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- how will it shape the future of arbitration?

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I.
THE COVID-19 PANDEMIC
- how will it shape the future of arbitration?

[INTRODUCTORY NOTE]

ARBITRATION AFTER COVID-19

By Athina Fouchard Papaefstratiou

Like about 20% of Parisians, and like many of my colleagues, I was lucky enough to be able to leave Paris when the lock-down began in mid-March 2020. I spent the following two and a half months in an isolated house in the mountains, working intensely on two filings and on my cases as arbitrator. My firm had taken measures to allow working from home well before the coronavirus outbreak, and at least video calls and on line document management did not present particular challenges. In parallel, I came to experience the delights of home schooling, printing thousands of pages of my three children's lessons and homework, and living in the rhythm of the hundreds of videocalls with the teachers at school and with the family members who offered to help with homework and e-babysit, so that my spouse and I, both lawyers, could find time to work. Finally, my life in confinement was marked by a disruptive anxiety I felt for family and friends, and a frenzied interest in Covid-19 statistics!

Now, about a month since the end of lock-down in France, or at least since the end of its strictest measures, life has moved to a different normalcy: Paris has reclaimed most of its self-ostracised inhabitants, we work partly from home and partly from the office, and even though it is possible to set up in person meetings with clients, witnesses and experts, video conferences or conference calls still remain the norm.

My experience is perhaps largely similar to the experience that several colleagues from different parts of the world have had or may have in the coming months. At a time that the Covid-19 emergency is slowing down in Europe and is relatively in control in parts of Asia, the coronavirus is still actively transmitting in other areas, such as the Americas.

In that context, the question of the hour in arbitration circles is whether the pandemic will bring permanent changes to the way we work, to our business, or to dispute resolution more generally.

I think that the coronavirus pandemic may be a factor of development for arbitration, and may create opportunities for young practitioners, especially those who are located outside established arbitration centres.

Arbitration became better known to business players around the world, as State courts were slowing down their activity, limiting their operation to urgent matters or, in some cases, shutting down entirely. Business partners submitted by common agreement ("submission agreement") disputes that were pending before national courts to arbitration, in order to progress their resolution. This represented, for some, an opportunity to discover arbitration, and realise its competitive advantage: the fact that arbitration proceedings progress irrespective of the general political or sanitary context. A notable initiative in that regard is the *Pandemic Business Dispute Resolution Service* put forward by CIArb together with CEDR, which consists of a fast-track, exclusively on-line and fixed-fee dispute resolution scheme to assist businesses, particularly small and medium-sized businesses, to quickly resolve their disputes in the present context, via mediation or arbitration. Likewise, the Paris Bar put in place an emergency mediation scheme to assist businesses in resolving disputes during the sanitary crisis.

Regarding the way that arbitration is practiced, a move towards more technology and less travel is to be expected. It is likely for example that unnecessary travel (for conferences that can take place via webinars or for meetings that can take place via video calls) will be avoided. Similarly, physical meetings for the first procedural hearing in arbitration are likely to become less frequent. To the extent that the discussion at such hearings focuses on limited issues, this opportunity for a first encounter between the arbitrator, the parties and their counsel may very well take place via video conferencing. Lastly, institutions such as the ICC or the AAA have published guidelines and protocols for virtual hearings, which are very effective in indicating issues that may arise and suggesting solutions to these issues.

In that context, the sanitary emergency provides an opportunity to practitioners based outside traditional arbitration hubs. With the arbitration community becoming increasingly familiar with virtual hearings, collaborative platforms for document management and video conferences, geographical distance is no longer a problem.

Parties may select arbitrators without paying particular importance to the country in which an individual is based in, knowing that the individual in question will be able to collaborate fully with her co-arbitrators, irrespective of the geographical distance that separates them. In that regard, the activity of associations such as AfricArb (which I have the honour to co-chair), Africa Arbitration Academy, I-Arb, etc, which contributes to the development of arbitration on the African continent generally, and to the visibility of African arbitrators more particularly, are very welcome in the current context.

Similarly, with an important part of our day to day work being done online, with law firms increasing distance-working and flexible working schemes, it will become easier for practitioners who are not based in major arbitration hubs to build a career in arbitration. To give an example from the French arbitration market, a market which, traditionally, was not particularly friendly to distance-working, certain arbitration teams have introduced new policies providing their lawyers with the possibility of working from home for two days a week. This could allow arbitration lawyers to live in other areas of France, provided that they can make arrangements to spend three days a week in Paris.

Webinars, virtual arbitration trainings and workshops also contribute significantly to the extension of the arbitration market and the sharing of know-how outside the main arbitration hubs. Practitioners, judges, in-house counsel and students from all around the world can attend webinars, get more familiarised with arbitration, exchange views, just within a couple of clicks from their desk. In the past, doing so necessitated a significant commitment of time and travel costs, not to mention the resulting C02 footprint. Never before was access to training so easy.

Certainly, physical attendance at an event offers advantages that webinars cannot offer, from networking with other participants and attendees, to visiting different places, learning about their culture and tasting the local cuisine. But one should not be fatalist.

On the one hand, this is a good time to participate in working groups, associations or arbitration communities, and be given the chance to work together with other practitioners all over the world. As an example, the Global Steering Committee of the Young Members Group of CIArb (CIArb YMG), which comprises 15 young arbitration practitioners of diverse profiles and origins, will be replacing two of its members in September, and a call for applications is to be published on the CIArb YMG website shortly. Participating in such groups presents a valuable opportunity for arbitration practitioners to exchange views on arbitration developments worldwide, and to work together with talented individuals outside one's firm.

On the other hand, it is always possible to organise virtual coffee breaks with smaller groups, exchange views and know-how while cracking a joke or two. This year, CIArb YMG is organizing, instead of its traditional day-long conference, a series of webinars on arbitration in the context of sanitary emergency. The webinar on virtual hearings which took place in June will be followed, in the coming months, by webinars on business development and profile-raising opportunities in the sanitary emergency context, on virtual cross-examination, on the impact of Covid-19 on commercial contracts and the resolution of contractual disputes. At the end of each webinar, we aim to propose virtual meetings in smaller groups, which will offer the participants the possibility to exchange views and discuss in a more informal manner.

In a nutshell, the sanitary emergency caused by the coronavirus pandemic and the economic consequences of state measures taken to address the pandemic has hit the lives of many of us, directly or indirectly. However, as summer approaches and with it the need for positive thinking; and as there must be some truth to the adage "every cloud has a silver lining" given that it exists in so many languages and cultures, it would be apt to also acknowledge the benefit and the opportunities that this most unusual year can bring to our lives in the longer term.

Athina Fouchard Papaefstratiou

COULD THE COVID-19 PANDEMIC CONTRIBUTE TO THE DEVELOPMENT OF ARBITRATION IN EUROPE?

By Jan Gasiorowski and Patryk Polek

I. INTRODUCTION

In 2020 the COVID-19 pandemic[1] that originated in Wuhan, China spread throughout the world disturbing the functioning of the justice system. Restrictions on the movement of people, forced isolation, limited operation of postal services and lack of technical preparedness adversely affected justice systems in various states. In response to the abovementioned issues, many countries took steps to maintain the functioning of their legal systems. Some countries were better prepared than others.

China established its first internet court in Hangzhou in August 2017. Subsequently, similar courts were established in September 2018 in Beijing and Canton. In February 2020 in the face of the epidemic, the Supreme People's Court of China issued the following statement: "*[c]onsidering that the epidemic may last for some time, the Supreme People's Court, the country's top court, ordered courts at all levels to guide litigants to file cases or mediate disputes online, encouraging judges to make full use of online systems for litigation, including those for case filing and ruling delivery, to ensure litigants and their lawyers get better legal services and protection*"[2].

Unfortunately, most European countries were not prepared to timely adopt similar measures.

II. COVID-19 IMPACT ON EUROPEAN JUSTICE SYSTEMS

In Germany, the Ministry of Justice of North Rhine-Westphalia on 17 March 2020 decided by decree that hearings should only be held if their postponement would be unacceptable. Under this decree, the courts will independently decide whether to cancel or modify the date of hearings and whether to suspend or interrupt proceedings, depending on the specific circumstances of each individual case[3]. The steps taken by the judiciary were also referred to individually by court presidents. The President of the Berlin Court of Appeal issued a statement that the activities of the courts would not be stopped, but could only be maintained to a very limited extent[4]. He emphasised

that until an order is issued for the complete closure of the entire civil service, each court, through its management and leadership, will decide, within the framework of the applicable law, to what extent and how the judicial proceedings will continue to operate in the current situation. In accordance with the abovementioned statement, the Bureau of the Berlin Court of Appeal provided recommendations to the judges of the Court of Appeal that all scheduled hearings (except those defined as urgent) should be suspended in order to keep the court running with limited resources. The statement defines 'urgent cases' as those in which, in order to avoid direct, substantial damage to a party or participant, a hearing or a ruling by the Chamber itself, given the current situation in which the health of all is at stake, is absolutely necessary and cannot be postponed. This applies overwhelmingly to family and criminal law cases, and not typical commercial disputes.

Similarly in France, the Minister of Justice ordered the closure of all courts and the revocation of scheduled hearings from 16 March 2020, with the exception of several types of proceedings, including arrests and detentions[5]. The operation of the commercial courts has been limited to dealing only with urgent hearings in collective cases and ad hoc proceedings.

In Malta, by virtue of Legal Notices 61 of 13 March 2020[6], 65 of 16 March 2020[7], 97 of 23 March 2020 (amending Legal Notice 65) [8], and Legal Notice 141 of April 2020[9] all courts, commissions, committees and other entities which operate from the buildings of the Courts of Justice before which any proceedings are heard or procedures undertaken which are subject to legal, judicial or administrative time limits for filing any claims, defences or other acts, were closed. The Maltese courts will, however, retain the power to order the hearing of cases of an urgent nature or those which are in the public interest. Moreover, any running time periods under substantive or procedural law (including any prescription or peremptory period) and those ordered by the court, governmental or public authority were suspended.

The approach to the COVID-19 pandemic was different in England, where the government has advised that most civil court buildings should remain open, but civil hearings should be conducted remotely wherever possible. Physical hearings have been limited to situations where a remote hearing is not possible and the safety of their participants is ensured by suitable arrangements[10]. Measures have been taken to make use of existing technology in the courts and to allow as many hearings as possible with some or all of the participants present virtually, either via the telephone or internet. As a result of these measures, many proceedings have been conducted in the normal course, with appropriate precautions, despite the developing epidemic in that country. This does not mean, of course, that no hearings were postponed in the face of the epidemic.

The decision on whether to conduct a hearing and how it should proceed was left to the judges in each individual case. When considering whether to use a video/audio connection at a given hearing, the judges were required to consider issues such as the nature of the cases at the hearing; potential problems with the use of the video/audio technology which the participants might encounter, and any other issues relating to public access or participation in the hearing[11]. Her Majesty's Courts & Tribunal Service provided a weekly operational summary on the courts and tribunals during the COVID-19 outbreak, where it published the civil court listing priorities[12].

The current pandemic was also not indifferent to European supranational courts.

The Court of Justice of the European Union on 19 March 2020 issued a statement in which it stated that it continues its judicial activity, but priority will be given to those cases that are particularly urgent[13].In the abovementioned statement, the CJEU also noted that procedural time limitations for instituting proceedings and lodging appeals continue to run and the parties are required to comply with those limits. However, to the contrary, time limits prescribed in on-going proceedings – with the exception of the abovementioned proceedings that are particularly urgent – are extended by one month. The CJEU also stated that all hearings would be postponed until 3 April 2020. In a later update, on 23 April 2020, CJEU extended the time for which all hearings are postponed to 25 May 2020.

The European Court of Human Rights, using a similar method, issued a press release on 16 March 2020 stating that, *inter alia*, as of 16 March 2020, the six-month period for lodging of applications was suspended for one month[14]. All time limits allotted in the proceedings that are currently pending will be suspended for one month, which takes effect from 16 March 2020. These time limits were later extended for a further two-month period[15].The ECHR decided not to notify further judgments and decisions until the resumption of normal operations, and decided that, with the exception of the Grand Chamber and cases of particular urgency, the Court will continue to deliver judgments and decisions but will postpone their delivery until then.

III. PROCEDURAL LIMITATIONS OF THE COMMON COURTS ON THE EXAMPLE OF MALTA AND ENGLAND

Digitalisation of European courts has been increasing in recent years, but still in the vast majority of European countries it is impossible to conduct entire proceedings without the physical presence of the parties and the exchange of physical correspondence. There are many procedural limitations regulating aspects such as (i) ways of initiating court proceedings; (ii) rules on submission of documents; (iii) possibility of conducting hearings via videoconference; (iv) methods of witness examination; *inter alia*, which limit the possibility of conducting proceedings remotely. For example, while most of the European courts allow the use of videoconferencing in civil cases, electronic submissions of motions is rarely possible[16].

An example of a country where procedural restrictions have led to an almost complete suspension of the judiciary during the COVID-19 pandemic, is Malta. First of all, litigation in Malta is usually initiated by means of a sworn application to be filed by the applicant to the court registry. Ways of starting

proceedings via the Internet are very limited but possible for example in regard to small monetary claims. Documents, however, cannot be served electronically in civil proceedings[17].

In addition, the exchange of pleadings in the course of proceedings before the Maltese courts cannot take place electronically. Under articles 176 (1) and 179 of the Maltese Code of organization and civil procedure ("**MCCP**"), pleadings must be printed, type-written or written in ink and filed to the registry of the respective court during the official opening hours of the registries.

Conducting hearings by using videoconferences is also not allowed under Maltese law. In the face of the COVID-19 epidemic, some judges have stated that this should be changed and that the Maltese parliament should draw up legislation to allow audio-visual sittings[18].

Maltese law allows for evidence to be taken by videoconference. In accordance with article 662B (2) of MCCP, "*the Court may also allow for the testimony of any witness even if present in Malta to be given by video conference or by teleconference from such place as the court may order and subject to such conditions and directions as the court may deem necessary*". This is despite the fact that, according to the information provided on a European justice website, this witness examination method is used as a last resort and the person examined by videoconference has to be present in court. Videoconferencing is usually used by the Maltese courts when: (**i**) one of the parties is in a foreign country, (**ii**) a witness is in a foreign country, (**iii**) a foreign expert needs to give expert advice on any matter from his/her own country; (**iv**) a case is being heard abroad and one of the parties or witnesses resides in Malta; and (**v**) an interpreter is required[19].

The abovementioned procedural limitations, which do not allow Maltese courts to function properly in the face of the COVID-19 pandemic, are not present in England where the approach to these matters is much more flexible, and the COVID-19 impact on courts is significantly lower.

Under rule no. 6.3 of the practice directions to the Civil Procedure Rules ("**CPR**"), regulating civil litigation procedures in the courts of England and Wales, a claim form may be served by any of the following methods: (**i**) personal service; (**ii**) first class post, document exchange or other service which provides for delivery on the next business day; (**iii**) leaving it in specified places of service in special circumstances; (**iv**) fax or other means of electronic communication; or any method authorised by the court when the court deems that there is a good reason to authorise such service. Rule no. 7.5 of the CPR clearly indicates that a claim can be submitted via e-mail. In this regard it must be noted that a claim form can be served by e-mail only when: (i) the defendant/defendant's solicitors agreed to service by email or a court order provided for alternate service to serve using email and (ii) the defendant/defendant's solicitors were asked about any limitations on their agreement to receive the claim form by e-mail such as for example the format or size of attachments. Moreover, nothing in the CPR prevents the parties from agreeing to accept service of documents by email.

CPR also does not prevent remote hearing or witness examination through videoconference to take place. In fact, under CPR 3.1(2)(d) the court, as a matter of its own case management powers, may hold a hearing and receive evidence by telephone or by using any other method of direct oral communication, unless the CPR provide otherwise elsewhere. A detailed guidance on videoconferencing in civil proceedings is listed in the Annex 3 to the Practice Direction 32 setting out how evidence is to be given and facts are to be proven.

Further, due to the COVID-19 pandemic, the Coronavirus Act 2020 came into force which in Schedule 25 makes provisions for public participation in proceedings conducted by video or audio and amends the Courts Act 2003. In short, these provisions enable the court to direct that those proceedings conducted remotely are broadcast to enable members of the public to follow the proceedings. The court may also direct that a recording of the proceedings should be made. Further, offences are created in relation to unauthorised recordings or transmissions of broadcasts.

In the light of the above, it must be concluded that procedural limitations of the national courts directly affect the COVID-19 pandemic's impact on juridical systems. England, which had all necessary infrastructure and proper procedural rules set up before the pandemic, was able to easily adapt to the new circumstances. Actions taken in England at legislative level in regard to the functioning of the courts were limited to only one act which also regulated other COVID-19 related matters. Whereas in Malta, as well as in many other European countries, the pandemic led to multiple legislative acts, which in most cases were limited to suspending and limiting the public courts' operation, without providing any working methods of conducting court proceedings remotely.

In this regard it should also be noted that regulations allowing for remote processing of claims and solving disputes are not enough without corresponding technical infrastructure. *Ad hoc* solutions introduced during pandemic most likely will not be able to deliver the expected result if the necessary infrastructure is not in place.

IV. HOW ARE ARBITRATION TRIBUNALS PREPARED TO RESOLVE DISPUTES DURING THE COVID-19 PANDEMIC?

As presented above, in the face of the pandemic most European states were forced to completely halt or at least vastly limit the judicial functions of the courts. In the majority of them, the closure of the courts happened without a foreseeable "end-date" or alternatively, the postponement of hearings is being extended. Litigants are therefore essentially barred from filing new claims and cannot finish ongoing proceedings. Is arbitration ready to replace the work of the courts and can it be a panacea for the current situation?

Arbitration was, and still remains, a more flexible forum to resolve disputes between commercial partners than the domestic courts. As presented above, judges in domestic court

proceedings have to strictly follow legislation adopted by the Parliament and being *in force* at the time of such proceedings. As a consequence, the judiciary has to wait for any new legislative implementations to be assessed, drafted, decided upon in the Parliament and that become binding law after their *vacatio legis*. This is especially relevant at a time when a special circumstance, such as a global pandemic, effectively paralyses activities of state judiciaries.

Contrary to the above, arbitration is in most cases governed by regulations that rarely change, and allow arbitration tribunals much more procedural freedom, even in countries in which procedural rules for domestic courts are very strict. Most European states based their regulations on arbitration on the UNCITRAL Model Law on International Commercial Arbitration. This model law allows for conducting arbitration proceedings entirely in a remote manner. Such instruments like remote hearings, electronic documents delivery, were legally allowed and commonly used in arbitration courts long before the COVID-19 pandemic outbreak.

Therefore, arbitration courts are now better equipped to quickly respond to new threats and the needs of litigants when compared to the national courts. Both the arbitrators and parties already have tools at their disposal to shape the course of the arbitral proceedings, which allows them to respond in real time to various obstacles, more or less serious than the COVID-19 pandemic. One of these tools is the ability enshrined in the arbitration rules of various arbitral institutions to conduct arbitral proceedings entirely in a virtual environment.

In order to mitigate delays caused by the pandemic, arbitral institutions have already put forward guidelines aiming to assist arbitrators, the parties and their counsels in alleviating the obstacles put forward by the COVID-19 pandemic.

The International Chamber of Commerce on 9 April 2020 released the "*ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*"[20] ("**ICC Note**"). This note is meant to provide guidance on the organisation of virtual hearings held either by audioconference, videoconference or any other similar electronic means of communication, which is already allowed under the ICC Rules of Arbitration.[21]. The ICC Note underlines that all parties in arbitration are under the obligation to consider all procedural measures that will mitigate the effect of delays caused by the COVID-19 pandemic, including filing new request for arbitration only in electronic form; obtaining the parties' submissions and exhibits by electronic means, using virtual hearings to conduct arbitration and carry out tribunals' deliberations and preparation of draft awards. Likewise, in order to mitigate any potential risks, the ICC Note suggests to proceed with virtual hearings as opposed to having arbitrators, counsels and witnesses physically present in one location. These general rules prove that ICC arbitration gives litigants a well functioning forum to resolve their disputes without delays by means of electronic exchange of submissions and the use of virtual hearings, as opposed to some of the domestic justice systems that are currently not functioning properly.

Similarly, other major arbitral institutions such as the London Court of International Arbitration ("**LCIA**") or the Hong Kong International Arbitration Centre ("**HKIAC**") in their arbitration rules provide that arbitration can commence and continue solely by means of electronic communication and by making use of virtual hearings. By way of example, Article 19.2 of the arbitration rules of the LCIA states that "*(…) the Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form, content, procedure, time limits and geographical place. As to form, a hearing may take place by video or telephone conference or in person (or a combination of all three).*" Likewise, arbitrations held under the auspices of HKIAC can be held virtually and HKIAC provides additional assistance in offering various virtual hearing services[22].

A separate mention should also be made that parties in their *ad hoc* arbitration are free to decide whether the process of gathering evidence and the conduct of hearings should be made entirely by means of virtual meetings and electronic submissions.

Therefore, arbitration – as compared to the current situation in the judiciaries of various European states (and the lack of digitalisation prepared beforehand) – is already ready to enable parties to settle their disputes without undue delay caused by these unforeseen pandemic circumstances. While the justice systems of various states do not allow (or are not sufficiently prepared) for online settlement of cases – either by lack of legislation or lack of technical preparedness – arbitration already makes vast use of electronic submissions and virtual hearings.

However, while the possibility to resolve disputes in arbitration via online submissions and hearings remains available for arbitrators and parties, it does not come without additional hurdles that have to be addressed.

Key principles of arbitration are the equality of parties, neutrality of arbitrators, safety and confidentiality of the arbitration hearing and the speed of arbitration. Conducting arbitration entirely by means of electronic or video communication creates additional hurdles not seen in typical, person-to-person arbitration, which may threaten each of these principles.

Conducting both arbitration and court proceedings remotely may result in major problems related to both practical and technical use of the virtual environment. Practical issues refer *inter alia* to protecting the confidentiality of the proceedings, verifying the identity of all participants, ensuring lack of external influence over participants of the proceedings, warranting the integrity of oral testimonies, protecting virtual hearings against illicit access and hacking. Similarly, overcoming technical burdens is not less important – these include ensuring possession of sufficient hardware and meeting technical requirements, including the compatibility of the technology used, availability of back-up hardware and the reliability of the internet and power connections.

The issues briefly outlined above are a few examples of potential burdens that have to be addressed in order to proceed with full, virtual proceedings in compliance with the

basic principles of justice. Arbitral institutions and private parties have already recognized these problems and are trying to find proper solutions – the ICC in annex I to the ICC Note prepared a checklist describing the key problems of virtual hearings. In November 2018, the Seoul Protocol on Video Conferencing in International Arbitration ("**Seoul Protocol**") was introduced, which was intended to serve as a best practice guide for planning, testing and conducting video conferences in international arbitration. The Seoul Protocol provides certain technical requirements for all participants to adopt in remote hearings to ensure uninterrupted and safe virtual hearings.

V. SUMMARY

In the current situation, in the case of both domestic and international disputes, arbitration seems to be the best solution as it ensures – first and foremost – the ability to conduct the given proceedings and finally resolve a particular dispute regardless of COVID-19 pandemic. Even if the parties in their original contract did not include an arbitration agreement, nothing bars them from submitting their dispute to *ad hoc* arbitration and resolving it without undue delay. Moreover, flexible arbitration rules of various arbitral institutions allow for the organisation and conduct of proceedings remotely and in a manner adapted to the current global situation, even in jurisdictions where at any given time the domestic courts are not functioning properly.

Current expectations toward European states and domestic courts regarding the introduction of legislative and technical solutions enabling true virtual dispute resolution may prove to go unfulfilled during the pandemic period. Arbitration starts this race from a much better position, as even before the time of the COVID-19 pandemic it already allowed and conducted remote proceedings. The ability of arbitration to flexibly react to the needs of litigants is a great chance for arbitration to develop in those countries where it has not been popular so far. While it provides a tailored solution to dispute resolution in the times of the pandemic and effective paralysis of the global justice systems, one has to take into account certain drawbacks and necessities strictly connected with the virtual environment and remote hearings.

Nonetheless, these problems are already recognized by both arbitral institutions and practitioners, and certain steps – such as adoption of the ICC Note or the Seoul Protocol – are taken to properly address these issues.

1 https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020
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São Paulo, Brazil

IMPACTS OF COVID-19 ON ARBITRATION – PRECAUTIONS

By Gilberto Giusti and Douglas Depieri Catarucci

The World Health Organization (WHO) has recently declared COVID-19 as a pandemic around the world, and issued recommendations to contain the spread of the virus. Following the WHO declaration, diverse arbitration agents have implemented specific emergency measures on different fronts.

In line with the WHO guidelines, both national and international law firms and arbitration institutions have: (i) cancelled or reduced considerably international travels of their attorneys and arbitrators; (ii) adopted conference calls instead of in-person meetings; (iii) suspended or rescheduled on-site hearings and meetings, where possible; and (iv) adopted the work-from-home policy throughout the COVID-19 risk period to avoid internal and external interactions.

Almost all national and international arbitration events set for 2020 were cancelled or postponed *sine die* to avoid social gathering and movement of people until the situation stabilizes, in compliance with the WHO measures.

Specifically in the context of national and international arbitrations, arbitrators have in general maintained the deadlines for allegations and submissions. They only cancelled hearings for signing of terms of reference and in their place conference calls were adopted, while hearings were suspended until the current situation comes back to normal or performed through remote means. Tribunal-appointed experts have postponed on-site inspections, audits of physical documentation, and meetings and hearings with party-appointed experts.

To provide the parties with greater certainty as to development of the arbitral proceedings, arbitration chambers and centers have issued resolutions dealing with remote management of arbitration, suspending deadlines for hard copy filings in general (for the parties to make their

submissions and deliver documents) while suspending in-person hearings and meetings in their conference rooms, making available remote means for filing of documents and holding hearings. For new proceedings, most arbitration chambers have implemented electronic-only filings of requests for arbitration.

For illustrative purposes only, without prejudice to other measures in addition to all resolutions issued until now by both national and international chambers, the table in the Annex I to this article outlines the operating measures put in place by certain arbitration chambers active in Brazil (note that the applicability of the rules below may change in certain cases, depending on specific orders issued by the arbitral tribunals).

As general rules cannot be established for the most varied scenarios in arbitral proceedings amid the current exceptional circumstances, the parties are strongly recommended to take additional precautions, increasing the number of consultations to the arbitral tribunals or to the secretariat of arbitration chambers, as appropriate, for advice on specific events and/or proceedings.

The parties and arbitrators are recommended to hold emergency conference calls to align points not dealt with in the rules and in the chamber resolutions, with issuance of a procedural order or official communication by the arbitral tribunal determining how the parties should proceed in specific situations so as to avoid obstruction of proceedings on account of the extraordinary measures.

