



Module 13: Investor State Arbitration and Mediation

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Overview



- Broadly known as Investment State Dispute Settlement (ISDS)
- Types of ISDS mechanisms include arbitration, mediation and conciliation
- ISDS mechanisms found in Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) between governments of Contracting States, also referred to as IPPAs (Investment Promotion and Protection Agreements in Hong Kong).
- CEPA (Closer Economic Partnership Agreement) between Hong Kong – Mainland China / Macao
- Purpose of IPPAs – protection of investors in each Contracting State and promotion of cross-border investments.

IPPAs - Protection of Investments



- Fair and equitable treatment
- Full protection and security of investments
- Non-discriminatory treatment of investments
- Non-discriminatory treatment in compensation for losses owing to, among others, war or armed conflict
- Compensation for expropriation of investments
- Free transfer abroad of investments and returns
- Settlement of investment disputes between a contracting party and an investor of another contracting party

Hong Kong IPPAs



- Chapter VII, Article 151 Basic Law permits Hong Kong to conclude and implement agreements on economic relations.
- Hong Kong has concluded 22 IPPAs, with an additional 3 IPPAs (Bahrain, Maldives, Myanmar) waiting to be signed, and 3 IPPAs under negotiation (Iran, Russia, Turkey)
- Full list of IPPAs can be found on the Hong Kong Trade and Industry website: <https://www.tid.gov.hk/english/ita/ippa/index.html>

Investor State Dispute Resolution



- Amicable settlement (negotiations) as precursor to any domestic court proceedings or arbitration – usually 3 months.
- Parties free to choose on the procedure for settlement, but if no agreement, then parties can have recourse to domestic courts or arbitration (ad hoc UNCITRAL Rules, ICSID Convention)
- Recourse by an investor to the domestic courts precludes the investor from bringing any subsequent arbitral proceedings
- Arbitration as predominant ISDS in most BITs.

Investor State Dispute Resolution (cont.)



- An increasing push towards other forms of ISDS by UNCITRAL and Hong Kong Government including mediation
- For example, dispute settlement clauses in the CEPAs between Mainland China and Hong Kong (no mention of arbitration):
 - Amicable consultation
 - Complaint handling organisations for foreign investors in Mainland China
 - Committee on Investment
 - Administrative review
 - Mediation
 - Recourse to judicial proceedings



Investor State Arbitration

Scope and Application of Investor State Arbitration



- Depends on the text of the IPPA
- Disputes that arise out of **“investments”** made by an **“investor”** of another Contracting Party in a Contracting State.
- Investments broadly defined as “including asset of every kind”, including but not limited to movable and immovable property, shares, IP rights, claims to any other performance having economic value, business concessions and re-invested returns
- Investor means a national of any contracting party (includes both natural person and juridical person)
- *Locus Standi*: Investments may be held directly or indirectly (through a juridical person) by the national of the Contracting State

Types of Arbitration



- Some examples of investor state arbitrations:
 - Ad hoc arbitration under UNCITRAL Rules
 - ICSID arbitration
- How to choose? Some considerations:
 - Place or Seat of Arbitration – ICSID (Washington) / ad hoc (choice of Parties or Tribunal)
 - Enforceability of Award or Voluntary Compliance? New York Convention vs. sanctions by World Bank

Procedural Matters



- Commencement of Arbitration
- Number of Arbitrators
- Appointment of Arbitrators and Constitution of Tribunal
- Default in Appointment of Arbitrators – Appointing Authority
- Seat of Arbitration
- Place of Arbitration – Hearing Venue
- Communications
- Written Statements
- Evidence, and Rules on Taking Evidence
- Witness Statements – Factual and Experts
- Applicable Laws
- Language of Arbitration
- Confidentiality / Transparency

Appointment of Arbitrators – UNCITRAL Rules



- UNCITRAL Arbitration Rules provide a detailed mechanism by which the arbitrators are to be appointed.
- Absent any agreement of Parties to a sole arbitrator, three arbitrators are to be appointed, one by each Party and the presiding arbitrator appointed by the two party appointed arbitrators. (Article 7)
- Exception where a Party does not respond on proposal for appointment of sole arbitrator and further does not appoint its own arbitrator – Appointing authority can determine that the tribunal to comprise sole arbitrator. (Article 7(2))
- Where there is default in appointment by any party, application to be made to the Appointing Authority for the appointment of the arbitrator (Articles 8(1), 9(2) and (3)).
- Appointing Authority subject to agreement and designation by Parties (Article 6(1)); absent agreement, application to be made to the Permanent Court of Arbitration for designation of appointing authority (Article 6(2))
- Appointing authority to consider the *advisability* of appointing an arbitrator of a nationality other than the nationalities of the Contracting States (Article 6(7)). Not an absolute prohibition.

