TAW
2021

TURKEY ARBITRATION WEEK

SCIENTIFIC PRESENTATIONS 2021

EDAC
ENERGY DISPUTES ARBITRATION CENTER

ENERJİ HUKUKU
ARAŞTIRMA ENSTİTÜSÜ
ENERGY LAW RESEARCH INSTITUTE

INDEX

1. Mauro Rubino-Sammartano

Mauro Rubino-Sammartano

Mauro Rubino-Sammartano sits as an arbitrator in commercial and investment arbitrations. He has a wide experience as an advocate in Italy and in Paris, as an associate tenant of a London set of Chambers for many years, as a Recorder and Deputy Judge in Italy and has been much involved since about 30 years in arbitration and more recently in mediation. He chairs the European Court of Arbitration and the Mediation Centre of Europe, the Mediterranean and the Middle East. He lectures on arbitration and mediation and is the writer of various text books and many articles on arbitration.

Investment Arbitration of Energy Disputes

1. A VERY CONCISE SUMMARY OF THE STATUS OF INVESTMENT ARBITRATION

The discussion on the prospects and future of investment arbitration will be preceded, just for good measure, by a very short and rough summary as to the present status of investment arbitration, which is well known to those who deal with it in one of the various possible capacities.

The great success of bilateral and multilateral treaties to regulate foreign investments (which are generally referred to as foreign direct investments [FDI]), such as to energy and infrastructure projects, is also due to the wish of foreign investors to have a neutral forum for possible disputes arising from their investment and to the acceptance of this by the Host State, in order to benefit from such investments.

Frequently, however, the Host State through such treaties has to grant to the foreign investor more than it generally grants to its own citizens and finds itself, in the case of disagreement with the foreign investor, faced with a generally quite determined counterparty, which feels to be at the same level of the State, while the State is not accustomed to that.

In the past, Host States have very frequently concentrated their attention – in the negotiation of such treaties – on favouring such investments. In the last few years, the importance has been stressed in various circles that such treaties must also cover the Host State from possible conducts by the foreign investor which are not in line with its basic interests.

The investor in fact must not only contribute to the improvement of the economic, environmental and social conditions of the Host country, but also respect during its activities, the fundamentals of the social and economic structure of the Host State. This includes respecting its environment, its basic rules concerning labour and the rights of its citizens to live and work without being under pressure. Investments which respect the basics of the Host country and contribute to its growth combine the interests of both sides and may be the basis for a fruitful cooperation. The time of the use of the gun policy by States to protect the interest of their citizens now seems to be largely over.

The majority of investment arbitrations is conducted under the Washington Convention 1965, which has given birth to the International Centre for Settlement of Investment Disputes (ICSID) and to its arbitration rules, even if other sets of rules may be selected by the parties, amongst which mainly the Uncitral Rules.

A major difference between investment and commercial arbitration is that while in the latter the arbitration is the result of an agreement between the parties, investment arbitration entitles the investor to take the Host State to arbitration, under an agreement not between itself and the Host State, but between the investor's State and the Host State, an agreement which has been entered into in its favour and to which it generally consents.

Such treaties provide for arbitration of the disputes arising from a breach of their provisions, such as direct or indirect expropriation, breaches of the investor's right to a fair and equitable treatment, to protection and security, as well as denial of justice, which are then governed by international law.

Investment arbitration does not cover disputes arising from a breach of contract, concession or other agreement which are frequently to be submitted to a state court, unless a commercial arbitration has been

agreed upon as to such disputes.

Only if the treaty contains the so called "umbrella clause" (under which the Host State in that treaty undertakes to comply with its obligations arising from the contract, on which its investment is based), even the "contract disputes" may become the object of investment arbitration which is otherwise limited to the "treaty disputes".

Opinions differ as to whether the Host State is entitled to make a counterclaim.

Rule 40 of the Arbitration Rules set out by the Washington Convention 1965 entitles a party to present a counterclaim "arising directly out of the subject matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre".

In spite of this opening to counterclaims, arbitration panels frequently take the view that unless the applicable bilateral investment treaty expressly provides for the right of the Host State to present a counterclaim, no counterclaims may be presented by it.

I disagree with such view and I have expressed a dissenting opinion on such issue while sitting in an ICSID arbitration.

A different issue is which counterclaims may be presented, a query to which the response should be that they must be limited to breaches of that treaty.

The award rendered by the arbitrators appointed under the ICSID Rules may be challenged by an application for the annulment of the award, which is decided by an ad hoc Committee, consisting of three arbitrators all appointed by the Chairman of the ICSID Administrative Council.

Under art. 54 of the Washington Convention

"*Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award* ***as if it were a final judgment of a court of that State***".

This provision then excludes any setting aside proceedings in any of the Member States of that Convention, and grants *finality* to such awards.

2. THE WEAKNESSES OF INVESTMENT ARBITRATION

In order to serve its purpose, arbitration must be quick, effective and inexpensive.

These targets are not always reached.

Duration of the proceedings

Time is as always a major element of justice. The old saying "justice delayed is justice denied" should be well impressed in the mind of arbitrators, who once in a while seem to imitate some state courts in "taking it easy".

It is occasionally opposed to this that it takes time to do justice. This being fully agreeable, it cannot justify neither being slow, nor the opposite, i.e. deciding in a hurry. Frequently one of the parties asks for too much time and occasionally the other side does the same. It is up to the arbitrator to be reasonable, but at the same time firm, in order to avoid that the proceedings are unnecessarily too long.

Two years from the commencement of the proceedings to the filing of the award could in general be a reasonable time.

Annulment and resubmission of the dispute

The Ad Hoc Committee, provided for by the ICSID Rules, must limit itself to set aside the first instance award, the dispute having then to go back to another arbitral tribunal. This has proven – it is submitted – to be unsatisfactory. A full review of the merits of the dispute by the Ad Hoc Committee might render a much better service to litigants and to arbitration in general.

Some investment arbitrations have in fact lasted even 9 and 10 years, also due to ups and downs from the

arbitral tribunal to the Ad Hoc Committee.

Reference is made in this respect to the annulment of the first instance award, to the resubmission of the dispute to a new first instance arbitration panel and to the annulment even of the second "first instance" award in *Klockner Industry Anlagen GmbH et al* v. *United Republic of Cameron et al*. (Ad Hoc Committee Decision 3 May 1985) and *Amco Asia Corp. et al*. v. *Republic of Indonesia* (Ad Hoc Committee Decision 10 May 1988).

Full de novo review of the merits

The need – which the writer has advocated for a long time – that there be a full de novo review of the first instance award, has been recently well taken by the European Commission.

A reference is made in this respect to the following article by this author "*European Court of Arbitration's Appellate Arbitral Proceedings*" published in *Getting the Deal Through – Arbitration* 2017.

A solid justice rather than mere intellectual exercises

It is not infrequent that the dispute is decided by making - like many state courts - an intellectual exercise, rather than by doing one's best to ensure to do justice within the space granted for that by the applicable law.

The high costs of the proceedings

Even the costs of investments arbitration are frequently too high, also due to the production by the parties of volumes of irrelevant documents and of unhelpful witnesses.

An investment dispute frequently does not require thousands of hours of work neither from Counsel nor from the panel. As a consequence its costs should be substantially lower.

Lack of consistency and of predictability

Dissatisfaction has been expressed for lack of consistency and of predictability of investment awards, such as it arises from *CMS Gas Transmissions* v. *Argentine Republic* (ICSID award 12 May 2005, 44 I.C.M. 2005, 125) and *LG&E Energy Corp. et al.* v. *Argentine Republic* (ICSID award 3 October 2006).

While inevitably some differences do exist amongst decisions on the same issue, in some striking cases opposite decisions has been experienced by investment tribunals on an issue of law

A different method to appoint the arbitrators, which will be dealt with hereafter, and the issue of recommendations as to specific legal issues by an ICSID Standing Advisory Committee might reduce this problem.

Multiple proceedings

A more predictable framework for addressing multiple proceedings has been advocated by the Working Group III of the United Nations Commission on International trade Law, which is actively working on an Investor-State Dispute Settlement Reform.

In this respect, the relationship between an issue which has been decided by final judgment on contract claims between the same parties and the issue to be decided in the investment arbitral tribunal, such as when the treaty claim is based on the same facts on which the contract claim has been or have to be decided, may be delicate.

In *Amco*[1], the tribunal decided: "*The general principle, announced in numerous cases is that a right, question, or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed*".

Issue estoppel arising from a decision in another jurisdiction has been applied in *Diag Human SE* v. *The*

1. Amco Asia Corp. v. Republic of Indonesia, ICSID Case No. ARB/81/1, Resubmitted Case, Decision on Jurisdiction (10 May 1988), 27 ILM 1281 (1988).

Czech Republic[2], in *Chantiers de l'Atlantique S.A.* v. *Gas Transport and Technigas* SAS[3] and in *Owen Bank Ltd.* v. *Bracco*[4].

In respect of court judgments confirming awards, amongst writers Hill[5] has commented that a judgment of a court of the seat of arbitral proceedings "*can give rise to an issue estoppel … that may be relied upon in later enforcement proceedings in England*".

Apparent lack of independence and impartiality

It is well known that on various occasions applications for the removal of an arbitrator are made to try to get rid of someone who is just disliked by the applicant.

On some occasions, even the entire panel has been challenged.

The appointment of some arbitrators - who have frequent relationships with each other and with a large number of litigants - may give rise, in some situations, to an apparent bias or in any event to embarrassment. Arbitrators who one day act in this capacity, the following day as counsel for a Client who might not be totally distant from one of the parties to his/her previous arbitration, and the third day as an expert witness for someone who has a link with or is associated to one of the parties to that arbitration or to her counsel (situations which are described as "double hatting"), are not always satisfactory. If the same situation existed as to a state court judge, this reaction might be seen as more justified, but in reality the two situations are basically the same.

The exclusion of party appointed arbitrator and a certification of arbitrators like the Fellows of the Chartered Institute of Arbitrators might substantially reduce this problem.

A reference is made in this respect to the following article by this author "*A Second (Quasi Perfect?) Storm Also in Arbitration*", published on the *Journal of International Arbitration*, Vol. 34, no. 6, 2017.

The feeling of some Host States that arbitrators tend to find against them

The feeling of some Host States that arbitrators tend to find against them is well known.

Statistics however do not seem to confirm this.

It seems possible to say that, in general, no anti Host State bias exists.

Sometimes the State seems to be doomed to lose because it has not adequately organised its defence (starting from not forming a team consisting - aside of local counsel - of an experienced international counsel) and due to the lack of an accurate preparation of the case in law and in fact, which requires discipline (and sometimes sophisticated methods for the retrieval and the storage of documents).

