which, in the main, are positive and aimed at making the countries in the region more attractive for users of international arbitration.

New arbitral institutions Kingdom of Saudi Arabia

The first international arbitration institution in the Kingdom of Saudi Arabia, the Saudi Centre for Commercial Arbitration (SCCA), was officially inaugurated in October 2016. The launch came two years after the Kingdom's Council of Ministers resolved in 2014 to launch a centre to administer civil and commercial disputes, with an ambitious vision of becoming the preferred ADR choice in the region by 2030.

The SCCA Rules, effective from May 2016, are based on the UNCITRAL Arbitration Rules and have been developed in partnership with the AAA-ICDR. At the same time, the SCCA Rules were drafted to be consistent with the Saudi Arbitration Law issued in 2012. The SCCA Rules are generally in line with most major arbitration rules and include provisions regarding the appointment of an emergency arbitrator

and joinder of third parties. Fees follow an ad valorem principle. In line with the new 2012 Arbitration Law, the SCCA has underlined that parties can appoint whomever they choose as arbitrators. The SCCA Rules are expressly stated to apply without prejudice to the rules of Sharia. However, as a matter of public policy, enforcement in Saudi Arabia is in any event only possible if an award does not violate Sharia principles.

While the opening of the SCCA is certainly welcome, the eyes of the international arbitration community will remain on enforcement of domestic and foreign arbitration awards in Saudi Arabia. While, in the recent years, this process has become easier, it is hoped that the opening of the SCCA (coupled with the government's plan to open three branches of the SCCA in Saudi Arabia by 2020) signal a desire to become a modern arbitration-friendly jurisdiction.

It remains to be seen if the SCCA will make any inroads on the position occupied by other existing regional arbitration centres (such as DIAC and DIFC/LCIA) and the local courts. It also remains to be seen whether the Saudi government will include SCCA dispute resolution provisions in its contracts with third parties (as opposed to its previous default position of Saudi courts).

United Arab Emirates

The Emirates Maritime Arbitration Centre (EMAC), a specialised maritime arbitration centre, commenced operations in September 2016. EMAC is intended to address the dispute resolution needs of the growing maritime sector in the region.

EMAC's rules are based on the 2010 UNCITRAL Arbitration Rules and provide for the DIFC as the default seat of arbitration, which means that the DIFC court will be the supervisory court. The

advantage of this arrangement is that awards recognized and enforced by the DIFC Court are automatically enforced by the UAE courts. Final EMAC DIFC awards will be enforceable in other convention countries under the New York Convention.

These developments, in the main, are positive and aimed at making the countries in the region more attractive for users of international arbitration.

New institutional rules

New DIFC-LCIA Rules

New DIFC-LCIA Arbitration Rules came into force on October 1, 2016, replacing the 2008 rules. The new rules mirror the amendments to the LCIA Arbitration Rules 2014 and the changes introduced are aimed at making DIFC-LCIA arbitrations more efficient and cost effective. The changes are also in line with the trends adopted by other arbitration institutions such as the SIAC and the HKIAC.

In summary, the key changes are

- Emergency Arbitrator (Article 9B) – the new rules allow parties, “in the case of emergency”, to request a temporary sole arbitrator to conduct emergency proceedings pending the constitution of the tribunal. The LCIA Court must appoint an Emergency Arbitrator within three days of receipt of the application.

The Emergency Arbitrator must decide the claim for emergency relief as soon as possible, but no later than 14 days from his/her appointment. The Emergency Arbitrator’s award or order may be confirmed, varied, discharged or revoked by order or award made by the tribunal once constituted. The Emergency Arbitrator provisions do not prejudice a party’s right to apply to the courts for interim measures before the tribunal has been constituted (Article 9.12).

The Emergency Arbitrator provisions will not apply to arbitration agreements made before October 1, 2016 unless the parties have expressly agreed to it.

It remains to be seen how the local courts will treat the awards or orders made by an Emergency Arbitrator.

- Consolidation of multi-party disputes (Articles 1.5, 2.5, 15 and 22) – the new rules expressly recognise that there may be more than one claimant or respondent. The tribunal may consolidate two or more arbitrations (subject to certain conditions) and, prior to the formation of the tribunal, the LCIA Court may do so (Article 22). Moreover, the tribunal is expressly empowered to provide additional directions regarding witness statements, submissions and evidence, “particularly where there are multiple claimants, multiple respondents or any cross-claim between two or more respondents or between two or more claimants” (Article 15.6).

