Specific types of arbitration: international investment arbitration

International Commercial Arbitration and International Sales Law

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Different types of arbitration

- international
- domestic
- investment
- corporate
- multiparty
- multicontract
- state-to-state
...

International investment arbitration

Peculiarities:
- Legal sources
- Subject-matter
- Arbitration agreement
- Applicable law
- R&E of arbitral awards
Legal ways to protect foreign investment

- Diplomatic protection
- Interstate dispute e.g. Barcelona Traction
- Recourse to the courts of the host State/home State
- International investment tribunals
Figure 1. Trends in known treaty-based ISDS cases, 1987–31 July 2018

Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD’s statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification processes and may not match case numbers reported in previous years.
Legal sources

**international level**

1958 New York Convention

bi- and multilateral investment treaties (IIAs): geographical and temporal scope

e.g. Energy Charter Treaty

1965 ICSID (Washington) Convention

**European level**

1961 European Convention

bi- and multilateral investment treaties between Member States

**Achmea**
Contents of the IIAs

(Substantive) standards of treatment
- national treatment
- most-favoured-nation treatment
  exception: procedural issues
- fair and equitable treatment
  vs. minimum standard of treatment
- full protection and security
- prohibition of arbitrary and discriminatory measures
- prohibition of unlawful expropriation

Procedural rules
investor-to-state arbitration is in
the 2441 IIAs (UNCTAD)
- consent of the State
- fora
Legal sources

national level

mandatory provisions of the seat as *ordre public*

mandatory provisions have no relevance when arbitration is under the ICSID Convention

national law is usually applicable to the merits of the dispute

often the parties exclude or limit application of national law
Subject-matter of investment arbitration

disputes arising out of "investments"
asset-based vs. enterprise-based; open vs. closed list
typical exemptions:
- taxation,
- government procurement,
- subsidies,
- grants

Under the ICSID Convention (Salini test):
• substantial contribution
• certain duration,
• risk,
• significance for the host State’s development
Subject-matter of investment arbitration

-brought by “investors”

criteria:
- incorporation,
- ownership,
- control;
- company seat and
- real economic activities in the home country

„nationality planning“
denial of benefits clauses

-against a (host) State
 States, federal units or municipalities
 State-owned companies (attribution)
Arbitration Agreement

Consent of a host State (an „offer“) based on
- a treaty between a host State and a home State
- a contract between a host State and an investor
- host State legislation

Limitations, e.g.:
- amount of compensation in case of expropriation
- future disputes

An acceptance of an investor by filing a claim by an investor
Applicable law

Procedural law:
IIAs:
preclusion of jurisdiction by
-cooling-off period
-fork-in-the-road clause
-waiver clause

Arbitration Rules:
2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Substantive law:
ICSID Convention:
choice of the parties
when no choice – host State law and applicable rules of international law

Energy Charter Treaty:
international law
investment contracts:
stabilization clauses
R&E

Under any other arbitration rules: New York Convention governs awards can be set aside at the seat of arbitration

ICSID: delocalization enforceable in all States Parties like final judgments of courts of these States no set aside, but can be annulled by ICSID