No surprise may then derive from the intention of the Uncitral Working Group III to envisage a multilateral advisory centre for Host States.

3. A PERMANENT INVESTMENT COURT

The European Union has frontally challenged the present investor-state arbitration system due to the lack of a full de novo review of the merits of the dispute and to dissatisfaction for the role played by many arbitrators.

Its firm position was the result of a very large poll and of the views expressed along that line by various European governments.

The second ground of its criticism has already been mentioned above. This problem then seems avoidable even under the present system.

The first criticism too might be remedied – as above discussed – by excluding party appointed arbitrators and providing for a requirement of a certification of arbitrators by a high standing institute.

The totally negative position taken by the European Union and its prompt negotiations for new important

2. High Court, England and Wales, 22 May 2014, Case no. 2011, Folio 864.
3. [2011] High Court, England and Wales, 3383.
4. [1992] 2AC 443 (HL).
5. J. HILL, The Significance of Foreign Judgments Related to an Arbitral Award in the Context of an Application to Enforce the Award in England (2009) 8(2) Priv. Int. L. 159.

bilateral investment treaties along that line such as with Canada, Singapore and Vietnam show that its decision to replace the present investor-state arbitration with a permanent investment court makes a possible back out rather unlikely.

While professional and full time investment arbitrators would definitely improve the present standard of arbitration, replacing arbitrators with judges or retired judges does not seem to necessarily improve the situation.

Judges belonging to a State will not always be able to find against their State and even judges of another State may be influenced by their State in favour of a friend State.

Bilateral permanent investment court would meet many organisational difficulties. A multilateral investment court, as advocated by the European Union, requires a multilateral treaty which will be neither easy nor quick.

2. Munkhnaran Munkhtuvshin

Munkhnaran Munkhtuvshin

Munkhnaran Munkhtuvsin completed her L.L.B at the National University of Mongolia and then completed her Master's Degree at Nagoya University. She has been doing PhD program at Nagoya University since 2020. Between 2016 and 2018, she worked as an administrative specialist at Mongolian Arbitration Center. Majoring in public private international law, Munkhtuvshin currently tutoring undergraduate students on International Commercial Arbitration at Nagoya University. She is fluent in Turkish, Japanese and English.

Transplantation Issues of UNCITRAL Model Law on International Commercial Arbitration in Developing Countries

I. Introduction: Transplantation Issues of the UNCITRAL Model Law on International Commercial Arbitration

Even though the Model Law is a globally accepted standard for international commercial arbitration, its *en bloc* adoption is perhaps not highly advisable for countries without much prior experience in arbitration. Indeed, the United States once concluded that adopting the Model Law en masse is not appropriate. After UNCITRAL introduced the Model Law in 1985, the *United States' Washington Foreign Law Society* established a Committee to Study the Model Law. It is significant that the committee recommended the *United States Congress* should not adopt the Model Law *en bloc*.[6] Literal adoption of the Model Law has caused application problems, particularly in countries without a pre-existing, developed arbitration tradition, such as Mongolia or Latvia. Nevertheless, at present most of the states adopting the Model Law *verbatim* are developing countries such as Fiji, Myanmar, and Cambodia[7], which are new to arbitration legislation. These states face particular difficulties regarding application of provisions in the Model Law. However, there has been little research on adoption and transplantation issues related to the developing countries or countries without much prior experience in arbitration.

Therefore, this research studied Model Law adoption experiences in three different jurisdictions: Mongolia, Japan, and Turkey. Mongolia is a developing country which adopted the Model Law for both its international and domestic arbitration; Japan is a developed country which adopted the Model Law for its national and international arbitration; Turkey adopted the Model Law only for its international arbitration. By comparatively studying the transplantation of the Model Law in different jurisdictions and cultures, the article aims to answer this research question: Is Model Law suitable for domestic arbitration, particularly in countries which are new to arbitration legislation?

For answering the main research question, the following subordinate questions come: What is domestic arbitration? Why do domestic and international arbitration proceedings require different regulations? According to the CIArb, "Domestic Arbitration is a form of alternative dispute resolution (ADR) where one or more person(s) are appointed to hear a case that takes place within one jurisdiction."[8] However, another significant aspect is the parties' continued use of arbitration even when they can apply to their domestic courts without any problems. Parties in domestic commercial disputes, deliberately choose arbitration, not litigation because they believe that arbitration dispute resolution in their countries is better than litigation in their domestic courts. Thus, domestic arbitration is not just a normal arbitration proceeding, often for the parties, it means a "convenient and fair trial" that the domestic courts in their countries do not provide.

According to Kole, there are four advantages in arbitration: first, the proceedings and awards are confidential; second, the neutral arbitrator knows the field of the dispute, saving the parties and their attorneys a great amount of preliminary presentation time; third, arbitration is a faster proceeding than a court trial,

6. Patrick John Potter, International Commercial Arbitration in the United States: Considering Whether to Adopt UNCITRAL's Model Law, 10 Mich. J. Int'l L. (1989): 912-934 at 912, 927

7. United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (Oct 11, 2021) https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

8. Chartered Institute of Arbitrators "Pathway in Domestic Arbitration" (Oct 11, 2021) https://www.ciarb.org/training/pathway-courses/domestic-arbitration/

fourth, the parties choose their own judge.[9] Thus, if the disputants' national court systems do not have these advantages, especially the convenience and the speed of proceedings and good quality judges, parties in domestic commercial disputes prefer domestic arbitration over courts. In other words, domestic disputants typically choose arbitration because they want and expect greater convenience and quality in their dispute resolution than they can achieve in their state court system. Hence, one may conclude that in the countries without good domestic court systems, the domestic arbitration caseload is high. Since many of the developing countries' court systems are considered unsatisfactory, most adopt the Model Law *verbatim* for their domestic arbitration. Then the question arises: is the Model Law suitable for domestic arbitration in countries where arbitration is in the early stages of development?

II. The Purpose of the UNCITRAL Model Law and the Developing Countries

Ndulo (1998) stressed the inadequate participation of developing countries in the lawmaking process of UNCITRAL.[10] Indeed, in the drafting process of UNCITRAL Model Law on International Commercial Arbitration, the participation of developing countries was small compared to that of developing countries. The Model Law has mainly a common law perspective and is mostly based on the Federal Arbitration Act of the United States.[11] Nonetheless, developing countries and countries without an arbitration tradition, which also happen to be countries from non-common law legal systems, adopt the Model Law for both their international and domestic arbitrations. These countries are proud to adopt it since the law gives them a chance to compete globally in the alternative dispute resolution industry.[12] However, the purpose of the Model Law was not domestic arbitration; as its name suggests, the law was designed for international commercial arbitration.

Historically, UNCITRAL prepared and adopted the Model Law as a tool to fill gaps in the New York Convention and the UNCITRAL Arbitration Rules, and it aimed to support countries seeking to adopt legislation for their international arbitration.[13] As for the delegates in the Drafting Committee, "more than 50 States of all regions and legal and economic systems as well as more than 15 international organizations participated in the preparatory work. The delegations included many internationally known arbitration experts."[14] Significantly, most of the experts were from Americanized arbitration cultures or states where arbitration was well established.[15] Hence, the Model Law has good quality provisions borrowed from the developed arbitration cultures.

As Kerr (1985) stressed when the Model Law was first drafted, if a country enacts legislation based on the Model Law, both parties to a contract will be find it easier to accept arbitration in that country, because they will know basically where they stand.[16] Thus, a goal of the Model Law was actually to make it easy for contractors to agree on the site of arbitration. Kerr (1985) also stressed that Model Law is a draft "Model Law" and not a draft international convention, so parties do not have to adopt it verbatim or reject it in its entirety. That is, the Model Law provides a basic model.[17] Nonetheless, at present, most of the states adopt the Model Law verbatim, particularly developing countries without much prior experience in arbitration.[18] Developing countries such as Fiji, Latvia, Cambodia, Mongolia, Jamaica, and very recently (in 2021) Uzbekistan, adopted the Model Law verbatim for both their international and domestic arbitrations.[19] However, there is little research related to Model Law transplantation issues in domestic arbitration in developing countries or countries without much experience in arbitration. All of the transplantations in the world cannot be investigated in one article, thus the

9. Janet Kole, 'Choose Your Own Judge' (1973) 2 Student Law 42, at 44.

10. Muna Ndulo, 'UNCITRAL: The Unification of International Trade Law and Developing Countries' (1998) 1998 Zam LJ 68

11. Gerold Herrmann, 'Introductory Note on the UNCITRAL Model Law on International Commercial Arbitration' (1985) 1985 Unif L Rev os 285

12. Alexander C Hoagland Jr, 'Mexico Enacts Arbitration Law Based on Uncitral Model' (1994) 1994 Int'l Bus LJ 360

13. Gerold Herrmann, 'Introductory Note on the UNCITRAL Model Law on International Commercial Arbitration' (1985) 1985 Unif L Rev os 285

14. Gerold Herrmann, 'Introductory Note on the UNCITRAL Model Law on International Commercial Arbitration' (1985) 1985 Unif L Rev os 285, at 287-288

15. Ibid

16. Michael Kerr, 'Arbitration and the Courts: The Uncitral Model Law' (1985) 34 Int'l & Comp LQ 1, at 7

17. Michael Kerr, 'Arbitration and the Courts: The Uncitral Model Law' (1985) 34 Int'l & Comp LQ 1, at 7

18. United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006" (Oct 11, 2021) https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status

19. Ibid

following parts will study only three different and unique transplantation experiences of the Model Law.

III. The Experience of a Developing Country: Mongolia

Mongolia adopted the UNCITRAL Model Law verbatim in 2017. The arbitration tradition of the country was formed under the Socialist regime of Mongolia when state arbitration was a famous method to resolve some administrative disputes or private disputes related to administrative offices.[20] The Arbitration Law of Mongolia formed in 2003 was based on the UNCITRAL Model law without its 2006 amendments and the law was not a pure translation of the Model Law.[21] However, the new Arbitration Law of Mongolia, introduced in 2017, is an *en bloc* adoption and a word for word translation of the Model Law. The leading arbitral institution in Mongolia is the Mongolian International Arbitration Center, affiliated with the Mongolian National Chamber of Commerce and Industry. The institution was established in 1960 as a state arbitration center; now it is a fully private arbitration center in which every year between 70 to 100 cases are submitted. The Mongolian International Arbitration Center (MIAC) states that more than 75% of their disputes are domestic.[22]

MIAC's caseload is much higher than that of the other arbitral institutions in similarly developed countries which adopted the Model Law. For instance, the National Commercial Arbitration Center of Cambodia (NCAC) received a total of only 25 disputes over the last five years.[23] Perhaps, MIAC's long history and the domestic courts' poor reputation in Mongolia has affected the parties' interests in arbitration. However, after the adoption of the Model Law verbatim, the arbitrators started to say they face some difficulties using and understanding the new provisions in the law.[24] Thus, some arbitrators say they are having a hard time understanding the Model Law and using the provisions in it. In fact, since the adoption of the Model Law in Mongolia in 2017, the major problem in arbitration proceedings in the country is adapting to the terms and related culture that the new Model Law brought into the Mongolian legal tradition.