- Measures to increase efficiency – the new rules include provisions aimed at reducing delay and costs of the DIFC-LCIA arbitrations, such as

- Reduced time periods – certain default time periods have been reduced: for example, a respondent’s time to submit a response to a request for arbitration has been shortened to 28 days (from 30 days) (Article 2.1). That said, the LCIA Court’s time to appoint the Tribunal has increased from 30 days to 35 days (Article 5.6).
- Tribunal’s availability (Articles 5.4 and 10) – each arbitrator candidate is now required to sign a written declaration stating, inter alia, that he/she is “ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration”. The aim of this provision is to ensure at the outset that the members of the tribunal formally commit to devoting sufficient time to the arbitration and make themselves available for hearings etc. To supplement this provision, the LCIA Court can revoke an arbitrator’s appointment if he/she is “unfit to act” (Article 10.1), which includes failure to “conduct or participate in the arbitration with reasonable efficiency, diligence and industry” (Article 10.2).

- On-line filing (Article 1.3 and 2.3)
 - claimants and respondents are now able to file their requests for arbitration and responses on-line on the DIFC-LCIA’s website.
- Conduct of counsel (Article 18) – the new rules set out provisions aimed at regulating the conduct of the parties’ legal representatives (e.g. proof of authority, changes or additions to counsel). In particular, the parties are now obliged to ensure that, “as a condition of such representation”, their counsel have agreed to comply with the “General Guidelines for the Parties’ Legal Representatives”, and the Tribunal may sanction counsel for violation of the guidelines.

New arbitration laws

New Qatari arbitration law

On February 16, 2017, a new Qatari arbitration law was introduced; Law No 2 of 2017 to issue the Arbitration Act in Civil and Commercial Matters. It will enter into force once published in the Official Gazette. The law is largely based on the UNCITRAL Model Law (though with some variations, in particular in relation to timelines) and will apply to arbitrations, present or future, seated in Qatar or to international commercial arbitrations (as defined) seated elsewhere if the parties have agreed to submit to the Qatari arbitration law. It will apply to both public and private sector parties, irrespective of the nature of legal relationship on which the dispute is based or treaties Qatar has with other countries. The scope for government-related arbitrations, however, may be

limited given that government entities can only agree to arbitrate with the Prime Minister’s consent. Notably, the new law allows parties to elect that the Qatar International Court (Qatari Financial Centre Civil and Commercial Court) will act as supervising court of the arbitration.

Arbitrator liability in the United Arab Emirates

A recent change to the UAE Penal Code (Article 257) has created a criminal offence punishable by imprisonment where arbitrators fail to act impartially (Federal Law No. 7 of 2016). This new law is controversial. The Code does not define the test for lack of integrity or partiality. In the absence of further guidance or amendment, Article 257 may reflect negatively on Dubai as a seat of arbitration, and could affect the advances made by Dubai in the recent years to establish itself as an arbitration-friendly jurisdiction. This has generated considerable discussion within the UAE legal community and there has been some suggestion that Article 257 may be amended in due course.

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Key English law developments for international arbitration

2016 in review

Written by Deborah Ruff and Charles Golsong

We look back at three decisions of the English courts which made headlines in the international arbitration community in 2016.

English court grants a six year retroactive extension of time to correct an ambiguity in an LCIA award

The English Commercial Court has exercised its power under section 79 of the English Arbitration Act 1996 (the Arbitration Act) to extend the time limit under Article 27.1 of the LCIA Rules, six years after the award was rendered in a London-seated LCIA arbitration (*Xstrata Coal Queensland Pty Ltd & Ors v Benxi Iron & Steel (Group) International Economic & Trading Co Ltd* [2016] EWHC 2022 (Comm)).

The unsuccessful party did not pay the US\$27.8 million award, leading the award creditors to seek recognition and enforcement of the award under the New York Convention in China, the place of incorporation of the losing party.

Almost three years after the application for recognition and enforcement was made, the Chinese court refused enforcement, accepting the award debtor's assertion that one of the award creditors was not a party to the

underlying contract and arbitration agreement. The Shenyang Intermediate People's Court found that the entire award was "without merit because of a lack of supporting legal argument or factual bases".