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Appointment of Arbitrators – ICSID Rules



- Number of arbitrators to be agreed between Parties (Article 37(2)(a), Convention Rules); absent agreement between Parties, Tribunal to comprise three members, one appointed by each party, the presiding arbitrator to be appointed by Parties' agreement (Article 37(2)(b), Convention Rules).
- Any arbitrators not yet appointed due to non-agreement may be appointed by the Chairman of ICSID, after consultation with the Parties (Article 38, Convention Rules).
- Arbitrators appointed by the Parties need not be on ICSID's Panel of Arbitrators. Appointments by ICSID Chairman under Article 38 to be from ICSID's Panel of Arbitrators (persons on the panel of arbitrators appointed by member states). (Article 40, Convention Rules)
- Majority of arbitrators to be nationals from other contracting states, unless otherwise appointed by agreement of Parties (Article 39)
- Arbitrators must be of "high moral character"; recognized competence in law (esp. for ICSID Panel), commerce, industry or finance; exercise independent judgment

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Qualifications and Attributes of Arbitrators



- Experience in investor-state disputes?
- Experience with public international law or the laws of the contracting state?
- Should nationality be a bar to appointment of an individual as arbitrator (c.f. ICSID rules)? Parties' suspicions – bias and prejudice; nationalism; interplay with the requirements for independence and impartiality.
- How do we assess “high moral character” – in the negative?

Challenge to Jurisdiction



- Investor required to elect between recourse to domestic courts or arbitration (ad hoc or ICSID), otherwise known as “fork in the road” provisions.

“2. In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:

*(a) to the courts or administrative tribunals of the Party that is a party to the dispute; **or***

*(b) in accordance with any applicable, previously agreed dispute-settlement procedures; **or***

(c) in accordance with the terms of paragraph 3.

3. *(a) **Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration [...]***

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Challenge to Jurisdiction (cont.)



- Two tests to determine whether arbitration tribunal has jurisdiction to hear the matter.
 - Fundamental basis test
 - overall consideration whether the claims are fundamentally the same as that pursued in the domestic courts
 - Triple Identity Test
 - same Object / Subject Matter
 - same Cause of Action
 - same Parties.

Seat of Arbitration



- ICSID (Washington) (Article 2 Convention Rules) vs. ad hoc (agreement of Parties or determination by Tribunal) (Article 18, UNCITRAL Rules).
- Supervisory jurisdiction of the local Courts (for e.g., see Article 5(1) and 6, Arbitration Ordinance (Cap. 609).
- Impacts on finality of award and the issue of appeals.
- Also impacts on the enforcement of the Award – enforceability through ICSID Convention or New York Convention?

Applicable Laws



- Subject to the provisions in the IPPA.
- The applicable law usually involves the law of the Contracting State involved in the dispute, and public international laws.
- Need to be mindful that investor-state arbitrations are not “common law” or “civil law” arbitrations.

Confidentiality / Transparency



- Increasing push towards transparency of investor-state arbitrations.
- UNCITRAL Rules on Transparency in Treaty Based Investor State Arbitration applicable to treaties concluded after 1 April 2014, or where otherwise agreed.
- Publication of documents filed in the arbitration with the UN Secretary General (written statements; list of exhibits; written submissions; transcripts; orders, decisions and awards of the Tribunal) (Article 3(1)); witness statements and expert reports, upon request (Article 3(2)).
- Exceptions to transparency set out in Article 7:- confidential business information; information confidential under the laws of the Respondent state; disclosure of information that impedes law enforcement.
- ICSID Awards – limited disclosure – publication by agreement of Parties, otherwise only excerpts of the Tribunal’s legal reasoning will be published (Rule 48 (4), Arbitration Rules)

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Investor State Mediation

Overview of Mediation



- Increasing push towards ISDS by mediation
- Features of Mediation
- Benefits / Cons of Mediation
- Applicability of Hong Kong Mediation Ordinance (Cap. 620)
- CEPA ISDS – Mediation Rules for Investment Disputes

Enforceability of Settlement Agreements



- Settlement Agreements binding on each Contracting Party
- Recognition and Enforcement (without having to re-litigate).
- Singapore Convention on Mediation and UNCITRAL efforts

Q&A



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