As an illustration, before the Model Law, arbitrators and judges were used to applying article 69 of the Civil Procedural Code of Mongolia 2002 as a general guideline to determine in what field and under which conditions they could issue measures to guarantee the enforcement of the final decisions in arbitration (which is an interim measure in the Model Law).[25] However, in 2017, when Mongolia adopted the new arbitration law based on the UNCITRAL Model Law, they used a word-for-word translation. Thus the law brought new terms such as "interim measures" or "preliminary orders." All these terms are new for arbitrators and lawyers in Mongolia. Thus, even after the adoption of the Model Law, Mongolia in fact could not achieve effective transplantation of that Model Law. Such issues related to the brand new terms and regulations in the Model Law have made domestic arbitration proceedings more complicated.

IV. The Experience of a Developed Country: Japan

As Haley (1991) concludes, scholars tend to believe that the Japanese people tend to seek harmonious resolution to disputes, while Western people tend to seek through arbitration and litigation what they believe contracts entitle them to.[26] Every country has its own tradition and attitude regarding dispute resolution. Japanese disputants may tend to seek harmony in any situation, but when they cannot reach harmony, it appears that they prefer to go to their domestic courts rather than the arbitration centers to resolve domestic commercial disputes. According to the leading arbitral institution in Japan, the Japanese Commercial Arbitration Association

20. Teshig Munkhjargal, Brief History of the Arbitral Tribunals in Mongolia, MNCCI Press, 2015 (Тэшигийн Мөнхжаргал, Монгол дахь Арбитрын Шүүхийн Товч Танилцуулга, МҮХАҮТ-н хэвлэх үйлдвэр, 2015.)

21. Interview with the former Secretary General of the Mongolian International Arbitration Center, Mr. Gunjdagva Chultem, September 15, 2021, Zoom interview. (Interviewee: Arbitrator Gunjdagva Chultem, Interviewer: Munkhnaran Munkhtuvshin)

22. MIAC, Statistics between 2016 and 2020, as provided by the Administrative Office of MIAC in April, 2020

23. National Commercial Arbitration Center of Cambodia, "Statistics" (Oct 15, 2021) https://ncac.org.kh/statistics/

24. Interview with the former Secretary General of the Mongolian International Arbitration Center, Mr. Gunjdagva Chultem, September 15, 2021, Zoom interview. (Interviewee: Arbitrator Gunjdagva Chultem, Interviewer: Munkhnaran Munkhtuvshin)

25. Civil Procedural Code of Mongolia, 2002, Article 69, "Toriin Medeelel" Official Gazette 2002, №8

26. John Owen Haley, Authority Without Power: Law and the Japanese Paradox, Oxford University Press, (1991) 115, as cited in the David A. Livdahl, Asako Yamagami, "Arbitration in Japan", International Commercial Arbitration in Asia, edited by Philip J. McConnaughay, Thomas B. Ginsburg, Published by JurisNet LLC, (2006) 137-200 at 189

(JCAA), among the 72 arbitration cases filed with the JCAA from 2016 to 2020, 86% were international cases, only 14% were domestic.[27] The reason for the low number of domestic arbitration disputes may be the Japanese court system's perceived high quality and its convenience for the disputants.

Regarding the Arbitration Law of Japan, Nakano (2004) emphasized that the Arbitration Law of Japan 2003 is a major, once-in-a-hundred-years, reform, since the old law was enacted in 1890 as Section 8 of the Japanese Civil Procedure Law. [28] Therefore, the Arbitration Law of Japan 2003 is in fact a significant reform of arbitration regulations which had served for a century. A significant feature of Japanese adoption of the UNCITRAL Model Law is that the Arbitration Law of Japan provides certain rules in order to adapt it to Japan's specific needs, such as special provisions for arbitration agreements in consumer contracts and individual employment contracts.[29]

In conclusion, in Japan, even though the country adopted the Model Law for both their domestic and international arbitration, in practice they use the law mostly for international arbitration cases; this is opposite to the practice in Mongolia. Perhaps, in developed countries or countries with good domestic court systems, domestic arbitration disputes are few. Thus, in these countries, even in the case where the Model Law is adopted for both international and national arbitrations, at the end of the day, in practice, the law is principally used for international arbitration purposes.

V. A Different Experience: Turkey

Turkey adopted the Model Law with modifications based on the International Chamber of Commerce Rules of Arbitration and the Swiss Private International Law Act of 1987. [30] Turkey adopted the Model Law differently to the common practice in other countries. Turkey adopted the Model Law only for their international arbitration cases in 2001.[31] The country has two different sets of acts for domestic and international arbitrations. Both legislations have different regulations and provisions for similar situations. For example, the interim measures' regulations for domestic arbitration are different to such regulations for international arbitrations. Article 414 of the Civil Procedural Code of Turkey 2011 provides that:

Only arbitration tribunals can issue interim measures; but in the case where an interim measure is necessary before the establishment of the arbitration tribunals, parties can apply to the courts for these measures. After the arbitral tribunals are established, they may annul the interim measures already issued by the court.[32]

This provision provides the arbitral tribunals in domestic disputes with wide supervision of interim measures, even with the power to annul the interim measures already issued by the courts. Meanwhile, according to Article 6 of the International Arbitration Act of Turkey 2001, parties in international arbitrations can apply to both courts and arbitration tribunals for interim measures.[33] The main idea of interim measures in Article 17 of the UNCITRAL Model Law 1985 (not including 2006 amendments) is stated in Article 6 of the International Arbitration Law of Turkey 2001. Even so, in international arbitration, the arbitral tribunals' control of the interim measures are narrower than the arbitral tribunals' authority in domestic arbitration matters. Likewise, there are many different regulations and approaches for similar scenarios in the domestic and international arbitration cases in Turkey. The legislators may have thought that it was best to leave the domestic regulations for arbitration as before when they adopted the Model Law, thus adopting the Model Law only for their international cases.

VI. Conclusion and Suggestions

27. Japanese Commercial Arbitration Association, "Statistics" (Oct 15, 2021) https://www.jcaa.or.jp/en/arbitration/statistics.html

28. Shunichiro Nakano, "International Commercial Arbitration under the New Arbitration Law of Japan," Japanese Annual of International Law 47 (2004): 96-118

29. Ibid

30. Serhat Esiyoruk, "The Development of Arbitration Law in Turkey and the Comparison of the New Act with UNCITRAL Model Law," Yearbook of Islamic and Middle Eastern Law 12 (2005-2006): 132

31. International Arbitration Act of Turkey, 2001., Kanun No.4686, Milletlerarasi Tahkim Kanunu, Kabul tarihi: 21/6/2001, Resmi Gazete 05/7/2001, No.24453

32. Kanun No.6100, Hukuk Muhakemeleri kanunu, Kabul tarihi: 12/1/2011, Resmi Gazete 04/2/2011 , No.27836

33. Kanun No.4686, Milletlerarasi Tahkim Kanunu, Kabul tarihi: 21/6/2001, Resmi Gazete 05/7/2001 , No.24453

Many developing countries or countries without much prior experience in arbitration adopt the UNCITRAL Model Law verbatim for both their international and domestic arbitrations. Most of the developing countries have a high number of domestic arbitration cases compared to the number of international arbitration cases. Thus, most of the developing countries using the Model Law apply provisions in the Model Law which are from very developed arbitration cultures into their newly developing domestic arbitration proceedings. However, the main purpose of the Model Law is not to regulate domestic arbitration but to provide a basic model legislation for international arbitration to make it easy for contractors from different (developed and developing) arbitration cultures to agree on the site of arbitration easily. Even Mongolia, a developing country which had some history and tradition of arbitration prior to the adoption of the Model Law, is facing application difficulties related to its *en bloc* adoption such as understanding the meaning of the provisions or even the meaning of a word-for-word translation of into their arbitration law.

Developing countries which are completely new to commercial arbitration legislation conceivably face more difficulties than Mongolia does in transplantation of the Model Law. However, many developing countries such as Fiji, Latvia, Cambodia, Myanmar, Uzbekistan, which have almost no prior experience in arbitration, have adopted the Model Law and have used it as a model for not only international but also domestic arbitration. Disappointingly, there is little research related to Model Law transplantation issues in domestic arbitration in developing countries or countries without much experience in arbitration. This article thus urges scholars to focus more on developing countries' adoption of the Model Law and their transplantation issues. Moreover, the paper suggests developing countries or countries without much experience in arbitration legislation adopt the Model Law only for international cases, and draft their arbitration laws for domestic cases carefully to match their specific needs and certain domestic dispute resolution traditions or established business practices. Freeing domestic arbitration legislation from Model Law verbatim adoption may help countries where arbitration is being newly promoted to establish their own unique arbitration cultures which suit and meet their needs effectively.

3. Marianna Rybynok

Marianna Rybynok

Education: Aberdeen University, London University - Metropolitan

Marianna represents companies and high net worth individuals in multi-jurisdictional matters most in connection with contractual breaches across a number of different industry sectors including finance and construction. In international arbitration, Marianna has experience advising under the key Arbitration Rules, including ICC, Swiss Rules, LCIA, and UNCITRAL with seats in different jurisdictions.

Professional career: Before joining K&Ps in 2014, Marianna trained with Baker & McKenzie, London: worked as an associate – Bryan Cave, London; associate – Berwin Leighton Paisner, London; Signature Litigation.

Third Party Funding In Post Covid World – Further Gross In The Uk And The First Steps In Russia And Cis. What Are The Challenges?

Introduction

Third party funding (further the "TPF") is a type of an investment, where an investor invests into a claim with high chances of success and gets a percentage of the final award (provided the claim is successful indeed) in return for the said investment. While this type of an investment is extremely popular in a number of countries now days, particularly in the UK, in the US and Germany, this was not always the case. In some other countries, Ireland, for example, the TPF is still prohibited, and some countries simply do not have much legal regulation in place, neither prohibiting nor formally recognizing the TPF, Russia for example.

The reason why an approach to TPF is so varied is because, on the one hand, the TPF can be an instrument, which actually improves access to justice, on the other hand, the very same instrument, if not properly regulated, may lead to conflicts of interest and interfering with the ordinary and normal course of justice. Regulation of TPF becomes particularly important in the context of international arbitration, as a lot of cases are getting funded via the TPF. Whether a particular country allows or prohibits the TPF is important in the context of a choice of the seat of arbitration. Obviously, if a certain country like, for example, Ireland, prohibits the TPF, then the arbitration award issued following a TPF funded arbitration with a seat in Ireland may well be declared void by the Irish courts. Given a rising importance of both the TPF and international arbitration, more countries are now getting involved in developing a regulatory regime for the TPF.