The award creditors approached the tribunal and requested it to use its power under Article 27 of the LCIA Rules to correct an ambiguity in the award. However, as the 30 day time limit for making such an application had expired, the LCIA confirmed that "while sympathetic to the [award creditors'] position,...absent agreement of the parties or an order from a competent court extending time for the application" the arbitral tribunal was "functus officio".

The award creditors therefore applied to the Commercial Court, asking it to extend the deadline under the LCIA Rules using its powers under section 79 of the Arbitration Act, by which the court may "extend any time limit agreed by [the parties] in relation to any matter relating to the arbitral proceedings...".

The court granted the extension, finding that a substantial injustice would be done if it were refused (one of the section 79 grounds). Mr Justice Knowles held that "... continuing uncertainty over the Award serves no worthwhile end, and more generally undermines the arbitral process. It reinforces the point that it would be unjust not to allow the available opportunity in the present case to allow the arbitral tribunal to consider whether the uncertainty can be removed".

The court's decision is notable in that, realistically, the 30 day time limit ... will almost always expire before the outcome of a challenge to recognition/enforcement in another jurisdiction is known.

The court's decision is notable in that, realistically, the 30 day time limit under Article 27 of the LCIA Rules (and similar provisions in other institutional rules) will almost always expire before the outcome of a challenge to recognition/enforcement in another jurisdiction is known.

Emergency arbitrator provisions limit the English court's ability to grant emergency relief

The English Commercial court has held that the emergency arbitrator provisions in Article 9B of the LCIA Rules limit the court's power, under section 44 of the Arbitration Act, to grant interim relief, at least in situations where the emergency arbitrator provisions have already been unsuccessfully invoked (*Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327(Ch)).

Gerald Metals and Timis Mining had entered into an offtake contract, whereby Gerald Metals had advanced US\$50 million to Timis Mining to finance the development of a mine in Sierra Leone. The contract provided for LCIA arbitration. A dispute arose and Gerald Metals commenced arbitration, claiming that Timis was in default. Gerald Metals also applied to the LCIA for the appointment of an emergency arbitrator.

The LCIA rejected Gerald Metals' application for the appointment of an emergency arbitrator on the basis that Timis Mining had given certain undertakings i) not to dispose of any assets other than for full market value and at arm's length and ii) to give seven days' notice to Gerald Metals before disposing of any asset considered to be worth more than £250,000.

Gerald Metals subsequently sought urgent relief in the courts under section 44 of the Arbitration Act, arguing a "gap" in the LCIA Rules which exists in cases which are not emergencies or of such exceptional urgency as to justify the expedited formation of the tribunal but which are nevertheless cases of urgency within the meaning of section 44(3) of the Arbitration Act".

Mr Justice Leggatt, dismissing Gerald Metals' application, held that "a similar functional interpretation of Articles 9A and 9B [of the LCIA Rules] needs to be adopted as has been given to section 44(3) of the Arbitration Act".

Mr Justice Leggatt further held that it was "only in cases where [the powers contained at Articles 9A and 9B of the LCIA Rules], as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under section 44".

The decision in this case appears to suggest that the court's powers are precluded where an application is made to a tribunal/arbitral institution and either deems itself to be empowered to act. Mr Justice Leggatt held that it would be "uncommercial and unreasonable to interpret the LCIA Rules as creating ... a gap" in cases which are not of sufficient urgency as to justify the appointment of an emergency arbitrator but which are nonetheless deemed "of urgency" under section 44(3) of the Arbitration Act.

This decision may also have an impact on arbitrations under the ICC, HKIAC or SIAC Rules, as they each contain emergency arbitrator provisions.

This decision may also have an impact on arbitrations under the ICC, HKIAC or SIAC Rules, as they each contain emergency arbitrator provisions. Parties may seek to agree to opt out of these in order to maintain the possibility of recourse to the courts for emergency relief.

Arbitration award is enforceable in England even if it includes an award in respect of a penalty

The English High Court recently held that a foreign arbitration award should be enforced in its entirety, despite it including a sum awarded pursuant to a penalty clause (*Pencil Hill Ltd v US Citta di Palermo SpA* (Case No. BA40MA109) (unreported)).

The contracts between the parties related to the sale of financial rights deriving from registration rights of a football player. Pencil Hill had acquired these from a Spanish football club and sold them on to an Italian football club (Palermo) for a total price of €10 million.

Palermo had agreed, in an April 2012 contract, to pay Pencil Hill a total of €6,720,000 in two equal installments, with a further €1 million pursuant to an August 2012 agreement.