ANNEX I

	ICC	CAM-CCBC (Resolution 40 of 2020)	FIESP/CIESP (Resolution 2 of 2020)	FGV (Resolution 1 of 2020)	CAMARB (Resolution 9 of 2020)	CBMA (Resolution 1 of 2020)	AMCHAM (Resolution 1 of 2020)	CÂMARA B3 (Resolution CAM 1 of 2020)	CAMES
Pending proceedings	Regular development, in accordance with the respective terms of reference or applicable rules	Regular development in accordance with the respective terms of reference or applicable rules; arbitrators may, *ex officio* or on request of the parties, issue orders in specific cases For proceedings in the phase of constitution of the arbitral tribunal, the parties will be permitted to exchange electronic communications only, but if the parties disagree, the proceedings will be stayed until hard copy filings come back to normal	Regular development in accordance with the respective terms of reference or applicable rules	Regular development in accordance with the respective terms of reference or applicable rules; arbitrators may, *ex officio* or on request of the parties, stay pending proceedings	Regular development in accordance with the respective terms of reference or applicable rules; arbitrators may, *ex officio* or on request of the parties, stay pending proceedings	The constituted Arbitral Tribunal may determine the suspension of arbitration, at its sole discretion or by agreement of the parties, as well as adopt other measures deemed necessary for the regular development of the arbitration procedure, with the objective of adapting it to the restrictions imposed by the COVID-19 pandemic	Regular development in accordance with the respective terms of reference or applicable rules; arbitrators may, *ex officio* or on request of the parties, stay pending proceedings	The Arbitral Tribunal or, in its absence, the parties involved, should decide on the possible need to suspend the procedure. If the suspension of the procedure is determined, the monthly costs provided for in item 8.1.1 of the Arbitration Rules will not be due by the parties during the suspension period	The Chamber remains operating in an isolated virtual manner, with no suspension of deadlines.
New proceedings	Electronic-only filing of new requests for arbitration; attached documents should be sent by e-mail to the ICC Court of Arbitration	Electronic-only filing of new requests for arbitration; attached documents should be sent to the e-mails specified in the Resolution	Electronic-only filing of new requests for arbitration; attached documents should be sent to the e-mails specified in the Resolution	Electronic-only filing of new requests for arbitration; attached documents should be sent to the e-mails specified in the Resolution.	Electronic-only filing of new requests for arbitration; attached documents should be sent to the e-mails specified in the Resolution	Electronic-only filing of new requests for arbitration; attached documents should be sent to the e-mails specified in the Resolution	Electronic-only filing of new requests for arbitration; attached documents should be sent to the e-mails specified in the Resolution	Electronic-only filing of new requests for arbitration; attached documents should be sent to the e-mails specified in the Resolution	
Filing of submissions	Temporary suspension of hard copy filings is strongly recommended. To comply with deadlines, submissions should be filed by e-mail. If hard-copy filing is needed, the case manager should be informed in advance to find a solution accordingly	Temporary suspension of hard copy filings until the termination of the resolution 40 of 2020. To comply with deadlines, submissions should be filed by e-mail and via upload to the cloud as made available by CAM-CCBC	Temporary suspension of hard copy filings for indeterminate period. To comply with deadlines, submissions should be filed by e-mail. Pending hard copy filings should be made on the first business day following the end of the suspension period	Temporary suspension of hard copy filings. To comply with deadlines, submissions should be filed by e-mail and contain the digital signatures of the attorneys	Temporary suspension of hard copy filings for arbitration, mediation and DRBs proceedings in all CAMARB's offices.	Temporary suspension of hard copy filings. To comply with deadlines, submissions should be filed by e-mail and contain the digital signatures of the attorneys	Temporary suspension of hard copy filings. To comply with deadlines, submissions should be filed by e-mail as established in the arbitration and mediation rules.	Temporary suspension of hard copy filings. With the authorization of the Arbitral Tribunal or, in its absence, of the parties, the submissions to be filed must be submitted, with all accompanying documents, through the CAM Digital platform, through access specially made available by the Secretariat.	
Calculation of time periods	There is no specific provision	There is no specific provision	The periods suspended by Resolution 1 of 2020 will return to flow on March 30, 2020, observing the rule of exclusively electronic protocol	Calculated as from electronic filing	There is no specific provision	Calculated as from electronic filing	Calculated as from electronic filing	Calculated as from electronic filing. The counting will start from the first business day following the availability of documents on the CAM Digital platform by the Secretariat or, alternatively, from the first business day following the sending of the electronic correspondence containing the manifestation and its respective documents	
In-person meetings and hearings	Hearings/meetings scheduled to be held at the ICC conference rooms will be suspended until April 13, 2020 or cancelled. The arbitrators will define whether to pursue another way of conducting meetings and hearings in specific cases, or to suspend them in other cases	In-person meetings and hearings should be avoided. Indispensable meetings and hearings should be conducted remotely via the Microsoft Teams system, also with the virtual participation of the chamber's case manager	During the Suspension Period, at the request of the Arbitral Tribunal, the Chamber Secretary will provide the telematics of arbitral proceedings, including hearings and meetings, conference calls (Dial In) or teleconferences through the Webex platform (Cisco).	No specific provision, to be defined in the specific case with the arbitral tribunal	It is up to the parties, arbitrators and mediators to decide on the possible suspension of the proceedings, hearings, meetings, changes to the calendar, or any other modification they deem necessary to meet the restrictions imposed by the COVID-19 pandemic.	No specific provision, to be defined in the specific case with the arbitral tribunal	The Chamber Secretary will provide tools to conduct experiments through the digital platform or telephone interviews, always with participation, also through the remote, of at least one member of the Secretariat. Although it is recommended not to hold hearings and face-to-face meetings, it is up to the parties to decide on how to proceed, but with the participation of the chamber secretary by remote	The Arbitral Tribunal or, in its absence, the parties involved, should decide on the eventual need to suspend the procedure, cancel or postpone the hearings, its realization by telephone conference mechanism provided by the Chamber Secretary, as well as any other measures deemed necessary to comply safety recommendations issued by public health authorities	
Chamber services	Exclusively by e-mail and telephone	Exclusively by e-mail and telephone	Exclusively by e-mail and telephone	Exclusively by e-mail and telephone	Exclusively by e-mail and telephone	Exclusively by e-mail and telephone	Exclusively by e-mail and telephone	Exclusively by e-mail and telephone	
Filing of documents	Temporary suspension of hard copy filings, USB flash drives, CDs or other physical media. To comply with deadlines, documents should be filed by e-mail or made available in the cloud	Temporary suspension of hard copy filings, USB flash drives, CDs or other physical media at least until the termination of the resolution 40 of 2020. To comply with deadlines, documents should be filed via upload to the cloud as made available by CAM-CCBC.	Temporary suspension of hard copy filings, USB flash drives, CDs or other physical media. To comply with deadlines, documents should be filed by e-mail or made available in the cloud.	Temporary suspension of hard copy filings, USB flash drives, CDs or other physical media. To comply with deadlines, documents should be filed by e-mail and, depending on the size of the files, a link with access to the cloud is recommended	Temporary suspension of hard copy filings, USB flash drives, CDs or other physical media. To comply with deadlines, documents should be filed by e-mail, as established by the Tribunal or arbitration rule.	Temporary suspension of hard copy filings, USB flash drives, CDs or other physical media. To comply with deadlines, documents should be filed by e-mail and, depending on the size of the files, a link with access to the cloud is recommended	Temporary suspension of hard copy filings, USB flash drives, CDs or other physical media. As from the normalization of the hard copy filings to be determined by means of a new Resolution, the Parties must submit at least one hard copy of the manifestations and documents presented electronically, which will be filed by the CAM-AMCHAM Secretariat.	Temporary suspension of hard copy filings. To comply with deadlines, documents may be sent by e-mail. In this case, documents larger than 20MB should be divided into as many files as necessary so that no e-mail exceeds this limit. It will not be allowed to send pen-drives or other physical media devices to the Secretariat during the term of this resolution.	

Save for on-site hearings and procedures, arbitral proceedings should not be suspended and the relevant deadlines should not be extended as a means of reducing as far as possible the impacts on the ordinary course of the proceedings. The parties are also encouraged not to postpone commencement of arbitration to avoid disrupting proper resolution of the disputes, as arbitration can follow its normal course.

Both lawyers, clients and arbitrators are advised to take the following general precautions during this period in the context of arbitral proceedings:

(i) To add delivery and read receipts to the e-mails sent in compliance with deadlines, requesting confirmation of receipt by all addressees;

(ii) To adopt a cloud-based storage system (with the option to record the insertion, change and removal of documents), preferably administered by the arbitrators or by the chamber, for filing documents in arbitration;

(iii) If a specific event is not dealt with in a resolution of the chambers, the resolution is silent, or the resolution in effect creates any unreasonable and unpredicted situation, to reach an agreement with the other party as a means of regulating this specific event and/or pursue a resolution at the secretariat of the chamber or at the arbitral tribunal;

(iv) To avoid any type of physical interaction with the adoption of a remote system in all cases (for example, meetings between attorneys and clients to align the strategy of the cases; meetings for arbitrator resolutions; meetings with potential witnesses to find out the facts);

(v) If it is extremely necessary to conduct on-site hearings or procedures during this exceptional period, they should be held without the presence of non-essential persons, additional care should be taken with sanitization of the venue and with respect to persons whose presence is essential, hiring staff specifically to carry out this sanitization in special conditions; and

(vi) To suspend the use of hard copy files and physical media both in internal and external interactions, sharing documents exclusively via e-mail or cloud system.

Finally, it is recommended that all members of the arbitration community act jointly and proactively to structure and share guidelines and views on specific situations they may face. The parties, chambers and arbitrators should also require a proactive approach from their peers in adopting and complying with preventive measures, also punishing opportunistic conduct of taking undue procedural advantage as a result of grey areas created by this exceptional period.

More importantly, human-wide conduct and solidarity are key components amid this pandemic that has severely hit countries around the globe. So it is essential to take effective action to reverse the current exceptional background, while avoiding negative impacts on the arbitration community.

Sangameshwar temple near Saswad, Pune, Maharashtra | realityimages

HOW THE INTERNATIONAL INVESTMENT ARBITRATION REGIME WILL SHAPE DURING AND AFTER THE PANDEMIC

By Shambhavi Sinha

1. INTRODUCTION

On 11th March 2020, the World Health Organisation marked the beginning of destabilisation of Global commerce when it declared the outbreak of Coronavirus as a pandemic. As I write this piece of literature, there are 43,07,287 confirmed cases of coronavirus in the world.[1] This number is likely to increase in the coming months because Coronavirus has already mutated itself into several dominant strains. The world is ailing because of this virus which is officially termed as COVID – 19. Countries have adopted various measures to curb the spread of coronavirus. More than one third of the world's population is on lockdown as countries have closed international borders, restricted transportation and cancelled foreign and even domestic flights.[2] The measures adopted by the states are collectively contributing towards a deglobalisation process. The automotive sector, the airlines and the energy industries are the worst hit. The stock market is as volatile as never before and companies are struggling with the economic loss. According to the United Nations Centre for International Trade and development, the global FDI is about to witness a negative impact which might range from - 5% to – 15% in the year 2020/2021.[3] COVID -19 has impacted more than two-thirds of the Multinational enterprises in UNCTAD's Top 100 MNEs.

Therefore, it is almost certain that several businesses won't be able to perform their contractual obligations and the world is about to witness a rise in the number of disputes across nations. Foreign investments are suffering as the states restrict them from trading. Their business is even at the risk of being nationalised or requisitioned by the respective host governments. A number of claims pertaining to commercial delay caused due to lockdown and curfews, claims related to cross-border transit and claims involving exports ban, claims arising from reliance on technology, insurance and data privacy claims are just amongst few of the disputes that will arise from the coronavirus crisis. This article will analyse how the existing International Investment treaty regime will play out

to balance the interests between the foreign investors and the State government.

2. IMPACT OF COVID-19 ON THE INTERNATIONAL INVESTMENT TREATY REGIME : THE THREE PIECES OF A PUZZLE

The dimensions of time can be described in past, present and future. Similarly, there can be three possible scenarios to describe the impact of Coronavirus on International Investment Arbitration regime[4]. The first case - since the outbreak of this pandemic, several investment disputes were notified by the claimants but not all are yet registered by the arbitral tribunal. The second case - Prior to the imposition of lockdown, there were several ongoing Investment Arbitration disputes before the investment Tribunals whose proceedings are halted now. The third case - Future claims which are about to be filed by the investors before Investment Tribunal post COVID -19. The following section of this article will analyse these three pieces to solve the puzzle pertaining to the impact of coronavirus on Investment Arbitration.

2.1. Disputes Notified by the Claimants but not yet registered by the Arbitral Tribunal

The arbitration mechanism under a Bilateral or Multilateral Investment Treaty kickstarts with the notice of intent by the claimant to initiate the Dispute Resolution mechanism under the Treaty. The next procedure is for the arbitration institution to register the dispute unless the particular secretary general or the relevant authority finds the nature of the dispute to be manifestly outside the jurisdiction of the tribunal.[5] However, nowadays, almost all the Bilateral Investment Treaties contains a provision for amicable settlement of the dispute before the constitution of the arbitral tribunal. Similarly a number of investment agreements have provisions regarding the Exhaustion of local remedies which is one of the rules under Customary International Law.[6] This rule in the context of Investment Arbitration postulates that an investor should approach the domestic courts and tribunals to seek redressal of the disputes before triggering the mechanism under investment treaty.[7] There are two similar provisions in the investment agreements – a) Cooling off period and b) Fork in the road clauses.

The first one refers to a waiting period during which the parties are expected to attempt amicable settlement of dispute by negotiation, mediation or conciliation before the constitution of Arbitral Tribunal. Almost 90% of the existing Bilateral Investment Agreements contain a clause for cooling off period.[8] For instance, Article 9 of the India-Romania BIT[9]:

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.

(2) If any such dispute cannot thus be settled within six months from the date on which the dispute was raised by one of the parties, it may be submitted…..

The Ad Hoc Tribunal in the case of Lauder v Czech Republic, has opined that the cooling off periods starts from the day the notice is served by the claimants.[10] Furthermore, an ISCID Tribunal in the case of Murphy Exploration and Production Company International (Murphy) v/s the Republic of Ecuador (Ecuador), declined to exercise jurisdiction because of claimant's failure to comply with the provisions of the cooling off period.[11]

In the present context regarding Coronavirus, it will be very convenient for the investors to bypass the cooling off period because of worldwide lockdown and practical difficulties. Investors can file meritless claims and misuse the time limits of the arbitral procedure. The investors might argue that the measures adopted by the states made their attempts of amicable settlement absolutely futile.

A different example would include evading the fork in road clauses present in the investment treaty. The provision provides the investor with an option of choosing between two forums to submit dispute. It basically establishes a limitation of opting only one of the decided option for disputes resolution. For instance, Article 10(2) of the 1991 Albania-Greece bilateral investment treaty states that "*the investor or the Contracting Party concerned may submit the dispute either to the competent court of the Contracting Party or to an international arbitration tribunal...*". Various investment tribunals including ICSID in the case of Pantechniki S.A. v/s Albania has held that foreign investors are precluded from initiating international arbitration if they had already initiated proceedings in the domestic courts.[12] However, the investors can attempt to circumvent this provision for the disputes which will be registered post COVID -19. For instance : if an investor choses to seek redressal in the domestic court and gets a verdict against their favour, then they will be very tempted to evade the fork in the road clause. They can simply argue before the investment tribunal that the closure of the domestic courts during the lockdown made it impossible to appeal against the decision of the domestic court.

On the other hand, even state governments can take undue advantage of this situation by demanding indefinite extension for time limit provided in the investment treaty. The sovereign can simply deny cooperation on the basis of hardships caused due to outbreak of coronavirus. States can also emphasise on receiving hard copies of the documents as a tactic to obstruct the recourse to justice. However, various arbitral institution have issued guidance and amended their provisions in order to fight the consequences of coronavirus.[13] For instance, ICSID in a recent press release encouraged the tribunals and parties to implement electronic-only filing of written pleadings.[14] However, the facts and circumstances of each case will determine how each tribunal reacts. Each tribunal is unique and it is too soon to analyse what will influence their decisions.

2.2. Ongoing Investment Arbitration Proceedings

There are 342 pending treaty based ISDS cases which were initiated under various arbitral rules.[15] The fate of these pending cases depends on how soon will everything go back

to normal. The situation will get worse if the virus spreads to developing nations because they neither have the required public health care facilities nor absolute economic independence to face the pandemic head on. Developing countries like USA and Italy are badly ailing from the consequences of the virus despite having the best public healthcare infrastructure in the world. One can only imagine what will happen to developing countries when things go south. This will be substantiated from the fact that USA spends 16.9 % of its GDP to healthcare services, whereas India spends only about 3.6% as per OCED.[16] As per the reports of the UNCTAD, the developing nations and transition economies are the respondent states in most of the ISDS cases.[17] This implies that the arbitration institutions and the arbitrators in the developed nations will steadily adjust to the new normal while the respondent states will find it very difficult. In such a scenario, the parties are left with three options – i) to adjourn the hearings, ii) in cases where factual evidence is not the key to the issues, the parties can agree for the dispute to be heard only on documents alone, iii) to arrange for remote hearings (Online Arbitral tribunal). Out of these three, the most feasible option to consider is to opt for remote hearings because the world is still uncertain about long this pandemic is going to last. To look at the positive side of things, this pandemic has forced the International community to opt for Green Arbitration Alternatives. An International Arbitrator Lucy Greenwood initiated a campaign called "Green Pledge" to encourage the arbitral community to reduce their individual carbon footprint. The Campaign's Steering Committee conducted a study of a medium-sized (valued at US$30-50 million) international arbitration which said that planting more than 20,000 trees would be required to counterbalance its carbon emissions.[18] Therefore, the need of the hour is to amend Alternate Dispute resolution (ADR) into Online Dispute resolution (ODR). International Arbitration has always been ahead when it comes to the use of technology but nonetheless the following affects of arbitral procedure are bound to get affected :

A. Data Privacy and Cyber Security

Confidentiality is one of the main advantages of arbitral proceedings. Investment Arbitration agreements contains confidentiality clauses in the investment contracts because of sensitive information like trade secrets, investment strategies etc. The confidentiality of documents and privileged communication will face an even greater risk when the entire process going online. The world is anyways witnessing a steep rise in the number of cyber frauds since the outbreak of COVID -19. Cyber-attacks on Arbitration Institutions websites can expose the parties to data theft. For instance, the Permanent Court of Arbitration (PCA) website was hacked in July 2015, during an ongoing dispute between China and the Philippines. There is no binding law to deal with data security in the context of International Arbitration. However, the arbitral community needs to examine The European Union's General Data Protection Regulation (GDPR) and its bearing on international arbitration, even if the arbitration is independent of EU.[19] Presently, the soft law '2020 Cybersecurity Protocol for International Arbitration' lays down the cybersecurity standards in International Arbitration.[20] One can only hope that consistent practice to tackle these threats will emerge as these issues arise in the post COVID-19 era.

B. Other Practicalities involving Remote Hearing

A number of arbitration institutions do not provide ways in which an online hearing should be conducted. Organising remote hearings would require considerable planning and logistical coordination amongst disputing parties, arbitrators, experts etc. Another challenge would be to accommodate participants from different time zones. Something called as Virtual break out rooms should also be organised to ensure communication between arbitrators and the legal team members. Arbitration institutions and the AD HOC Tribunals can adopt recommendation from the 2020 Seoul Protocol on Video Conferencing In International Arbitration.[21] The protocol address the various issues related to examination of witness, technical requirements, observers and other preparatory arrangements.

Another major problem is with respect to the enforcement of the Arbitral Awards. After the commencement of the proceedings, the award sure can be delivered over email and delivered in person when life gets back in order. But, nothing stops the party adversely affected by the award to challenge the enforcement of the award. Awards rendered pursuant to the ICSID rule can be challenged under Article 52(5) ICSID Convention and Rule 54 ICSID Rules.[22] The parties of Non – ICSID arbitration dispute can challenge the award under the following article of New York Convention of 1958[23] –

"Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: ……..

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; …….

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or…."

In some cases the law of the respective seat of the arbitration can simply refuse to enforce an award declared electronically. In other cases, the challenging party can simply argue that it is impossible to ensure that whether the witness was unaccompanied or not to discredit the testimony of the witness. A number of legitimate challenges in this arena is already faced by several domestic courts. For instance, the award delivered by the ICDR arbitral in the case of Eaton Partners LLC v. Azimuth Capital Management Ltd was challenged in the U.S. District Court because the respondent's witness was unavailable and the Arbitrator did not postpone the hearing.[24]

City in the Indian State of Maharashtra, Pune, India

The court refused to enforce the award and opined that had the tribunal arranged the appearance of witness even by video conferencing, the respondent's right to fair hearing would have remain intact. However, in absence of such a circumstance, it was pertinent to set aside the award.

It remains unclear how courts and tribunals will react to these issues. But, considering the contractual and flexible nature of International Arbitration, it is quite obvious that sooner or later, the arbitral community will adjust with the practicalities of remote hearing.

2.3. Future Claims before Investment Tribunals (Post COVID -19)

There is not a single industry left which is unaffected by the pandemic. The world is facing a health crisis and a financial crisis at the same time because of the same cause. Every state Government is adopting measures to reduce the impact of damage that is caused by this virus. There seems to have an inevitable clash of interests between public health and investment claims.[25] The measures adopted by states like Nationwide lockdown, imposition of curfews, nationalisation of companies, especially private hospitals[26] and ban on import of drugs and medical equipment[27] etc will bear direct consequence on global commerce. International flights are suspended in numerous nations and International Air Transport Association has predicted that the airlines industry might loose revenue ranging from USD 63 billion to USD 113 billion in 2020.[28]

If these measures adversely affect the assets of the foreign investor, then it will lead to a breach of provisions contained the Investment Treaties. In the near future, multiple foreign investors can bring claim against the host state for adopting emergency measures to tackle the situation. It raises two questions, first being, will investors be indemnified for the losses and alternatively, the second being, will host state be able successfully claim defences for the measures adopted in response to COVID -19. The following section of this article will first, discuss the relevant treaty standards under which foreign investors can claim compensation. It will be followed by the possible defences that the host state can use to counter the allegation of violation of investment Treaty.

A. Safeguards for foreign investors under Investment Treaty

Fair and Equitable Treatment - Consider article 5 of the 2004 US Model BIT, which states : *"Each Party shall accord to covered investments treatment in accordance with customary international law, including **fair and equitable treatment** and full protection and security."*

This standard of Fair and Equitable Treatment (FET) is present in almost each and every investment agreement ever concluded. The roots of FET lies in the Customary International Law according to which the investments of the foreign investors should not be subjected to any form of discrimination.[29] FET is the most invoked provision in the Investment Treaty Arbitration and according to Dr. F.A Mann this provision constitutes the 'Overriding Obligation' because it provides both procedural and substantive protection.[30] Professors and distinguished jurists have different views on interpretation of this provision. However, the Arbitral Tribunals have define five elements of FET, which are – (i) Due process (non-arbitrariness and delivery of justice),[31] (ii) Good faith[32], (iii) Responsibility of vigilance and protection[33], (iv) Fair Conduct[34], and (v)Transparency[35].

Therefore, the tribunals have seemed to adopt a strict view regarding FET and if the states respond to Coronavirus with hasty and drastic measures, then foreign investors are

bound to allege breach of Fair and Equitable Treatment. What prepares us better for future than the evaluation of history itself ? A number of times, investors have brought claim for breach of FET caused due to adoption of emergency measures by the host nations to tackle a crisis. For instance, in the year 2001, Argentina faced a huge economic crisis caused due to overvaluation of currencies, bad fiscal policies, huge turmoil at social and political fronts. The nation suffered a downfall of 50% in their GDP per capita, the employment rate was at an all time low and the poverty rate was as high as 50%. There was so much political instability that Argentina became the only country in the world to have witnessed 5 Presidents over the period of two weeks.[36] Quite naturally, Argentina Government had to take stringent steps to deal with the economic crisis and they ended up violating several investment agreements. As a result of this, Argentina was the respondent state to more than 50 investment arbitration cases and combined damages of all the publicly available awards delivered against Argentina amounted to USD 2 billion.[37] The FET provision under Argentina-United States BIT was invoked in CMS v. Argentina[38] and Enron v. Argentina, amongst other cases.[39] The government had drastically changed regime of tariff guarantees that had actually persuaded the investor to make an investment in the territory of Argentina. The tribunal acknowledged the fact that the emergency measures by the government was in response to the economic crisis of 2001-2002. Nevertheless, the Tribunal held that Article II(2)(a) of the treaty which dealt with FET was breached and stated that :

"The measures that are complained of did in fact entirely transform and alter the legal and business environment under which the investment was decided… The Tribunal believes this is an objective requirement unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question…"

In an another situation, since the beginning of 2020, Lebanon government started facing protests to bring reforms in the economic and political arenas. The government closed banks for two weeks straight and later imposed restriction on transfer of fund. The measures taken by the Lebanese government was to ensure that the nation's financial system don't collapse. But the measure affected the business of foreign investors as became converting Lebanese pound into other currencies and making international transfer of money became near to impossible. Now, there are about 42 active investment treaties to which Lebanon is a party to and International Law firms are already planning to initiate the investment arbitration against the nation for violation of FET standards.[40]

In the contemporary situation, if the state government didn't take the required measure to protect the investment after WHO declared Coronavirus a pandemic then nothing can prevent the investment tribunals to awards heavy damages against the host state. Therefore a state's failure to contain the virus leading to worsening of the situation can violate the investment Treaty Standards. This assertion is backed by the underlying jurisprudence developed by a number of case laws on similar matters, for instance in the case of AMT v Congo, the Tribunal held that : "Zaire is responsible for its inability to prevent the disastrous consequences of these events adversely affecting the investments of AMT while Zaire had the obligation to protect."[41]

Expropriation – The investment tribunal in the case of SEMPA Energy International defined expropriation as "*The formal withdrawal of property rights for the benefit of the State or for private persons designated by the State*".[42] If State does something which has a similar effect to expropriation, then it is called as indirect or creeping expropriation.[43] A classic example of such an example can be found under Article 13 of the Energy Charter Treaty 1994 : "*Investments of investors of a Contracting Party in the Area of any other Contracting Party shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation….."*

Nowadays, cases of direct expropriation are rare as the host state does not directly seize the assets of the investor or takes indefinite control of his company without adequate compensation. However, what is common is the case of indirect expropriation where it is very difficult to establish the breach. But, various arbitral tribunals are contributing to develop the jurisprudence behind the cases of indirect expropriation. In fact, The ICSID Tribunal in the case of Saipem v. Bangladesh , took indirect expropriation to an another level when it declared the interference by the domestic court as an act to indirectly expropriate the investment of the claimants. [44] Similarly, one tribunal declared that taking control of owner's investment even for a limited period of time as act of creeping expropriation.[45] Tribunals have found that even suspension of an export license for a few months would breach the treaty standards because the investor is being deprived of his right to be financially benefitted out of his investment.[46]

It is needless to say that almost all the countries are into lockdown, some of countries like Spain and Italy have nationalised a few private hospitals while other countries who are into business of exporting pharmaceutical products like India have imposed ban on exports of few medicines to ensure that the domestic needs are met on a priority basis. All these measures would amount to indirect expropriation if the investors are able to satisfy all the required elements.

In such a situation, the states are suffering to strike a balance between their duty to protect the public health and adopting measure to ensure that their financial system do not collapse like a pile of cards. This is where the state defences to claim of violation of Treaty standards come into picture. No investment Treaty or and Investment contract is a one side deal. It contains provision to protect the sovereignty and interests of the state government in certain crisis like situation. Hence, the following part of this article will discuss about the legal defences that a respondent state might take to justify the alleged violation of the investment treaty standards.

1. Treaty based defences

It is often a widely debated topic whether or not the IIAs impose unjustified restrictions on a state from acting in public interest. There comes a time when state has to take

stringent steps in the interest of public health and policy and therefore, the IIAs provide for some exceptions in this regard. More than 163 investment treaties contain exceptions regarding public health and most of them are modelled on the basis of Art XX of GATT or Art. XIV of GATS.[47] Thus, states are given a right to even breach the provisions of Fair and Equitable Treatment and Expropriation if such an act is done in good faith to safeguard legitimate public welfare objectives, including their health and environment.[48] Some treaties like the Japan-Korea BIT (2002) also provide exceptions to maintain public order. Legal text of each treaty is different but the essence of exceptions provided is the same. All the clauses have three components – a) a defined and exhaustive list of exceptions, b) nexus between the measure of the state and the exception enlisted, c) Non-discriminatory and non-arbitrary nature of the measure of the host state.[49]

For instance, consider Article XI of the US and Argentina BIT which provides:

"*This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security or the protection of its own essential security interests*."

The tribunal in the case of L&G held that economic crisis is included in the scope of the above mentioned article. It also stated the Argentina did not contribute to the escalation of the of economic crisis and did everything in its power to further de-escalate the crisis.[50] However, other tribunals have denied to consider the public interest justification and analysed the situation from an economic point of view. It is difficult to prove how treaty based defences will play out because the text and wording of each IIA is different in some aspect and Tribunals have different interpretation of the wordings as per the facts and circumstances of each case.

