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What Makes Arbitration Against A State Different?

HBA INTERNATIONAL LAW SECTION PRESENTATION

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Why is Arbitration Against A State Different?

- Several specific types of transactions frequently involve sovereign states and parastatal entities as parties.
- And, as a result, a significant (and growing) number of arbitrations involve sovereign states or parastatal entities as parties.
- Arbitrations against sovereign states and parastatal entities require an understanding of some issues that are unique to disputes involving sovereigns.

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Three Types of Dispute Highlight the Differences

We look at two types of disputes in particular:

- Investor-state arbitration, and
- Commercial/Contract Arbitration against the state or parastatal entities.

Investor-State Disputes

- Often arise in connection with direct foreign investments in a host country.
- May also arise in connection with indirect foreign investments, such as purchases of sovereign debt.
- There is an inherent tension between maintaining sovereignty and attracting foreign investment.
- Investors need assurances that disputes can be resolved in an efficient and reliable way.
- Dispute resolution in a host-country's domestic courts is often unattractive to international investors.

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International Dispute Resolution Through Treaties

- Multilateral and bilateral investment treaties may be available to provide a means for arbitration of disputes involving sovereigns.
- Multilateral treaties sometimes create a framework for dispute resolution in particular groups of countries or with respect to a particular industry.
- Bilateral investment treaties (BITs) allow investors to assert claims against sovereigns.
- BIT disputes are often arbitrated under the auspices of the ICSID (International Center for the Settlement of Investment Disputes).
- There are currently more than 2500 BITs in force.

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Bilateral Treaty Arbitration is now a Well-Known Mechanism for International Dispute Resolution

BIT arbitrations arise in connection with a wide variety of investment transactions between participating countries and foreign investors.

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The Role of ICSID in BIT Arbitrations

- ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention) with over one hundred and forty member States.
- The ICSID Convention is a multilateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank).
- The Convention sought to foster the free international flows of private investment by creating a means to avoid non-commercial risks and provide a specialized international forum for investment dispute settlement.
- ICSID maintains facilities in Washington, D.C. and cooperates with numerous international arbitration organizations to provide neutral facilities around the world for ICSID arbitrations.

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Multilateral Treaty Based Arbitrations Involving Sovereigns

- Some disputes involving sovereigns do not fit the “investor dispute” framework.
- Multi-lateral treaties may exist to facilitate resolution of commercial disputes between states and foreign counterparties.
- Examples:
  - Regional - NAFTA. A treaty signed by the U.S., Mexico and Canada to establish, among other things, multi-national dispute resolution means among the participants.
  - Industry Based - The Energy Charter Treaty. A treaty signed or acceded to by fifty-one countries and the European Union to facilitate resolution of multi-national energy disputes.

Examples of Types of Disputes Involving Sovereigns That May not Fit the "Investor Dispute" Framework.

- Sales of goods and services
  - Cross-border transactions involving relating to procurement of goods and services for delivery/installation/performance in the host jurisdiction.
  - The traditional measures to secure liens and preserve security for payment may not be available.
- Multi-national joint ventures involving states or parastatal entities
  - Joint ventures for manufacturing, construction and commodity trading are increasingly common. Complex contract relationships often result.
  - Mining and oil and gas projects.
- Technology transfers
  - Protection of intellectual property is increasingly problematic.

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Contractual Arbitration is Also A Possibility

- Even if treaty-based arbitration is not available, many multi-national agreements include contractual arbitration provisions.
- Numerous international bodies are available to facilitate dispute resolution under contractual arbitration provisions.
- The key is the sovereign's agreement to submit disputes and abide by the award.

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What Makes Arbitration Against A State Different?

- For a State, it is not all about money.
  - The government's political agenda.
  - Remaining in power.
  - A multitude of constituencies.
  - But money is not irrelevant.

What Makes Arbitration Against A State Different?

- The decision to arbitrate always involves some risk that it will adversely affect current and future relationships. Arbitration against States may put more at risk. States are policymakers, legislators, regulators and enforcers of domestic law. Independent commercial interests within the country may also align with the state.
  - Is the relationship dead at least under current political conditions?
  - Pursue serious efforts to resolve amicably.
  - Consider a “relationship discount” to settle.
  - Consider corollary proposals that will be “win, win” for you and the government.
  - Public relations campaign.
  - Domestic activity with others.
  - Diplomatic and other activity.

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What Makes Arbitration Against A State Different?

- But states are not necessarily monolithic. When the arbitration involves a policy decision, the political opposition may benefit from a high-profile defeat of the incumbent government.
  - Your friends and their prospects.
  - Maintaining some relationships.

What Makes Arbitration Against A State Different?

- States have some unique defenses/defensive strategies that must be considered in making strategic decisions.
  - Sovereign immunity.
  - Avoidance of liability for State entities.
  - A desire to have matters resolved in domestic courts.
  - A desire to have matters resolved under domestic law.
  - Special privileges against disclosure of information and documents.
  - Ability to interfere with arbitration.
  - Powers to resist enforcement.
  - A special claim to fair treatment.

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What Makes Arbitration Against A State Different?

- Interim Relief
  - A useful tool if it is available.
  - Can sometimes transform an arbitration.
    - Audits
    - Injunctions
    - Interim orders regarding discovery or preservation of property or property rights
    - Mitigation of damages.

What Makes Arbitration Against A State Different?

- Special considerations relating to evidence.
  - Internal collection challenges: does the client understand the obligation to produce and preserve documents and data?
  - Special privileges: does the chosen governing law provide privileges and protections from discovery that differ from what we may assume.
  - The political dialogue outside the hearing room can impact the direction of the proceedings.
  - Unfamiliarity and ambiguity in the record
    - "Industry" custom versus literal meaning: what parties assume may not be obvious to the arbitrators.
    - Role of experts: to satisfy the Tribunal's needs for quality analysis.

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What Makes Arbitration Against A State Different?

- Special considerations relating to evidence (continued).
  - Extrinsic evidence of intent or meaning and contract construction?
    - Arbitrators may let their curiosity overcome evidentiary deficiencies or stray beyond strict rules of construction.
  - Importance of language and the role of translators
    - In developing the record it is critical to build a record that is admissible and credible. Poor or conflicting translations can damage a case
    - In the actual hearing: the official language of the proceedings may make cross-examination and testimony cumbersome; especially in cases involving technical terms or complex analysis.

What Makes Arbitration Against A State Different?

- Arbitrator Selection
  - Unique opportunities to evaluate arbitrators.
    - "Neutrality" does not foreclose strategic selection and due diligence in identifying arbitrators.
    - Certain international arbitral forums publish awards; others do not. Look for prior opinions.
    - Seminars and papers may provide insight.
  - Impact of civil and common law "cultures" on decision-making.
    - Common-law trained arbitrator/lawyers are accustomed to vigorous cross-examination and more liberal discovery.
    - Civil-law trained arbitrators/lawyers are more accustomed to critical analysis of documents and application of contract terms and laws as written. They may be less inclined to permit wide-ranging discovery.

What Makes Arbitration Against A State Different?

- Arbitration Rules and Procedures - Ad Hoc or Institutional?
  - "Ad hoc" arbitrations (UNCITRAL) presume parties will remain cooperative and compliant in disputes as they may have been in original negotiations or implementation of the transaction.
  - Institutional arbitrations, such as proceedings under the ICC, ICDR or LCIA will be administered by a third-party and, in the case of the ICC, an established internal court oversees the process and reviews the award.
    - Institutional administration may encourage parties to cooperate and adhere to agreements more readily.
    - Institutional administration may also improve access to interim measures and facilitate arbitrator selection.

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