Clause 4 of the April 2012 contract specified that “In the case [Palermo] fails to pay any of the installment agreed, then, all the remaining amounts shall become due and as penalty [Palermo] will have to pay an amount equal to the amount pending IE [Palermo] will pay the double of the pending amount at the moment of the fail on the payment”. Palermo duly missed an installment.

In July 2013, Pencil Hill filed a request for arbitration with the Court of Arbitration for Sport (CAS), claiming €6,720,000 under the April 2012 contract, with a penalty of a further €6,720,000 and the €1 million due under the August 2012 agreement.

In its award of August 2014, CAS awarded Pencil Hill €9.4 million, comprising the €1 million due under the August 2012 agreement, the €6,720,000 due under the April 2012 contract, and €1,680,000 representing 25 per cent of the penalty claimed by Pencil Hill.

Palermo appealed to the Swiss Supreme Court, which upheld the penalty awarded by CAS, after which Pencil Hill applied to the English High Court to enforce the award, where the judge held that it would not be contrary to public policy to enforce the award, indicating that “there is a strong leaning towards the enforcement of foreign arbitral awards and the circumstances in which the English Court may refuse enforcement are narrow”. In the judge’s view, the “public policy of upholding international arbitral awards [...] outweighs the public policy of refusing to enforce penalty clauses. The scales are tipped heavily in favor of enforcement”.

This case cannot be taken as a blanket approval by the English courts of arbitral awards awarding sums pursuant to penalty clause

Many will be heartened to note the pro-arbitration stance taken by the English High Court. However, it is important to note that the contract in this instance was governed by foreign law (Swiss law), under which penalty clauses are not prohibited. Moreover, on appeal the curial court had upheld a reduction of the payment obligation, made in accordance with Swiss law – as the English court noted, that variation arguably changed the payment obligation from a penalty to a non-penalty. Accordingly, this case cannot be taken as a blanket approval by the English courts of arbitral awards awarding sums pursuant to penalty clauses. Such clauses must still be carefully drafted, particularly if enforcement is to be sought in England or other jurisdictions where penalty clauses are contrary to domestic public policy.

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Drafting arbitration agreements: the pitfalls of compromise

A Chinese case study

Written by James Rogers and Kevin Hong

The Chinese courts have reminded parties of the need for clear and unambiguous drafting of arbitration agreements. This is particularly important as arbitration agreements are too often still the product of eleventh hour negotiations, reflecting a hasty compromise between the parties' respective arbitration preferences.

In recent years, the Chinese courts have adopted a more liberal approach towards the interpretation of arbitration clauses and have enforced arbitration agreements which are ambiguous but nonetheless reflect a clear intention to arbitrate. Important decisions demonstrating this trend include *Zhejiang Yisheng Petrochemical v INVISTA Technologies* (as featured in issue 3 of this report), and *Anhui Longlide Packing and Printing v BP Agnati S.R.L.* (as featured in issue 4 of this report). In these cases, the Supreme People's Court of China (SPC) upheld the validity of arbitration agreements providing, respectively, for a China-seated ICC arbitration and a China-seated UNCITRAL arbitration administered by CIETAC.

But there are limits to the Chinese courts' willingness to enforce poorly drafted clauses. The decision in *Wicor Holding AG v Taizhou Haopu Investment Co Ltd* handed down by the Taizhou Intermediate People's Court of China (IPC), highlights the risks of a poorly drafted arbitration

agreement, particularly one which reflects an apparently hasty compromise between the parties' respective arbitration preferences.

Court challenge to the arbitration agreement

In 1997, a Swiss company, Wicor Holding AG (Wicor), entered into a joint venture contract with a Chinese company, Taizhou Haopu Investment (Haopu). The contract contained an arbitration clause providing that:

“the dispute shall be finally settled under the Rules of Mediation and Arbitration of the International Chamber of Commerce. If arbitration claim is brought by one party, the place of arbitration should be chosen by the other party.”

Haopu brought court proceedings in July 2011 against Wicor in the Taizhou IPC alleging that Wicor had breached the joint venture contract. The Taizhou IPC considered the validity of the arbitration clause in the joint venture contract and found that it was invalid as, in breach of

article 16 of the PRC Arbitration Law, no administering arbitration institution had been specified in the arbitration agreement.