2. Other defences in International Law

Doctrine of Police Power – The Black Law Dictionary defines the doctrine of police powers as "*power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity*".[51] This doctrine formed a part of general international law. In 1903, Venezuela and Germany were the disputing parties in the Bischoff Case, and the claims commissions held that the state's act to contain the spread of an infectious diseases (epidemic of smallpox) was held to be well within the police power doctrine by the Claims Commission.[52] Even though, the recognition of this doctrine has a long pedigree but by 1991 the investment Arbitration Tribunals also started accepting it.[53] The tribunal in the case of PMI v. Uruguay held that the state's measure directed towards achieving better and improved public health is one of the core elements of police power doctrine[54].

Given the extreme nature of this pandemic, states can argue that the measures taken by them fall well within the doctrine of police power because ever since WHO announced Coronavirus as a pandemic, each and every country on the world's map is trying their best to curb the spread of the virus.

Human rights Obligations – There are several International Human Rights treaties whose sole purpose is to protect and promote the basic human rights of people. There are 9 core International Human Rights Treaties but the one relevant in present context is International Covenant on Economic, Social and Cultural Rights (ICESCR)[55]. Article 12(2)(c) & (d) of ICESCR states that –

"Article 12 (2) : The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for….

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

There are 71 countries which are signatories and 170 countries in total which are parties to this Convention. The Vienna Law on the Convention of Treaties mentions that if a country impliedly or explicitly becomes a party to the Treaty then it is obligated to abide by the purpose and meaning of the treaty.[56] Moreover according to the document published by ILO, even multinationals and corporation are bound by the UDHR and other Human Rights Conventions.[57]

Besides this, the issue of Human Rights in the Investment Treaty regime is on the rise.[58] The tribunal in the case of Amco has already acknowledged the fact the goal of ICSID Convention is to protect the investments of the foreign investor and it cannot be done by neglecting the general interest of people and the development goals of the host nation.[59]

Therefore, the first priority of the host nation is to look after the public health during these times of crisis.

Customary International Law – While most of the defences that the host nations resort to are explicitly mentioned in the investment treaty itself, there are however some defences codified in the ILC Articles on State Responsibility which actually form a part of customary International Law.[60] Chapter V titled "Circumstances precluding Wrongfulness" under the ILC Draft articles provides for six defences for states to avoid responsibility. In the present circumstance, if the Bilateral or Multilateral Investment Treaties do not contain relevant exceptions then the states can resort to three of the defences under ILC Articles, which are a) Force majeure,[61] b) Distress,[62] and c) Necessity.[63] Out of the three defences, the plea of necessity is the most invoked defence before an investment Tribunal. Even the International court of Justice has taken the view that defence of necessity is a well-recognised principle of Customary International Law.[64]

Article 25 of the ILC Article state that "*Necessity may not be invoked by a State as a ground for precluding the wrongfulness of*

an act not in conformity with an international obligation of that State unless the act…….". It is evident that the article is negatively worded because the intention of the drafters was to keep a higher threshold for application of this defence. Therefore, it is premature to comment on how tribunals will react to the defence of necessity because the previous Tribunals have always adopted a somewhat restrictive approach.

3. CONCLUSION

They say 'Desperate time calls for desperate measures'. But what if, the desperate measures are carried out by states which were host nations to several foreign investors. In this article my sole purpose is to strike a balance between the obligations of host nation towards its investors and obligations of that particular nation towards its citizens. But, if I am told to pick sides, I absolutely cannot choose between the investors and the sovereign government. Only future is going to decide how will things shape up after the dust of coronavirus settles. However, the international community is urging the government to suspend all international investment treaties for measures adopted due to COVID-19.[65] But this is just going to shake the confidence of the entire world regarding the existing investment arbitration regime. This is not the time to pit investors against foreign governments. This is the time to make them walk hand in hand to see the end of this pandemic.

Investors and state government should be considerate about one another. The host nation should be aware of the fact that investors may get adversely affected and it should access its rights and obligations under IIAs and Investment contracts. The government should ensure that they measure they take are transparent and in consistency with the general principles of International law. The affected investors should be consulted while bringing in new policy options and they should also be given a chance to scrutiny the draft regulations that can majorly impact their business. The government should also come up with stringent regulations for new investments. On the other hand, investors should engage in discussions with the host state to be more aware about measures to be adopted by the state. Should an investor's business be negatively affected, they must immediately engage with the government to negotiate in good faith. Investors should apply their due diligence before establishing any new venture in any country. A worldwide synchronized response to this menace is the way not only to fight the pandemic but also to foster solidarity in the international community.

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Panoramic view of Bern in a beautiful summer day, Switzerland | Bloodua

COVID 19 AND STANDARDS OF INVESTMENT PROTECTION

By Amrit Onkar Bathia

When the outbreak of Covid-19 was first reported to the World Health Organisation (WHO) on 31st December 2019,[1] it was difficult to anticipate the impact it has since had on global public health and economy. Earlier this year on 11th March, the WHO declared the rapid spread of Covid-19 a 'pandemic', after more than 4,000 people in 114 countries had lost their lives to the virus.[2] The declaration by the WHO provided the requisite thrust for states around the world to act and scramble to put in place measures to curb the rapid spread of the virus. As states continue to adopt a number of wide-ranging and unprecedented measures to tackle the public health and economic crisis engendered by Covid-19, questions about the legitimacy of such measures in light of commitments made by them under several international investment agreements (IIAs), are beginning to be raised.

These questions are timely and pertinent for the following reasons. Firstly, the novelty of the Covid-19 disease and the lack of scientific knowhow of any effective treatment for it has compelled states to adopt drastic, stringent and often *ad-hoc* measures to counter its spread. Secondly, recent reports indicate that foreign investors are already contemplating the initiation of investment arbitration proceedings against Peru and Mexico respectively, for Covid-19 related measures adopted by them.[3] Thirdly, there has traditionally been a tenuous relationship between the sovereign right of states to adopt public health measures on the one hand, and their obligation to protect and promote foreign investments under the plethora of IIAs signed by them on the other (labelled as the 'clash of cultures'[4]), which has culminated in a number of investment claims in the past. Finally, a large number of investment claims have also been filed against states (Argentina, Cyprus and Greece provide a few examples) for financial measures adopted by them in the face of some severe economic crises, raising questions about whether this trend is set to continue in the aftermath of the current Covid-19 induced economic crisis.

The aim of this article is to analyse the possible impact of eight commonly adopted state measures on four substantive standards of investment protection, found in the majority of IIAs. The article will also discuss the possible defences that states could rely upon if faced with such claims.

Before proceeding further, it is important to note that any investment claims being brought for the breach of the standards of investment protection discussed below, will be dealt with by tribunals on a case-by-case basis after taking into account the nature and impact of the impugned state measure, the specific facts and circumstances of the case, the relevant treaty standards and the availability of any exceptions for states in the IIA in issue or in public international law.

1. Fair and Equitable Treatment (FET):

While the FET standard is the most commonly invoked in investment arbitration, there is still much debate about whether it comprises a higher and autonomous standard than the minimum standard of treatment provided under customary international law. In *Waste Management v. Mexico (No. 2)*, the tribunal took into account the interpretations adopted by other tribunals to hold that state conduct and measures with respect to a foreign investor which are, "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory… or involves a lack of due process… or a complete lack of transparency and candour in an administrative process"[5] would constitute a violation of the FET standard.

In *Biwater Gauff v. Tanzania*, the tribunal elaborated upon the "specific components" of the FET standard to note that it sets an obligation on host states to deal with foreign investors in "good faith" and protect any "legitimate expectations" that the investor had reasonably relied upon at the time of making the investment.[6] Some tribunals have also included the concept of "denial of justice" as an integral part of the FET standard.[7] However, as noted by the tribunal in *Mondev v. United States*, any determination of state liability under the FET standard "cannot be reached in the abstract" and therefore, must be determined based on the particular facts of each case.[8]

The impact of Covid-19 related measures on the FET standard:

a. Imposition of lockdown/quarantine within states

A number of states including China, Italy, France, and India, among many others, have put in place strict social-distancing measures, which include the imposition of a period of lockdown or quarantine, where citizens have been directed to stay at home. The enforcement of the strict social-distancing measures has compelled factories, businesses, markets, educational institutions, government buildings, public transportation and infrastructure, as well as places of hospitality and entertainment, to shut-down their operations abruptly, thereby having a severe adverse economic impact on them.

In the recent decision of *Hydro Energy 1 v. Spain*, the tribunal upheld the principle of 'proportionality' as a part of the FET standard. The tribunal stated that states must not only ensure that a measure is "suitable" and "necessary" to achieve a legitimate policy objective, but also ensure that the measure is "not excessive" and "the effects of the intended measure remain proportionate with regard to the affected rights and interests".[9] In light of a number of states recently reopening their economies and allowing citizens to go back to work, at a time when the number of Covid-19 related fatalities are still increasing, raises the question of "proportionality" of the lockdown/quarantine orders issued by those states in the past. Foreign investors whose investments have been adversely affected by these measures, could claim that lockdown/quarantine orders were "excessive" to achieve the legitimate policy objective of protecting public health and states could have enacted less restrictive measures as they have done while reopening their economies.

b. Declaration of 'emergency' and classification of "essential" businesses

A large number of states have declared a state of 'emergency' within their territories, where the executive branch of the government has been granted a wide range of powers, including the ability to rule by decree in states such as Hungary, Japan, Philippines and Italy. This allows leaders to bypass any legislative scrutiny of their decisions and increases the threat of arbitrary and discriminatory decisions being taken, potentially exposing those state to claims under the FET standard.

Additionally, during the period of lockdown instituted by states such as India and Argentina, certain businesses and services have been classified as "essential", and have been allowed to continue their operations unabated, while other businesses and services have been forced to close.[10] Those foreign investors whose investments have suffered an adverse economic impact as a result of this classification, could claim that it was done in 'bad-faith', or that it suffered from arbitrariness, discrimination or a lack of due process and was therefore in breach of the FET standard.

c. Trade related measures and impact on 'legitimate expectations'

Firms around the world, including those involved in global value chains (GVCs), depend on clear, predictable, and stable rules governing international trade, to conduct their operations. According to a list published by the World Trade Organisation, more than eighty member states have now adopted new trade distorting measures in light of the Covid-19 pandemic.[11] These measures have often come in the form of export bans/restrictions or higher safety standards for certain products and are subject to frequent modifications.

In *CMS v. Argentina*, where measures taken by the Argentinian government in the midst of a financial crisis were challenged, the tribunal held that "a stable legal and business environment is an essential element"[12] of the FET standard. While the tribunal in *Tecmed v. Mexico*, held that host states were under an obligation to "act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor"[13]. As states continue to adopt new and stringent measures such as closing and reopening borders or instituting bans/restrictions on the export of goods, GVCs and other firms engaged in international trade are likely to be adversely affected and could turn to the FET standard to hold states liable for losses suffered by them. Questions about the impact of Covid-19 related measures on the 'legitimate expectations' (the "dominant element" of the FET standard according to the tribunal in *Saluka v. Czech Republic*[14]) that a foreign investor relied upon at the time of first making the investment, are also likely to be put forward to tribunals.

d. Closure of judicial authorities and 'denial of justice':

As states have instituted social distancing measures, national courts and arbitral institutions have been forced to shut their doors.[15] While some courts have been able to adapt to virtual hearings

to continue their work, in many less developed countries, such hearings have not been possible due to a lack of access to the requisite technology or a lack of skills amongst the people to use that technology. In some states, courts are only hearing 'emergency' or 'urgent' matters, which may be selectively listed before them.

With an increasing number of IIAs requiring foreign investors to 'exhaust local remedies' as a first step of the dispute settlement process, foreign investors could be left without a forum to protect and enforce their rights. While those foreign investors who have initiated judicial or administrative proceedings in domestic courts, could be set for major delays. The tribunal in *Azinian v. Mexico,* stated that "a denial of justice could be pleaded if the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way."[16] Thus, a lack of access to the judicial authorities or an "undue delay" in the dispute settlement process could prompt claims of 'denial of justice' against states.

2. Full Protection and Security (FPS)

The FPS standard is often found together with the FET standard in IIAs. Initially, the FPS standard was considered to solely encapsulate the "physical integrity of an investment against interference by use of force"[17]. However, the tribunal in *Biwater Gauff v. Tanzania* relied on the use of the term 'full' before 'protection' and 'security' to hold that the FPS standard "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal." [18]

The interpretations adopted by tribunals in the past raise important questions with regards to state liability under the standard. Could a failure by a state to take early, pre-emptive and immediate measures to combat the spread of Covid-19 (for example, at the time when the WHO first declared the outbreak of Covid-19 "a public health emergency of international concern"[19] on 30th January 2020) have contributed to the spread of Covid-19 in their territory and therefore, comprises a failure to provide "full protection and security" to foreign investors? This issue may be raised before tribunals in the future.

3. National Treatment (NT)

The NT standard is an important provision which seeks to ensure that domestic and foreign investors are treated equally within the host state. It is important to note that almost all NT provisions contained in IIAs restrict the comparison between foreign and domestic investors to those in 'similar' or 'like circumstances'. In *Pope & Talbot v. Canada*, the tribunal interpreted the notion of 'like circumstances' provided in Article 1102 of NAFTA, as a comparison between the foreign and domestic investor engaged "in the same business or economic sector"[20], while other tribunals have accepted the existence of a 'competitive relationship' between the two to satisfy this requirement.

It is also important to remember that the NT standard encapsulates both *de jure* and *de facto* discrimination as provided in *S.D. Myers v. Canada*.[21] The tribunal in that case also observed that the "protectionist intent" of an impugned state measure, by itself, would not constitute a violation of the NT obligation (in this case, the treaty in issue was NAFTA) because the term "treatment" indicated that an adverse "practical impact" on the foreign investor attributable to the impugned state measure, is also required to be established.[22]

The following Covid-19 related measures adopted by states could be considered to breach the NT standard:

a. State aid and bailouts:

The economic impact of the Covid-19 crisis has been severe. Some of the biggest economies in the world such as the US, France, Germany, the UK, India, and Japan, have all provided large sums of money in the form of state-aid/bailouts to their domestic industries in an effort to mitigate the economic effects of the Covid-19 crisis. As state-aid/bailouts are typically reserved for nationals, foreign investors could argue that these measures are discriminatory in nature. It can also be argued that state aid/bailouts create an adverse economic climate for foreign investors by modifying the competitive conditions in favour of domestic investors. While no investment arbitration claims have so far been initiated which challenged state aid/bailouts under the NT standard, this may change in the future.

b. Tax concessions/deferrals:

In order to mitigate the economic effects of the Covid-19 crisis, states have also provided tax concessions or allowed for the deferral of tax payments by nationals. Australia, Belgium, Canada, Japan, the UK, and Vietnam have chosen to defer income and sales tax payments from businesses and workers respectively, while China and Costa Rica have indicated their willingness to provide tax concessions to their nationals.

In *Feldman v. Mexico*, the state measure being challenged was a tax rebate provided by Mexico to domestic resellers and exporters of cigarettes which was not extended to the claimant, a foreign exporter of cigarettes from Mexico. The tribunal in this case, observed that while Mexico was "entitled to strictly enforce its laws, but it must do so in a non-discriminatory manner, as between foreign investors and domestic investors"[23]. Due to the discriminatory nature of the impugned tax measure, the tribunal upheld the claimant's argument that it had been treated "in a less favourable manner than domestically owned reseller/exporters of cigarettes, a *de facto* discrimination"[24], and therefore was in breach of the NT obligation.

While a significant number of IIAs exempt taxation measures from their purview or provide specific carve-outs to allow contracting parties to adopt taxation measures as they deem fit, some IIAs do not contain such exemptions and carve-outs, which could open the door for investors to bring claims against them for discriminatory taxation measures.

4. Expropriation

Almost all IIAs contain provisions which provide protection for foreign investors against unlawful 'expropriation', i.e. measures

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taken by the host state which deprive the foreign investor of their investment either directly or indirectly. While direct expropriation involves an outright seizure or "mandatory legal transfer of the title"[25] of the foreign owned property/investment, indirect expropriation involves a "total or near-total deprivation of an investment but without a formal transfer of title or outright seizure."[26]

It is important to note that the difference between indirect expropriation and a non-compensable regulatory taking is often difficult to discern and is typically determined on a case-by-case basis. In some cases, tribunals have relied solely upon the detrimental impact of the impugned state measure on a foreign investor/investment (known as the 'sole effect doctrine'), while in other cases, additional factors such as the "magnitude of the interference to the investor's property rights"[27] as well the purpose and content of the impugned state measure, are also taken into account.

The impact of Covid-19 related measures on the standard of 'expropriation':

a. Requisition/nationalisation measures by governments

A large number of states have issued orders for the requisition or nationalisation of private property and businesses to combat the Covid-19 crisis. At the height of the Covid-19 crisis in March-April, Italy, France and Spain issued orders for the requisition of medical supplies and equipment.[28] The United States invoked the Domestic Production Act,[29] which granted the President vast powers to direct companies to manufacture essentially needed items. In Asia, governments in China and Taiwan requisitioned all domestically manufactured medical goods and supplies[30] while China and Japan have even allowed the seizure of private property if it was deemed necessary to do so to aid their efforts to fight the Covid-19 crisis.

While the sovereign right of host states to expropriate foreign owned property located within their territories has been well-recognised in public international law, any lawful expropriation must contain the following widely accepted principles, as enumerated by Dolzer and Schreuer[31] and relied upon by the tribunal in *Siag v. Egypt*. Firstly, the expropriation must be done to serve a 'public purpose', secondly, it must not be done on a discriminatory or arbitrary basis which adversely affects the foreign investor(s), thirdly, the expropriation must follow principles of 'due process', and lastly, the expropriation must be done against 'prompt, adequate and effective' compensation.[32]

In *Wena Hotels v. Egypt*, the issue before the tribunal was whether the seizure of the hotels belonging to the claimant, amounted to expropriation. The tribunal held that the seizure of the claimant's hotels for nearly a year "is more than an ephemeral interference"[33] and returning "the hotels stripped of much of their furniture and fixtures"[34] without providing "prompt, adequate and effective compensation for losses suffered as a result of the seizure"[35] was a violation of Egypt's obligations under Article 5 of the U.K.-Egypt BIT and hence amounted to unlawful expropriation.

This case is especially relevant for states which have recently introduced domestic legislations to allow for the requisition and seizure of private property and investments as it demonstrates that if such measures are adopted in a discriminatory/arbitrary manner or without the payment of adequate compensation, states can be held liable for unlawful expropriation.

b. Lack of access to courts

As previously stated, the access to courts has been severely limited in a number of states due to the Covid-19 pandemic. In *Amco Asia v. Indonesia* the tribunal held that, "expropriation in international law also exists merely by the state withdrawing the protection of its courts from the owner expropriated, and tacitly allowing a *de facto* possessor to remain in possession of the thing seized".[36] Thus, in cases where foreign owned private property/investments are seized in exercise of a state's emergency powers in a discriminatory or arbitrary manner and/or without the payment of adequate compensation, foreign investors could bring a claim for unlawful expropriation against the state.

c. Compulsory licensing

Some states, such as France, Germany and Canada have expressed their willingness to issue compulsory licenses for patented drugs which could provide effective treatment for Covid-19.[37] Recently, Israel issued a compulsory license for the production of the generic version of Kaletra, a drug used for the treatment of HIV, as a possible treatment for Covid-19.[38] In the past, Colombia decided to withdraw its plans to issue compulsory licenses for a cancer-related drug after arbitral proceedings were initiated against it by the investor, Novartis[39].

In the current public health crisis, states are likely to rely on compulsory licenses to ensure the availability and accessibility of drugs which can be used in the treatment of Covid-19 amongst citizens. If such measures become the subject of investment claims, as has been threatened in the past, tribunals will be called upon to strike a delicate balance between the protection of a foreign IP holder's rights with the sovereign right of states to protect public health.[40]

DEFENCES AVAILABLE TO STATES TO COUNTER CLAIMS ARISING OUT OF COVID-19 RELATED MEASURES:

Specific Exception in IIAs

An increasing number of IIAs contain a set of 'General Exceptions', modelled on Article XX of the General Agreement on Tariffs and Trade (GATT). These exceptions are meant to allow contracting states to pursue important policy objectives which may be incompatible with their obligations under the IIA.

A list of common general treaty exceptions provided under IIAs are as follows:

- Protection of human, animal or plant life or health;
- Protection of public order and morals;
- Protection of national security;
- Protection of the environment and natural resources.

The Doctrine of Police Powers

The doctrine of police powers is a powerful defence available for states to defend measures taken by them during the Covid-19 crisis. The police powers doctrine allows states to take measures in public interest which may be in violation of their obligations in the IIAs signed by them.[41] In the well-known case of *Philip Morris v. Uruguay*, the tribunal upheld the right of Uruguay to take measures related to the packaging requirements of cigarettes in the country to protect the public health of its citizens in exercise of its police powers.[42] In doing so, the tribunal observed that "investment tribunals should pay great deference to governmental judgements of national needs in matters such as the protection of public health."[43] In *Suez & Vivendi v. Argentina*, a claim brought in the aftermath of the Argentina's financial and economic crisis, the tribunal upheld the right of Argentina to take measures to mitigate its economic crisis by recognising "a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation."[44] However, it is important to note that the exercise of the police powers doctrine cannot be said to be absolute, and is limited by a responsibility upon the state to adopt non-discriminatory measures in good faith and follow the due process of law.

Additional Defence under the ILC's Articles on Responsibility of States for Internationally Wrongful Acts, 2001[45]

Force Majeure (Article 23)

States could argue that the outbreak of the Covid-19 pandemic was a *force majeure* or 'unforeseeable occurrence' which was "beyond the control of the State, making it materially impossible" to perform an obligation. However, in order to be able to successfully rely on this provision, a state must be able to demonstrate that the *force majeure* event did not arise due to its own conduct and also that it had not "assumed the risk" of the *force majeure* event taking place.

Necessity (Article 25)

The necessity doctrine[46] allows a State to commit an act which is "not in conformity with an international obligation" if the following conditions are fulfilled:

i. The impugned act is the "only way for the State to safeguard an essential interest against a grave and imminent peril", *and*

ii. The impugned act "does not seriously impair an essential interest" of the State to which the obligation is owed.

However, this defence may not be available to states if the international obligation specifically "excludes the possibility of invoking necessity" or if the state "has contributed to the situation of necessity".

CONCLUSION

Based on the above discussion of the four standards of investment protection as interpreted by investment tribunals in the past, it is clear that public health and economic measures being currently adopted by states to combat the Covid-19 pandemic may become the subject of investment claims in the future. State measures which are arbitrary, discriminatory, or do not follow the due process of law, are particularly vulnerable to challenges by foreign investors. While investment tribunals have allowed a significant margin of appreciation for states to pursue legitimate public policy objectives such as protecting public health, it is imperative for states to ensure that measures adopted by them to combat the Covid-19 pandemic are not only designed to achieve legitimate policy objectives but also ensure that those measures are adopted in 'good faith' and not as a means to pursue policies of protectionism or unlawful expropriation in order to be able to avoid or successfully defend against any possible investment claims in the future.

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43 *Ibid,* para 399.
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II.
A dialogue between India and Brazil on investor-state dispute settlement

NEW PATHWAYS BETWEEN BRAZIL AND INDIA[1]

By Luis Fernando Guerrero

1. Introduction and Objective: The purpose of this article is to address the context of a bilateral investment agreement between Brazil and India. While Brazil and India had a common past, being relevant stages of the Great Navigations, today the two countries have a common present: they are both former colonies and are nations with large populations, a relevant and growing gross domestic product, and serious social challenges to overcome.

The idea of this article is to show how these countries have been acting in the international investment scenario until culminating in a common agreement. For this purpose, particularly from the Brazilian historical and legal point of view, the relevance of arbitration and the appropriate conflict resolution methods will also be reviewed in this context.

2. Brazil, India, and Their Own Navel-Gazing – On the Fringe of the System of the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – ICSID: The ICSID Convention[2] was signed in 1965. It is a document that aims to establish a centralized forum for the settlement of conflicts involving States and National States (sic).

Structurally, ICSID has an Administrative Council formed by one representative of each of its members. Such Council has the role of administering the cases submitted to it, as well as institutionally representing ICSID.

On the other hand, the Secretariat has around 70 professionals engaged in the administration of conciliation (a consensual method of conflict resolution) and arbitration (an adjudicative method of conflict resolution).

Historically, production for investors in the world was made diplomatically. Whoever works with Public International Law certainly knows that the agenda of the States does not

always involve the solution of specific and localized problems of individual companies and investors.[3]

Thus, with the ICSID Convention the World Bank intended to establish a more objective and agile system to settle these situations through an agreement of will between Member States. By signing the Convention, States and their citizens automatically undergo conciliation and arbitration procedures requested by other States or by citizens of other Member States to resolve investment issues.

However, Brazil and India are not signatories to the ICSID Convention.[4] The strategy of these two countries was different, using Cooperation and Investment Facilitation Treaties and Multilateral and Bilateral Investment Treaties.

The evolution of the Gross Domestic Product from the 1960s to the present day, according to information from the World Bank, shows a very large similarity between Brazil and India over these 50 years. The curves generally go along with each other:[5]

On the other hand, the 1960s also had similarities, particularly with regard to the affirmation of sovereignty[6] and nationalism in both countries. While Brazil experienced a Military Coup in 1964, which would last until 1985,[7] India was living the initial decades of its independence in the so-called Nehru era (1947-1964), with a divisive regime, ongoing warlike conflicts with Pakistan over the Kashmir region, and internal conflicts, including religious ones, which culminated in the assassination of Mahatma Gandhi.[8]

It should also be noted that, during this historical period, these countries were eminently rural, not in the sense of the development of agribusiness and of the relevance of this sector for the economy as it is today, but in terms of human occupation. Cosmopolitanism in both nations was low at this point, as they were more closed and dealing with their own internal issues.

Therefore, the path chosen by these two countries to not adhere to the ICSID Convention is understandable.

The situation of Argentina in the early 2000s,[9] a country that in the 1960s had a level of development that was even higher than Brazil's and India's in many respects, demonstrates that the non-signing of the ICSID Convention could have its reasons. Brazil, for example, declared a foreign debt moratorium in the 1980s.[10]

As can be seen, the non-signing of the ICSID Convention was certainly more deliberate than one would imagine at a first glance and reaffirms the strategy of these countries and their position in international trade. In view of all these circumstances, Brazil received a series of foreign investments with its political and institutional stability since the 1990s.[11] The big point today is to protect Brazil and India as investors.

3. The Opening Strategy – MERCOSUR, BITs, and BRICS[12]: At some historical moment, however, this alienation of Brazil and India from the global investment scenario would have to change.

And this is not a conceptual criticism of this position, not least because the ideal is for each nation to find the most appropriate

tools for its action in international trade and the protection of its interests. Therefore, there are several models and strategies.

Thus, the ICSID Convention is "*(…) merely one of several possible avenues and is limited to regulating procedural aspects.*"[13]

3.1. Economic Blocs

A relevant Brazilian association initiative, which deserves much prominence due to the legal documents it produced, was the Organization of American States (the "OAS").

On the one hand, in the context of the OAS, the Pact of São José, Costa Rica (or the Inter-American Convention on Human Rights) introduced a series of procedural principles into the Brazilian legal system, allowing, for example, civil imprisonment of alimony debtors only. As for the rest, due process, in this sense, has been reinforced in Brazilian law.[14]

The 1975 Inter-American Convention on International Commercial Arbitration (or the Panama Convention) also deserves mention.[15] In the Inter-American context, at least, and for Private International Law, Brazil already had an award circulation and enforcement system since the 1970s. Although in force, mention of such system by Brazilian Judiciary for the enforcement of awards was rare. It is worth mentioning a decision of the Superior Court of Justice,[16] which is accompanied by only four more single-judge decisions of that Court:[17]

> "*PRELIMINARY ISSUE. RULING VACATING NOTICETO SUBMIT DOCUMENTS. ABSENCE OF DECISIONAL CONTENT. NO LOSS FOR THE PARTY. SUBMISSION OF MOTION FOR CLARIFICATION. INADMISSIBILITY.*
>
> (…)
> *3. The laws applicable to the latter, i.e. the New York Convention, Article V(1)(e) of Decree No. 4.311/2002; the Panama Convention, Article 5(1)(e) of Decree No. 1.902/1996); the Brazilian Arbitration Law, Article 38, item VI of Law No. 9.307/1996; and the Las Leñas Protocol, Article 20(e) of Decree No. 2.067/1996, all of which have been internalized in the Brazilian legal system, leave no doubt that a foreign judgment or arbitration award must indispensably have become final and unappealable in order to be ratified by this Superior Court, and local literature shares the same understanding."*

Brazil began the adventure of an economic bloc with its accession to MERCOSUR,[18] which was very much inspired by the European Union.

