



Investment Arbitration's Influence on Practice and Procedure in Commercial Arbitration

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This article discusses, by reference to examples, the growing influence of investor-State arbitration on international commercial arbitration. It is a modified version of an address given by the author at an evening event organised by HK45 at the HKIAC on 3 July 2013.¹

Introduction

The growth of investment arbitration over the last two decades has been monumental on a number of levels. Under public international law, individuals traditionally lacked standing to bring international claims against foreign States. Through investment treaties, private investors may now not only have recourse to arbitration directly against States, but are also protected by substantive rights expressed in such treaties. Moreover, should the ICSID Convention² be chosen to resolve an investment treaty dispute, this dispute resolution mechanism provides one of the most delocalised international arbitration systems ever to be implemented.

These are just a few of the ground-breaking aspects of investment arbitration that are frequently the subject of comment and discussion. A less frequently discussed and more subtle development is the influence that investment arbitration practice and procedure is having and will continue to have on commercial arbitration.

Different approaches to confidentiality

In the author's view, a primary reason for this influence is the public availability of investment arbitration awards. Commercial arbitration awards, by contrast, usually remain confidential. The fact that most commercial awards are confidential means that guidance from commercial arbitration awards and practice is rare. As a result, commercial arbitrators and practitioners are now looking to the widely available corpus of investment arbitration awards to assist them in deciding or pleading a case. This trend will only increase.

And this development is a wholly desirable one. Although confidentiality in arbitration has many attractions and benefits, in commercial arbitration it may be criticised for stultifying the development of the law and practice of arbitration.

Influences on the practice and procedure of commercial arbitration

From the author's experience as an arbitrator, there is an

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increasing tendency to cite the practice and procedure of investment arbitrations in commercial arbitration cases. In this way, investment arbitrations thus inform commercial arbitration proceedings. The precise degree and effect of this development would be a worthwhile subject of study and analysis. For present purposes, however, this article identifies, by reference to investment arbitration case law, instances in which these decisions can serve to enlighten commercial arbitration practice and procedure in similar situations.

An obvious example is *Hrvatska v Slovenia*, in which arbitrators first raised publicly in an ICSID case the notion that they had an inherent power to prevent counsel appearing if to do so would undermine the integrity of the process.³ The tribunal in that case refused permission for one party's counsel to appear, upholding the other side's objection that that counsel was a member of the same chambers as the tribunal chair (although as a door tenant) and notice of that counsel's involvement had been given at the last minute.

In *Rompetrol v Romania*, another ICSID case, the tribunal considered *Hrvatska* but, on the facts of that case, decided that there was no need to intervene.⁴

So the issue is out there – fair and square – and those facing similar circumstances in commercial arbitration practice will consider and perhaps agree with these awards if they want to

recognise inherent powers. The current public debate on this issue would never have occurred in commercial arbitration but for the publication of the *Hrvatska* decision.

The essential feature of this new phenomenon is that principles or approaches adopted and applied to real life situations in investment arbitrations are set out explicitly in awards that are accessible to the public.⁵ Because they are readily available for guidance, these awards will inevitably be referred to in argument and decision-making in like situations that may arise in commercial arbitrations. Perhaps application of these principles will lead other tribunals to conclude that a prior practice or decision was not an appropriate or correct approach. Conversely, prior applications may have helped to enhance the reasons for subsequent applications. As a result, a more rigorous and considered decision-making environment has been created. The benefit to commercial arbitration practice is clear.

A number of other relevant issues have been dealt with in investment arbitration awards. These include the following.

- (1) Several awards have considered hornbook issues such as onus and burden of proof.⁶
- (2) The author has experience of one unreported ICSID award that considers in some detail the question of legal professional privilege and mediation privilege and what law governs these.⁷
- (3) Wider issues as to privilege have also arisen – eg. is privilege applicable to States? There has also been discussion of public interest immunity.⁸
- (4) A number of awards show how tribunals have dealt with the vexing issue of corruption.⁹
- (5) Many BIT cases have discussed the correct approach to interim measures and the consequences of non-compliance with them.¹⁰

- (6) Compensatory awards in BIT cases frequently contain sizable sections on the assessment of loss. These involve analyses of expert evidence concerning, for example, the correct approach to discounted cash flow methods, dealing with country risk etc.¹¹
- (7) Challenges to arbitrators in BIT cases are public and therefore provide guidance on how they are dealt with. These decisions can assist not only practitioners challenging arbitrators but also arbitrators or arbitral institutions that have to decide challenges.¹²
- (8) A number of investment awards address what is meant by a subdivision or agency of a State. Commercial arbitration cases involving States can raise the same issues.¹³
- (9) Approaches to document production and the taking of evidence are also to be found in investment awards.¹⁴
- (10) Factors to be taken into account when awarding costs are discussed in investment awards on a frequent basis.¹⁵
- (11) Last but not least, many investment arbitrations delve in great detail into what is meant by direct and indirect control of a company.¹⁶

Special mention should be made of the body of awards issued

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by the Iran-US Claims Tribunal – a tribunal that may be said to be a precursor of the many investment arbitrations of today.¹⁷ There are upwards of 40 volumes of awards,¹⁸ all of which report the case law of the Tribunal and provide a wealth of jurisprudence on subjects such as:

- (1) due process issues;
- (2) beneficial ownership or interests; and
- (3) challenges to arbitrators.