This paper is going to focus on the current use and regulation of the TPF in the UK and Russia.

Needless to say, a large number of claimants and defendants, who can't afford to fund their cases properly, will not be able to secure any TPF because an investor obviously wants to make a certain profit first of all. Therefore an investor won't be interested in the cases, which are not profitable enough, even though the funding may really be necessary. This paper is going to cover legal aid and its use in the context of international arbitration.

Part I – TPF in England – History and Current Trends – How the TPF situation in England affects a larger international arbitration community

1.1. A few words on a historical background…

The gross of the third-party funding (the "TPF") use in England has been tremendous over the past few years with further gross anticipated following the Covid-pandemic. This affects not only the English legal market, but other legal markets too, given that the UK funders are investing not only just into the English litigation cases, but also into international arbitration, both ad hoc and institutional with seats in different countries.

Interestingly TPF was prohibited in the UK and many other Anglo-Saxon jurisdictions for a long time: back

in the 1960s TPF was considered a "champerty" - an illegal agreement in which a party with no interest in a claim funds it in order to obtain a part of the disputed property. Of course, there are reasons why a third party profiting out of a dispute between the others may raise concerns. In 2007 a government working group was set up in England to develop the basic TPF rules to warn against the potential abuses in this area. Six years later Jacksons' commercial litigation reform went ahead in England and recognized that litigation funding contributes to access to justice by allowing parties to manage their financial risks more effectively. The TPF Code is currently in force in England and Wales and lays down the basic rules for litigation investors.

Part II - English Code of Conduct for Litigation Funders and a EU Parliament's Draft of the TPF

2.1. The Key Elements of the English Code of Conduct for Litigation Funders

Third party funding in England and Wales is self-regulated by the Association of Litigation Funders (ALF). The ALF is a private company limited by guarantee, owned and directed by its member firms.

The English Code of Conduct for Litigation Funders was founded in 2011 by the Association of Litigation Funders (ALF) (further the "Code"), which is self regulated. The ALF is a private company and the code is voluntary, however all the members of the ALF must adopt it. The Code covers some of the key issues of concern around the TPF:

- capital adequacy requirements for funders;
- rights to terminate;
- control proceedings.

Obviously, a sudden loss of support by the funder in the midst of the legal proceedings is highly likely to leave a litigant in a very difficult situation. For this very reason the Code makes it compulsory for the funders to maintain enough capital for all the aggregate funding liabilities for 36 months, to be able pay all the debts when they fall due, to maintain access to a minimum of £5 million.

The Code also does not allow the funder to leave the case "without good reason". Funders also have to make sure that a prospective litigant "receives independent advice" on the funding agreement. This will usually be an advice from the litigant's own solicitors.

In certain circumstances the interests of a funder may not totally coincide with the interests of a party to a dispute. For instance, a funder may be pushing for a settlement agreement, whereas this may not be in the best interests of a litigant. Under the Code, the funders are prevented from taking control of litigation or settlement negotiations and from causing the litigant's lawyers to act in breach of their professional duties. This is in line with the practice, accepted in England & Wales, which prescribes keeping the roles of funders, litigants and their lawyers separate.

Many UK litigation funders adopted the Code. On top of this some litigation funders are subject to a regulation by FSA (Financial Services Authority) and have solicitors working for them, who are regulated by the Solicitors Regulation Authority (SRA). However there is a new tendency in the UK now – more disputes focused law firms are setting up their own "internal funds" out of which the cases, on which these firms are getting instructed, may get funded. Potentially this kind of arrangement may increase a conflict of interests' risk. However whether this means that more regulation is required and whether the regulation should become law rather than a voluntary code remains to be seen.

2.2. TPF in the EU

As mentioned already, the UK TPF investors play an important part in international arbitration too. Whether or not it may be possible for an investor to fund an arbitration seated outside of England and Wales depends on the chosen law of the seat of arbitration. Another important issue which may also be very relevant is the enforcement of an award in a jurisdiction, where TPF is not allowed. It is getting more and more widely recognized that some form of the TPF regulation is required.

In February 2021 the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament published a research paper on the regulation of TPF https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662612/EPRS_STU(2021)662612_EN.pdf. The said paper sets out the following risks of the TPF:

- excessive economic costs due to multiplication of opportunity claims, problematic claims and so called 'frivolous claims'. Such claims "could be used for the pursuit of strategic goals by competing businesses, and the cost and time wasted in frivolous litigation in some instances could also potentially directly affect aggregate productivity and competitiveness"…
- moving away from a traditional form of litigation funding to a much wider range of funding models such as complex portfolio funding – higher conflict of interests risks and lower transparency;
- " a strong focus by some funders on cases with large settlements and with a low risk of losing, thus not exactly always corresponding and aligning with the interests of claimants…"
- excessive remuneration of the funders or operating in a conflict of interests with the claimant in managing or settling the case. The lawyer might also be in a potential conflict of interests with clients, given that the former usually obtains their fees directly from the litigation funder

On 15 June 2021 The European Parliament's Legal Affairs Committee published a draft report on the TPF regulation with recommendations for the European Commission. The purpose of the draft is to "safeguard the integrity of our justice system by effectively protecting European citizens from financial exploitation by litigation funders". The limitations on the TPF in the draft are similar to the ones in the Code and seem to properly address the above-mentioned risks. It remains to be seen what the actual law is going to say, once enacted and how it is going to be implemented in the EU member states.

Part III TPF – The Status in Russia

In some countries the status of TPF is simply not clear. For a long time this was the case in Russia. Historically during the post-Soviet period many "Russian" corporate and commercial contracts were governed by English law, which lead and continue to lead to a large number of the "Russian" disputes to be heard before the English courts or before the international arbitral tribunals seated in London. For this reason Russian legal community involved in this kind of international cases is well familiar with the TPF. However the Russian legislation was silent on the TPF till recently.

On May 15, 2019 the representatives of the Russian legal community discussed some of the key issues in the development of the institution of the TPF in Russia at the St. Petersburg International Legal Forum. During the discussion, the legal community spoke in favor of introducing amendments to civil legislation that would eliminate the risk of an agreement between a court investor, a financed party and its representative being declared as an aleatory transaction (i.e. void for uncertainty), as well as to ensure the balance of interests between the parties to the agreement.

On December 2 2019, Federal Law No. 400-FZ "On Amendments to the Federal Law" On Advocacy and the Bar in the Russian Federation was signed, expressly allowing a "success fee". According to new law, as of March 1, 2020, the "success fee" is permitted. This form of payment can be chosen by the lawyers working in civil cases. There is still no TPF specific legislation in Russia, however an official permission of the "success fee" is certainly helpful for the investors and their clients in Russia. Last year a round table was held by the Federation Council, during which a TPF in Russia was discussed amongst the Russian top legal practitioners, the legislators and the investors. Oleg Tsepkin, a member of the Federation Council committee on Constitutional Legislation and State Construction confirmed that in his view TPF, if properly regulated, could potentially improve access to justice and benefit the state court system by helping to eliminate groundless, speculative cases, as the funder simply won't fund a groundless case.

At the moment, there is a draft law that provides for changes in Section IV "Certain Types of Obligations" of Part II of the Civil Code of the Russian Federation, to which it is proposed to introduce a separate chapter - "Financing of Court Expenses by Third Parties".

It remains to be seen how Russian TPF legislation will develop. During the said roundtable it was emphasized that an experience of other jurisdictions, including Germany, UK, USA, Canada and Australia should be carefully researched and taken into account.

Part IV - Better Regulation of the TPF Around the Globe and the First Russian Funder

Having more jurisdictions accepting and developing their own legal frameworks for the TPF gives a chance to make sure that only the positive sides of the TPF are being kept, which includes providing the decent claimants with the funds, absent which they are simply not able to protect their rights and legitimate interests, reducing a number of groundless cases and thereby relieving the state judicial system of unnecessary burden; generally, improving access to justice.

As mentioned already, the dangers posed by the TPF, if left unregulated or improperly regulated, are also very substantial

Having more jurisdictions establishing their own legal frameworks for the TPF also mean creating a better competition between the existing investors, as more local TPF providers will start to develop also. In Russia the first TPF provider, a company called PLATFORMA started its work back in 2014. For the UK investors Russian and certain other CIS courts appear as too risky and the funding won't be available for this kind of disputes for sure. Also the disputes of a lower value (less than $10m) are very difficult to get funding for from the UK investors. The situation is different in Russia, where the investors generally are prepared to work with lower amounts and obviously are prepared to work on the cases before the Russian courts, as well as the Ukrainian, Kazakh and other CIS courts.

If TPF develops in other countries, this will certainly bring more diversity in the choice of investors and what they can cover. The TPF is of course primarily a type of an investment activity. Naturally, as with any other types of investment, a primary goal of an investor is to make a profit. As already mentioned, for this very reason it might be quite difficult for a decent claimant to receive a funding for the claim the value of which is less then USD10,00, which of course can't be said to be in the interests of improving access to justice. As already mentioned, this problem is likely to be solved by an increased competition between the funders and more private funding appearing. However what about the cases where any profits are simply unlikely to be made at all? What about the cases where legal aid is required?

TPF and Legal Aid

Traditionally, international arbitration was seen as a dispute resolution mechanism for the commercial transactions and corporate deal of a higher value. Today however arbitration clauses can be found in employment and consumer contracts, contracts of medial care. In professional sprots, an athlete may simply have to choose but to accept sports arbitration clauses in their engagement contracts. As international arbitration is outside of the scope of the state judiciary, the state strictly speaking is not under an obligation to provide any funding to a party, who can't find afford a legal representative for his or her case. In some instances, a party who is not able to take part in commercial arbitration because of its cost, would refer a case to a national court instead, arguing that an arbitration agreement became impossible to preform and thus inoperable, impossible to perform. Such position was accepted by the German courts (14 September 2000, III ZR 33/2000, BGHZ 145, 116), whereas, for example, the English courts would accept that arbitration agreement became inoperable due to the lack of funds only when the said lack of funds resulted from a breach of the corresponding substantive agreement (Janos Paczy v. Haenlder & Natermann GmbH [1981] 1 Lloyd's Rep 302 (CA)).

Given a rise of the TPF investors, it might be worth incentivizing them to actually provide some legal aid for international arbitration matters. The incentivizing might be a tax related mechanism, for example. However such legal aid would also have to be regulated to avoid any abuse, which might take place similarly to the standard TPF.