The Southern Common Market (MERCOSUR) was established in 1991 and is the most comprehensive initiative for regional integration in Latin America, arising in the context of the re-democratization and rapprochement of Latin American countries in the late 1980s. MERCOSUR was established by Brazil, Argentina, Paraguay, and Uruguay through the Treaty of Asunción.

Today Venezuela, which joined the Bloc in 2012, has been suspended, since December 2016, for non-compliance with its Accession Protocol and, since August 2017, for violation of the Bloc's Democratic Clause. The other South American countries are Associated States of MERCOSUR. Bolivia, on the other hand, despite its Associated State status since 2015, still depends on incorporation by the congresses of the State Parties to complete its accession process.

The Treaty of Asunción, the founding instrument of MERCOSUR, established a model of deep integration, with the central objectives of shaping a common market with free internal circulation of goods, services, and productive factors, establishing a Common External Tariff (TEC) on trades with third countries, and adopting a common trade policy.

The 1994 Ouro Preto Protocol institutionally structured the Bloc and gave it legal personality under international law. The Protocol also enshrined the rule of consensus in the decision-making process, listed the legal sources of MERCOSUR, and instituted the principle of simultaneous effectiveness of the rules adopted by all three decision-making bodies of the Bloc: the *Common Market Council (CMC)*, a higher-level body in charge of the political conduct of the integration process; the *Common Market Group (GMC)*, the executive body of the Bloc; and the *MERCOSUR Trade Commission (CCM)*, a technical body that enforces the instruments of the common trade policy.[19]

This scenario was fruitful for arbitration, particularly from a legislative point of view. In this regard, the Bloc established the Brasília Protocol,[20] complemented by the Ouro Preto Protocol[21] and, finally, by the Olivos Protocol,[22] with several provisions for dispute settlement systems, but strong emphasis on arbitration as an adjudicative method.

India, on the other hand, has a tradition of non-alignment, having even been a founder of this group during the Cold War

Brasília Protocol	Ouro Preto Protocol	Olivos Protocol
CHAPTER II *Direct Negotiations* **CHAPTER III** *Intervention of the Common Market Group* **CHAPTER IV** *Arbitration* **CHAPTER V** *Individual Complaints*	CHAPTER VI Dispute Settlement System Article 43 Disputes which arise between the States Parties concerning the interpretation, application or non-fulfillment of the provisions of the Treaty of Asunción and the agreements concluded within its framework or of Decisions of the Council of the Common Market, Resolutions of the Common Market Group and Directives of the Mercosul Trade Commission shall be subject to the settlement procedures laid down in the Brasilia Protocol of 17 December 1991. Sole paragraph. The Directives of the Mercosul Trade Commission are also incorporated in Articles 19 and 25 of the Brasilia	Chapter III Consultative Opinions Chapter IV Direct Negotiations Chapter V Intervention of the Common Market Group Chapter VI Ad-Hoc Arbitration Chapter VII Review Procedure Chapter IX Compensatory Measures

period and played an important role among the group of 100 lower-income countries (the Global South) in collective negotiations on economic matters with Industrialized States (the Global North).

India is also a member of the Commonwealth, also known in the past as the Commonwealth of Nations or the British Commonwealth of Nations, an association of sovereign States comprising the United Kingdom and several former colonies that have decided to maintain cooperation links and recognize the British Monarch as symbolic head of this association.[23]

On the other hand, regarding relations in groups of countries, with emphasis on the South Asian Association for Regional Cooperation (SAARC),[24] there are several subjects dealt with in this context, but much more from a point of view of cooperation, such as agriculture, education, culture and sports, health, population and child welfare, environment and meteorology, rural development, tourism, transportation, science and technology, female development, and drug trafficking. As can be seen, it does not reach the level of an economic bloc, decisions need to be unanimous, and bilateral and contentious issues should be avoided.[25] Certainly, this conflict resolution system generates a great deal of difficulty in the discussion and application of controversial issues.

In neither case is arbitration seen as a natural solution to conflicts, and even the level of interaction between India and the other States is so deep as to require arbitration.

3.2. Bilateral Investment Treaties ("BITs") and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")

BITs were India's bet for this international interaction, from the point of view of Public International Law, through the effective participation of the Indian State in international transactions and potentially in arbitrations. Regarding these treaties: "*In fact, investment treaties have a greater impact on the balance between the parties, as they deal with material aspects of protection, including the definitions of investor and investment, which determine the scope of arbitral jurisdiction*."[26]

And this may be the cause of the controversy involving BITs hot seat in the Indian State today. Generally, as can be seen, BITs are entered into between an industrialized country, which seeks legal certainty for its investments, and a developing country.[27]

As seen above, the role of India, as well as that of Brazil, has changed substantially in the past 50 years. If before they were developing countries that basically received international investments, today these countries often perform the opposite role, investing in other less developed countries.

This situation can cause perplexity as BITs may not essentially represent the economic scenario of the country at the moment and harm its performance in international trade, since they were structured for a different economic and financial point of view.

In general, the dispute resolution system is arbitration. Thus, the fact of being required in arbitrations arising from different BITs caused India to impound its strategy. The potential difference in interpretations of key points of foreign investments and of the right of the study (sic) to regulate these investments also seems quite risky. Below are four significant examples where the analysis of the Indian Judiciary was put into question:[28]

Vodafone Group Plc and Vodafone Consolidated Holdings Limited v. The Republic of India (I and II)[xxix]	White Industries Australia Limited v. The Republic of India.[xxx]	Port of Kolkata v. Louis Dreyfus Armatures Sas & Ors[xxxi]	Khaitan Holdings. (Mauritius) v. The Republic of India[xxxii]
England and India BIT[xxxiii]	Australia and India BIT[xxxiv]	France and India BIT[xxxv]	Mauritius and India BIT[xxxvi]

Finally, although it is within the sphere of Private International Law, it is important to mention that both Brazil and India are signatories to the New York Convention, internalized in Brazil in 2002[29] and in India as early as 1960.[30] Despite being a multilateral convention, it plays a unifying role in international trade law and greatly facilitates the circulation of commercial arbitral awards rendered by a Member State for enforcement in another Member State.

In Public International Law, as seen above, Brazil and India were both outside the most internationally acclaimed system, a position that Brazil followed, in terms of Private International Law, at least until 1996, when the current arbitration law (Law No. 9.307 of September 23, 1996) introduced many international private rules into Brazilian legislation, which was reinforced by the Decree that internalized the New York Convention in 2002.

3.3. Investment Cooperation and Facilitation Treaty. Even though the structure of an ICFT is similar to the structure of a BIT, the Brazilian government is highly critical, particularly as to the degree of litigation that these documents generate, with a high degree of review among the countries that use them, including India, and there are no BITs between developed countries. India also has criticisms of this model, as already mentioned, particularly since *White Industries Australia Limited v. The Republic of India*.[31]

Thus, Brazil has developed ICFTs, a new agreement framework based on three pillars: "*a) risk mitigation, b) institutional governance, and c) thematic agendas for cooperation and investment facilitation. (…) In summary, an ICFT is an innovative alternative to traditional investment agreements, seeking to overcome their limitations and litigious focus and fostering a more dynamic and long-term interaction between the Parties*."[32]

Brazil has signed several BITs, but has not ratified any.[33] Today Brazil has 15 ICFTs signed ,[34] while India has reached almost 60 BITs and ICFTs since the 1990s, many of them already terminated.[35]

3.4. BRICS:[36]

Brazil, Russia, India, and China (BRIC) informally began to hold meetings of foreign ministers from 2006, in parallel to their participation in the United Nations General Assembly. The

acronym BRIC was created by the financial market to mean a cooperation mechanism in several areas which could generate actual results.

In 2009, the BRIC Heads of State began to hold annual meetings. In 2011, at the Sanya Summit, South Africa joined BRIC, which became BRICS.

Acting in concert within the scope of the G20, of the IMF and of the World Bank for a new global financial governance, in line with the increasing relative weight of emerging countries in global economy, these countries stood out in the financial sphere, particularly for the reform of IMF quotas.

In the same area, the BRICS cooperation led to the launch of the first two institutions of the mechanism: the New Development Bank (NDB) and the Contingent Reserve Arrangement (CRA). The bank was created with the aim of overcoming the scarcity of funds for financing infrastructure projects.

The initiative, however, did not stop there. Since 2015, other areas of cooperation have been sought, particularly health, science, technology and innovation, digital economy, and cooperation in the repression of transnational crime.[37]

Undoubtedly, this movement represented a very strong rapprochement between Brazil and India.

4. Brazil and India: Old and New Pathways: Soap operas are a strong cultural element in Brazil. Those aired in prime time (after 9:00 PM) are the most disputed and valuable in the advertising market. In 2009, the *Caminho das* ***Índias*** soap opera was aired.[38]

Not that the soap opera was decisive for the signing of the treaty between the two countries, but it is a portrait of the moment between them of resumption of mutual interest, just as in the period of the Great Navigations. It is perhaps a harbinger of the resumption of routes, which, from a practical point of view, has been seen with the BRICS since 2006.

In January 2020 came the encouraging news of the signing of an ICFT between Brazil and India, in a structure quite similar to that of the ICFTs previously entered into by Brazil.[39] The document has not yet been internalized and is not in force in either country, but it is undoubtedly an interesting novelty.[40] The stipulated validity of the ICFT is 10 years (art. 28.3).

In the tradition of ICFTs, there is a strong incentive to consensual methods of conflict resolution, such as the Ombudsman and the Joint Committee for the resolution of conflicts that may arise and are escalating (arts. 14 and 18, respectively).

However, if a consensual solution is not possible, the parties may resort to arbitration (art. 19). It is interesting to note that this ad-hoc arbitration will review the limits of interpretation of the ICFT, but not determine any damages, probably due to the negative experience of India with its BITs and discussions regarding the limits of the arbitrations provided for therein. These are the limits of the arbitration agreement[41] established between Brazil and India (art. 19.2).

The applicable rules are those of the Permanent Court of Arbitration, i.e. the PCA Optional Rules.[42]

Annex II to the ICFT contains a Code of Conduct for the appointed Arbitrators. It is interesting to note the reaffirmation of the general principles of process. The rules for recusing arbitrators are established beginning in item 3 of Annex II.

The general idea of the ICFT is to reaffirm the Calvo Doctrine, i.e. investments from Member States will be protected to the same extent as national investments in other Member States.[43]

It remains to be seen how the Brazilian and Indian Judiciaries will resist the temptation to intervene in the arbitral awards rendered.

5. Conclusion: As seen above, the change in Brazil's role on the global stage also triggered a change in its actions in the context of international investments.

If in the past Brazil was a closed country and occasionally sought foreign associations for large investments, particularly in infrastructure works; today the country is not only open to these investments, but its large companies from various industries also seek protection when they operate abroad.

The Indian context, on the other hand, has its own nuances. From a large and historic cosmopolitan center of the world, India was an English colony until the late 1940s. Today, with a gigantic population, the advantage of the English language (consolidated as the language of international transactions), and resounding achievements in the technological sector, India is also looking for a place in the global market.

This is an incredible opportunity for cooperation between these two countries, with arbitration and consensual conflict resolution methods as a moderating element and a guarantee of a good and lasting relationship between the Nations and of quick and technical solutions in the event of a disagreement.

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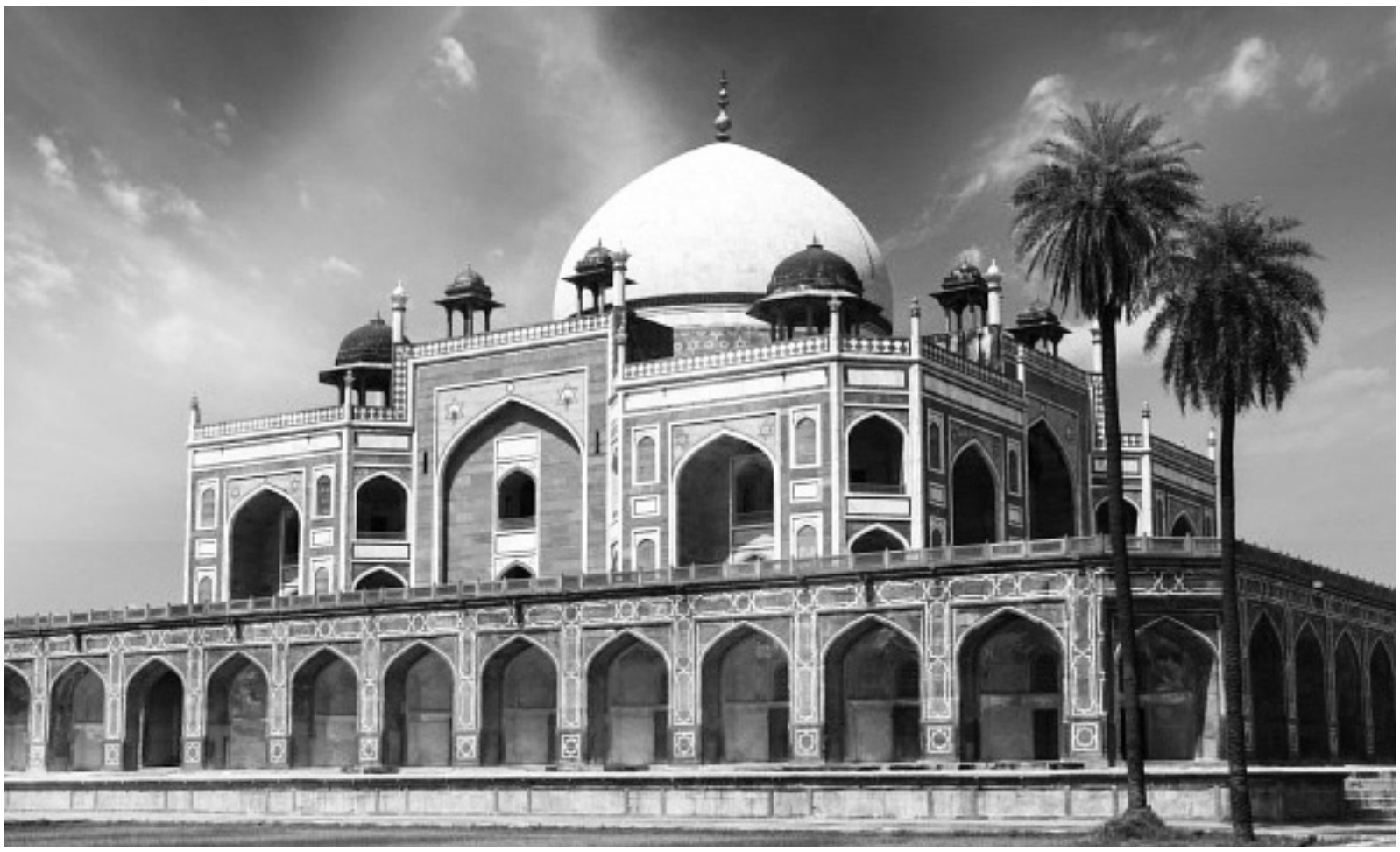

The Red Fort, Delhi, India

INDIA-BRAZIL BILATERAL INVESTMENT TREATY – LESS INDIAN, MORE BRAZILIAN!

By Prabhash Ranjan[1]

India and Brazil signed a bilateral investment treaty on 25 January 2020.[2] From Brazil's point of view, this BIT is an extension of a novel approach to foreign investment in international law based on investment *facilitation* and *cooperation*, not investment *protection* - something that a typical BIT entails. Brazil embraced this approach in 2015 when it launched its Model BIT.[3] Since 2015, Brazil has signed more than 10 such treaties focussing on investment facilitation and cooperation - the one signed with India being the latest one.[4]

From India's point of view, this is the fourth BIT signed after adopting a new Model BIT in 2016.[5] India adopted the new Model BIT after a rethink on its BIT policy due to a high number of investor-State dispute settlement (ISDS) claims being brought against India. So far, more than 20 such ISDS claims have been brought against India under different BITs challenging a wide array of measures ranging from imposition of taxes to judicial delays to cancellation of licenses. India has already lost four disputes with one dispute being decided in favour of India. Before adopting the new Model BIT in early 2016, India unilaterally terminated more than 60 of its BITs.

In addition to the India-Brazil BIT, India has also signed BITs with three countries - Belarus,[6] Taiwan[7] and Kyrgyz Republic.[8] India's BITs with these three countries closely resemble the Indian Model BIT. However, India's BIT with Brazil is different from the Indian Model BIT. It is based on the Brazilian, not Indian model BIT, though a careful reading of the text shows that both sides have compromised to strike this deal.

The purpose of this article is to demonstrate how the India-Brazil BIT deviates from the Indian Model BIT. I discuss deviations on the following issues: definition of investment, expropriation, and investor-State dispute settlement (ISDS). I will also discuss the similarities of the India-Brazil BIT with the Indian Model BIT.

Definition of Investment

The definition of investment in a BIT plays a crucial role in determining the scope of application of rights and obligations under the treaty and the eventual establishment of jurisdiction of an ISDS tribunal.[9] Most BITs define investment 'as every type of asset' followed by several illustrative categories. However, the India-Brazil BIT, like the Indian Model BIT, adopts an enterprise-based definition of investment where an enterprise is taken together with its assets. The Indian Model

BIT further requires that the enterprise must satisfy certain characteristics of investment such as commitment of capital and other resources, duration, the expectation of gain or profit, and the assumption of risk and significance for the development of the country where the investment is made. Article 2.4 of the India-Brazil BIT also provides for these characteristics of investment except for 'significance for the development' of the host State. The requirement that investment should be significant for the development of the host State is a subjective requirement and proving that this requirement has been met could be a challenge for foreign investors. In other words, by not imposing an additional obligation on investors to prove that their investment is significant for host State's development, the India-Brazil BIT makes it easier for an enterprise to meet the requirements of definition of investment.

Expropriation

One of the most important provisions of BIT is expropriation. BITs do not prohibit States from expropriating foreign investment provided States expropriate foreign investment for public purpose, following due process and pay due compensation. Expropriation carried out without meeting these conditions will amount to unlawful expropriation.

A very important feature of the India-Brazil BIT is that it only protects against direct expropriation. Article 6.3 of the BIT states: "*For greater certainty, this treaty only covers direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through a formal transfer of title or outright seizure*". Thus, indirect expropriation is outside the scope of the BIT. Indirect expropriation refers to the deprivation of the substantial benefits flowing from the investment without any formal 'taking' of the property.[10]

This provision is consistent with Brazil's Model BIT. Brazilian lawmakers have been critical of provisions in BITs that allow foreign investors to challenge indirect expropriation claims.[11] Brazil believes that rules on indirect expropriation open the gates for abusive claims by foreign investors that limit a State's capacity to adopt regulatory measures to pursue public interests such as the protection of public health and environment.

The absence of rules on indirect expropriation in the India-Brazil BIT is a complete departure from Article 5 of the Indian Model BIT and also India's BITs with Belarus, Taiwan and Kyrgyz Republic that provides protection to foreign investment from both direct and indirect expropriation. The clear reference to indirect expropriation is given in Article 5.3 (a)(ii) of the Indian Model BIT. This provision provides that indirect expropriation occurs if a country's measure or a series of measures has an effect 'equivalent to direct expropriation', that is, the effect should result in substantial or permanent deprivation of the fundamental attributes of property - rights of use, enjoyment, and disposal – of the investor's investment, without the formal transfer of title.[12]

In fact, the Indian Model BIT not only provides protection from indirect expropriation but also provides how to determine that an investment has been expropriated indirectly.

In today's world, direct expropriations of foreign investment have become rare. As modern States adopt a number of regulations to regulate various spheres of life, instances of indirect interference with investor's property rights have become more prominent. However, the difficulty is in determining when such indirect interference constitutes expropriation.[13] Whether host country's regulatory measures result in indirect expropriation is a question that has acquired prominence due to a range of sovereign regulatory functions being challenged as acts of expropriation by different foreign investors under BITs in the last decade or so. This includes expropriation cases against Argentina for adopting regulatory measures to save itself from an extremely severe economic and financial crisis; claims of expropriation for environment-related regulatory measures;[14] regulatory measures aimed at addressing the supply of drinking water;[15] regulatory measures involving sovereign functions like taxation.[16]

Thus, leaving indirect expropriation outside the scope of the BIT creates a yawning gap in the protection of foreign investment.

Dispute Settlement

The most important aspect of the India-Brazil BIT, inspired from Brazil's Model BIT and other Brazilian BITs, is that it adopts a very different approach to the settlement of investment disputes.[17] It is well known that Brazil has been a vocal opponent of the ISDS system. Thus, Brazil has developed a novel approach to settlement of investment disputes based on prevention. For this purpose, Article 13 of the India-Brazil BIT provides for the creation of a joint committee comprising officials of both the countries. This joint committee shall, *inter alia*, supervise the implementation and execution of the treaty and resolve disputes concerning investments of investors in an amicable manner.

Article 14 establishes the creation of national focal points or ombudsman in both the countries that would, *inter alia*, endeavour to follow the recommendations of the joint committee, and address differences in investment matters. Article 18 of the India-Brazil BIT provides for a dispute prevention procedure. Article 18.1 provides that '*if a Party considers that a specific measure adopted by the other Party constitutes a breach of this Treaty, it may invoke this Article to initiate a dispute prevention procedure within the Joint Committee*'. As per this procedure, any measure of a country that the other country considers amounts to a breach of the BIT, shall be referred to the joint committee for dispute prevention.

In case the joint committee is unable to prevent the dipsute, the dispute shall be dealt with in accordance with Article 19, which provides for State-State dipsute settlement (SSDS). Article 19.1 provides '*any dispute between the Parties which has not been resolved after being subject to the Dispute Prevention Procedure may be submitted by either Party to an ad hoc Arbitral Tribunal, in accordance with the provisions of this Article. Alternatively, the Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for settlement of investment disputes. Unless the*

Red sandstone tower in new delhi, India

Parties decide otherwise, such institution shall apply the provisions of this Part'. Thus, Article 19.1 provides for SSDS or State to State arbitration.

Article 19.2 states that the purpose of SSDS arbitration is to decide on the interpretation of the treaty or observance by a country of the terms of the treaty. It further clarifies that the SSDS arbitration tribunal shall not award compensation. This particular provision, not requiring arbitration tribunals to award damages in case of treaty breaches, is a major departure from the working of international investment law. Awarding damages has been the most important remedy that ISDS tribunals have followed. In fact, there is no mention of ISDS in the India-Brazil BIT. The absence of ISDS in the BIT is a clear reflection of the Brazilian stand on this issue. Brazil has been sceptical of ISDS for several reasons, including it being discriminatory against domestic investors. Thus, allowing only for SSDS and mandating tribunals not to award compensation are the two major departures from the general trend in international investment law.

The dispute settlement provisions in the India-Brazil BIT are not consistent with the dispute settlement provisions of the Indian Model BIT. The Indian Model BIT provides for both SSDS and ISDS. The investor's access to international arbitration in the Indian Model BIT is subject to several restrictions. The Model BIT provides that the foreign investor, after exhausting all local remedies for five years, without reaching a satisfactory resolution, can commence the arbitral process by transmission of a notice of dispute to the host State.[18] This 'notice of dispute' will be accompanied by another six months of attempts by the investor and the State to resolve the dispute through meaningful negotiation, consultation or other third party procedures.[19] In the event that there is no amicable settlement of the dispute, the investor can submit a claim to arbitration,[20] subject to the following additional conditions:

• *first*, not more than six years have elapsed from the date on which the investor first acquired or should have acquired knowledge of the measure in question;[21] and/or,

• *second*, not more than 12 months have elapsed from the conclusion of domestic proceedings;[22]

• *third*, before submitting the claim to arbitration, a minimum of 90 days' notice has to be given to host state;[23]

• *fourth*, the investor must waive the 'right to initiate or continue any proceedings' under the domestic laws of the host state.[24]

Additionally, in cases where the claim is submitted by a foreign investor in respect of loss or damage to a juridical person owned or controlled by the investor, the juridical person must waive its right to initiate or continue any proceedings under the laws of the host state.[25]

While these strict restrictions on ISDS reduce the time period available to the foreign investor to bring claims against the host State before an international arbitration tribunal, it at least provides for ISDS in a limited form. However, not allowing ISDS, as is the case in the India-Brazil BIT, means that foreign investors shall be completely dependent on the

home State to espouse her cause. Home State shall take into account several factors before deciding whether to take up the investor's cause such as how friendly are the relations between the home State and its investor, the political, diplomatic and international relations between the home State and host State, what are the chances of winning the case etc. It is quite possible that for political reasons, the home State may decide not to espouse the case of its investor.

If for any reason the home State decides not to espouse the cause of the foreign investor, there will be no redress available for the foreign investor under international law. While Brazil's concerns about ISDS are legitimate, the solution to addressing these concerns is not to do away with the system completely. Instead, it would be better to ensure that the systemic concerns that plague the ISDS model such as lack of transparency, bias in the appointment and functioning of arbitrators, etc., are addressed by undertaking the necessary reforms.

Similarities with the Indian Model BIT

Some provisions in the India-Brazil BIT are common to the Indian Model BIT. We discuss some of these provisions here:

Absence of the most favoured nation (MFN) provision – India decided not have a MFN provision in its Model BIT after it lost the case, *White Industries v India*.[26] Like the Indian Model BIT, there is no MFN provision in the India-Brazil BIT, although the Brazilian Model BIT provides for a MFN provision.

Taxation measures: There is also a similarity between the Indian Model BIT and the India-Brazil BIT on taxation matters. Article 20.3 of the India-Brazil BIT states, 'for greater certainty, where the Party in which an investment is made makes it evident to the other Party that a measure alleged to be a breach of its obligations under this Treaty has been adopted in compliance with a specific tax law, such measure of that Party shall not be open for review under Article 19'. In other words, Article 20.3 puts taxation related regulatory measures outside the purview of the BIT. However, there is one subtle difference. Article 2.4(ii) of the Indian Model BIT states that the host state's decision that the impugned regulatory measure is taxation-related shall be final and non-justiciable. The Article 20 language in the India-Brail BIT that gives immunity for taxation related measures does not use the language of non-justiciability.

Allowing host States the sole and unfettered prerogative to characterise a regulatory matter as relating to taxation might lead to regulatory abuse. An ISDS tribunal in *EnCana v Ecuador* has previously recognized the States capacity to abuse their power to tax by designing tax laws that are 'extraordinary, punitive in amount or arbitrary' which, in turn, could trigger a claim of indirect expropriation.[27] Similarly, the tribunal in *Burlington v Ecuador* recognized that taxation can be confiscatory leading to indirect expropriation.[28] Excluding taxation measures altogether from the purview of the BIT is a disproportionate reaction especially when taxation is arguably part of a State's police powers and thus allows for non-compensation in cases of deprivation of foreign investment.[29] The absolute exemption of taxation measures from arbitral review limits the protection to foreign investment even through abuse of taxation powers.

Issuance of Compulsory licenses: The 2016 Indian Model BIT excludes the issuance of compulsory licenses ('CLs') provided that such issuance is consistent with the WTO treaty.[30] Thus, if a CL has not been issued in accordance with the WTO's Trade Related Aspects of Intellectual Property Rights (TRIPS) agreement, then it could fall within the purview of the BIT. In other words, foreign investors can challenge the issuance of CLs for not being in accordance with the TRIPS Agreement.[31] The task to determine whether a CL has been issued in accordance with the WTO's TRIPS agreement or not shall squarely fall on the ISDS tribunal with limited or no expertise in the WTO law.[32]

Article 3.6 (c) of the India-Brazil BIT states 'the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement'. Thus, the provision in the India-Brazil BIT on the issuance of CL is same as the India 2016 Model BIT.