Although the parties had stipulated the arbitral rules applicable to the arbitration (ICC Rules), they had failed to include any express reference to an administering institution. Nor could one be inferred simply by reference to the ICC Rules: the rules in force at that time (ICC Rules 1998) did not contain provisions equivalent to those found in the later ICC Rules 2012 and 2017 which provide that “The [ICC] Court is the only body authorised to administer arbitrations under the Rules...”; and “By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the [ICC] Court” (Articles 1.2 and 6.2).

Had the ICC Rules 2012 or 2017 been the applicable rules, pursuant to Article 4 of the Interpretations on Certain Issues Relating to the Application of the PRC Arbitration Law 2006, the arbitration clause would have been considered enforceable.

The Taizhou IPC's decision was subsequently confirmed by both the Jiangsu High People's Court (HPC) and the SPC in March 2012. The SPC, in endorsing the Taizhou IPC's decision, considered which law applied to questions over the validity of the arbitration agreement. The parties had not specified in the arbitration agreement the governing law of the arbitration agreement. Moreover, the arbitration agreement had deferred the choice of arbitral seat until after an arbitration claim had been commenced – when Haopu issued court proceedings no arbitration claim had been raised nor had the place of arbitration been nominated or agreed.

To ascertain the applicable law, the SPC relied on the following principles

- In the absence of the parties' agreement on the applicable law of the validity of an arbitration agreement, the law of the place of arbitration shall apply if such a place is chosen.
- If the place of arbitration is not chosen or not clear, the law of the place where the court is located shall apply.

The SPC therefore held that the law at the locality of the court, i.e., PRC law, applied to the arbitration clause. And applying PRC law, the arbitration clause was invalid given it breached article 16 of PRC Arbitration law.

Challenge to enforcement of the award

In the meantime, Wicor had commenced arbitration proceedings in November 2011 against Haopu in respect of a different dispute arising out of the joint venture contract. In accordance with the parties' arbitration agreement, Haopu was expected to, but did not, nominate a seat of arbitration. The ICC Court therefore chose the seat of arbitration

(Hong Kong) in accordance with the ICC Rules. The validity of the arbitration clause was subsequently confirmed by the tribunal in an award issued in November 2012. The final award on the merits was issued in favor of Wicor in July 2014, with a supplementary award being issued in November 2014 (Awards).

Wicor applied to the Taizhou IPC for recognition and enforcement of the Awards. Haopu relied on the public policy exception to resist enforcement.

The Taizhou IPC held that recognition and enforcement of the Awards would be contrary to Chinese public policy. The Awards were issued on the assumption that the arbitration clause was valid, but the clause had already been found to be invalid by the Chinese court judgments in 2011 and 2012, before the Awards were issued. Therefore, the Awards were in direct conflict with the decisions of the courts, and it would be contrary to Chinese public policy to enforce them.

Earlier decisions of the Chinese courts have taken a different approach but it is likely that they can be distinguished. In one earlier case, even though the PRC courts had found the arbitration clause to be invalid, the SPC held that enforcement of the award was not in violation of Chinese public policy. In that case, however, the PRC's decision on validity of the clause had been handed down after the arbitral award was rendered. The timing of the court's decisions on validity of the arbitration agreement therefore seems key.

Comment

All of the cases referenced in this article concern the interpretation of a compromise arbitration agreement, i.e. one which seeks to reach a compromise between the parties' competing preferences for resolving disputes. Often such a

compromise is necessary to resolve a negotiating impasse. However, the lesson to be learned from these cases is that the compromise reached must not undermine the validity of the clause – clear and unambiguous drafting is necessary to ensure the validity of an arbitration agreement.

This is particularly so in China, where there are a number of idiosyncrasies to Chinese arbitration law which are not familiar to foreign parties. If the arbitration clause does not clearly spell out the seat, the rules and the administering arbitration institution, parties doing business in China run the risk of lengthy legal battles over the validity of an arbitration clause before they can even start arbitrating their substantive dispute. A dispute resolution clause is after all meant to be incorporated into a contract to assist in resolving disputes, not to create additional satellite litigation.

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State immunity and international arbitration

A comparative analysis of key common law jurisdictions

Written by Azim Hussain, Matthew Kirtland, Alfred Wu, Wilson Ang, Ernie Van Buuren, Philip Nunn, Matthew Buckle, Jenna Anne de Jong, Katherine Connolly, Charles Street, Mathias Goh and Cara Dowling

Foreign state immunity is an important consideration for commercial parties dealing with foreign states or state owned entities. Failure to properly address the issue can have serious consequences. State immunity is in itself a complex issue, but this is compounded by the fact that the approach to immunity is not common across all jurisdictions. In an increasingly global market, commercial parties must be alive to jurisdictional nuances. We compare the approaches to state immunity in England, Hong Kong, Singapore, Australia, the US and Canada.