4. Ayse Tugba Ozkarsligil

Ayse Tugba Ozkarsligil

Drafting Investment Treaties: the Devil in the Details

> *I suspect that the United States and Canadian drafters of Chapter 11 did not expect that their countries would be on the receiving end of so many NAFTA claims and that they might write parts of Chapter 11 differently if they were to draft it again today. My basic point is that it is not too late. Chapter 11 is a work in progress and, if it can be improved upon, both investors and host governments stand to benefit.*[34]

Introduction

The concept of the investment treaty regime has been a controversial issue in global economic governance due to its asymmetric nature, which imposes various obligations on the States but "no inherent limitation" upon substantive rights of investors.[35] A significant concern associated with the growing reliance on investment treaties is whether the many States signing them, have understood and paid enough attention to the treaties' provisions at the drafting and negotiation stage. In the last few decades, investors have become more aware of the treaties' provisions and the rights they enjoy under the treaties, leading to an increase in the number of investment claims against States.

Based on the increasing number of investment disputes and the lack of consistency in the resulting decisions, there are numerous problems within the international investment regime and thereby reform is needed for the sustainability of the system. However, it is still open for discussion as to what kind of reform is needed, how future investment agreements should be written to achieve a balance between States and investors, and as yet no consensus has been agreed upon.[36]

The study aims to analyze these imperfections of the system and make suggestions to promote balance between the conflicting interests that have become evident through application of investment treaties. Some investment treaties' key provisions pose problems due to reliance on vague standards of protection for investors. This, in turn, can result in a lack of consistency in the manner in which arbitral tribunals interpret key International Investment Agreements ("IIAs") provisions. This study seeks to shed light on the immediate need for revisions to some of these key provisions such as fair and equitable treatment.

Reforming Treaty Substantive Rules: Fair and Equitable Treatment

Since the Fair and Equitable Treatment ("FET") provision is one of the most relied upon for investor claims asserting breach of IIAs,[37] it is crucial to draft this provision precisely so that it is properly interpreted true to its meaning, to ensure a balance between the investor's legitimate expectations *vis-a-vis* a State's right to

34. Barry Appleton et al, Investment Disputes and NAFTA Chapter 11, 95 Processing of Annual Meeting ASIA 196 (April 4-7, 2001).

35. Barry Appleton et al, Investment Disputes and NAFTA Chapter 11, 95 Processing of Annual Meeting ASIA 196 (April 4-7, 2001).

36. UNCTAD, Trade and Development Board, 5th Sess., U.N. Doc. TD/B/C.II/MEM.4/14 (2017); Tarald Laudal Berge, Dispute by Design? Legalization, Backlash, and the Drafting of Investment Agreements, 64 Int'l Studies Quarterly 919 (2020).

37. According to the UNCTAD, Investment Policy Hub, Investment Dispute Settlement Navigator, 368 claims alleged breach of the FET provision which makes FET provision is the highest number of relied upon IIAs claims, http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches

regulate. The main problem with the FET standard is that it lacks detailed, stable and clear content. Indeed, it is not always easy and self-evident to explain what is "fair" and "equitable," and so, the meaning of these terms in the context of each case relies on interpretation by the arbitral panel. The FET provision has been interpreted as more "broader" by arbitral tribunals then other IIA provisions intended to protect investor rights.[38] Hence, the FET provision has been relied upon in almost all investment cases.[39]

On the other hand, for arbitrators the meaning of FET is remains problematic and there is no consistent and clear definition emerging from the decided investment cases. This issue has been discussed by some tribunals.[40] In *Eastern Credit Limited, Inc and A.S. Baltoil v. Republic of Estonia*, the tribunal held that "the exact content of this standard is not clear."[41] Further, in *Ronald S Lauder v. Czech Republic*, the tribunal stated "… there exists no precise definition of the obligation to provide fair and equitable treatment. What is fair and equitable is to be determined on the basis of the facts in each individual case."[42]

Even if the vast majority of existing IIAs contain the provision of FET, nevertheless, there is still no uniform language in treaties. Whilst some include the exact phrase, "fair and equitable treatment,"[43] others contain "equitable and reasonable treatment," or "just and equitable treatment." Further, while some rely on "in accordance with customary international law" or "according to international law," others contain "unqualified" or "stand-alone" FET provisions. In this regard, I might add that basically two types of FET provisions exist.[44] One addresses the reference of "international law" or "customary international law," while the other one merely addresses "fair and equitable" treatment without referring to international standards.[45] In the latter case, without reference to international standards, the tribunal's focus has been on interpreting these words, "fair" and "equitable."[46] In particular, this unqualified FET provision has been interpreted by tribunals as "delinked from customary international law" and thus arbitrators "focus on the plain meaning of the terms fair and equitable."[47] As an alternative to drafting the FET provision, some states prefer to omit it in their treaties entirely.

In the past decade, States have become more aware of this provision due to the increasing number of arbitral awards that involved the FET standard.[48] One of the best examples of this awareness appears in the text of the 2012 US Model BIT.[49] This draft article reflects that the drafters were cognizant of the importance of the FET standard. In contrast with many FET provisions contained in a majority of BITs, this article contains more detail and clarifications, rather than merely a short, stand-alone provision.[50]

---

38. Joachim Karl, FDI in the Energy Sector: Recent Trends and Policy Issues in Foreign Investment in The Energy Sector Balancing Private And Public Interests 26 (Eric De Brabandere and Tarcisio Gazzini eds., 2014).

39. The first case that FET provision invoked by investors was American Manufacturing Trading Inc. v. Democratic Republic of Congo, ICSID ARB/93/1, Final Award, 21 February 1997.

40. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, [hereinafter Tecmed v. Mexico] Award ICSID Case No. ARB/(AF)/00/2.

41. Yulia Levashova, Fair and Equitable Treatment and the protection of the Environment, Introduction to Bridging The Gap Between International Investment Law And The Environment 59 (2016).

42. Ronald S Lauder v Czech Republic, UNCITRAL, Final Award, 3 September 2001, ¶ 291.

43. There is also a discussion on 'whether the FET standard actually contains two standards, namely "fair" and "equitable", with independent meanings of both concepts. However, the general assumption so far is, presumably, that "fair and equitable" must be considered to represent a single, unifies standard.' See Rudolf Dolzer, Fair and Equitable Treatment: A Key Standard in Investment Treaties, The International Lawyer, Vol. 39, No. 1, 91 (Spring 2015).

44. An UNCTAD study on FET provision has been shown that five approaches to the FET standard
(1) No FET obligation; (2) FET without any reference to International law; (3) FET linked to International law; (4) FET linked to customary international law; (5) FET with additional substantive content. UCTAD Series on Issues on Issues in international Investment Agreements II Fair and Equitable Treatment 17 (2012).

45. Schefer, supra note 10, at 339.

46. Id.

47. Patrick Dumberry, Fair and Equitable treatment: Its Interaction With The Minimum Standard and Its Customary Status 32 (2018).

48. IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 33 (2009).

49. 2012 US Model BIT provides as follows in Article 5 (Minimum Standard of Treatment):
("1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this article."), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf

50. Tudor, supra note 15, at 32.

Conclusion

Drafting the key provisions of investment treaties is arguably the most important and problematic issue in order to establish an appropriate balance between public and private interests. Nowadays, there has been considerable attention paid to the content of a treaty's obligations by developing and developed countries alike; these countries have realized the need to clarify the language used in these treaties to achieve a proper balance.[51] Hence, today, there are widespread calls for reform of the system governing international investment law and related dispute resolution. Although such reforms are necessary, there is no consensus on what kind of reform is needed. Many states therefore seek an answer to the question of how future investment agreements should be written.[52] Negotiators have the primary responsibility for this task. During treaty negotiations, drafters should use clear language and ensure that the meaning of treaty provisions can be understood by everyone.[53] Treaty drafters also understand the audience for these treaties (e.g., future disputants) and should assure that the provisions of the treaties are sufficiently detailed and cohesive so that they are more likely to be interpreted and applied consistent with the drafters' intent.[54]

51. Kavaljit Singh & Burghard Ilge, Introduction to RETHINKING BILATERAL INVESTMENT TREATIES CRITICAL ISSUES AND POLITICAL CHOICES 4 (Kavaljit Singh and Burghard Ilge eds., 2016).

52. Berge, supra note 3.

53. Kathryn Gordon and Joachim Pohl, Investment Treaties over Time -Treaty Practice and Interpretation in a Changing World 24 (OECD Working Papers on International Investment, 2015).

54. Id.

5. Andrii Zharikov

Andrii Zharikov

Andrii achieved his Bachelor in Law degree (with honours) at Taras Shevchenko National University of Kyiv (Ukraine) and LL.M. in International Trade Law (with distinction) at the University of Essex. Following his masters studies Andrii practised law in Ukraine where he was involved in various projects in banking & finance, international trade, dispute resolution and corporate law.

In 2016 Andrii was awarded a Dean's Scholarship by Aston University in support of his doctoral research project. In November 2019 he successfully defended his thesis (with no corrections) before the panel of experts comprising Professor James Devenney and Stuart Weinstein

Energy sector security as a ground for refusal in the recognition and enforcement of arbitral awards in Russia

Introduction

Whilst the Russian Federation produces only 3% of the world's GDP and accounts for only 2% of the world's population,[55] it is one of the key players in the global energy arena, especially in relation to traditional fossil fuels. According to the latest statistics, Russia has over 19% of world's total proved natural gas reserves, over 6% of total proved oil reserves as well as over 15% of total proved coal reserves.[56] Furthermore, the country produces 18.3% of world natural gas (the largest exporter), 12.6% of world crude oil (second largest exporter), as well as 5.3% of world coal (third largest exporter).[57] Thus, it is not surprising that the country heavily relies on its energy sector: for example, in 2019 oil and gas revenues contributed 39.3% of the country's federal budget which constituted a major share of exports.[58] Furthermore, a large proportion of overall foreign direct investment into Russia goes to the oil and gas industry.[59]

At the same time, the level of protection of foreign investors' rights in Russia remains questionable. The Russian Federation ranked 51st out of 137 economies for investor protection according to the Global Competitiveness Report.[60] Moreover, despite the World Bank placed Russia as 28th out of 190 economies in its Doing Business ranking, shareholder protection was one of Russia's weakest aspects (ranked 72nd).[61]

As pointed out by a number of commentators, this is especially relevant to the energy sector of the country.[62] Not least this is due to the notorious reputation of the local courts.[63] Therefore, despite the current paternalistic

55. James Henderson and Tatiana Mitrova, 'Implications of the Global Energy Transition on Russia' in Manfred Hafner and Simone Tagliapietra (eds), The Geopolitics of the Global Energy Transition (Springer 2020) 95.