Conclusion

The India-Brazil BIT reflects a compromise between the Indian and Brazilian approaches to investment treaties. However, the BIT is certainly more titled towards the Brazilian approach. It does not contain ISDS and rules on indirect expropriation, which creates a gaping hole in the protection of foreign investment. The focus of the BIT is more on dispute prevention. While this is admirable, the fact that also needs to be appreciated is that host States may abuse their public power and thus BITs need to reflect a careful balance between a host State's right to regulate and investment protection. Subsequent to being sued by several foreign investors, India adopted a Model BIT that gives precedence to the host State's right to regulate over investment protection. The India-Brazil BIT tilts even more towards a host State's right to regulate, thus marking a departure from India's Model BIT. It will be interesting to see whether India, in its future BIT negotiations, would come back to its Model BIT template or be more comfortable with the Brazilian template.

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3 Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil And…. (hereinafter Brazil Model BIT) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download. Also see Henrique Choer Moraes and Felipe Hees, Breaking the BIT Mold: Brazil's Pioneering Approach to Investment Agreements, 112 American Journal of International Law (AJIL) Unbound (2018), 197-201.

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5 Model Text for the Indian Bilateral Investment Treaty https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf. For more details on India's Model BIT and India's BIT programme see Prabhash Ranjan, India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash (Oxford University Press: 2019).

6 Treaty Between Republic of Belarus and Republic of India on Investments https://dea.gov.in/sites/default/files/BIT%20with%20Belarus.pdf

7 Bilateral Investment Agreement Between the Indian Taipei Association in Taipei and the Taipei Economic and Cultural Centre in India https://dea.gov.in/sites/default/files/BIA%20between%20ITA%20and%20TECC.pdf

8 Bilaeral Investment Treaty Between the Government of the Kyrgyz Republic and the Government of the Republic of India https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5993/download

9 See generally M. Sattorova. 2012. 'Defining Investment under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond', *Asian Journal of International Law* 2(1): 267–90.

10 R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press: 2012), p. 92; J Salacuse, *The Law of Investment* Treaties (Oxford University Press: 2015) p. 297; *Starrett Housing Corporation v Islamic Republic of Iran*, 4 Iran-US CTR 122, 154 (1983). *See alsoTippetts, Abbett, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran v Islamic Republic of Iran,* 6 Iran-US CTR 219, 225 (1984).

11 Martino Maggetti, Henrique Choer Moraes, The Policy Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption in C A Dunlop et al (eds) Learning in Public Policy (Springer: 2018), 295-316.

12 2016 Indian Model BIT, art. 5.3(a)(ii) provides -

The Parties confirm their shared understanding that: a) Expropriation may be direct or indirect: (ii) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially or permanently deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

13 *See generally Feldman v Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, at para 100 (The Feldman tribunal recognised the difficulty by saying that direct expropriation was relatively easy whereas 'it is much less clear when the governmental action that interferes with broadly-defined property rights ... crosses the line from valid regulation to compensable taking'); S Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements', Journal of Interantional Economic Law, 1049–52; Ursula Kriebaum. 2007. 'Regulatory Takings: Balancing the Interests of the Investor and the State', 8 Journal of World Investment and Trade, 717.

14 *See Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, Aug. 30, 2000;*Methanex Corp. v U.S., NAFTA-UNCITRAL*, Award, 3 August 2005.

15 *See BiwaterGauff Ltd v United Republic of Tanzania,* ICSID Case No. ARB/05/22, Award, (Jul. 24, 2008).

16 *See Occidental Exploration v Ecuador*; *EnCana Corporation v Republic of Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006.

17 Also see Ashutosh Ray and Kabir Duggal, Dispute Resolution in the India-Brazil BIT: Symbolism or Sytemic Reform, Kluwer Arbiration Blog, 9 April 2020, http://arbitrationblog.kluwerarbitration.com/2020/04/09/dispute-resolution-in-the-india-brazil-bit-symbolism-or-systemic-reform/?doing_wp_cron=1593694983.8616809844970703125000

18 2016 Indian Model BIT, art. 15.2.

19 2016 Indian Model BIT, art 15.4.

20 2016 Indian Model BIT, art 16.

21 2016 Indian Model BIT, art 15.5(i).

22 2016 Indian Model BIT, art 15.5(ii);

23 2016 Indian Model BIT, art. 15.5(v).

24 2016 Indian Model BIT, art 15.5(iii).

25 2016 Indian Model BIT, art 15.5(iv).

26 *White Industries Australia Limited v Republic of India*, UNCITRAL, Final Award, 30 November 2011

27 *EnCana Corporation v. Republic of Ecuador*, LCIA Case No. UN3481, Award (3 February 2006) para 177.

28 *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2014) para 395;See also *Occidental Exploration v Ecuador,* para 85.

29 Louis B. Sohn and R.R. Baxter. 1961. 'International Responsibility of States for Injuries to Aliens', *American Journal of International Law* 55: 545.

30 2016 Indian Model BIT, art. 2.4(iii) (providing that the treaty shall not apply to "the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the international obligations of Parties under the WTO Agreement.")

31 See Christopher Gibson. 2010. 'A Look at the Compulsory License in Investment Arbitration: The Case of Indirect Expropriation', *American University International Law Review* 25(3): 357, 421; Bryan Mercurio. 2012. 'Awakening the Sleeping Giant: Intellectual Property Rights in International InvestmentAgreements', *Journal of International Economic Law* 15(3): 871, 905–06

32 Also see Prabhash Ranjan. 2019. 'Pharmaceutical Patents and Expropriation in Indian Bilateral Investment Treaties', in *Regulation and Investment Disputes: Asian Perspectives*, Mahdev Mohan and Chester Brown (eds), p. Cambridge: Cambridge University Press, forthcoming.

III.
The rise of arbitration in Angola

THE BILATERAL INVESTMENT TREATY BETWEEN PORTUGAL AND ANGOLA: The story of a difficult but successful birth

By António Vicente Marques and Raquel Vieira Ferreira

A. ***Brief Background on the Agreement between the Republic of Angola and the Portuguese Republic on the promotion and reciprocal protection of investments***

More than 20 years after several discussions between Portugal and Angola, it is with unquestionable excitement and hope that the arbitration community finally saw a Bilateral Investment Treaty ("BIT") in place between the two countries – entered into force on 24th April 2020.

This was not an easy birth though, but rather a lengthy and complex process of negotiation made with several back and forth steps.

In fact, a first bilateral investment treaty was signed between the two countries in October 1997, which unfortunately never came into force due to lack of ratification.

More than a decade later, and in the context of strengthening the economic cooperation between Portugal and Angola, both countries resumed discussions about a new BIT which was then finally signed in September 2008 and superseded the one signed in 1997.

But again, this was not the end of the story, since the formalities required for the BIT to enter in force were only completed twelve years later.

The BIT was published in the Official Gazette of Angola through Presidential Decree no. 41/20, of 27th February, after which the agreement was formally approved by the Angolan President - João Lourenço - in March, and a notification of such approval was sent to the Embassy of Portugal in Luanda.

The BIT between Portugal-Angola finally saw the light of the day, for the joy and benefit of entrepreneurs, investors and companies with footprints in both countries, who for many years had claimed for enhanced protection to their investments including but not limited to the possibility of resorting to international arbitration under the United Nations Commission on International Trade Law ("UNCITRAL") rules and have access to the International Dispute Settlement

Center for Conciliation or Arbitration Investments ("ICSID"), for settlement of investment disputes under the Washington Convention, dated 18 March 1965.

It is worth noting that in addition to Portugal, Angola has now five more BITs in place with other countries, being that Cape Verde, Germany, Italy, Russian Federation and Brazil. There were also BITs signed with other countries, such as Mozambique, United Arab Emirates Namibia, France, Spain, Guinea Bissau, South Africa and United Kingdom, which have not yet fulfilled all formalities required to enter in force.

B. *Key aspects of the BIT*

The BIT grants to investors of one State a set of protections in respect of the investments made in the territory of the other State, as from its entry into force of the BIT. Hence, investments made prior to 24 April 2020 do not enjoy the protections granted by this BIT, although they may benefit from protection of the applicable legislation and the specific contracts under which the respective authorization has been granted.

Among those protections provided in the BIT, aimed at promoting the undertaking of investments, we can highlight the following:

i) The creation of favourable conditions for investment in both territories and that each Party in its territory shall grant to investments a "*treatment no less favourable*"[1] than that granted to the investments, income and returns of investors from third party States; In respect of the treatment to be given by one Party to the investors of the other Party, it is further provided that, where the applicable law is more favourable than the provisions of the Agreement, the most favourable treatment shall prevail;

ii) The agreement also contains provisions relating to expropriation, stating that there shall be no nationalization, expropriation or other equivalent measure, of the investments of investors of one Party in the territory of another Party, except for reasons of public interest, in which case it shall be attributed an immediate, adequate and effective compensation[2]. Furthermore, any expropriation shall be carried out in accordance with the legal procedures and in a non-discriminatory manner.

iii) Investors of one Party whose investments are affected by losses, in the territory of the other Party, due to war or other armed conflict, national emergency state, revolt, insurrection, or other similar situations - shall be granted restitution, indemnification, compensation or other form of reparation in terms no less favorable than those that this Party grants to its own investors or to investors from a third party State;

iv) Furthermore, investors of either Parties to the Agreement are free transfer[3], upon fulfilment of the tax obligations, among others, profits, capital gains, dividends, interest, charges or other income resulting from the investment; income resulting from the sale or liquidation of all or part of investments; loan repayment funds related with the investments; income of nationals of the other Party authorised to work in connection with the investments made in its territory; initial capital amounts and additional funds required for the maintenance or development of existing investments; amounts spent in the management of the investment, in the territory of the other Party or of a third party State; compensations or other payments arising from compensation for losses or expropriations;

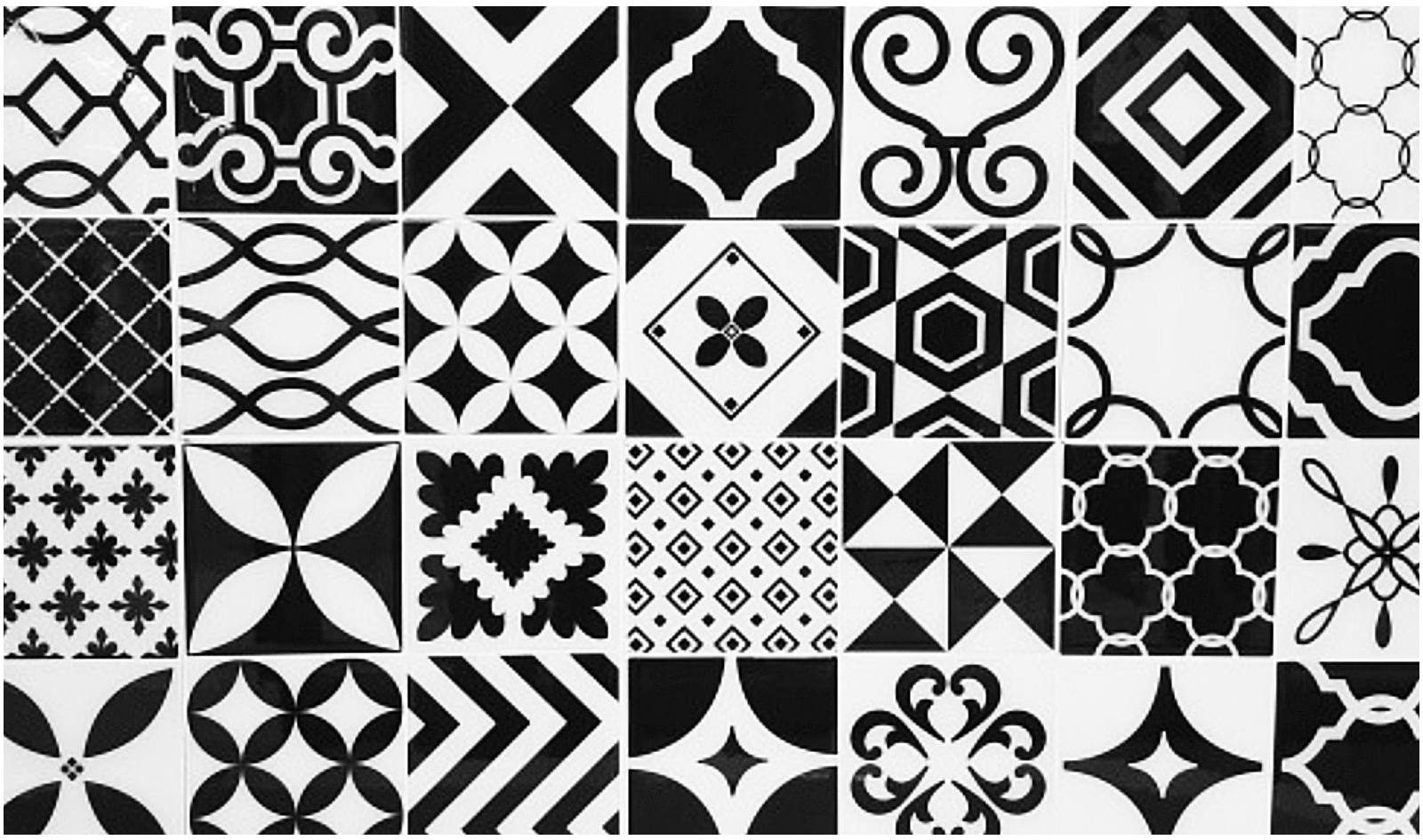
v) The provision of mechanisms of resolution of disputes between investors and the State where the investment is made, especially arbitration to which the State is bound by means of the BIT;

vi) It is also worth noting the broad concepts of "*investment*" and "*investor*" pursuant the terms of the BIT. Article 3 (2), defines investment as all assets invested by the investors of one of the Parties on the territory of the other, pursuant to the law in force of the country in which the investment is made, including, particularly, the following: a) movable and immovable property, as well as others real rights, such as mortgage, pledge and usufruct and another similar rights; b) titles, shares, quotas or other social shares, as well as another types of participation in companies and/or economic interests resulting from the respective activity; c) credit rights or another economic rights; d) intellectual property rights, including copyrights, reproduction rights, trademarks, registered brands, commercial names, industrial designs, technical processes, trade secrets, know-how and clientele; e) concessions with economic value, granted by Law, contract or administrative act of a competent public authority, including concessions for the prospection, cultivation, extraction or exploitation of natural resources and f) goods which, within the scope and in accordance with the applicable law and the respective lease agreements, are made available to a lessor in the territory of one of the Parties.

In its turn, "*investor*" shall mean any natural or legal person from one of the Parties that invests on the territory of the other, in accordance with the law in force therein, being that: a) "*Natural Person*" designates any physical person that possesses the nationality of one of the Parties, in accordance with the respective nationality law; b) "*Legal Person*" means one organization with legal personality composed by a community of people or by a mass of goods, engaged to the achievement of common or collective interests, with the respective head office seated on the territory of one of the Parties, duly constituted under the terms and provisions of the Law in force in such country, including associations, foundations, corporations and commercial companies.

C. *The Dispute Resolution mechanisms under the BIT*

As mentioned above, one of the key aspects of the BIT is the possibility of investors of one State resort to alternative



Decorative tile pattern with geometric shapes, Lisbon, Portugal | FPK

means of dispute resolution with regards to disputes arising from investments carried in the other State.

It should be noted that the BIT encourages Parties to resolve their disputes, as far as possible, through amicable terms, i.e. by way of negotiation.

If the negotiations fail and Parties do not reach an agreement, six months after such negotiations began, the investor may, at his request, submit the dispute to:

a) The competent courts of the Party in which the investment is located;

b) Ad-hoc arbitration court, established by special agreement between parties or in accordance with the UNICTRAL rules;

c) ICSID Arbitration Centre under the Washington 1965 Convention;

d) if one of the parties is not a party to the Convention referred in previous paragraph, the parties can still resort to the rules of the additional mechanism for the administration of procedures provided by ICSID secretariat;

e) or to any other arbitration institution or in accordance with any other arbitration rules.

The decision to submit the dispute to one of the abovementioned proceedings is irreversible and, the arbitral awards rendered by an *ad-hoc* tribunal will be final and binding and can only be subject to appeal under the terms of the said Convention.

Finally, it should also be noted that the arbitral awards thus rendered will be recognized and enforced in accordance with applicable domestic and International Law.

D. *The accession process to the ICSID Washington Convention*

In order to ascertain whether investors can benefit from the widest protection granted under the BIT and the investment settlement dispute center foreseen by the Washington Convention, it is necessary to ascertain whether both Portugal and Angolan have signed and adhered to such Convention.

Portugal, as a member of the European Union, is part of this Washington Convention since 1984, whilst Angola has only initiated its procedure for its accession to the Convention very recently.

According to public sources, the Angolan Council of Ministers has approved on 29th April 2020 the draft resolution for the adhesion to the referred legal instrument which still requires to be ratified by the National Assembly and published in the Official Gazette.

Given the current pandemic situation and the fact that Angola is currently under the State of Calamity regime, we anticipate that the Convention will be ratified and published in the Official within the next couple of months.

These are very encouraging news to the arbitration community, especially following the ratification of the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2017, since clearly shows that Angola is

strongly committed to create and promote a friendlier and attractive investment framework by granting access to the world's most respectable investment dispute center.

ICSID is unquestionable the world's leading institution in terms of international investment dispute settlements and it has extensive experience, having hosted most of the international investment cases.

This Convention establishes an international center for the resolution of disputes related to investments (ICSID) which objective is to offer the means of conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting State in accordance with the provisions herein stated.

Headquartered at the International Bank for Reconstruction and Development, the center also has full international legal personality, having, among others, the ability to contract, acquire and dispose movable and immovable property, as well as to be in court.

It is worth noting that ICSID's activity has increased significantly during 90s of the last century, especially due to proliferation of bilateral investment treaties concluded between States.

As we have seen, these treaties aim to promote and protect investments made by nationals of each of the respective State's parties in the territory of another State party, giving, for this purpose, several fundamental guarantees to foreign investors.

For emerging economies, such as Angola, the ratification of the ICSID Convention proves to be a fundamental instrument for attracting foreign direct investment as it provides additional comfort to investors in matters such: protection against nationalization or expropriation, limitations on the repatriation of profits or disinvestment, change of tax laws, etc., which of course can be crucial if somehow such rights are harmed by the host country.

In fact, international arbitration constitutes an essential guarantee of impartiality, in the event of a dispute arising with a State or another public entity; in turn, from the perspective of the State which receive the investment, it is a way of encouraging foreign investment.

In light of the above, and quoting the wise words of Professor Dário Moura Vicente[4], one cannot forget that whenever negotiations and conciliation prove to be unprofitable in order to solve disputes arising from foreign investments, arbitration remains the preferable mechanism for this purpose, given the neutrality of the court called upon to rule. In a nutshell, as previously noted, these new steps ahead, especially combined with the ratification of the NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in 2017 are very good news to Angola, showing her strongly commitment to create and promote a friendlier and attractive investment framework to investors by granting access to the world's most respectable investment dispute center. Such efforts will hopefully lead to an increase, as would be expectable, of the foreign investment.

António Vicente Marques and Raquel Vieira Ferreira

1 Notwithstanding these provisions concerning "*treatment no less favourable*", the Agreement safeguards certain situations, such as: i) such treatment shall not apply "*to the privileges that either Party grants to the investors from other States by virtue of participation in free trade areas, customs unions, common markets existing or to be established and any international conventions establishing similar institutions, including other forms of economic cooperation to which either Party is a party or will become a party*"; or (ii) in determining that the provisions in question (concerning the "treatment of investments") do not entail the "*granting of treatment of preference or privilege by one Party to investors of the other Party which may be granted by virtue of bilateral agreements, multilateral agreements, whether or not with a regional nature, involving fully or partially tax nature*".

2 It shall reflect the real market value of the expropriated investments at the date before the expropriation or the date it becomes public knowledge, whichever is the earlier; it shall include interest at the commercial rate applicable from the date of expropriation until the date of payment.

3 In a freely convertible currency, at the exchange rate of the prevailing market on the date of the transfer in the territory of the Party where the investment is made.

4 VICENTE, Dário Moura – Arbitragem de Investimento: *A Convenção ICSID e os Tratados Bilaterais, in* Conferência proferida aos 21 de julho de 2011, V Congresso do Centro de Arbitragem Comercial.

Luanda, Angola | FRPK

INTERNATIONAL ARBITRATION IN ANGOLA

By Nuno Albuquerque, Conceição Manita Ferreira and Luisa Castro Ferreira

Introduction

This article has the main purpose of giving a general overview of the legal framework for international arbitration in Angola. With this short study, we intend to give a general but precise view of how the international arbitration proceedings work in Angola.

Background

Angola is one of the fastest-growing economies in the world, being now positioned to become an active member of the global economic community, since it has a privileged geographic location on the coast of the Atlantic Ocean, and abundant natural and human resources. Angola's economic development policies are focused on private investment, so Angola is perfectly placed to provide interested investors with financial incentives that increase potential for return on capital. According to the World Bank statistics, Angola has made substantial economic and political progress since the end of the war in 2002. . In the last few years, Angola has been undertaking deep legal reforms in order to modernise its legal system so it can foster investment projects in the country. For instance, a reform to the Voluntary Arbitration Law is being studied, and in 2016 Angola ratified the New York Convention. Given the evolving process of political and economic opening-up of Angola, it has become necessary to provide more security, certainty and juridical predictability in regard to the resolution of eventual conflicts arising from internal and external relations. According to the World Bank, foreign direct investments in Angola reached their peak in 2015 with US$9.2 billion, compared to US$1.7 billion in 2002 when the civil war ended.

Since Angola is experiencing exponential economic growth and an increase in international transactions and foreign direct investments involving Angola and/or Angolan parties, the practice of international arbitration in Angola is also growing. Given the reforms of the last few years, it is expected that the use of arbitration for domestic cases with a foreign element will increase (i.e., where a party has foreign shareholders). Also, there are an increasing number of arbitrations relating to Angolan parties where recognition and enforcement in Angola are important issues to consider, while an increasing number of investment arbitration cases relating to Angola or Angolan parties can be seen as well.

Currently, Arbitration in Angola is regulated by Law no. 16/03, of 25 July 2003, the "Voluntary Arbitration Law"

(VAL). This law does not strictly follow the UNCITRAL Model Law (Model Law); however, it includes many solutions that are common to the ones found in that Model Law. In contrast to the Model Law, we can point out the following aspects:

• the VAL contains no provision on definitions;

• it does not provide for rules on interpretation;

• it adopts the disposable rights criteria regarding arbitrability;

• it does not address the issue of preliminary decisions;

• it does not distinguish between different types of awards; and

• it permits appeal on the merits in domestic arbitrations, unless the parties have agreed otherwise.

Regarding institutions and centers for arbitration, Decree no. 4/06, of 27 February 2006, has the purpose of promoting institutional arbitration in Angola, and deals with the licensing procedures for the incorporation of arbitration centres. The Ministry of Justice is the entity empowered to authorise the incorporation of arbitration centres in Angola. To date, the Ministry of Justice has authorised the creation of the following arbitration centres:

• Harmonia – Centro Integrado de Estudos e Resolução de Conflitos;

• Arbitral Juris;

• CAAL – Centro Angolano de Arbitagem de Litígios;

• Centre of Mediation and Arbitration of Angola,

• CEFA's Arbitration Centre;

• CREL – Centro de Resolução Extrajudicial de Litígios; and

• CAAIA - Centro de Arbitragem da Associação Industrial de Angola.

Arbitration is also foreseen in other legislation, namely the following:

• Private Investment Law (Law no. 14/15, of 11 August 2015);

• the Mobile Values Law (Law no. 22/15, of 31 August 2015);

• the Petroleum Activities Law (Law no. 10/04, of 12 November 2004); and

• the Public Procurement Law (Law no. 20/10, of 7 September 2010).

In 2016, Angola took another major step to improve participation in international arbitration, by signing the New York Convention on the Recognition of Foreign Arbitral Awards (New York Convention). On 6 March 2017, Angola deposited its instrument of accession to the New York Convention with the UN Secretary General. Under Article XII (2), the Convention entered into force in Angola on 4 June 2017, 90 days after the deposit of its instrument of accession.

Presently, the majority of arbitration cases conducted in Angola are ad hoc. Normally, the Angolan state and companies in the public sector accept, without any complaints, the use of arbitration to resolve disputes with foreign investors.

Arbitration Agreement

According to Article 1 of the VAL, parties may opt to use arbitration for disputes regarding disposable rights (that being those rights that the parties can construct and extinguish by act of will and those which parties can renounce). The VAL generally admits the arbitrability of disputes pertaining to disposable rights, provided that these disputes are not subject, by special law, to the exclusive jurisdiction of judicial courts or to mandatory arbitration. Regarding any disputes involving the state or other legal persons of public law, the VAL establishes that these entities may enter into arbitration agreements when the relevant dispute concerns a private law relationship, in administrative contracts or in other cases specifically provided by law (article 1 of the VAL). Only the disputes reserved by law to the State courts or to some other type of proceedings cannot be submitted to arbitration. Therefore, all commercial disputes can be subject to arbitration.

In order to resort to arbitration, the parties must establish an arbitration clause (in the contract or in the form of a separate agreement for future disputes arising from a defined legal relationship) or an arbitration agreement (signed by the parties to resolve an immediate dispute), which states that any dispute must be resolved using arbitration, instead of seeking judicial courts. To be valid and effective, an arbitration agreement must comply with several requirements. The arbitration agreement will be void if:

• it is not made in writing;

• it goes against the provisions stated in article 1 of the VAL; or

• the object of the arbitration is not specified and there is no other way to specify it.

The VAL only includes rules on the expiration of the arbitration agreement, and does not include rules on the modification and revocation of the arbitration agreement. Thus, the arbitration agreement and the arbitration clause expire when:

• any of the arbitrators dies, is excused, becomes disabled for the exercise of the arbitration and is not replaced;

• a majority cannot be reached in the deliberations (in cases where the arbitration is collective); and

• the award is not rendered by the established deadlines.

However, according to section 4 of article 2 of the VAL, the arbitral clause or convention is not automatically void when the contract where it is inserted is void, if it is clear that the will of the parties is to have an arbitral clause or convention regardless of the validity of the contract.

Regarding the competence of the arbitral tribunal, article 31 states that the arbitral tribunal may decide on its own jurisdiction (the principle of competence-competence). This decision can only be syndicated in impugnation or opposition to the execution of the arbitral award. This means that the award of the arbitral tribunal by which it rules on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement can only be appreciated by the judicial court after the arbitral tribunal has rendered the award. This legal provision gives a letter of law to the fundamental principle of arbitration, the principle of competence-competence: that the arbitral tribunal has full competence to resolve all questions raised in the arbitral proceedings relating to it, whether of a substantive nature relating to the merits of the case, or of a procedural nature. The principle of competence-competence preserves the autonomy of the arbitral tribunal in relation to the jurisdiction of the state courts.

Arbitration Procedure

The parties are free to agree on the procedural rules (directly or by reference to an institution). In the absence of agreement, the tribunal will have the power to determine those rules (article 16). The same reasoning applies to the place of arbitration (article 17). Arbitration begins when the request for submission of the dispute to arbitration is received by the Respondent – if nothing otherwise is stipulated by Agreement of the parties. This request for submission of the dispute to arbitration is generally named "notice to arbitration". The notification can be made by any means, as long as it is possible to prove its receipt by the other party. The notification must contain:

• the identification of the parties;

• the indication that they wish to submit the conflict to arbitration;

• the indication of the Arbitration Agreement; and

• the subject of the conflict, if that isn't already stated in the Arbitration Agreement.

Also, if the parties are due to nominate the arbitrators, the claimant must indicate the arbitrator chosen by them in the notice to arbitration, and must invite the other party to indicate their arbitrator. If the arbitration procedure is to be commanded by a single arbitrator, the notifying party must suggest an arbitrator, and invite the other party to accept that suggestion. However, the nomination can also be made by a third party. If that happens, the notifying party must also notify that third party to appoint and communicate the appointment of the arbitrator to both parties.

As stated previously, article 16 of the VAL states that the parties can agree about the rules of the arbitration. However, if those rules aren't defined until the acceptance of the first arbitrator, the arbitrators must define the rules of the arbitration. The seat of the arbitration is also determined by agreement of the parties in the Arbitration Agreement or later. In common with the rules of arbitration, if the parties do not agree on the seat of the arbitration until the acceptance of the first arbitrator, the seat of arbitration must also be chosen by the arbitrators.