Moreover, the Tribunal’s case law also provides one of the most extensive sources on the application of the UNCITRAL Arbitration Rules, on which the procedural rules of the Tribunal are based.¹⁹

Conclusion

The fertile minds we have in the commercial arbitration community could no doubt think of other useful subjects discussed in investment arbitration awards in addition to the ones referred to above.

Whether one agrees with them or not, investment arbitration awards have provided a flow of knowledge into international commercial arbitration. As a result, a wealth of information has been made available for robust debate on many aspects of commercial arbitration law and practice. This cross-pollination has undoubtedly influenced commercial arbitration and will continue to do so. The development is a positive one for the advancement and growth of commercial arbitration. [\[1\]](#)

- 1 The author is grateful to Romesh Weeramantry and Brar Harprabdeep Singh for their valuable assistance and research on this article.
- 2 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (the Washington Convention).
- 3 *Hrvatska Elektroprivreda dd v The Republic of Slovenia*, ICSID Case No ARB/05/24, Tribunal's Ruling of 6 May 2008 (Paulsson, Brower, Williams).
- 4 *Rompotrol Group NV v Romania*, ICSID Case No ARB/06/3, Decision of Tribunal on Participation of Counsel, 14 January 2010 (Donovan, Berman, Lalonde).
- 5 *Editorial note*: investment arbitration awards and decisions are available on a number of websites, including www.italaw.com and <https://icsid.worldbank.org/ICSID/Index.jsp>. See also the *ICSID Reports* (Cambridge University Press).
- 6 See *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para 83 (Kaufmann-Kohler, Schreuer, Otton); *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, p 81 (Williams, Pryles, Vicuna); *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, p 39 (Kaufmann-Kohler, Berman, Bockstiegel).
- 7 See *Libananco Holdings Co Ltd v Republic of Turkey*, ICSID Case No ARB/06/8, Decision on Preliminary Issues, 23 June 2008 (Hwang, Alvarez, Berman).
- 8 See *Libyan American Oil Company v Socialist People's Libyan Arab Jamahiriya*, 482 F Supp 1175 (DDC 1980).
- 9 See *World Duty Free Co Ltd v The Republic of Kenya*, ICSID Case No ARB/00/7, Award, 4 October 2006, pp 34-59 (Guillaume, Veeder, Rogers); *RSM Production Corporation v Grenada*, ICSID Case No ARB/05/14, Decision on Application for a Preliminary Ruling of 29 October 2009, Annulment Proceeding, 7 December 2009, pp 2-13 (Griffith, Abraham, McLachlan).
- 10 See *Tethyan Copper Co Pty Ltd v The Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Claimant's Request for Provisional Measures, 13 December 2012, pp 30-41 (Sachs, Hoffmann, Alexandrov); *Tanzania Electric Supply Co Ltd v Independent Power Tanzania Ltd*, ICSID Case No ARB/98/8, Tribunal's Decision on the Respondent's Request for Provisional Measures, 20 December 1999, pp 12-18 (Brower, Rogers, Rokison).
- 11 See *Technicas Medioambientales Tecmed SA v The United Mexican States*, ICSID Case No ARB(AF)/00/2, Award, 29 May 2003, pp 74-80 (Grigera Naon, Fernandez Rozas, Bernal Vereas); *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, ICSID Case No ARB/84/3, Award, 20 May 1992, pp 379-397 (Arechaga, El Mahdi, Pietrowski). *Editorial note*: see also Mark Kantor, *Valuation for Arbitration* (2008, Kluwer Law International).
- 12 See *Perenco Ecuador Ltd v The Republic of Ecuador & Empresa Estatal Petróleos del Ecuador*, PCA Case No IR-2009/1, Decision on Challenge to Arbitrator, 8 December 2009 (Kroner); *Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, 22 October 2007 (Salacuse, Nikken).
- 13 See *Emilio Agustin Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, paras 71-89 (Orrego Vicuna, Buergenthal, Wolf); *Metalclad Corporation v The United Mexican States*, ICSID Case No ARB(AB)/97/1, Award, 30 August 2000, pp 12-14 (Lauterpacht, Civiletti, Siqueiros).
- 14 See *Rumeli Telekom AS v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Decision of 29 July 2008, pp 8-12 (Hanotiau, Lalonde, Boyd).
- 15 See *Generation Ukraine, Inc v Ukraine*, ICSID Case No ARB/00/9, Award, 16 September 2003, paras 24.1-24.8 (Salpius, Voss, Paulsson).
- 16 See *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, pp 213-231 (Weil, Bernardini, Price); *Plama Consortium Ltd v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005 (Salans, Veeder, van den Berg).
- 17 *Editorial note*: see, for example, Christopher R Drahozal & Christopher S Gibson, *The Iran-US Claims Tribunal at 25* (2007, Oxford University Press).
- 18 *Editorial note*: see the *Iran-US Claims Tribunal Reports* (Cambridge University Press).
- 19 See David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn., 2013, Oxford University Press); Charles N. Brower and Jason D. Brueschke, *The Iran-United States Claims Tribunal* (1998, Martinus Nijhoff); Isaak I Dore, *The UNCITRAL Framework for Arbitration in Comparative Perspective* (1993, Graham & Trotman/Martinus Nijhoff), ch 2.