The doctrine of state immunity can sometimes resemble the playground game of tag: the private investor chases after the state this way and that until, immediately before being caught, the state touches the wall, declaring that it is immune when “on base”.

Diligent commercial parties must approach all dealings with foreign states or state owned entities carefully; considering who to contract with and how to incorporate comprehensive waivers of state immunity

State immunity provides foreign states with protection against legal proceedings brought before the courts of other jurisdictions. It is to be distinguished from “crown immunity” which protects states from legal proceedings brought before their own courts. There are important reasons why national laws protect foreign sovereign interests, even if at the expense of private investors. However, this means that diligent commercial parties must approach all dealings with foreign states or state owned entities carefully; considering who to contract with and how to incorporate comprehensive waivers of state immunity – both in respect of immunity from suit and immunity from execution – in all relevant jurisdictions. Parties need to be aware of the limitations of any waiver, and,

critically, the approach to state immunity in all jurisdictions where any award or judgment would be enforced against state assets.

Most jurisdictions adopt either an “absolute” or a “restrictive” approach to state immunity. Under the absolute approach a foreign state enjoys total immunity from being sued or having its assets seized by a foreign court, even in commercial matters. Under the restrictive approach, a foreign state is only immune in relation to activities involving an exercise of sovereign power. The state may therefore be sued and have its assets seized in a foreign court in commercial or private matters, and important distinctions must be drawn between commercial versus sovereign activities and assets.

In the context of arbitration, the agreement by the state entity to arbitrate is often – but not always – sufficient to waive immunity from suit and establish the tribunal’s jurisdiction over the state. Critically though, it generally does not follow that this amounts to an effective waiver of immunity from execution of the award against state assets.

The purpose of this article is to compare the approaches to state immunity taken by key common law arbitration jurisdictions and to highlight recent developments.

England

England takes a restrictive approach to state immunity. The English State Immunity Act 1978 (UKSIA) provides immunity from jurisdiction subject to exceptions, including where the state has agreed to arbitrate. The UKSIA also provides immunity from execution subject to two exceptions where: (1) there is written consent to execution (submission to jurisdiction only will not be sufficient); or (2) where state property is used for commercial purposes.

In *LR Avionics Technologies Limited v The Federal Republic of Nigeria* [2016] EWHC 1761 (Comm), the Commercial Court considered the question of what constitutes “use for commercial purposes”. Premises owned by Nigeria had been leased on commercial terms to a private company for the purpose of outsourcing consular activities (issuance of visas and passports). The court held that the premises were not in use for commercial purposes so remained immune from execution. The issuance of visas and passports was a sovereign activity. That it was performed through a commercial agent under contract was “merely incidental”.

Hong Kong

Prior to the handover of Hong Kong to the PRC in June 1997, Hong Kong followed the English approach of restrictive immunity. After 1997, Hong Kong was required by the Hong Kong Basic Law to adopt the PRC position on “foreign affairs” and the PRC’s position is one of absolute immunity.

This represented a fundamental change to Hong Kong’s approach to state immunity. Foreign states are now absolutely immune from suits brought against them in the Hong Kong courts.

Accordingly, the Hong Kong Court of Final Appeal (CFA) decided in the case of *FG Hemisphere v The Democratic Republic of Congo* FACV 5-7/2010 that after 1997 the absolute doctrine of immunity applies in Hong Kong. The CFA’s decision was referred to the Standing Committee of the National People’s Congress for confirmation (the SCNPC has the ultimate responsibility for matters of foreign affairs in Hong Kong) and confirmation was duly provided.

This represented a fundamental change to Hong Kong’s approach to state immunity. Foreign states are now absolutely immune from suits brought against them in the Hong Kong courts.

Singapore

Singapore takes a restrictive approach to state immunity. The Singapore State Immunity Act (Chapter 313, Revised Edition 2014) (SSIA) is modelled

closely on the UKSIA, with some minor differences. These include removing references to international conventions on state immunity to which Singapore is not a party (such as the European Convention on State Immunity and the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships).