According to the VAL, and in line with most arbitration laws, the arbitration proceedings are subject to fundamental principles of due process, including the principle of equality of the parties and the adversarial principle (article 18 of the VAL). Indeed, the arbitration procedure must respect the following principles and rules:

• the principle of equal treatment of the parties;

• the right to response must be granted in all phases of the procedure; and

• both parties must be heard, orally or by writing, before the rendering of the award.

These are the fundamental principles and rules that must be respected in any procedure. The breach these principles and rules may lead to the setting-aside of an award.

The VAL stipulates that parties to an arbitration must be represented by a constituted lawyer (i.e. an Angolan lawyer). The National Council of the Angolan Bar Association decided on 31 March 2014 that only lawyers with valid registration may intervene as lawyers in arbitration proceedings.

According to article 24 of the VAL, in national arbitration, the arbitral court must decide in accordance with the national law, unless the parties establish that the conflict is to be solved by referring to equity. However, if the parties agree on the decision by the rules of equity, they automatically renounce the ability to appeal the award. On the other hand, in international arbitration, the parties are free to designate the applicable law, and may do so by referring to a specific national law or state legal system. If the parties do not agree in this matter, the arbitral court must decide what substantive law to apply, resorting to the conflict rule which it considers applicable to the dispute.

Regarding the production of proof, in arbitration all means of proof allowed by law are accepted. There is no specific rule in Angolan law establishing limits to the permissible scope of disclosure or discovery. If the proof depends on a third party and that third party refuses to collaborate, the parties or the arbitral court can request the judicial court to carry out the procedure so that proof is produced.

Angola | FRPK

The arbitration procedure ends when the award is deposited or after the award becomes definitive, if a withdrawal happens, since the withdrawal is free at any time of the procedure. If the arbitral award is not rendered within the applicable time limit or if for some reason the tribunal becomes incomplete and a new arbitrator is not appointed, the proceedings will not be dismissed, but the arbitral agreement itself will be deemed to have lost its validity - for that specific dispute - article 5 of the VAL.

The VAL allows the parties to agree on a time limit to render the award, but if nothing is said until the acceptance of the first arbitrator, the said time limit will be of six months and will only be extended by agreement of the parties (article 25 of the VAL). Instead of agreeing on a specific limit, the parties may refer the dispute to institutional arbitration (providing that the rules of the institution contemplate the extension of the time limit to render the award). After all the diligences on the process are made, the arbitrators must decide and render an award, which is to be notified to the parties and deposited in the secretariat of the Provincial Court of the place of arbitration.

Arbitrators

An arbitral tribunal may be composed by a single arbitrator or several, but there must always be an odd number of arbitrators (article 6, paragraph 1, of the VAL).

Appointment

Arbitrators are appointed by the parties in the arbitration agreement or in posterior writing. However, the VAL establishes supplementary criteria to be used in the cases where the parties have not established the means of designating a single or several arbitrators. Indeed, if the parties do not agree on the designation of the arbitrators, or on the way they are to appoint the arbitrators, each of the parties appoints one arbitrator, and the arbitrators appoint the third arbitrator, which completes the composition of the arbitral court (article 8, paragraph 1 of the VAL). The VAL is silent as to the means of constituting an arbitral tribunal in the case of multiple parties.

Requirements

Arbitrators must be singular persons who have the full enjoyment and exercise of their civil capacity (article 9, paragraph 3 of the VAL). Arbitrators must be independent and impartial. Arbitrators are free to reject their designation but, once accepted, the excuse of functions is only admissible if it is justified by a supervening cause that makes it impossible for the arbitrator to exercise its functions.

Any person invited to exercise the functions of arbitrator has to reveal immediately all circumstances that may cause doubts about their impartiality and independence. If any circumstance causes a founded doubt of the impartiality and independence of the arbitrator, they may be refused the right to arbitrate. However, the party that appoints the arbitrator can only refuse the designation if the motive is subsequent to the appointment.

In the case of failure to appoint one arbitrator, and unless the parties have agreed on another appointing authority, the missing arbitrator will be nominated by the president of the local State Court (article 14 of the VAL).

Replacement

An arbitrator can be replaced in case of death, refusal, permanent disability for the performance of its duties, or if the appointment becomes void. The motives for the replacement are very similar to the ones established by the UNCITRAL

Law. They are contemplated in article 10 of the VAL. The VAL addresses the matter of challenging the arbitrator when there is reasonable doubt about his or her impartiality or independence, or when he or she manifestly does not possess the qualifications that were previously agreed upon by the parties (article 10, paragraph 2 of the VAL). If the arbitrators do not step down, the decision on this is made by the Tribunal, with appeal to the State Courts (article 10 of the VAL).

Interim Relief

Interim relief may be granted in arbitration, unless otherwise stated by the parties. Any of the parties may require that the court orders interim measures, related to the object of the conflict, namely the provision of guarantees that it considers necessary. Interim relief is stated in article 22 of the VAL, which is inspired by article 17 of the UNCITRAL Model Law. However, it does not specify what kind of measures are admitted. This does not prevent the parties from requesting from the court, in accordance with the Civil Procedure rules, any procedure they deem necessary to prevent or protect the injury of rights. It is essential that the petitioner alleges and proves two requirements: the *periculum in mora* and the *fumus bonus iuris*.

Arbitration Award

The VAL contains a considerable number of provisions regarding the award and its preparation (articles 24 to 33 of the VAL).

Unless the parties agree otherwise, under article 25 of the VAL, the Arbitration Award must be rendered in the timeline of six months after the acceptance of the last arbitrator. Any extension to that timeline must be agreed by the parties and cannot be decided unilaterally by the arbitrators. There is also the possibility for the parties to agree that, if any instruction measure is necessary, the timeline can be suspended during that period of time for which the instruction is in course. The decision must be rendered with the presence of all of the arbitrators, by simple majority, except if the parties have stipulated a larger majority. The parties can also establish that, if the arbitrators cannot reach an agreement, the decision can be made by the president of the court.

Under article 27 of the VAL, the arbitration award must be made in writing and must contain the following information:

- the identification of the parties;
- reference to the Arbitration Agreement;
- the object of the conflict;
- the seat of arbitration;
- the location and date on which the award was rendered;
- the decision and justification for the decision;
- signature of the arbitrators; and
- indication of the expenses associated with the process and their distribution between the parties.

The statement of a decision given in accordance with the rules of equity is sufficient, with a statement of the facts that are considered proved. If any arbitrator disagrees with the decision, the reasons for the disagreement must also be stated in the decision.

Under article 23 of the VAL, the fees and costs of the process and their division between the parties must be agreed by the parties, unless this decision results from regulations of arbitration chosen under article 16 of the VAL. The decision is to be notified to the parties, who can ask for the correction of material errors, obscurities or clarification of doubts, within 10 days. The court has 30 days to respond to such requests. Throughout the process, the parties can also reach an agreement regarding the subject of the conflict. Under article 28 of the VAL, the agreement must be submitted to the court for homologation.

According to paragraph 4 of article 20 of the VAL, in the course of the process, the withdrawal by any of the parties is also admitted, as long as the opposing party agrees with it,. The withdrawal must be homologated by the court.

Challenge of the Arbitration Award

For domestic arbitrations, the arbitration award can be challenged in two ways: annulment of the award and appeal of the award. Appeal can be waived by the parties, but not their right to request the award to be set aside. Annulment of an award can occur in the following cases:

- when the conflict is not sought to be solved through arbitration;
- when the court that rendered the award is incompetent;
- when the arbitral agreement has expired;
- when the arbitral court has been irregularly constituted;
- when the decision doesn't contain the justification;
- when the decision has violated the principles of equality of response and that fact has influenced the resolution of the conflict; when the court has decided on questions that were not to be decided or when it did not decide on questions that it should decide; or
- when the arbitral court, in cases where it decides through equity and custom, did not comply with the public order or with the Angolan legal order.

The arguments of incompetence of the court and irregularity of the constitution of the court can only be invoked if, during the process, the exception of incompetence of the court or irregularity of its constitution have been also invoked and the court declared itself competent to resolve the conflict, or if the irregularity had influence on the final decision.

If an award does not decide on a certain subject that was brought to the court's attention, the omission can be admitted, if it is demonstrated that the lack of decision on a certain question or issue was determinative of the final decision.

A request for annulment must be addressed to the Supreme Court and the deadline to submit the annulment is 20 days from the date of notification of the arbitral award. The right to request the annulment of an award cannot be waived.

An award can be appealed in the same way that a judicial award can be appealed. Appeal petition must be addressed to the Supreme Court and the deadline to submit the appeal is 15 days from the date of notification of the arbitral award. There is a slight difference in the law when it comes to international and domestic arbitration. With international arbitration, the non-appeal principle (as stated in article 44 of the VAL) applies, except when the possibility of appeal is expressly agreed by the parties. With domestic arbitration, the principle is of the admissibility of the appeal, except if the parties expressly renounce that right (as stated in article 36 of the VAL).

Enforcement of the Arbitration Award

National awards

Article 33 of the VAL states that the award has to be fulfilled in 30 days. If this does not happen, the non-lacking party may coercively execute/enforce the award. Awards rendered in Angola (i.e., awards rendered within domestic arbitrations and awards rendered in Angola, within international arbitrations) are enforceable exactly as if they were decisions rendered by a state court (article 37 of the VAL). If the deadline given by the court to voluntarily accomplish the award is over, or if such deadline isn't fixed by the court, the interested party has 30 days after the notification of the award to enforce it before the Provincial Court, in the terms stated in the Angolan Civil Procedure Code.

The requirement for the enforcement must be accompanied by the arbitral award, its rectification or clarification, and the proof of notification and deposit of the award. The summoned party has the right to oppose the enforcement of an arbitral award, stating one or more of the grounds mentioned in articles 813 and 814 of the Angolan Civil Procedure Code:[1]

• unenforceability of the award;

• falseness of the process or transfer or infidelity of the latter, when one or the other influences in terms of the enforcement;

• illegality of the claimant;

• illegality of the defendant;

• undue accumulation of executions;

• unlawful coalition of claimants;

• fault or nullity of the first summons to the action, when the defendant has not intervened in the proceedings;

• uncertainty, illiquidity or unenforceability of the obligation;

• res judicata prior to the sentence that is to be enforced;

• any fact that extinguishes or modifies the obligation, provided that it is after the close of the discussion in the declaration process, and is proved by a document. The prescription of the right or obligation can be proven by any means; or

• any fundament that is sufficient to annul the award.

Opposition to enforcement of an award must be filed within eight days from the date the defendant is notified of the enforcement process. The decision on the opposition to the enforcement is not appealable.

International awards

Angola has ratified the New York Convention via Resolution no. 38/2016, which was published in the Official Gazette of the State on 12 August 2016. Angola made a reservation pursuant to which the New York Convention will only apply to the recognition and enforcement of awards issued in the territory of another contracting state.

Since Angola has ratified the New York Convention, article 1096 of the Angolan Civil Procedure Code – which states the requirements necessary to recognize an award in the Angolan judicial system - will no longer be applicable to arbitral awards. When the New York Convention is in force in Angola, its articles IV and V will be applicable.

To provide certainty that foreign arbitral awards are practically enforceable in the country, Angola may need to harmonise both the provisions of the VAL and the Angolan Civil Procedure Code with its obligations under the New York Convention.

Investment Arbitration

Investment arbitration is not specifically regulated under Angolan law. Therefore, unless more favourable rules have been adopted in international instruments, the VAL applies to investment arbitration.

The New Private Investment Law of Angola prescribes, under paragraph 2 of article 15, that conflicts and their interpretation can be resolved by arbitration[2]. This law also has the aim to foresee the main guarantees granted to foreign investors in the scope of public international law or established by the international jurisprudence of the most various arbitration institutions, namely:

• the Angolan State must ensure, irrespective of the origin of capital, fair, non-arbitrarily discriminatory and equitable treatment of incorporated companies and companies and the foreign investor's assets;

• payment of a fair compensation, prompt and effective in the case of expropriation or requisition for weighty and justified reasons;

• protection of intellectual and industrial property rights;

• protection of acquired rights over possession;

• non-interference in the management of private companies, except in cases expressly provided for by law; and

• non-cancellation of licences without judicial or administrative proceedings.

Additionally, bilateral investment treaties (BITs) provide for the authorisation or consent of the Angolan State to arbitration in terms that allow the foreign investor immediate recourse to international arbitration, without the need to enter into any subsequent arbitration agreement. Some of the BITs involving Angola provide that an arbitral tribunal shall consist of three arbitrators, each party being responsible for choosing one arbitrator and the third arbitrator being the arbitrator-president chosen by agreement between the other two. In the absence of an agreement for the choice of the third arbitrator, the latter, under the most diverse investment contracts, shall be appointed by one of the following entities:

i. the General Secretariat of the Paris International Chamber of Commerce (ICC);

ii. a designation authority appointed by the Secretary General of the Permanent Court of Arbitration at The Hague, under the UNCITRAL Regulation; and

iii. the President of the Provincial Court of Luanda, at the request of either party.

Some BITs involving Angola refer to the arbitration of disputes by the International Centre for the Settlement of Investment Disputes (ICSID), the Complementary Mechanism for the Administration of Conciliation, Arbitration and Inquiry Procedures (CIRDI), as well as for the Arbitral Tribunal of the International Chamber of Commerce (ICC), or even for an international arbitrator or tribunal to be designated by special agreement or established in accordance with the UNCITRAL Rules of Arbitration.

In summary, it can be said that Angola does indeed protect foreign investments through arbitration, namely in the private investment sector, and has taken steps to reduce bureaucracy and facilitate international arbitration and investment arbitration; namely and most importantly, by ratifying one of the most important arbitration conventions that was missing from the Angolan legal system, the New York Convention.

Third-party funding

No regulation on third-party funding of arbitration exists in Angola. Given the fact that there is no regulation on third-party funding, it would seem prudent for arbitration agreements to include certain provisions to ensure less uncertainty in potential claims, and in particular:

1) the obligation to disclose the existence of funding agreements in the event of disputes, and the content to be disclosed; and

2) acknowledgment by the parties that, as a security measure to avoid a potential annulment of the award or refusal of its recognition and enforcement under the 1958 New York Convention, the funder's eventual uplift should not comprise any recovery of costs or indemnity due to the prevailing party in the arbitration or litigation.

Conclusion

In conclusion, one can say that Angola has travelled a long path in the arbitration journey, but a lot is yet to be done. We believe that, since arbitration has a growing place in alternative dispute resolution, more and more steps will be made in the near future.

Nuno Albuquerque, Conceição Manita Ferreira
and Luisa Castro Ferreira

1 Article 813 (reasons for opposition to the execution based on sentence): the opposition to the execution of a sentence can only have the following reasons: a) unenforceability of the title; b) falsity of the process or transfer, whenever it influences the terms of the execution; c) illegitimacy of the applicant or the defendant or tis representation; d) undue cumulation of executions or illegal coalition of applicants; e) fault or nullity of the first notification for the action, when the defendant didn't intervene in the process; f) uncertainty, illiquidity or unenforceability of the obligation; g) res judicata prior to the sentence that is trying to be enforced; h) any extinctive or modifying fact of the obligation, since it is posterior to the closing of the discussion in the declarative process and proven by document. The prescription of the right or obligation can be proven by any means.
Article 814 (execution based on an arbitral award): 1. There are reasons for the execution based on an arbitral award, not only the foreseen in the precedent article, but also those in which an annulment of the decision can be based. 2. The court rejects the request for execution when it recognizes that the dispute can't be put to the arbitrators' decision, for being submitted to special law, exclusively to judicial courts or to mandatory arbitration, or if the right is indisposable.

2 Article 15, paragraph 2: Within the scope of the present law, the conflicts that eventually arise regarding disposable rights can be solved throughout the alternative means of dispute resolution, such as negotiation, conciliation and arbitration, since by special law they are not committed to judicial courts or to mandatory arbitration.

IV.
Arbitrating around the world

São Paulo, Brazil

THE NEWEST TREND ON FINDING THE APPLICABLE LAW TO THE ARBITRATION AGREEMENT: Kabab-Ji SAL v Kout Food Group signals the end of the ongoing discussion?

By Vitória Zanotto Farina

The discussion concerning the applicable law to the arbitration agreement has been on the spotlight for several years. Whenever the arbitration clause is silent when it comes to its legal regime, one may find divergent positions both sustained by case law. One suggests that the law of the main contract should apply to the arbitration agreement, while the other, that the law of the seat should apply to the arbitral agreement.

The most recent decision on the subject, Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait), was held by the England and Wales Court of Appeal in January 2020. Before analyzing the English case, it is important to examine the previous case law in order to better understand the reasoning of the Kabab-Ji SAL v Kout Food Group decision.

1. The England and Wales Courts Decisions

The British courts have analyzed the applicable law issue and settled an important guideline for arbitrators. The two leading cases that changed the way that courts worldwide faced the applicable law issue are the Sulamérica v. Enesa case [1]

(as of now 'Sulamérica Case') and the Arsanovia v. Cruz City case[2] (as of now 'Arsanovia Case').

1.1. The Sulamérica Case

The first decision rendered by the English and Wales Court is known as "the Sulamérica Case", which involved two Brazilian companies: 'Sulamérica Companhia Nacional de

Seguros' and 'Enesa Engenharia'. Sulamérica provided insurance services to Enesa during the construction of a hydroelectric generating plant in Brazil called 'the Jirau Greenfield Hydro Project'. The contract provided for arbitration seated in London, and parties chose the Brazilian Law to govern the main agreement.

England and Wales Court of Appeal had to rule on the governing law of the arbitration agreement issue. The court had to decide between the applicability of the law of the main contract – Brazilian law – or the law of the seat of the proceedings – English law. The court noted that, due to special requirements in Brazilian Law for protecting parties in adhesion contracts, one of the parties would not be bound to arbitration if such law applied to the arbitral clause[3]. In this sense, England and Wales Court of Appeal noted that, under Brazilian law, the arbitral tribunal would not have the jurisdiction to rule on the case.

Therefore, the court held that the law of the seat – English Law – should apply to the arbitration agreement. On its reasoning, the court applied a three-stage enquiry in order to identify the applicable law: one should look first to (i) an express choice of law, second to (ii) an implied choice and, in the absence of a choice, to (ii) the law with the closest and most real connection[4].

Since there was no express choice of law to the arbitration agreement, the court proceeded to the analysis of an implied choice of law, stating that: "[a]s the parties must have been aware, the choice of another country as the seat of the arbitration inevitably imports an acceptance that the law of that country relating to the conduct and supervision of arbitrations will apply to the proceedings.[5]"

The court refused to apply Brazilian Law to the arbitration agreement, as there was at least "a serious risk that a choice of Brazilian law would significantly undermine that agreement.[6]"

In conclusion, in the Sulamérica Case, the England and Wales Court of Appeal held that the English law – the law of the seat – should govern the arbitration agreement, since, on the tribunal's view, it had the closest and most real connection to the arbitral clause. That reasoning, however, was not applied in the Arsanovia case.

1.2. The Arsanovia Case

In 2012, the British courts were, one more time, invited to rule on the issue of the governing law of the arbitration agreement. This time, however, the England and Wales High Court held that the law of the main contract was to govern the arbitration agreement.

On the facts, the parties signed a Shareholder's Agreement, governed by the Indian Law. The parties chose London as the seat of the arbitration; however, they omitted the law applicable to the arbitral agreement. The Court applied the three-folded test provided for in the Sulamérica Case.

The court held that the parties had an intention to apply the Indian law to the arbitral clause[7], as the governing law clause of the main contract was "a strong pointer to their intention about the law governing the arbitration agreement."[8] It was mentioned that, since the contract provided that "this agreement" should be in accordance with the Indian Law, the parties must have meant that all the clauses should be governed by and construed in accordance with said law, including the arbitration agreement.

The court concluded that the parties externalized their intention to apply the law of the main contract to the arbitration agreement and that it was unnecessary to discuss whether there was an express or an implicit choice of that law.

1.3. The Kabab-Ji v Kout Case

Recently, the British court ruled, again, on the applicable law to the arbitration agreement. In the Kabab-Ji S.A.L. v Kout Food Group[9] (as of now 'Kabab-Ji Case'), the England and Wales Court of Appeal held, in January 2020, that the law of the main contract should apply to an arbitration clause.

On the facts, the parties expressly designated the arbitration to be seated in Paris, France, and agreed that the Laws of England should govern the main agreement. The parties did not choose the law applicable to the arbitral agreement[10].

The court applied a less usual approach which focused on the first stage of the Sulamérica test – i.e. on the express terms[11]. The court concluded that there had been an express choice of English law as governing the arbitration agreement[12], for the choice of law to the main agreement encompassed the arbitration clause[13]. This was reinforced by the fact that Article 1 of the contract provided that the agreement "shall be construed as a whole and each of the documents mentioned is to be regarded as an integral part of this Agreement and shall be interpreted as complementing the others."[14]

The court concluded that the terms of the arbitration agreement itself (Article 14) did not militate against the conclusion that the governing law provision also encompassed the arbitration agreement in Article 14, but "[o]n the contrary […] the first sentence of Article 14.3 supports the conclusion that, on the true construction of the FDA as a whole there is an express choice of English law to govern the arbitration agreement."

Therefore, by highlighting that the parties had expressly provided for the systematic interpretation of the agreement as an important indicative of the law applicable to the arbitration agreement, this decision settles a relevant milestone on the discussion of the applicable law of the arbitral clause.

2. The Applicability of the United Nations Convention on Contracts for the International Sales of Goods (CISG)

In Kabab-Ji v Kout, the law applicable to the substantive issues was English law. England is not a party to the Vienna Convention on International Sales of Goods ("CISG" or

"Convention"). Therefore, in that case, there were no reasons for applying the Convention to the arbitration agreement. However, when the law applicable to the merits is the law of a Contracting State, it should be analyzed whether the CISG is the law applicable to the arbitration agreement.

If the Vienna Convention is the law applicable to the contract, there is a strong reason for applying the law of the contract to the arbitration agreement, when the parties have not chosen an applicable law. The Vienna Convention comprises - although not expressly - the principle of the interpretation of the contract as a whole.

In this sense, it will be demonstrated that the Convention is applicable to procedural agreements, such as jurisdiction clauses, forum clauses, arbitration agreements. Also, the separability of the arbitration agreement is not an obstacle of the applicability of the Vienna Convention.

2.1. Contract Interpretation under the Vienna Convention

2.1.1. The structure of Article 8 of the CISG

In Kabab-Ji v Kout decision, the arbitral tribunal acknowledged the fact that the contract provided for rules of interpretation, being one of them the need to interpret the contract as a whole. As a consequence, the tribunal held that the law applicable to the arbitration agreement was the law of the contract. While contracts may not provide for the contract interpretation as a whole expressly, the law governing the contract might contain such principle. One example is the Vienna Convention on International Sales of Goods.

When interpreting a contract, one should look for agreed rules of interpretation on the parties' agreement. When the contract lacks such rules, resource is to be had to the applicable law. If the latter is the Vienna Convention itself or the law of a Contracting State, Art. 8 CISG should be applied. And, while this provision does not expressly mandate for an interpretation of the contract as a whole, such principle is incorporated to the Convention.

Contract interpretation is regulated mainly by Article 8 of the Vienna Convention. This article excludes the resort to domestic interpretation rules[15], as it prevails over any domestic conflicting rule[16]. Art. 8 CISG also aims aiding the court in the interpretation of the contract in order to gap-fill its lacunae. However, the Convention applies only subsidiarily to the contract[17], as the latter precedes the CISG in the hierarchy of rules[18].

While Art. 7 CISG expressly provides for the interpretation of the Convention as a whole, such provision deals only with interpretation of the *Convention* itself [19]. Article 8 CISG deals with the interpretation of the *statements and conduct of the parties*[20]. The Convention does not expressly provide for a systematic interpretation of the contract nor does it provides for an interpretation of the contract "as a whole". However, it may serve as a supplementary rule in aid of interpretation, since it is in accordance with the intent of Article 8 CISG[21].

In support of that, it is acknowledged that the Convention excluded the parol evidence rule, as Article 8(3) expressly allows recourse to "the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties"[22]. The parol evidence rule would mandate an arbitral tribunal to look solely to the terms of the contract when interpreting it.

According to Schlechtriem and Schwenzer, Art. 8 CISG is decisive for the contract interpretation, as it deals with the interpretation of various contracts and the relationship between them, as much as the qualification of its sections[23]. Schlechtriem and Schwenzer refer that a court, when interpreting a contract, should take into account its purpose[24]; the authors sustain the Convention requires the interpretation of the contract as a whole[25]. This principle could also be applied to a group of contracts situation[26].

According to Di Matteo, Article 8 determines intent "based upon a totality of the circumstances analysis (prior dealings, course of performance, usage)"[27]. The author refers that the courts have "expanded the reasonable person analysis from a literal interpretation of contractual language towards an ever-expanding totality analysis"[28]. The totality analysis means that, in the process of judicial construction, a court must take into account the whole of the instrument, its main purpose, and reject words that are inconsistent with the main purpose of the contract[29].

This reasoning has been applied in an arbitration held in Russia, where the panel interpreted a contractual term in light of Art. 8 CISG, referring that "the meaning of the contractual term is determined by comparison of the content of that term with that of the other contractual terms and the tenor of the contract as a whole with due regard to the subsequent conduct of the parties"[30]. The arbitral tribunal extracted such reasoning from Art. 8(3) CISG[31].

Article 8(3) CISG refer courts to look to all relevant objective circumstances of the case, such as "the negotiations, any practices which the parties have established between themselves, usages, and any subsequent conduct of the parties"[32]. As a consequence, it has been ruled that "the exact wording chosen by the parties as well as the systematic context are of particular relevance[33]", and that due consideration is to be had to the purpose of the contract[34].

The principle of the contract interpretation as a whole may not be expressly provided for in the Convention text. However, it is suitable with the purpose of Art. 8 CISG, as, according to this provision, an unstated intent does not stand alone, being necessary that the other party knew or must not have been unaware what that intent was[35]. According to Schlechtriem, Article 8(1) and (2) prevents a party's purely subjective intent from being decisive[36]. And, in order to

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establish the parties' intent, Art. 8 requires an assessment of all relevant facts and circumstances[37]. Therefore, it is important that, in order to find such intent, the interpreter analyses the whole contract, its wording and purpose in order to find the translated intent of the parties.

2.1.2. The role of the usages in contract interpretation

The rule providing for a systematic interpretation of the contract could also be derived from Article 9 of the Convention[38], as the existence of an usage can be demonstrated.

While the usage under Article 9(1) of the Convention will only apply if the parties expressly agreed so - expressly or impliedly[39] -, the usage provided for in Article 9(2) applies as a matter of presumption, since it refers to a widely known norm in international trade that the parties knew or ought to have known of it[40]. The approach taken by the CISG is more protective towards weaker parties, as it requires that the parties at least "knew or ought to have known" the relevant usage[41].

Therefore, even if the parties did not expressly provide for the observation of the principle of contract interpretation as a whole, it may still apply as a presumption. In order to verify if such principle constitutes a "widely known norm in international trade", some relevant transnational sources will be analyzed.

According to Cordero-Moss, the main sources of transnational law are usages of the trade or customs (*lex mercatoria*), general principles of law, soft law, general principles of public international law, treaties and conventions[42].

Restatements of general principles of contract law, such as the UPICC and the PECL are deemed to reflect generally recognized principles[43]. The Principles of International Commercial Contracts (UPIC) and the Principles of European Contract Law (PECL) are the result of an attempt to achieve the harmonization of legal traditions regarding general contract law by creating sources of soft law[44]. Neither are international conventions or have binding effects, but they are a codification of generally adopted principles of international contracts[45]. They act as a guideline for arbitrators when ruling a dispute on the basis of the transnational law in the sense that they can rely on a readily available set of rules instead of having to do an extensive research to find out what standards to apply[46].