56. BP, Statistical Review of World Energy 2020 (69th ed).

57. International Energy Agency, 'Key World Energy Statistics 2020' (IEA, August 2020) <https://www.iea.org/reports/key-world-energy-statistics-2020> accessed 12 October 2021.

58. Anastasia Kulachinskaya et al, 'The Challenge of the Energy Sector of Russia during the 2020 COVID-19 Pandemic through the Example of the Republic of Tatarstan: Discussion on the Change of Open Innovation in the Energy Sector' (2020) 6(3) Journal of Open Innovation: Technology, Market, and Complexity 1; Marta Domínguez-Jiménez and Niclas Poitiers, 'An analysis of EU FDI inflow into Russia' (2020) 6(2) Russian Journal of Economics 144, 149; Alexei Gromov and Nikolay Kurichev, 'The Energy Strategy of Russia for the Period up to 2030: Risks and Opportunities' in Susanne Oxenstierna and Veli-Pekka Tynkkynen (eds), Russian Energy and Security up to 2030 (Routledge 2016) 114. See also statistical information on the website of the Ministry of Energy of the Russian Federation, available in Russian only, at 'Statistics' (the Ministry of Energy of the Russian Federation, [no date]) <https://minenergo.gov.ru/activity/statistic> accessed 12 October 2021.

59. Domínguez-Jiménez and Poitiers (n 4); Marta Domínguez-Jiménez and Niclas Poitiers, 'FDI another day: Russian reliance on European investment' (2020) 3 Policy Contribution Bruegel 1

60. Klaus Schwab (ed), The Global Competitiveness Report 2017–2018 (World Economic Forum Insight. Report 2017) 249.

61. The World Bank, 'Ease of doing business in Russian Federation' (The World Bank, [no date]) <https://www.doingbusiness.org/en/data/exploreeconomies/russia> accessed 14 May 2020. See also The United States Department of State, '2020 Investment Climate Statements: Russia' (The United States Department of State, [no date]) <https://www.state.gov/reports/2020-investment-climate-statements/russia/> accessed 12 October 2021.

62. See, for example, Elliot Glusker, 'Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications' (2010) 10(3) The Pepperdine Dispute Resolution Law Journal 595, 619; Noah Rubins and Azizjon Nazarov, 'Investment Treaties and the Russian Federation: Baiting the Bear?' (2008) 9(2) Business Law International 100; Fredrik Erixon and Iana Dreyer, Vested and Invested Interests: The Role of Investment Protection in EU-Russia Relations (European Centre for International Political Economy Policy Brief No. 2/2010).

63. Ethan Burger, 'Corruption in the Russian Arbitrazh Courts: Will There Be Significant Progress in the Near Term?' (2004) 38(1) The International Lawyer 15;

approach of the state towards arbitration regulation,[64] it has been a very common practice for foreign investors to provide, where possible, for dispute resolution via international arbitration rather than through the Russian judicial system.

However, a major blow to foreign investors in the Russian energy sector came in October 2009 when Russia decided to withdraw from the Energy Charter Treaty, which it signed in 1994 and applied provisionally (without ratification). The Energy Charter Treaty provides for a wide range of measures with regards to investment protection in the energy sector, including specific provisions on dispute settlement.[65] At the time of withdrawal, there were six international energy investment disputes being considered under the Energy Charter Treaty,[66] including the well-known Yukos arbitrations.[67] On 17 April 2018 the Russian Federation officially confirmed their intention not to be considered as Signatories to the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects.[68]

Furthermore, whilst being a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (hereinafter referred to as the ICSID Convention), the Russian Federation has not formally ratified the convention. This means that arbitration at the International Centre for Settlement of Investment Disputes, which was established by the ICSID Convention, is not available for disputes between foreign investors and the Russian Federation.

Nonetheless, investors could still enjoy access to ICSID arbitration against Russia via the convention's Additional Facility Rules if it is allowed under the appropriate investment treaties in the event that the ICSID Convention has not come into force for one or both of the contracting parties when arbitration is initiated. These include, for example, bilateral investment treaties with China, Japan, Azerbaijan, etc.[69] However, there is an important difference in recognition and enforcement between ICSID awards and non-ICSID awards, including those issued under the convention's Additional Facility Rules.

According to Article 54 of the ICSID Convention, all contracting states shall recognise and enforce an ICSID award as if it were a final judgment of a court in that State. Therefore, any ICSID award is not subject to scrutiny by domestic courts or other authorities, whose task is limited only to the verification of the authenticity of the award. This is indeed a highly unusual obligation which arises out of the self-contained ICSID system under which the contracting state is bound to perform the award, even if it contradicts its domestic public policy.[70] Naturally, this results in the increased attractiveness of ICSID arbitration.[71] The only possibility for a party not to be bound by an ICSID award is to submit a request for the annulment of an award to an ad hoc

---

Russia was placed 91st and 116th out of 141 economies for judicial independence and incidences of corruption, respectively, see Klaus Schwab (ed), The Global Competitiveness Report 2019 (World Economic Forum Insight Report, 2019) 483. See also Gabriela Knaul, The UN Report of the Special Rapporteur on the Independence of Judges and Lawyers: Mission to the Russian Federation, addendum (United Nations, Human Rights Council A/HRC/26/32/Add.1, 30 April 2014) at III(A)3 which highlighted very limited confidence in the judiciary system by the general public and the fact that it is perceived as corrupt since the judges "adopt politically motivated decisions that aim to protect only the interests of the State". According to the public poll conducted in September 2020 among 1600 Russian citizens, only 31% of the participants placed trust in Russian courts, see Lev Gudkov, 'Доверие к Основным Социальным Институтам [Trust in the main social institutions]' (Levada-Center, 21 September 2020) <https://www.levada.ru/2020/09/21/doverie-institutam/> accessed 12 October 2021.

64. Andrey Kotelnikov, Sergey Kurochkin and Oleg Skvortsov, Arbitration in Russia (Kluwer Law International 2019).

65. Irina Pominova, Risks and Benefits for the Russian Federation from Participating in the Energy Charter: Comprehensive Analysis (Energy Charter Secretariat Knowledge Centre, 2014) 2-3; Kaj Hober, 'Investment Arbitration and the Energy Charter Treaty' (2010) 1(1) the Journal of International Dispute Settlement 153, 155.

66. 'Russian Federation' (International Energy Charter, 11 February 2019) <https://www.energycharter.org/who-we-are/members-observers/countries/russian-federation/> accessed 12 October 2021.

67. A series of arbitration cases initiated by the former majority shareholders of Yukos following the bankruptcy and nationalisation of the company by the Russian state resulted in the shareholders being awarded over $50 billion in damages: the largest arbitral award in history. At the time of writing the award is being reviewed by the Dutch Supreme Court following the decision of the Court of Appeal of The Hague to reinstate it in February 2020 (after a lower court had set the award aside). For the brief overview of the issues in the Yukos arbitrations, see Lena Serhan, 'Arbitration Unbound: How the Yukos Oil Decision Yields Uncertainty for International-Investment Arbitration' (2016) 95 Texas Law Review 101; Halil Rahman Basaran, 'What to Make of the Yukos v. Russia Dispute' (2019) 22 Gonzaga Journal of International Law 41 and Martin Brauch, 'Yukos v. Russia: Issues and legal reasoning behind US$50 billion awards' (2014) International Institute for Sustainable Development.

68. Nonetheless, some investor protection mechanisms will continue to be binding on Russia until October 2029 regarding the investments made before the time of Russia's withdrawal notice, see Article 45(3)(b) of the Energy Treaty Charter.

69. Although see Rubins and Nazarov (n 8) on how the approach of Russia towards investment dispute resolution and model investment agreements has changed considerably over the years. See also Yaroslav Klimov and Andrey Panov, 'Russia's new guidelines on future bilateral investment treaties' (2017) 8 Norton Rose Fulbright International Arbitration Report 30.

70. Failure of the contracting state to recognise and enforce the award against it may result in diplomatic protection being issued by another contracting state, see article 27 of the ICSID Convention. Furthermore, there is a possibility of bringing a claim before the International Court of Justice against the aberrant contracting state, see article 64 of the ICSID Convention.

71. See, for example, Kenneth Reisenfeld and Joshua Robbins, 'Finality under the Washington and New
York Convention: Another Swing of the Pendulum?' (2017) 32(2) The ICSID Review—Foreign Investment Law Journal 371. Although see Markus Burgstaller and Charles Rosenberg, 'Challenging International Arbitral Awards: To ICSID or not to ICSID?' 27(1) Arbitration International 91, 99.

committee on the limited grounds outlined in Article 52 of the ICSID Convention.[72]

For any non-ICSID arbitrations, including ICSID Additional Facility Rules, the awards may be reviewed by domestic courts or other authorities prior to their recognition and enforcement. This, of course, places an additional burden on the party seeking to enforce the arbitration award in the state against which the award was rendered.

The main international instrument that provides for the principles for recognition and enforcement is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter referred to as the New York Convention), which Russia is a party to. In particular, Article V of the New York Convention provides a number of grounds under which the recognition and enforcement of the arbitral award may be refused:

"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:

(a) The parties to the agreement referred to in article II were, 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

It is this latter ground (violation of public policy) and its application by Russian courts that this article will explore in detail, specifically from the energy sector perspective. The main focus of the analysis will be on the recent guidance which was issued by the Supreme Court of the Russian Federation following the latest updates of the legislative framework regulating international arbitration in Russia. The article will look into court practice regarding the violation of public policy as a ground for refusal in the recognition and enforcement of an arbitral award, analyse the new test for such claims as proposed by the Supreme Court and the likely implications of such test for arbitral awards in the energy sector.

Violation of the public policy: the Russian perspective

When a party is seeking to recognise and enforce an arbitral award in Russian domestic courts, the most often ground invoked for refusal is the violation of public policy.[73] The New York Convention (as well as

72. In practice states use this option quite regularly, see Emmanuel Gaillard and Ilija Mitrev-Penusliski, 'State Compliance with Investment Awards' (2021) The ICSID Review - Foreign Investment Law Journal 1; Burgstaller and Rosenberg (n 17).