Under the SSIA, foreign states are generally immune from jurisdiction, save for where: the state has submitted to the jurisdiction of the Singaporean courts (s. 4(1)); a state has agreed to arbitrate (s. 11(1)); and proceedings relate to commercial transactions entered into by the state or a contractual obligation of the state (whether commercial transaction or not) that falls to be performed wholly or partly in Singapore (s. 5(1)). In defining a “commercial transaction”, Singapore has followed the UK approach by setting out a list of categories of such transactions (s. 5(3)).

As for immunity from execution against a state’s property, the general immunity is set out in section 15(2) of the SSIA. However, there is a commercial exception to this immunity: a state’s immunity from execution against its property does not apply to property “which is for the time being in use or intended for use for commercial purposes” (s. 15(4)). “Commercial purposes” is defined as “purposes of such transactions or activities as are mentioned in section 5(3)”, and section 5(3) in turn and as explained above, relates to the “commercial transactions” exception to state immunity.

In *WestLB AG v Philippine National Bank and others* [2007] 1 SLR(R) 967, the Singapore High Court considered the commercial transaction exception (s. 5(1)(a) SSIA), albeit obiter. This

case concerned funds accumulated by the late President of the Republic of Philippines (Philippines), Ferdinand E Marcos, which were, as a result of steps taken by the Philippines and the Swiss authorities, moved from bank accounts in Switzerland to the Philippines National Bank (PNB), and then by PNB to WestLB AG, Singapore (WestLB). In 2003, the Supreme Court of the Philippines ordered the funds to be forfeited to the Philippines and PNB instructed WestLB to release the funds. WestLB refused as it faced competing claims to the funds. WestLB commenced interpleader proceedings in Singapore to determine ownership, adding the Philippines as a defendant to those proceedings. The Philippines applied for a stay on the basis that it was, *inter alia*, entitled to state immunity.

The court held that the Philippines had submitted to the court's jurisdiction (a finding upheld on appeal). Although it was unnecessary to determine whether the commercial transaction exception was made out, the court went on to consider this for completeness. The court took the view that the act of placing the funds into WestLB's bank account must be looked at in its whole context and that, in context, it was "an integral part of the exercise of its sovereign powers to recover the funds and ... not commercial transactions undertaken by [the Philippines]". Accordingly, the commercial transaction exception would not have applied (and this point was not pursued on appeal).

Australia

Australia's Foreign States Immunity Act 1985 (Cth) (AUFSA) takes a restrictive approach to state immunity. Foreign states are granted immunity from jurisdiction unless certain statutory exceptions apply (ss. 10-21 AUFSA).

A foreign state's agreement to arbitrate will waive immunity from a tribunal's jurisdiction. In addition, section 17 of the AUFSA provides that where a foreign state has agreed to arbitrate, subject to any inconsistent provision in the agreement, the state is not immune in court proceedings related to the arbitration (e.g. court proceedings determining the validity or operation of the arbitration agreement or procedure, or to set aside an award), unless it is an inter-governmental agreement.

Foreign states also enjoy immunity from execution unless and to the extent that the state has waived immunity in relation to its property or the property is being used for commercial purposes. Submission to the jurisdiction (by agreement or conduct) will not be sufficient on its own to waive immunity from execution.

In *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43, the High Court considered both the commercial transaction exception to jurisdiction (s. 11(1)) and the property in use for commercial purposes exception to immunity from execution (s. 32). The court held, in the context of proceedings for the registration of a foreign judgment, that Nauru was not immune from the jurisdiction of Australian courts. There was an exception to immunity from suit because the proceedings concerned a commercial transaction; namely, the guarantee upon which the foreign judgment was based. However, the court upheld Nauru's claim to immunity from execution against its property represented by bank accounts held in Australia because the purposes for which those accounts were in use, or for which the monies in them were set aside, were not commercial purposes.

The United States

Like England, the US takes a restrictive approach to state immunity. The Foreign Sovereign Immunities Act (USFSIA) grants foreign states immunity from suit in US courts (federal or state). There are a number of exceptions to immunity under the USFSIA, including where a state waives immunity, agrees to submit a dispute to arbitration or engages in commercial activity.

In recent years, the immunity afforded by the USFSIA has been narrowed, however the commercial exception to state immunity has potentially broadened.

Justice Against Sponsors of Terrorism Act

In September 2016, the US Congress passed the Justice Against Sponsors of Terrorism Act (JASTA). JASTA made a number of changes to state immunity under the USFSIA.