According to Zeller, the UNIDROIT Principles contain similar rules of contract interpretation when compared to the CISG, and the main departure from the CISG is that PICC has added more guidelines, such as one providing for a systematic interpretation of the contract[47]. Article 4.4 provides that "terms and expressions shall be interpreted in the light of the whole contract or statement in which they appear[48]." The UNIDROIT Official Commentary refers that:

"[t]erms and expressions used by one or both parties are clearly not intended to operate in isolation but have to be seen as an integral part of their general context. Consequently they should be interpreted in the light of the whole contract or statement in which they appear."[49]

Similarly, the Principles of European Contract Law (PECL) contains the rule on interpreting the individual provisions with reference to contract as a whole (Art. 5:105)[50].

Other sources of transnational law also provide for an interpretation of the contract as a whole. The common European sales law (CESL) provides on Art. 60 that "expressions used in a contract are to be interpreted in the light of the contract as a whole". Also, the European Contract Code (Code Européen des Contrats) provides that the interpreter should regard the contractual text as a whole, coordinating the various clauses with each other.

"1. Quand les déclarations contractuelles sont de nature à révéler de manière claire et univoque l'intention des contractants, le contenu du contrat doit être déduit de leur sens littéral, eu égard au texte contractuel dans son ensemble et en coordonnant les différentes clauses les unes aux autres.[51]"

Other examples are the OHADAC principles on international commercial contracts[52]; the Trans-Lex Principles[53].

Therefore, the principle of interpretation of the contract as a whole is a widely known and regularly observed norm applicable in international trade. Consequently, if the Vienna Convention is the law applicable to the contract, there is a strong reason for applying the law of the contract to the arbitration agreement, when the parties have not chosen an applicable law, for the Convention deems applicable any usages widely known in international trade, such as the principle of the interpretation of the contract as a whole.

2.2. The Applicability of the Vienna Convention on International Sales of Goods

The parties to an arbitration must choose, when drafting the arbitral clause, the applicable law to the arbitration agreement. An express and clear choice avoids unpredictability, as the arbitral tribunal, when making a decision on a conflict, will definitely apply the law chosen by the parties and will not have to decide on the applicable law. Otherwise, absent a choice of law, the arbitral tribunal might determine the applicability of an undesired law by both parties. Notwithstanding, the parties still rarely choose the applicable law to the arbitral clause.

Although there are arguments against the applicability of the Vienna Convention to the arbitral clause, the Convention may - and sometimes ought to - be applied to the arbitral clause. The procedural nature of the arbitration agreement and the separability doctrine are not obstacles for the applicability of the Vienna Convention.

There are different positions in relation to the application of the Vienna Convention to the arbitration clause, three of which stand out. The more restrictive one sustains that the Convention should be applied neither for formation issues nor for validity issues[54]. The main arguments against the application of the Convention to the arbitration agreement stands that the Convention cannot apply to procedural issues (i) and that its application would contradict the separability between the main contract and the arbitration agreement (ii)[55].

2.2.1. The two features of the arbitral agreement

According to Schwenzer, the arbitration agreement has a contractual and procedural aspect, consisting of a "substantive agreement over procedural issues"[56]. Accordingly, the arbitral clause consists of an agreement of the parties regarding procedural issues, such as the applicable law, arbitration's forum and language.

Regarding the substantive issues of the arbitral clause, the law chosen to regulate the contract should apply to the arbitration clause, especially if the Parties had agreed on an interpretation of the contract as a whole, or have chosen an applicable law that comprises such principle. And, if the latter is the Vienna Convention itself or the law of a Contracting State, the Vienna Convention can be applied without difficulty to the substantive issues of the arbitration clause.

In order to demonstrate the existence of a substantive feature of the arbitral agreement, some case law will be addressed.

Brazilian Appeal Courts have already ruled that the filing of a lawsuit by the proposing party that drafted the adhesion contract containing an arbitral clause constituted a violation of the principles of good faith and reasonableness[57]. Another example is the decision rendered by a swiss tribunal which recognized that the violation of the arbitral clause constituted a breach of contract[58].

Also, there are case law in which the Vienna Convention was applied to the arbitration agreement as a consequence of Art. 1 CISG. In Filanto v. Chilewich, the U.S. District Court applied the Vienna Convention as a consequence of Art. 1(1)(a) CISG in order to interpret whether the "writing requirement" necessary to the formation of an arbitration agreement had been fulfilled[59]. Similarly, in Hazelnuts case the Vienna Convention was applied as a consequence of Art. 1(1)(a) to an arbitration agreement between a French and a German party[60]. In cereal case, the Vienna Convention was also applied through Art. 1(1)(a) in order to determine whether an arbitration agreement had been incorporated into a contract[61].

Similarly, in Chateau des Charmes Wines Ltd., the court analyzed, in light of the Vienna Convention, whether a forum selection clause in the invoices that defendant sent to plaintiff was duly incorporated to the contract. The court applied the CISG as a consequence of Art. 1(1)(a) CISG, since both parties were Contracting States, and none had made any reservations to the applicability of the Convention. Moreover, the court expressly stated that the "Convention governs the substantive question of contract formation as to the forum

selection clauses". The court held that the mere fact that defendant sent multiple invoices did not create an agreement as to the proper forum with plaintiff[62].

In Epis-Centre v. La Palentina, Claimant sought to declare the recognition and enforcement of the decision held by the arbitral tribunal. The Respondent sustained the arbitration clause was null. The court applied the CISG to state that the arbitral clause had been formed, according to Arts. 18(1) and 18(3) CISG.

In Generators case, the Regional Court of Appeal applies the Vienna Convention in order to analyze whether the requirements of the incorporation of a jurisdiction clause, which is part of the standard terms, were met. In order to do so, it applies Arts. 8 and 9 of the Vienna Convention. The court held that while the CISG requires the offeree to give a reasonable opportunity to the offeror to note the standard terms, this standard was not met in that case[63].

Therefore, Art. 8 of the CISG is used by courts for interpreting jurisdiction agreements, forum agreements, arbitration clauses, choice of forum for the execution of the award.

2.2.2. The separability principle

The separability principle, recognized by most arbitration laws, intends to protect the jurisdiction of the arbitral tribunal or arbitrator. Essentially, the consequence of doctrine of separability is that any invalidity of the contract will not affect the validity of the arbitration agreement; that is, the conflict arising out of an invalid contract will be decided by an arbitrator, for the arbitral clause - despite the invalidity of the contract - is still valid[64]. Therefore, the jurisdiction of the arbitral tribunal overcomes invalidity and the termination of main contract.

The separability of the arbitral clause, however, is not an absolute rule, as the "autonomy of the arbitration clause and of the principal contract does not mean that they are totally independent one from the other as evidenced by the fact that the acceptance of the contract entails acceptance of the clause, without any other formality"[65]. There are situations in which the separability of the arbitration agreement can and should be disregarded, for example, in order to give effect to the arbitral clause, applying the law of the contract instead of the law of the seat (the called "validation principle").

In this sense, when there is no choice of law expressed or implied to the arbitral clause, and the applicability of the law of the seat of arbitration would result in the invalidity of the arbitral clause, the law of the contract should be applied to the clause to preserve the will of the parts, overcoming separability[66]. This reasoning was upheld in the Sulámerica case.

The "lifting" of the separability is useful when the law of the seat would render the arbitral clause invalid. According to Gary Born, Brazil could be regarded as a representative example of this trend, since often international arbitration agreements were historically void[67].

Therefore, the Convention is applicable to arbitration agreements, and the separability of the arbitration agreement presents no obstacle for its applicability.

Conclusion

Kabab-Ji SAL v Kout Food Group decision complements the three-folded test set by Sulámerica Case, adding an important element for arbitrators to look for when analyzing the issue of the applicable law to the arbitration agreement. In Kabab-Ji SAL v Kout Food Group decision, the fact that parties had provided for an interpretation of the contract as a whole was paramount to the tribunal's decision in applying the law governing the main agreement.

While the contract may not contain rules of interpretation, the law chosen by the parties to govern the main agreement will most likely contain such rules. And, if the Vienna Convention is the governing law, there is a strong reason for applying the law of the contract to the arbitration agreement, when the parties have not chosen an applicable law. The Vienna Convention comprises - although not expressly - the principle of the interpretation of the contract as a whole.

While parties to international sales contracts will keep omitting the applicable law to the arbitration agreement, Kabab-Ji SAL v Kout Food Group decision introduced an important step to the end to this ongoing discussion, providing predictability for future decisions.

Vitória Zanotto Farina

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THE CHALLENGES OF INTELLECTUAL PROPERTY – RELATED INVESTMENT ARBITRATION

By Ana Pepeljugoska Kostovska

ABSTRACT:

The enforcement of intellectual property rights abroad can be challenging task. However, the international investment law can be of assistance in this respect. The primary question that arises in this respect is if the intellectual property rights can be considered as covered investments. This especially if we take into account the fact that the ICSID Convention does not contain concise definition of "investment". Recently there has been certain development in regarding the intellectual property rights as "investments", thus enabling the intellectual property rights holders' to use the mechanism provided in the BITs and the ICSID Convention. There has even been some publicly available case law in this respect, showing the investment arbitration as suitable mechanism for enforcement of the intellectual property rights. However, from the rendered decisions it seems that most of the tribunals consider that it is very difficult to prove as claimant that the intellectual property related investment has been violated by the host state.

Key words: arbitration, enforcement, intellectual property rights, investment law, investment protection

1. Introduction

It is already established in theory and practice that the international commercial arbitration is firm forum for the resolution of intellectual property disputes between two private parties. The question that arises from this context is whether the private party has the same option in cases where the intellectual property rights are violated by a foreign state.

Traditionally, private companies were obliged to look to their own governments to take up their cause and attempt to enforce their rights against offending state. Since the entry into force of the TRIPS Agreement, this is now done most commonly through the dispute resolution mechanism of the World trade organization. There are also number of additional international legal instruments that provide dispute resolution at the level of states. While the system of state-to state enforcement has many strengths, it also suffers from certain limitations which may – in some cases – hinder or prevent the effective protection of the intellectual property rights.[1]

It is our position that the international investment arbitration, although it has emerged recently, provides very attractive alternative to the state dispute resolution mechanisms. As Professor Bjorklund rightly pointed out, the emergence of investment cases involving intellectual property matters is even more recent, and the scrutiny of these claims by investor-state tribunals raises new questions and challenges with regard to the legitimacy of this practice.[2]

This paper will focus on resolving the issue of whether the intellectual property rights can be classified as "investments" under the international conventions and the investment treaties and will outline the main concerns of the intellectual property-related investment arbitration regime and case law.

2. Defining the Intellectual Property Rights as "Investments"

In general, the intellectual property represents the creations that arise from the intellectual activities in the industry, the science, the literature and the art. Generally speaking, the intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Those rights do not apply to the physical object in which the creation may be embodied, but instead to the intellectual creation as such.[3]

The key point of the protection of the intellectual property rights is the possibility to regulate in a balanced way the rights of the intellectual property rights holders' and the interest of the society. The success of the efforts to establish the norms for protection of the intellectual property depends largely on the perceived impact which the adoption of such norms may have upon a country`s economic and political development.[4]

The intellectual property law is divided in two major groups' copyright and related rights and industrial property rights. When defining the industrial property rights, the modern doctrine and practice, include the set of rights which are stipulated in the Article 1 of the Paris Convention for the protection of Industrial property.[5] Namely, under this article, the subjects of protection of the industrial property rights are: patents, utility models, industrial designs, trademarks, trade name, geographical indications and unfair competition. However, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) implements the rights of know-how, trade secrets, topography of integrated circuits.

The first inquiry that needs to be addressed when analyzing the intellectual property rights in the field of the international investment law is whether they can actually qualify as an "investments". Namely, it is often assumed from economic point of view, that the direct investments involve: transfer of funds, longer – term projects, regular income, participation of the person transferring funds in the management project and a business risk.[6] On the other hand, the definition of the intellectual property rights as direct investments, from a legal point of view still remains open for debate.

2.1. The Notion of "Investment" under the BITs

The qualification of the intellectual property rights as covered investments under most international agreements is far from being a novelty. The reference to intellectual property rights was already a common feature of the US Friendship Commerce and Navigation Agreements before the expansion of BITs. As early as 1903, the US had negotiated a FCN treaty with China that included copyright protection. In some treaties, the term -property was simply extended to such intangible rights, while in others explicit reference was made to patents, copyrights and trademarks. [7]

With regard to the coverage of intellectual property rights, BITs can be separated into three general categories:

1. there are small number of BITs that – while containing a broad definition of "investment" that generally include all "assets" - do not explicitly include any type of intellectual property. This does not mean that the intellectual property rights are *per se* excluded, but in the author's opinion fall under the broad scope of "assets";

2. there are a number of BITs that explicitly mention intellectual property rights being covered as "investments"[8], but provide very little detail about the types of the intellectual property rights that are covered;

3. the most common type of BITs are those that not only explicitly provide that intellectual property rights are covered as "investments", but also provide "*lengthy detail about what types of rights are covered within the concept of intellectual property rights".* [9]

In cases where the type of intellectual property right in question has been explicitly included in the BITs definition, there will probably be little room for a host state to argue that it does not constitute an investment. Thus, the most common types of intellectual property rights: patents, trademarks, copyrights and trade secrets will generally qualify as protected investment under the BITs.

Nevertheless, there are certain agreements (such as the trade agreement between Canada and the EU), which contain explicit reference of which part of the intellectual property rights cannot be treated as expropriation in the sense of the investment law. [10]

It is still however unclear whether the applications (filed but not yet granted rights) to intellectual property rights can be qualified as investments. According to the prevailing view of the majority of BITs, the "IP rights generally have to be registered in the host State to qualify as an investment".[11]

2.2 The Notion of "Investment" under the ICSID Convention

The ICSID Convention does not provide a definition of investment. This was a conscious choice made by the drafters who believed that an explicit definition of investment would be unduly restrictive and preferred to give the parties flexibility to determine the scope of their consent to ICSID arbitration.[12]

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According to the prevailing opinion in the theory a good starting point of the evaluation whether the intellectual property rights can be classified as "investment" would be the Article 25 of the ICSID Convention[13]. This especially if we take into account the fact that in light of the protection provided under the ICSID arbitration the vast majority of investment agreements refer to this dispute settlement mechanism. Among these advantages, the most obvious lies in the enforcement mechanism attached to the arbitral decisions of the ICSID that requires member states to the Convention to consider these arbitral decisions as having the same force as judgements of their own courts.[14] In addition, "this simple procedure eliminates the problems of recognition and enforcement of foreign arbitral awards, which subsists in domestic laws and under international conventions" and also "it is the only enforcement option mandated as of right". [15]

In order to have access to ICSID arbitration the requirements of the Article 25 of the ICSID Convention[16] must be met, respectively "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally". However, the main issue here lies in the fact that even thought this Article refers to the notion of "investment", it does not provide definition for the term, and its interpretation is subject of the parties` intention.

The absence of the definition of investment does not mean that there was no attempt to define the term.[17] In fact several attempts were made during the negotiations of the Convention and the formula that was finally adopted was a broad and open-ended reference to "investment" without limitation, combined with specific procedural mechanisms which allowed each state to create an individualized definition of "investment" after the Convention was ratified.[18]

In regard to this two different approaches have been adopted to define the meaning of "investment" under the ICSID Convention:

- The 'Typical Characteristics Approach' – According to a strict application of this approach as far as the underlying consent to arbitration recognizes the activity or asset as an investment, the ICSID Convention imposes no further jurisdictional limit. The more subtle perspective embraces the reasoning of the *Salini*[19] case. In the cases that followed it is accepted that where the evidence of one or more hallmarks of "investment" is weak, a tribunal may approach the issue from a holistic perspective and determine whether there is other evidence in support of the hallmarks of "investment" which is strong as to off-set the weakness in other hallmarks of investment.[20]

- The 'Jurisdictional Approach' – This approach is an alternative and more restrictive approach which is rooted in the lack of definition in the ICSID Convention. It often requires that all the established hallmarks of "investment" must be present before a contract can even be considered as an "investment".[21]

On the basis of the previous analysis under the "typical characteristic approach", which is more appropriate when assessing the intellectual property investment operations, the intellectual property assets are likely to be considered as investments under the ICSID Convention.[22]

It is therefore fair to assume that the intellectual property investments are susceptible, similar to any other assets and depending on the features of the operation at stake to qualify as "investments" under the ICSID Convention.

3. Enforcement of intellectual property rights through investment arbitration

Intellectual property is designed to protect right holders' against unauthorized uses by third parties. It is understood as a negative right to exclude, rather than a positive right to "use" the protected invention or creation. Investment protection covers a different range of rights. Investors are protected against expropriation and other unlawful acts or omissions committed by States.[23]

Therefore it is challenging by the virtue of these rights to shift from the protection provided by the intellectual property law into the sphere of international investment law.

As it is demonstrated above, in many case the intellectual property rights may constitute covered investment and thus the intellectual property rights-holders may qualify as covered investors. In this respect, the intellectual property rights violations can be subject to possible investment arbitration claim. In addition to this in order to argue the case, the intellectual property rights-holders have to rely on the generally applicable substantive and procedural protections contained in most of the investment treaties such as: protection against unlawful expropriation, guaranteed fair and equitable treatment, full protection and security, national treatment and most favored nation treatment, as well as the additional supplementary protection provided by the umbrella clauses and safeguard clauses.

Although, for a long time the practical relevance of the intellectual property and investment overlap seemed negligible, over the past decade at least nine international investment arbitration proceedings relating intellectual property rights have been publicly initiated.[24]

In the first set of cases the claimant was Philip Morris and the cases referred to anti-smoking legislation as improper interference with the right of trademark. [25] In these cases the states introduced a set of regulations to reduce smoking, including prohibited marketing, labeling and usage of the trademarks as design features on the packaging. In both cases the decisions were not in favor of the claimant, thus the tribunals found that there is no breaches of the international investment law.

The second set of cases refer to the improper interference of the patent rights. The claimant in the case *Eli Lilly v. Canada* [26]claimed improper invalidation and in the case *Apotex v. US (I)*[27] claimed that it was prevented from obtaining patent non-infringement judgement. Although, the *Eli Lilly v. Canada* arbitration was to be consider d in theory as a high profile case in the award, the tribunal found that the Claimant failed to establish the factual premise of its claims and the invalidation of the patents cannot be considered as expropriation claim under the NAFTA Article 1110, where in the second case, the tribunal decided that it lacks jurisdiction to hear the case.

Some of the investment arbitration cases include expropriation of trademarks. In the case of *AHS Niger v. Niger*[28], the claimant claimed *inter alia* that upon termination of the concession agreement for the airport, the government continued to use the old uniforms of the staff containing the logo of the claimant. The tribunal rejected all intellectual property related claims. In 2002 Nicaragua seized trademarks belonging to two subsidiaries of Shell. Shell started ICSID procedure against Nicaragua [29]which was discontinued due to the tact that the Appeal court of Nicaragua reversed the lower court decision for seizure of the trademarks.

Finally there is a group of cases[30] that refer to the regulatory measures as improper interference of generic drugs. It is important to note that in one of these case *Servier v. Poland*, the tribunal decided that the refusal of granting marketing authorization to be discriminatory, disproportionate and "not a matter of public necessity" - therefore representing unlawful expropriation.

4. Conclusory remarks

It is undisputed that with the growth of international transactions, the intellectual property rights investments are increasing their importance. In this global context this has led us to the analysis of two distinct legal regimes: international investment law and international intellectual property law.

Currently it is fair to conclude that the intellectual property rights are "investments", not only in a theoretical sense of the investment law, but also in practice through the existing case law.

The analyzed case law shows that most of the claimants have challenged both legislation and executive and regulatory actions of the state concerning their intellectual property rights.

There are however some concerns in handling the intellectual property cases through the investment arbitration. This in context of the fact that the binding investment tribunal decisions may contribute in changing the intellectual property protection standards, already established in the international intellectual property legal acts.

In this respect it is our standpoint that safeguards to ensure the consistency of decisions should be incorporated. This is to be done either in the treaties that serve as a basis for the claims, or in the statutes of the arbitral tribunals. In such manner the risk of having legal inconsistencies will be decrease and the adverse impact of the offered flexibility to deal with intellectual property – related cases in investment arbitration will be eliminated. In such manner the investment arbitration will become effective forum for intellectual property protection, rather than the state dispute resolution mechanisms offered so far.

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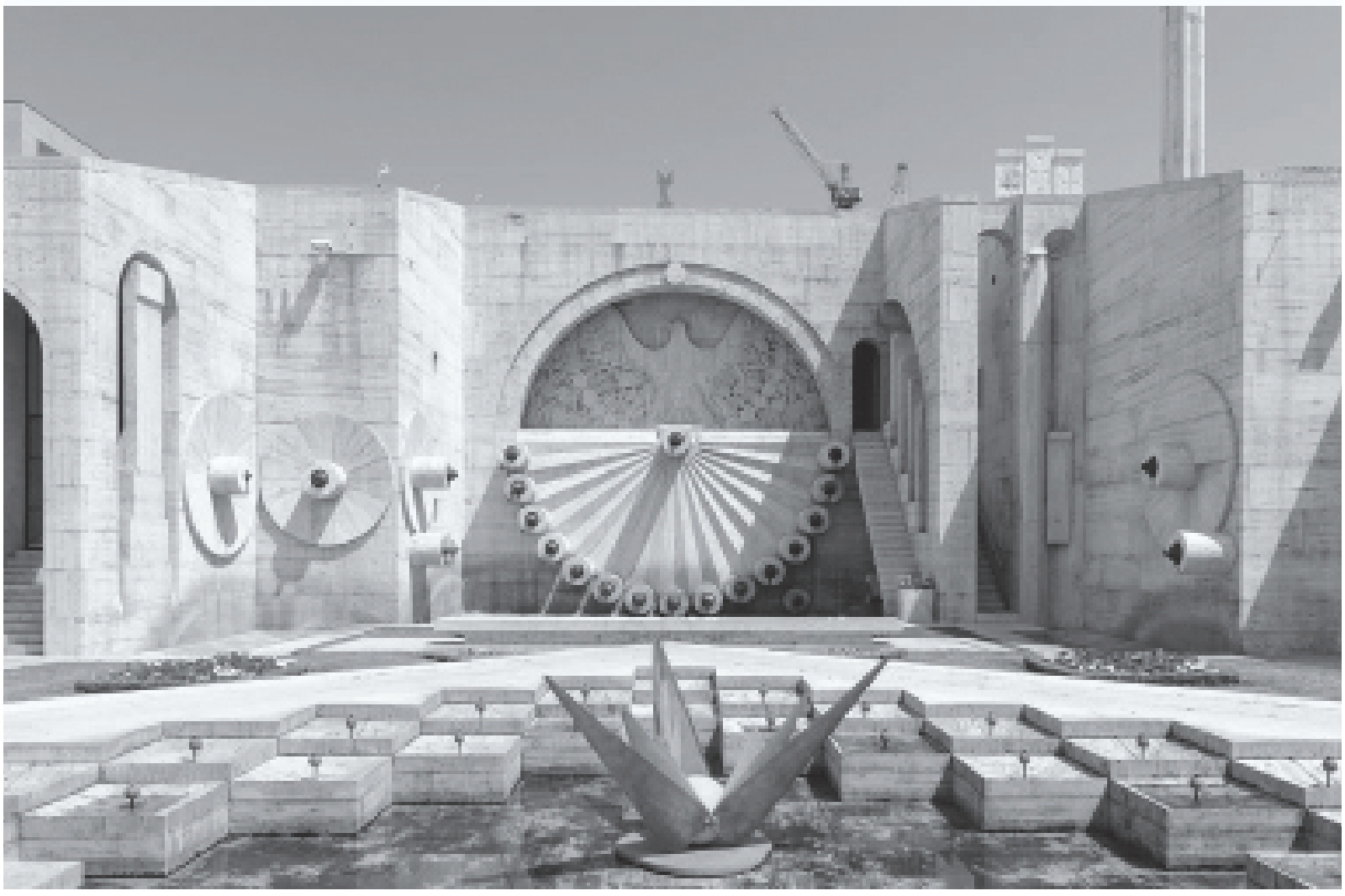

Yerevan Cascade, a giant stairway in Yerevan, Armenia | Anton Ivanov

RECOGNIZING AND ENFORCING FOREIGN ARBITRAL AWARDS IN ARMENIA – "THE AMENDED APPROACH"

By Aram Aghababyan

Introduction

After the newly elected Armenian president stepped in office on April 9th, 2018, the amended Civil Procedure Code of the Republic of Armenia (the "CPC") entered into force. [1]

This was the first substantial amendment to the CPC since 1997. The amendment has entirely changed the previous CPC of the Republic of Armenia. All provisions of the former law on recognition and enforcement of foreign[2] arbitral awards[3] were replaced by five new chapters on the procedure of recognition and enforcement of and challenge to local and international arbitral awards. More importantly, the CPC was improved with the inclusion of the new chapter 47 regulating the procedure of recognition and enforcement of foreign arbitral awards.[4] The aim of this paper is to examine the procedure of recognititon and enforcement of foreign arbitral awards in Armenia in the light of the amended CPC.

Before getting into details of the new amendments, however, a brief overview of the legal regime to the procedure of recognition and enforcement of the foreign arbitral awards is required.

On December 29, 1997, Armenia ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").[5] When ratifying the Convention Armenia made the reciprocity and commercial reservations as permitted by the Convention itself.[6] That is to say, the Republic of Armenia will only enforce awards issued in the territory of a contracting state and would solely apply the Convention to the relations considered as commercial.[7]

The Law on Commercial Arbitration of the Republic of Armenia. 1996, as amended in 2015 (the "Arbitration Act") neither includes a definition of an "arbitral award" nor of a "foreign arbitral award". However, the definition of the term

"foreign arbitral award" could be found in the amended CPC. Article 326(1) defines foreign arbitral awards as international commercial arbitration awards and awards arising from the arbitrations initiated in the territory of of a foreign state.

Article III of the New York Convention stipulates that foreign arbitral awards should be recognized and enforced according to the rules of procedure of the contracting state where the award is being enforced.[8] In the case of the Republic of Armenia, the procedure of recognition and enforcement of the foreign arbitral awards is governed by the CPC, the Arbitration Act[9] and by the Law of the Republic of Armenia on Compulsory Enforcement of Judicial Acts[10] (the "Compulsory Enforcement Act")

According to the New York Convention, foreign arbitral awards are subject to recognition and enforcement provided that none of the grounds for refusal stipulated in Article V(1) of the New York Convention are in existence. The same grounds with minor differences[11] are provided under Article 36(1) of the Arbitration Act.[12] The reason for the similarity is that the Arbitration Act is based and developed on the basis of the Uncitral Model Law on International Commercial Arbitration (The "Model Law")[13] which, in its turn, was developed based on the New York Convention. The Armenian Constitution stipulates that in case of a conflict between the norms of international treaties ratified by Armenia and local laws, the norms of international treaties shall prevail.[14]

The grounds for refusing recognition and enforcement of arbitral award as listed under Article 36(1) of the Arbitration Act are:

"a) The party to the agreement referred to in Article 7 was with no active legal capacity, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[15]

It is also worth mentioning that foreign arbitral awards cannot be challenged in Armenian courts.[16] A foreign arbitral award may only be annulled in the country where it was issued. The possible alternative to challenging the foreign arbitral award in Armenia is to request the competent court[17] to refuse recognition and enforcement of the foreign arbitral award.[18]

Prior to the enactment of the amendment, CPC had very few provisions regulating the procedure of recognition and enforcement of or challenge to arbitral awards. When dealing with arbitral awards the court was guided with the Arbitration Act instead. The new CPC filled the gap by introducing 5 new chapters regulating the procedure in precise details. Newly added Chapter 47 is aimed at addressing the gaps present in the previous CPC.

A. Form and Content Requirements for Applications to be Filed with the Court.

In the previous CPC, there were no form and content requirements provided for the applications to be filed with the competent court requesting recognition and enforcement of foreign arbitral awards. The requirements for the applications were only inferred indirectly from the Arbitration Act and the previous CPC. Based on the analysis of the Arbitration Act and the former CPC it could only be concluded that the application should be in writing, be signed by the person who is authorized by the party to the arbitration and presumably, provide some information and explanations on the grounds of the application.

Unfortunately, in Armenia, the judicial practice of challenging arbitral awards is far from being rich and comprehensive. Thus, lack of detailed regulation was causing confusion both with the parties submitting the application to the court and for the court examining the application.