73. See the study of court cases from 2008 to 2017 conducted by the Working Group of the Russian Arbitration Association as reported at Russian Arbitration Association, 'Application of the New York Convention in Russia' (Russian Arbitration Association, 21 November 2018) <https://arbitration.ru/en/press-centr/news/application-of-the-new-york-convention-in-russia/?sphrase_id=48700> accessed 12 October 2021; see also William Spiegelberger, Enforcement of Foreign Arbitral Awards in Russia (Juris Publishing 2014) 85.

applicable Russian legislation, which replicates Article V(2)(b) of the New York Convention)[74] does not define public policy.[75]

In essence, it is very difficult to provide for a uniform definition of a public policy. For example, following its review of public policy as a defence to the recognition and enforcement of arbitral awards under the New York Convention in the more than 40 jurisdictions (including Russia), the International Bar Association (IBA) concluded that public policy is an evolving concept which is impossible to define precisely.[76] Thus, the report concluded, it should be the task of state courts to attempt to define this notion.[77]

The IBA Report also highlighted that in the vast majority of jurisdictions a violation of public policy implies a breach of fundamental or basic principles or values upon which the foundation of society rests, such as justice, fairness or morality.[78] Similarly, the United Nations Commission on International Trade Law (UNCITRAL) describes public policy exception as a safety valve which should be used only in exceptional circumstances when "it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based".[79] International arbitration practitioners highlight that in most jurisdictions public policy is construed narrowly and applied exceptionally when the violation of public policy is so "blatant", "flagrant" or "intolerable" that the recognition and enforcement of an arbitral award should be refused.[80]

Since Russian legislation does not contain the definition of public policy, this has resulted in a number of conflicting court judgments on the application of this ground for refusal of recognition of an arbitral award. For example, the courts refused to enforce arbitral awards citing the violation of Russian public policy in the cases when:

a) the arbitration respondent had not been properly notified about the date, time and place of the arbitration proceedings;[81]

b) enforcement would affect the rights of the third parties;[82]

c) enforcement would lead to the insolvency of the defendant, which is a municipal entity;[83]

d) there was lack of proportionality of penalty imposed by the arbitral award in relation to the consequences of the breach;[84]

e) the award is incompatible with mandatory provisions of Russian law regulating the creation and activities of joint ventures;[85]

f) the recognition and enforcement of the award would lead to preferential treatment of one of the creditors of a bankrupt entity;[86]

---

74. Article 244 the Arbitrazh (Commercial) Procedure Code the Russian Federation dated 24 July 2002 (as amended).

75. Although the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration (as amended in 2006) provides that the violation of public policy should be understood as serious departures from fundamental notions of procedural justice, see UNCITRAL Secretariat, UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006 (UNCITRAL 2008) 35. However, such definition is arguably applicable only to the process of setting aside the arbitral award in the country where it was rendered.

76. International Bar Association, Report on the Public Policy Exception in the New York Convention (IBA 2015) 18.

77. ibid 3.

78. Ibid 6.

79. UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) [2016 edition, United Nations Publication 2016] 240.

80. Paul Stothard and Alexa Biscaro, 'Public Policy as a Bar to Enforcement' (2018) 10 Norton Rose Fulbright International Arbitration Report 23.

81. See Decision of the Supreme Court of the Russian Federation No. 306-ЭС19-8787 in the case No. A57-31314/2017 dated 17 June 2019 as cited in Sergey Treshchev and Elena Malevich, 'Enforcement of international arbitration awards in Russia' (International Bar Association, 4 September 2019) <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B75B728A-1D7E-4264-8473-20DEAC97F771> accessed 12 October 2021.

82. See Decision of the Supreme Court of the Russian Federation No. 305-ЭС16-19572 in the case No. A40-147645/2015 dated 28 April 2017 as cited in Lorenzo Sasso, 'The Russian Arbitration Reform: Between Lights and Shadows' (2019) 8(2) Russian Law Journal 79, 100. See also Decision of the Arbitrazh (Commercial) Court of the West Siberian region in the case No A45-33999/2019 dated 25 February 2020.

83. See Decision of the Federal Arbitrazh (Commercial) Court of the Volga-Vyatka Region in the case No. A43-10716/02-27-10isp dated 17 February 2003 as cited in Sasso (n 28). See also Chaman Lal Bansal and Shalini Aggarwal, 'Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS countries: A comparative analysis of legislative and judicial approach' (2017) 59(6) International Journal of Law and Management 1279, 1284.

84. See Decision of the Federal Arbitrazh (Commercial) Court of the Volga-Vyatka Region in the case No. A82-10555/2005-2-2 dated 25 May 2006 as cited in Sasso (n 28) 98-99. See also a reference to this practice by Russian courts in Nigel Blackaby et al, Redfern and Hunter on International Arbitration (6 ed, OUP 2015) at para 11.118.

85. See Decision of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. 2853/00 dated 14 January 2003 as cited in Sasso (n 28).

86. See Decision of the Arbitrazh (Commercial) Court of the Moscow Region in the case No. A40-30440/2019 dated 04 March 2020 as cited in Russian Arbitration Association, Обзор Российской Судебной Практики по Вопросам Арбитража и Трансграничных Судебных Разбирательств [Overview of Russian Court Practice relating to Arbitration and Cross-Border Judicial Proceedings] (Russian Arbitration Association, 2020) 123 and in Dmitrii Andreev et al, 'Иностранный арбитраж из России, обеспечительные меры и банкротство // Обзор практики за I квартал 2020 года [Foreign arbitration from Russia, interim measures and bankruptcy // Review of practice in the first quarter of 2020]' (Zakon.ru, 21 May 2020) <https://zakon.ru/discussion/2020/05/21/inostrannyj_arbitrazh_iz_rossii_obe-

g) there are inconsistencies between the amounts stipulated in the partial and final arbitral award;[87]

h) there is absence of any indication of the nature of the obligation in an arbitration award;[88]

i) there was an unclear dispute resolution authority named in the arbitration clause.[89]

As can be seen from the above, the notion of public policy has been applied extremely widely by the Russian courts and in practice this has sometimes led to reconsideration of the whole case on merits (despite this not being permitted under law).[90] As has been correctly noted by a contemporary Russian legal scholar: "Inspired by Russian present-day reality, the institute of public policy ceased to play any special protective role and became a moderator for state control of jurisdictional decisions, imposed from the outside of the national court system (in other words, foreign court judgments, foreign arbitral awards)".[91]

In the light of this inconsistent practice by local courts, some guidance as to the meaning and application of public policy as the ground for refusal of the recognition and enforcement of an arbitral award was offered by the Supreme Arbitrazh (Commercial) Court of the Russian Federation in its Informational Letter,[92] wherein a number of court decisions were given for illustrative purposes on how to deal with this issue. Despite the obvious usefulness of these guidelines (which is illustrated by a substantial decrease of court cases granting public policy motions in the following years),[93] a number of commentators indicated certain inconsistencies and confusion[94] which led to the absence of a uniform approach among the Russian courts. Some authors further commented that despite the clear shift towards a narrower interpretation of a public policy ground following the Informational Letter, local courts continued to apply this ground "on apparently protectionist and anti-arbitration instincts, especially where high value awards were concerned".[95]

In December 2019 the Supreme Court of the Russian Federation published its Resolution No.53 "On Russian courts' cooperation and control over international commercial arbitration"[96] (hereinafter referred to as the Resolution). The Resolution highlighted a number of important aspects for the courts to consider whenever they touch upon the issues of recognition and enforcement of arbitration awards. In particular, the Supreme Court provided the definition and applicable test for the application of public order violation as a ground for refusal in recognition and enforcement of an arbitral award.

According to the Resolution, public order is a collection of fundamental legal principles having the highest imperative and universal character, a unique social and public significance, and forming the basis of the economic, political and legal system of the Russian Federation. This definition was to a significant extent borrowed from the 2013 Informational Letter produced by the Supreme Arbitrazh (Commercial) Court. Likewise, the Supreme Court once again addressed the previous inconsistent practice of courts and emphasised that the refusal to recognise and enforce an arbitral award on a basis of violation of public policy of the Russian Federation should be upheld only in extraordinary circumstances. Therefore, according to paragraph 51 of the Resolution, this ground is not applicable when:

a) the respondent did not take part in the arbitration proceedings;

spechitelnye_mery_i_bankrotstvo__obzor_praktiki_za_i_kvartal_2020> accessed 12 October 2021.

87. See Decision of the Arbitrazh (Commercial) Court of the Moscow Region in the case No. A40-163027/2019 dated 18 March 2020 as cited in Russian Arbitration Association (n 32) 111.

88. See Decision of the Arbitrazh (Commercial) Court of the Moscow Region in the case No. A40-124600/2019 dated 10 June 2020 as cited in Russian Arbitration Association (n 32) 116.

89. See Decision of the Arbitrazh (Commercial) Court of the Moscow Region in the case No. A40-337611/2019 dated 03 September 2020 as cited in Russian Arbitration Association (n 32) 91.

90. Bansal and Aggarwal (n 29) 1284; Muruga Ramaswamy, 'Enforcement of ICSID and Non-ICSID Arbitration Awards and the enforcement Environment in BRICS' (2018) 15(2) International Journal of Business, Economics and Law 73, 78; Anton Maurer, The Public Policy Exception Under the New York Convention: History, Interpretation and Application (Revised edition, Juris Net 2013) 223-224. Mikhail Antonov, 'Executing the Decisions of Foreign Courts and the Question of Sovereignty in Russia' (2012) Working Research Paper Series: LAW WP BRP 07/LAW/2012.

91. Sergey Kurochkin, 'Violation of Public Policy of the Russian Federation as a Ground for Refusing Recognition and Enforcement of Foreign Judgments and Arbitral Awards' (2014) 2 Russian Law: Theory and Practice 117, 127-128. See also Antonov (n 36).

92. Informational Letter of the Presidium of the Supreme Arbitrazh (Commercial) Court of the Russian Federation No. 156 dated 26 February 2013.

93. Russian Arbitration Association (n 19).

94. Boris Karabelnikov, 'Высший Арбитражный Суд РФ объясняет публичный порядок [The Supreme Arbitrazh Court of the Russian Federation explains public policy]' (2013) 5 Zakon 115; Vsevolod Baibak, 'Соблюдайте публичный порядок [Observe Public Order]' (Russian Business Gazette 15(893), 23 April 2013) <https://rg.ru/2013/04/23/arbitraj.html> accessed 12 October 2021; Natalia Shinyaeva, 'Публичный порядок – не дубинка [Public order is not a club]' (Vegas Lex, 04 April 2013) <https://vegaslex.ru/media/press_statements/63369/> accessed 12 October 2021.

95. Maurer (n 36) 230.

96. Dated 10 December 2019.

b) an arbitral tribunal applied foreign law rules that do not have equivalent provisions under Russian law; and/or

c) the debtor does not file objections to the forced execution of the arbitral award.

The specific list of instances when the courts should not refuse recognition and enforcement of an arbitral award should undoubtedly be beneficial for bringing uniformity into local courts' application of public policy considerations.

However, the most novel aspect of the Resolution is the introduction of the two-stage test for setting aside or refusal to enforce arbitral awards on the ground of breach of public policy. According to the Supreme Court, when examining a possible violation of public policy, the courts should establish that:

a) there is a breach of the fundamental principles that form the basis of the economic, political or legal system of the Russian Federation; and

b) such breach may result in the infringement of the sovereignty or security of the state, or affects the interests of large social groups, or violates the constitutional rights and freedoms of individuals or legal entities.