JASTA narrowed states' rights to jurisdictional immunity by eliminating the requirement that a foreign state first be designated by the US government as a "state sponsor of terrorism" before it could be sued in US courts.

JASTA further narrowed immunity by eliminating the "entire tort" rule. Prior to JASTA, certain US courts had construed USFSIA to allow claims against foreign states for an act of international terrorism only when both the alleged injury and terrorist act occurred within the United States. JASTA eliminated this rule, allowing claims against foreign states for injuries to persons or property in the United States "regardless where the tortious act or acts of the foreign state occurred.". JASTA counterbalanced its narrowing of immunity by providing the US government with authority to intervene in any lawsuit and effectively stay the case

indefinitely upon a certification that good-faith state-state negotiations concerning the resolution of the claims against the foreign state were ongoing.

Commercial activity carried on in the US

In 2015, the US Supreme Court clarified the standard for applying USFSIA's exception to jurisdictional immunity for actions "based upon a commercial activity carried on in the United States" by a foreign state (*OBB Personenverkehr AG v Sachs*, 136 S. Ct. 390 (2015)). In this case, the claimant was injured in Austria when stepping off a Eurorail train. She sued Eurorail in the US on the basis of having purchased her ticket in the US electronically. The lower appellate court found this sufficient to trigger the "in the United States" condition of USFSIA's "commercial activity" exception. The Supreme Court reversed and, under a "gravamen of the complaint" standard, found that the "foundation" of the suit was the injury in Austria.

Canada

Like the UK and the US, Canada also takes a restrictive approach to state immunity. But its approach is unique in certain important aspects. Under the Canadian State Immunity Act R.S.C 1985 (CSIA), a state may waive immunity. A waiver of jurisdictional immunity requires proof that the foreign state "explicitly submits to the jurisdiction of the court by written agreement" (s. 4). A waiver of execution immunity requires proof that the state has, either explicitly or by implication, waived its immunity from attachment, execution, etc. (s. 12). A foreign state is also not immune from jurisdiction in any proceedings relating to commercial activity (s. 5).

Unlike the UKSIA and the USFSIA, the CSIA does not have an exception from immunity for arbitration agreements.

However, unlike the UKSIA and the USFSIA, the CSIA does not have an exception from immunity for arbitration agreements. Obiter reasoning in *TMR Energy Ltd. v State Property Fund of Ukraine*, 2003 FC 1517 suggests that an agreement to arbitrate may be considered an express waiver of jurisdiction immunity but this has not yet been definitively decided. Instead, both the commercial activity exception and the waiver of execution immunity by implication have been relied upon by Canadian courts to enforce arbitral awards against states.

These issues were considered in *Collavino Inc. v Tihama Development Authority*, 2007 ABQB 212. The Alberta Court of Queen's Bench reasoned that the respondent, a state organ of Yemen, must be deemed to have waived execution immunity by agreeing to international commercial arbitration; otherwise, the effect of an award could be thwarted. The court also accepted that the "plain, obvious and ordinary meaning" of "commercial activity" as used in the CSIA captured the underlying transaction at issue and thus the commercial exception to immunity applied.

Recent cases have followed a similar path. *Canadian Planning and Design Consultants Inc. v Libya*, 2015 ONCA 661 is an ongoing case in the context of enforcement of an ICC award against Libya. In 2014, the Ontario Superior Court of Justice issued an order recognizing the ICC award, stating that Libya had by implication waived its immunity from execution. However this case raised a further novel issue, namely whether by agreeing to ICC arbitration, Libya had waived either execution or diplomatic immunity (or both) in respect of certain bank accounts in Ontario (over which the claimant had obtained garnishment orders). Libya argued that the bank accounts specified were accounts of the Embassy of Libya and that they were used by that Embassy for diplomatic purposes. This issue is yet to be adjudicated.

Conclusion

As the brief discussions above highlight, issues of sovereign immunity are not only complex but they differ from jurisdiction to jurisdiction. Failure to adequately consider and address questions of sovereign immunity could have serious consequences, including losing the ability to enforce contractual rights, recover damages or enforce judgments or awards. Parties contracting with foreign states or state-owned entities must ensure that they have obtained comprehensive advice covering all relevant jurisdictions, including jurisdictions where proceedings might be brought as well as those where enforcement against state assets might be sought. Contractual terms must be carefully drafted if parties are to benefit from the best possible protection.

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