With the new addition, Article 327 of the CPC defined requirements for the form and the content of the applications to be filed with the competent court designated by the Arbitration Act. According to the said Article, an application for recognition and enforcement of a foreign arbitral award should contain the following information:

(1) the name of the court, with which the application is filed;

(2) the name, the place and the composition of the foreign arbitral tribunal;

(3) name of the claimant, his / her domicile (location);

(4) name of the debtor, his / her place of residence;

(5) the year, month, date and number of the arbitral award (if any);

(6) the request of the applicant on the recognition and enforcement of the foreign arbitral award;

(7) the list of accompanying documents.

The application for the recognition and enforcement of foreign arbitral award shall be accompanied by:

(1) The original of the arbitral award or a duly certified copy thereof;

(2) The original of the arbitration agreement or a duly certified copy thereof.[19]

Although said Article presents much clearer requirements for the applications there is still place for improvement. Upon looking at Article 327(2)2, it becomes clear that the text is somewhat inconsistent with Article IV(1)b of the New York Convention and Article 35(2) of the Arbitration Act. Both documents provide that the **duly authenticated original of the award** or a duly certified copy is required. While the amended CPC provides that supplying the original of the award (with no "due authentication") is sufficient.

Also to meet the requirements of the New York Convention and Arbitration Act it is necessary that the award should have become final and enforceable in the country of the seat of arbitration. CPC makes no reference to this requirement nor to the need to provide evidence of finality of the award in the country of the seat. Presumably, it is left to the party challenging enforcement to provide evidence that the award has not yet become final and, therefore, is unenforceable.

Lastly, Article 327 concludes that the applications should be submitted along with the proof of paying the state fee[20]. Failure to submit an application in accordance with the requirements set in Article 327[21] will subject to be returned by the supervisory court.

B. The Form and Content Requirements of the Court Decision

The provisions of the new CPC went even further and defined the form and content requirements for the court decision as well. With the addition of Article 330, CPC also listed the specific points that should be addressed in the court decision to recognize and enforce an award. According to the new requirements, the decision of the court should include the following details:

(1) the name, place, and composition of the foreign arbitral tribunal or international commercial arbitral tribunal;

(2) names of the claimant and the debtor;

(3) year, month, date and place of foreign judgment;

(4) the conclusion of the court recognizing and authorizing compulsory enforcement or denying recognition and enforcement of the foreign arbitral award.

C. Differentiation between international and local arbitral awards.

One of the most obvious concerns caused by the previous CPC was that it was not differentiating between foreign and local arbitration awards. So the court was obliged to follow the text of Article 35(1) of the Armenian Arbitration Act which was stating:

"An arbitral award, which was issued in ***the Republic of Armenia or in the country party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards****, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."*[22]

The provision uses the word "or" which is a different formulation than provided by the New York Convention. This, coupled with the title of the Article "Recognition and Enforcement of Awards of Arbitral Tribunals", was putting an equation mark between the awards issued in Armenia and awards issued in the territory of one of the contracting states to the New York Convention. Given that fact and absence of the regulation in the CPC, the courts in Armenia were ending up in a situation where they were obliged to recognize the awards which were made in the territory of the Republic of Armenia.[23]

The amended CPC came with a new regulation to solve the controversy. The CPC has been developed with chapters dealing with local and foreign arbitral awards separately. The current regulation stipulated in Article 321(1) of the CPC sets that the supervisory court shall examine the application for the execution of a writ for the compulsory enforcement of the arbitral award in cases where the seat of arbitration is the Republic of Armenia[24]. Put in other words, the amended CPC does not provide nor implied a requirement for recognition of domestic awards. At the same time, the foreign arbitral awards should go through a separate procedure of recognition and enforcement as provided in the 47th Chapter.[25]

Although distancing the procedures from each other solved the issue with the local arbitral awards, it left some unclarities for the procedure of recognition and enforcement of the foreign arbitral awards. Article 326(3) and 326(4) of the new CPC provide:

"3. Depending on the nature of the award, a Party may, apply to the court only for recognition of the award. 4. An application relating to a foreign arbitral award requiring enforcement may be filed for recognition and enforcement within three years from the date of entry into force of the foreign arbitral award."[26]

From the joint analysis of the above-stated articles, it is possible to infer that the party to the arbitration may apply for either recognition of the award **only** or for enforcement and recognition **collectively**. The amended CPC remains silent on a scenario when the party has applied for the recognition of the award at first and later on decides to enforce it separately.[27]

D. When does a Foreign Arbitral Award become Enforceable in Armenia

The previous CPC did not address the time limitation for seeking enforcement of an award with the Compulsory Service

of The Republic of Armenia (the "Compulsory Service"). Instead, the procedure was regulated by Article 23(1)1 of the Compulsory Enforcement Act which for filing of an enforcement application was setting a one year time limitation from the date of issuance of the award.[28] The problem was that the Article was not differentiating between local and foreign arbitral awards which ended up becoming an issue with the Interpipe *Ukraine v Golden Field* award. The compulsory enforcement service refused to execute the court decision because the applicant failed to comply with the time limitation requirements. Subsequently, the Cassation Court decided that the time limitation set in Article 23 of the Compulsory Enforcement Act should start running from the date the award was recognized by the Armenian Court.[29] In 2016 the Constitutional Court sided with the Cassation court's decision[30] and reaffirmed that the one-year time limitation should run from the date such award was recognized by the competent court in Armenia.[31]

The new CPC rectified the problem by providing a time limitation of three years to file the application for enforcement of the foreign arbitral award. The newly added article (326(4)) provides:

"An application relating to a foreign arbitral award requiring enforcement may be filed for recognition and enforcement within three years from the date of entry into force of the foreign arbitral award."[32]

Nevertheless, the article did not bring any clarity to the issue already existing with the previous provisions. The Article remained silent on the question: "**when exactly does the arbitral award enter into force?"** Does it enter into force from the date the award was rendered by the arbitral tribunal or does the clock start running once the award is recognized by the Armenian court vested with the authority of granting recognition to foreign arbitral awards? To provide a clear answer to the question, the better alternative would seem to be redrafting the article in the light of the Cassation Court and Constitutional Court decisions[33] mentioned above. The issue is particularly important to clarify since the time limitation has been increased to three years instead of the previous one-year limitation.

E. Court Discretion

One point that remained unchanged in the new CPC is the issue of providing unnecessary discretion to the courts to decide on the grounds for refusal. When adopting the Arbitration Act based on the Model Law, Article 36(1) was copied into the Arbitration Act which has resulted in an undesired consequence. Article 36(1) provides:

"Recognition or enforcement of an arbitral award, which was issued in the territory of the Republic of Armenia or in the territory of the country party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ***may*** *be refused if:"*

Using the word "may" causes confusion to the procedure of the recognition and enforcement of arbitral awards. It provides the court with a discretionary right to decide on refusing the enforcement of an award. Put differently, it implies that the court has a right and not an obligation to refuse the recognition and enforcement of an award if the grounds for refusal are present. . While four out of five official languages of the New York Convention use the word "may", the French version of the Convention uses the phrase "subject to refusal" which is more of an imperative approach and obliges the competent court to refuse the recognition and enforcement of an award in such circumstances. It is known that the word "might" in the discussed article have been given an important role in international literature as a way of granting jurisdiction to national domestic courts.[34] However, given the early development stage of arbitration in Armenia and the previous unfriendly approach[35] by courts towards arbitration, it would have been a more appropriate approach to provide the court with an obligation to refuse the recognition if any of the grounds stipulated in Article 36(1) are present.[36] Therefore changing the wording of the above discussed Article will clarify the limits of the court's discretion thus being beneficial to the development of international arbitration in Armenia.

While the adoption of the new CPC could have served as an appropriate opportunity to clarify the above point, along with some other pending unclarities discussed above, it has not done so.

F. Translation of Article 36(1)a

When enforcing foreign arbitral awards the parties to the arbitration should be aware of the following issue with Article 36(1)a. When adopting the Arbitration Act Article 36(1)a was translated as follows:

"At the request of the party against whom it is invoked if that party furnishes to the competent court where recognition or enforcement is sought proof that:

1-One of the parties to the arbitration agreement referred to in article 7 lacked ***legal capacity****, (…);*[37]*"*

The problematic article should have been implemented with a phrase "under some incapacity" as it is provided by the New York Convention Article V(1) and Model Law article 36(1)(a)i. According to the Armenian legislation, only physical persons could lack legal capacity.[38] Thus the erroneous translation causes a situation when the foreign arbitral award could only be refused recognition on the above-mentioned ground in case the party to the arbitration was a physical person. Although Article 1255(1)[39] obliges the court to clarify the content of its norms in accordance with their official interpretation and practice of application in the respective foreign state, the problem arising from the incorrect translation of Article 36(1) still remains in need of rectification, if not by legislative amendment at least through court decisions and legal precedence.

Conclusion

It is unquestionable that the recent amendment to the CPC has brought an invaluable addition to the procedure of recognition and enforcement of foreign arbitral awards

in Armenia. Not only the amendment has clarified many ambiguities that existed before but it has also added extensive new provisions to fill in the gaps in the unregulated areas of recognition and enforcement procedures. Notably, the amendment has drawn a solid line between the enforcement procedures of foreign and local arbitral awards. While admitting that Chapter 47 was a remarkable addition to the CPC, there still remain some ambiguities in need of clarification in practice or legislative intervention, if necessary.

With all its novelties the amended CPC failed to take into account scarce but nevertheless existing judicial practice. The Cassation Court decision[40] was an important development in the field of arbitration in Armenia and should have been considered when amending the CPC. Additionally, it would have been desirable that while developing the CPC provisions the drafters would have adjusted those with already existing and recognized legal instruments. Lastly, the amended CPC could have resolved certain other already known problems in the Armenian arbitration legislation.

The existence of extensive judicial practice is essential to have a well-developed procedure on recognition and enforcement of foreign arbitral awards. Hopefully with the amended CPC Armenia will become a more attractive destination for international arbitration and consequently, the judicial practice would be enriched.

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1 The Code of Civil procedure of the Republic of Armenia, 2018, Article 439(1)
2 According to the Code of Civil Procedure of the Republic of Armenia, the award is considered as foreign if the arbitration was initiated in the territory of a foreign state or it is an international commercial arbitration award.
3 The Code of Civil procedure of the Republic of Armenia (1997), Articles 247.6, 247.7
4 *See Footnote 1*, Chapter 47
5 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) http://www.newyorkconvention.org/english (last visited, 03.02.2020)
6 *Ibid*, Article 1 part 3
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9 The Law on Commercial Arbitration of the Republic of Armenia, 2015. Chapter 8
10 Law of the Republic of Armenia on Compulsory Enforcement of Judicial Acts, 5 May 1998
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12 *See footnote 9*, article 36
13 UNCITRAL Model Law on International Commercial Arbitration, United Nations: 1994, Source: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf (last visited, 15.02.2020) Article 36(1)(a)i
14 The Constitution of the Republic of Armenia,2015, Article 5(3)
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16 Hayk Hovhannisyan "*Grounds of challenging arbitral awards and their classification.*" Digest of materials from 2015 session of postgraduates and applicants of the faculty of Law of Yerevan State University, Yerevan: 2015, p. 395
17 The functions provided by Article 34 (2), 35-36.2 of the Armenian Arbitration Act shall be exercised by the Yerevan City Court of General Jurisdiction
18 *See Footnote 9*, Article 1(3)
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20 *Ibid*, Article 327 part 4
21 *Id, Article 327*
22 *See Footnote 9*, Article 35(1)
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24 *See Footnote 1*, Article 321(1)
25 Ibid, Chapter 47
26 *Id*, Article 326(3),326(4)
27 Aida Avanessian: *Commentary on the draft Code of Civil Procedure of RA*, unpublished manuscript: 2017
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32 *See footnote 1*, Article 326(4)
33 *See footnote 1*
34 *See footnote 11*
35 Supreme Court of Cassation of the Republic of Armenia, Civil and Administrative Chamber, 20 April 2014, case EKD/1910/02/13
36 *See footnote 11*, p. 38
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38 Civil Code of the Republic of Armenia, Article 307 (1).
39 *Ibid*, 1255(1)
40 *See footnote 29*

[BIOGRAPHIES]

The Founders

PEDRO SOUSA UVA

Pedro Sousa Uva is an international dispute resolution lawyer focused in international arbitration and cross-border disputes. Based in Munich, he is Founder of SUA - Sousa Uva Arbitration & Conflict Management, a new law firm dedicated to international dispute resolution.

As to date, Pedro has gathered over 15 years of work experience in Dispute Resolution. He was Of-Counsel at the Lisbon based full service law firm pbbr until July 2020, where he previously headed the arbitration and litigation department of the firm. Before, he handled at Miranda law firm international disputes, often based in former Portuguese colonies in Africa or Asia for almost 5 years. Seconded to the London office of Wilmer Hale in 2009/2010, Pedro worked on international arbitration matters alongside a worldwide team of lawyers. He started his career at Abreu Advogados, where he represented foreign and national clients in court and arbitral proceedings for nearly a decade.

Pedro holds a LL.M degree in Comparative and International Dispute Resolution from the School of International Arbitration (Queen Mary University of London). Before graduating in Law at the Lisbon Law School of the Portuguese Catholic University (2003), he studied as a scholarship student International Arbitration at the Katolieke Universiteit Leuven in Belgium in 2001/2002. Pedro is a regular speaker on arbitration events and hosts conferences, including São Paulo, Vienna and Lisbon. He was one of the invited lecturers for the 7th Post Graduation Course of Arbitration at the University Nova, in Lisbon (2018).

Pedro co-chaired the Sub40 Committee of the Portuguese Association of Arbitration (APA) from 2013 to 2018, being an active member of the Co-Chairs Circle (CCC). He was a member of APA's Ethics Committee. Pedro co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA).

During the last years, Pedro authored several articles on international and national arbitration topics, notably "*International Arbitration Shifting East*", published in Iberian Lawyer in December, 2017, "*Getting the Deal Through - Arbitration 2016*" (co-author, Portugal; 11th Edition), "*World Arbitration Reporter -2nd Edition*" (co-author, Jurisnet 2014), "*Interim Measures in International Arbitration* - Chapter 30 (Portugal)" (co-author, Jurisnet 2014) and "*Portugal finally approves its new arbitration law*" (co-author, Revue de Droit Des Affaires Internationales / International Business Law, no. 3, June 2012). His dissertation was published in the American Review of International Arbitration under the title "A *Comparative Reflection on Challenge of Arbitral Awards Through the Lens of the Arbitrator's Duty of Impartiality and Independence*".

Pedro has been recently considered a leading individual in Portugal again by *Who's Who Legal (WWL) – Arbitration Future Leaders 2020*.

Pedro has been selected by his peers for inclusion in the 10th Edition of "The Best Lawyers in Portugal" for his work in Arbitration and Mediation, a recognition which he holds since 2015.

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The idea for YAR was born in London and put into practice by the co-founders Pedro Sousa Uva and Gonçalo Malheiro in January, 2011. It is a pioneer project as it was the first under40 international arbitration review ever made.

[BIOGRAPHIES]

The Founders

GONÇALO MALHEIRO

Gonçalo Malheiro is an associated partner of Abreu Advogados. He focuses his work on Arbitration and Litigation.

With around 20 years of experience, Gonçalo has a broad expertise in handling arbitration, civil, commercial and criminal litigation. He has represented foreign and national clients before Tribunals and Courts.

He has also handled numerous contract disputes including claims arising out of sales of goods agreements, distribution arrangements, unfair competition matters, banking and insurance, real estate, franchising disputes and corporate matters.

Gonçalo completed his LLM at Queen Mary – University of London (School of International Arbitration) and published his dissertation about interim injunctions in Portuguese Arbitration Law and a compared analysis with different jurisdictions.

Before, he already had attended a Summer Course at Cambridge University.

Between 2012 and 2015 he was Chairman of the Young Member Group of the Chartered Institute of Arbitrators and is currently member of the Chartered Institute of Arbitrators.

Gonçalo attended the 1st Intensive Program for Arbitrators organized by the Portuguese Chamber of Commerce and Industry in April 2015 and is Arbitrator at the Portuguese Chamber of Commerce of São Paulo, Brazil.

He has been a speaker in several national and international conferences focused on arbitration.

Besides publishing in English and Portuguese regarding various arbitration matters, Gonçalo is also Co-Founder of *YAR - Young Arbitration Review*,.

Gonçalo also co-founded AFSIA Portugal (2010), the national branch of Alumni & Friends of the School of International Arbitration (AFSIA), of which he is a member.

Gonçalo published recently articles about arbitration in Portuguese speaking countries and recently about rules of evidence in arbitration for the book “La prueba en el procedimiento arbitral”.

Gonçalo was awarded as the Client Choice Award winner 2020 for litigation in Portuguese jurisdiction

[BIOGRAPHIES]

ATHINA FOUCHARD PAPAEFSTRATIOU

Athina Fouchard Papaefstratiou, counsel at Eversheds Sutherland, has acted as counsel or arbitrator for over thirteen years in commercial and investment arbitrations in various sectors, such as telecommunications, mining, energy, international sale of goods and construction.

She has significant experience in Africa-related arbitration, and has worked in arbitrations under the ICC, ICSID, UNCITRAL, LCIA, ACIC, CRCICA, and CCJA arbitration rules.

Athina is the Chair of the Steering Committee of CIArb Young Members Group, the Co-Chair of AfricArb, a member of the Board of Management of CIArb, a member of the ICC Arbitration Commission and a Board member of the Arbitration Committee of ICC Greece.

She is registered with the Bar in Paris and in Athens and works in English, French, and Greek.

PATRYK POLEK

Patryk Polek is an Advocate Trainee working as a Junior Associate in the Warsaw office's Litigation and Arbitration Team **of DWF Poland**. His practice focuses mainly on commercial dispute resolution, in particular international and domestic arbitration, as well as litigation before the Polish courts.

Throughout his practice, he obtained experience in a broad scope of civil law disputes, especially in competition law, construction and infrastructure disputes, and intellectual property litigations alike.

He has gained legal experience working for international and Polish law firms in Warsaw. He has also undertaken a mini-pupillage at the barristers' chambers in London.

JAN GASIOROWSKI

Jan is member of the Dispute Resolution team at DWF Poland. He provides legal consultation to domestic and international clients in regard to contract disputes.
He has experience in advising clients in matters regarding financial services, real estate, corporate law as well as construction and infrastructure.
Before joining DWF Poland he gained experience in DWF London office and other leading law firms across Europe.

GILBERTO GIUSTI

Partner at Pinheiro Neto Advogados and head of the Litigation and Arbitration practice in the firm.

Gilberto Giusti holds a LLB in Law from the University of São Paulo (USP) and a LL.M. (Master of Laws) degree from the University of California – Berkeley. Among other positions, he is member of the Advisory Council of the American Arbitration Association (AAA) and a former member of the Permanent Court of the London Court of Arbitration (LCIA).

Gilberto has been dedicated to arbitration and other out-of-court methods of dispute resolution and has actively participated as an attorney in arbitrations in Brazil and abroad.

DOUGLAS DEPIERI CATARUCCI

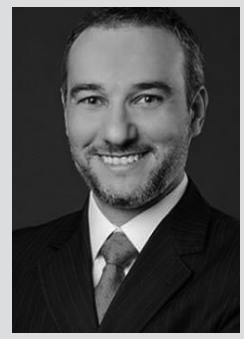
Douglas Depieri Catarucci is associate at Pinheiro Neto Advogados working in the firm since 2013 with the arbitration and complex dispute resolution team headed by Gilberto Giusti. He is graduated in Law from Mackenzie University and specialized in Contract Law from Fundação Getulio Vargas. Douglas has acted as Secretary of arbitral tribunals in domestic and international arbitrations, participated in the founding board of the Young arbitrators Institute (INOVARB) from the American Chamber of Commerce (AMCHAM) and has published several academic articles in the arbitration area.

SHAMBHAVI SINHA

Shambhavi Sinha is a penultimate year student at Symbiosis Law School, Pune which is affiliated under Symbiosis International University. In 2020, Shambhavi participated at the Frankfurt Investment moot court Competition (India Rounds) and has written several papers and blog articles for various offline as well as online journals.

AMRIT ONKAR BATHIA

Amrit Bhatia completed a B.A. (Honors) degree in Political Science from the University of Toronto and acquired an LL. B degree from the University of Delhi thereafter. In 2018, Amrit joined the LL. M degree program at the World Trade Institute (WTI) of the University of Bern, where he continues to work on his Master's thesis. Amrit was awarded the John H. Jackson Scholarship for his performance during the LL.M program by WTI in June 2019, allowing him to complete internships at reputed organisations for international investment law and policy, namely UNCTAD (Geneva) and ICSID (Washington D.C.). Amrit has also had the opportunity to intern and work with some reputed organisations– Tata Sons in Mumbai, WIPO and ITC in Geneva, the Delhi High Court, and Luthra & Luthra Law Firm in Delhi.



LUIS FERNANDO GUERRERO

Luis Guerrero holds a LL.M. and J.D. in Civil Procedure, University of São Paulo Law School. He is specialist in Conflict Mediation, Northwestern University.

Member of CBar, ICC YAF, and LCIA YAG. Member of Panel II of the Committee on Domain Name Registration Disputes of the Brazil-Canada Chamber of Commerce Arbitration and Mediation Center (CCRD-CAM/CCBC)/Arbitrator/Mediator.

Luis is a University Professor, with experience in Judicial Litigation, Arbitration, and Conflict Resolution. He is Partner at Lobo De Rizzo Advogados.

PRABHASH RANJAN

Dr. Prabhash Ranjan is a Senior Assistant Professor at the Faculty of Legal Studies, South Asian University, New Delhi. He holds a PhD in law from King's College London.

He has been a visiting fellow at the Lauterpacht Centre for International Law, University of Cambridge and a visiting scholar at Brookings India. As a Chevening scholar, Dr. Ranjan pursued his LLM at the School of Oriental and African Studies (SOAS) and University College London (UCL) in the United Kingdom (UK).

His latest book is 'India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash' published by Oxford University Press in 2019. Dr. Ranjan has published in the area of international investment law and international trade law in leading international journals.

ANTÓNIO VICENTE MARQUES

Antonio Vicente Marques founded AVM Advogados in 2003, in Angola, Luanda. In 2010, he established the firm in Portugal (Lisbon and Oporto) and Mozambique (Maputo) assisting Clients as an international Full-service law firm.

Antonio has worked extensively in matters and major operations involving Foreign Investment, Banking, Financial and Insurance, Commercial Contracts, Capital Markets, Tax, Labour and Migration, Corporate, Energy and Natural Resources, Administrative Law and Customs, and in the technology sectors.

Antonio Vicente Marques has been ranked by Chambers and Partners Global since 2013, following next editions as a leading lawyer in General Business Law and as an expert in Oil & Gas and Tax in the IFLR Sub-Saharan Africa Energy & Infrastructure Guide. He has also been ranked as a leading lawyer by Chambers and Partners and Legal 500 since 2013 following all the next editions. AVM has been ranked in legal 500, edition 2020, as tier one firm.

NUNO ALBUQUERQUE

Born on July 19, 1964, in Angola. Nuno has a law degree, University of Coimbra (1988). Nuno has been inscribed in Portugal's bar association, as a lawyer, since 1990; in Angola's bar association, since 2008; and in Paris' bar association, since 2014. He is an insolvency administrator, inscribed in the official list since 1995. Nuno is the executive director of CAAL – Angolan arbitration centre for litigation, since 2012. He is a certified mediator – public and private mediation ICFML. Member of TAD-Portuguese Court of Arbitration for Sport (where he is also Vice-President since 2015 until 2019); Brazilian Centre for Mediation and Arbitration; Committee of Experts on Sports and Entertainment Industry of the European Arbitration Association; Arbitration Council of the State of S. Paulo; CAAD-Portuguese Administrative Arbitration Centre; Arbitration Centre of the Commercial Association of Porto; Executive Director of the CAAL-Angolan Central Voluntary Arbitration of Disputes, Luanda and arbitrator in the Arbitration Centre for Property and Real Estate, since 2016. Nuno was the founding partner of "N-ADVOGADOS – Nuno Albuquerque, Deolinda Ribas, Sociedade de Advogados, RL".

RAQUEL VIEIRA FERREIRA

Raquel Ferreira Vieira is an Associate Lawyer at AVM Advogados Firm, in Lisbon. Her practice is manly focused on Civil, Commercial and Criminal litigation and other forms of dispute resolution, as well as Insolvency Law. After pursuing her degree in Law, Raquel worked at the Legal Department of one of the biggest companies in the Oil & Gas sector, being also a member of the Litigation Department of one of the top Iberian law firms. There, Raquel provided legal assistance mostly in matters involving commercial contracts and the respective accompaniment, including legal assistance during litigation in court, in cases of infringement, for nearly 4 years. More recently, Raquel is preparing her Doctoral Thesis to be defended before the Faculty of Law of Oporto University.

CONCEIÇÃO MANITA FERREIRA

Born on February 16, 1959. Conceição is member no. 559 of the Angolan Bar Association. Conceição graduated in Law from Agostinho Neto University (2005), and has a Master's Degree in Legal and Economic Sciences, by the same University. She also completed a course in Social Research and Economic Analysis; in Emergency and Disaster Management; and in Basic Financial Management and Control for Managers. From 1983 to 1999 she was in the UNHCR; from 1995 to 1999 as Representative for Middle and Lower Juba Regions in Somalia. From 2005 to 2011 she worked at RGT Law Firm, Luanda, as Executive Director/Head of Labour/Family Law Departments. In 2007 she worked in the UNHCR, Luanda, as National Protection Officer. She is currently a Consultant, Mediator and Lawyer, Head and main partner of CM Advogados and she is currently attending the Masters in Tax Law at University of Minho, Portugal.

LUISA CASTRO FERREIRA

Born on September 23, 1989. Luísa has a law degree, University of Minho (2011), and a Masters in Administrative Law, University of Minho, 2014. Luísa is legally qualified to give professional training, 2017. Luísa has been inscribed in Portugal's bar association, as a lawyer, since 2014, and has worked at N-Advogados & CM Advogados since 2015.

She was a speaker at the Study Session on European Public Procurement Law, University of Minho, March 2013, and at the 1st Public Procurement Congress of Cape Verde, November 2014. She is co-author of the article, "e-Procurement and Public e-Procurement", in The New Code of Administrative Procedure – for Professor Cândido de Oliveira and author of the article "The Electronic Public Procurement", in Minutes of the First Congress of Public Purchases of Cape Verde, 2015.

VITÓRIA ZANOTTO FARINA

Vitória Zanotto Farina is a LLB student at Federal University of Rio Grande do Sul (UFRGS) and an Intern at lawfirm Rossi de Lima e Lenz Advogados, in Porto Alegre, in Brazil.

She is a member of the UFRGS Mediation Group as well as an Associate at the Chartered Institute of Arbitrators, the LCIA Young International Arbitration Group and the Young ICCA.

ANA PEPELJUGOSKA KOSTOVSKA

Ana Pepeljugoska holds Ph.D. from the Faculty of Law Justinianus Primus Skopje, University Ss. Cyril and Methodius. She is currently working as Partner in the Law office Pepeljugoski in Skopje, North Macedonia and industrial property representative. In 2012 she has taken part in the 19th Willem C. Vis International Commercial Arbitration Competition, held in Vienna where she was awarded with an Honorable Mention in the scope of the Martin Domke award for Best Oralist, as well as Honorable Mention in the scope of the team awards.

Ana Pepeljugoska has taken part in various seminars and conferences as participant and lecturer and is author of two books and serval scientific papers. She is listed as an arbitrator in the following arbitration institutions VIAC, SCIA, ECDR, Sports Arbitration in the scope of the Macedonian Olympic Committee. Ana Pepeljugoska is fluent in English and German and has intermediate knowledge of Serbian and Bulgarian language

ARAM AGHABABYAN

Aram is serving as the Coordinator of the American University of Armenia LLM program Alternative Dispute Resolution (ADR) Clinic. He is admitted to practice law in Armenia and is a recent graduate of the American University of Armenia LLM program.

He also holds a Bachelor of Statistics (BS) degree from the Armenian State University of Economics.

YAR

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