It is notable that the Supreme Court placed considerable attention on the economic and political fundamental principles with emphasis on those before legal, which perhaps signifies the priorities that the courts should follow when considering a possibility of public policy violation. Furthermore, the inclusion of economic and political criteria in the context of public policy requires a judge to evaluate expediency rather than analyse the legality of the recognition and enforcement of the arbitral award.[97] This, of course, requires the judge to apply certain skills that are beyond his/her legal training. As one practising counsel has commented, the enforcement of a perfectly legally correct foreign arbitral award which is fully delivered in accordance with Russian law may theoretically be recognised as contravening public policy due to a particular judge's interpretation of non-legal considerations of public order.[98]

Importantly, any such breach of the fundamental principles needs *potentially* to result, *inter alia*, in the infringement of the sovereignty or security of the state, which is a very unusual requirement for public policy considerations. Notably, in the late 1990s and early 2000s several authors commented on the possibility of state immunity as was established in Soviet doctrine becoming a reason for refusal of the enforcement of arbitral awards against Russian state entities.[99] The test established by the Supreme Court not only confirms this, but further expands the boundaries of the public policy concept, as security of the state may not be limited to state-owned enterprises and their activities. Given the above, it is necessary to establish whether current Russian legislation contains relevant provisions which deal with the issue of security of the state, including from the energy perspective.

Security of the state from the energy perspective

Whilst the term "security of the state" may have a broad meaning, including political,[100] Russian legislation consists of a number of acts that allow determination of the likely scope of the security of the state, including from economic and energy perspectives. In essence, "security of the state" is interpreted via the prism of normative acts forming national strategy plans which aim to protect certain values and principles deemed to be of fundamental importance to the Russian state.[101]

Some general provisions in relation to the security of the state are included in the Constitution of the Russian

97. Dmitry Davydenko and Eugenia Kurzynsky-Singer, 'Substantive Ordre Public in Russian Case Law on the Recognition, Enforcement and Setting Aside of International Arbitral Awards' (2010), 20(2) The American Review of International Arbitration 209, 213. The authors link it to the socialistic legal doctrine which was alien to the principle of separation of powers.

98. Svetlana Bjorkman, 'The Conception of Public Policy and Its Applicability with Respect to Enforcement of Awards of International Commercial Arbitration in the Russian Federation' (2013) 6 International In-House Counsel Journal 1.

99. Eugen Salpius, 'Recent Developments in Arbitration in Central and Eastern Europe' (1996) 2 Arbitration and Dispute Resolution Law Journal 175; Simon Zinger, 'Navigating the Russian Shipping Industry: Making the Most of International and Russian Law for Successful Arbitration against Russian Parties' (1995) 8 University of San Francisco Maritime Law Journal 141, 171; Glenn Hendrix, 'Business Litigation and Arbitration in Russia' (1997) 31 The International Lawyer 1075, 1077; Kaj Hober, Enforcing Foreign Arbitral Awards against Russian Entities (Transnational Juris Publications, 1994) 83-106; Daniel Michalchuk, 'Filling a legal vacuum: the form and content of Russia's future state immunity law suggestions for legislative reform' (2001) 32 Law and Policy in International Business 487, 497.

100. Davydenko and Kurzynsky-Singer (n 43) 210.

101. Kurochkin (n 37) 120. See also Robert Larsson, Russia's Energy Policy: Security Dimensions and Russia's Reliability as an Energy Supplier (Swedish Defence Research Agency Report, 2006) 48.

Federation. However, substantive regulation is found in the Federal Laws and, specifically, in a number of Presidential Orders. According to Articles 4(2) and 8 of the Federal Law of the Russian Federation No. 390-ФЗ "On security" dated 28 December 2010, it is the prerogative of the President of the Russian Federation to determine the directions of state security and its strategy.

The Strategy of the National Security of the Russian Federation (hereinafter referred to as the National Security Strategy) was adopted by Presidential Order No 683 dated 31 December 2015. This document forms the basis for strategic planning which, *inter alia*, outlines national security interests and priorities.[102] Fundamentally, the National Security Strategy emphasises the link between national security and the social and economic development of the country (see article 5 of the National Security Strategy).

Notably, the definition of national security provides for a number of aspects, including economic and energy security.[103] Furthermore, article 60 of the National Security Strategy explains that one of the priorities of economic security is energy security. This illustrates the strategic significance of the energy sector to Russian national interests. In addition, article 24 of the National Security Strategy expressly highlights the modern economic pressures on the Russian Federation and emphasises the key role of energy resources for the modern economy, thus signifying the vital importance of oil and gas as well as other fossil resources to the development of the economic well-being of the state.

Article 57 the National Security Strategy emphasises the increased danger of the use of "illegitimate legal methods" against Russia and its economic security. No examples of such legal methods are provided, including clarifications as to why they are deemed as illegitimate, but presumably this category includes certain economic sanctions as well as any restrictions imposed by international organisations which Russia does not view as licit. It remains unclear whether this category could possibly include foreign court judgments or foreign arbitral awards that affect Russian economic security.

Since economic security is viewed as an integral part of national security, a more detailed strategic policy has been developed in this regard which is reviewed from time to time. Thus, the Strategy on Economic Security of the Russian Federation until 2030 (hereinafter referred to as the Economic Security Strategy) was adopted by Presidential Order No. 208 dated 13 May 2017. Article 7 of the Economic Security Strategy provides a number of important definitions. Thus, economic security relates to the protection of the national economy against internal and external threats under which the economic sovereignty, integrity and conditions for implementation of the strategic national priorities of the Russian Federation are preserved. National economic interests are defined as objectively important economic needs of the country the satisfaction of which ensures the implementation of the national strategic priorities of the Russian Federation, whereas threats to economic security are defined as factors and circumstances that create a direct or indirect possibility of damage to national economic interests.

Interestingly, the Economic Security Strategy describes the provision of economic security as the implementation of a wide spectrum of measures (political, organisational, informational, economic, legal, etc) for the purposes of counteracting threats to the economic security and protection of national economic interests of the Russian Federation (see article 7(7) of the Economic Security Strategy). Such measures should primarily be implemented by state organs (public authorities).[104] Importantly, relevant provision does not limit the implementation of relevant measures to executive and/or legislative bodies only, which means that, given the distinction as per the Russian Constitution,[105] the judiciary is also involved.[106] Therefore, Russian courts take an active role and have a duty to participate in the implementation of the economic security of the state.

Furthermore, given the importance of the energy sector to the country's economy, the Doctrine on Energy

102. Article 1 of the National Security Strategy.

103. Article 6 of the National Security Strategy.

104. Article 7(7) of the Economic Security Strategy.

105. See articles 10,11 and 118. See also Federal Constitutional Law No 1-ФКЗ "On Judicial System of the Russian Federation" dated 31 December 1996 (as amended).

106. Whilst the idea of the judiciary being a state organ (public authority) is not expressly mentioned either in the Constitution and/or Federal Law, Russian legal scholarship seems to interpret relevant provisions accordingly, see Boris Edidin, 'Суд в системе органов государственной власти России [Courts in the system of public authorities of Russia]' (PhD thesis, Russian Academy of Justice 2005); Igor Noskov, 'Судебная деятельность: понятие, виды, основные характеристики [Judicial Activity: Concept, Types, Main Characteristics]' (PhD thesis, Russian State University of Justice 2016).

Security of the Russian Federation (hereinafter referred to as the Energy Security Doctrine) was adopted by Presidential Order No. 216 dated 13 May 2019. It is worth noting that energy security has gradually developed as an absolute priority aspect of national security,[107] not least because the oil and gas industry is totally dominated by companies owned either by the state or by individuals who are personally close to the government.[108] As mentioned by Zhavoronkova and Shpakovskiy, the Energy Security Doctrine is a peculiar document since, as opposed to other strategic documents with regards to other industry sectors, it does not deal with planning, but only concerns matters of national security and related policies.[109] Hence, whenever Russian courts assess issues of public policy and national security regarding recognition and enforcement of foreign arbitration awards in oil and gas area, the Energy Security Doctrine will inevitably be a key normative act for analysis and application. Russian practising lawyers in the oil and gas sector have also emphasised the importance of the Energy Security Doctrine for legal regulation of related activities and investments in the area.[110]

Article 3 of the Energy Security Doctrine provides that its aim is to contextualise and further develop the provisions of the National Security Strategy and Economic Security Strategy with regards to the energy sector of the country. It is also worth mentioning that article 5 of the Energy Security Doctrine specifically emphasises the key role of oil and gas for the energy sector of the country and its critical importance to budget income generation.

Energy security is defined as the protection of the economy and citizens against threats to the national security in the area of energy under which the Russian Federation performs its energy supply obligations to customers as well as performs its export contracts and international obligations.[111] Thus, such definition effectively encompasses two aspects: security of domestic energy supply and security of energy exports.[112]

Article 4(в) of the Energy Security Doctrine defines threats to national security in the area of energy as factors and circumstances that may lead to damage to the energy sector of the Russian Federation. The Energy Security Doctrine specifically mentions a number of external threats to the energy sector. Notably, these include "the use of international agreements and financial mechanisms" by foreign states in order to cause damage to the Russian energy sector and its economy overall.[113] Furthermore, the Energy Security Doctrine outlines the priority of the internal market (article 23) and the need to protect the interests of Russian energy companies at international level (article 24(г)), thus clearly linking the well-being of local energy companies to national energy security.[114] In the light of the above very broad definition, one may wonder whether it would be possible to enforce arbitral awards against Russian energy companies which are issued outside of the Russian Federation. Thus, the recognition and enforcement of such awards may be refused by local Russian courts on the basis of threatening the security of the energy sector of the Russian Federation and, consequently, potentially infringing the security of the state. Furthermore, this is also supported by the fact that oil and gas extraction on a subsoil block of federal importance[115] is specifically included into the list of activities of strategic importance for national defence and state security as per Article 6 of the Federal Law "On the Procedure for Making Foreign Investments in Companies of Strategic Importance for National Defence and

107. Larsson (n 47) 67-68. See also Aleksei Bogoviz, Svetlana Lobova, Yulia Ragulina, Alexander Alekseev, 'Russia's Energy Security Doctrine: Addressing Emerging Challenges and Opportunities' (2018) 8(5) International Journal of Energy Economics and Policy 1.

108. Aliaksandr Novikau, 'What does energy security mean for energy-exporting countries? A closer look at the Russian energy security strategy' (2021) 39(1) Journal of Energy & Natural Resources Law 105, 105-106.

109. Natalya Zhavoronkova and Yuriy Shpakovskiy, 'Новая Доктрина энергетической безопасности России: вопросы стратегического планирования [New Energy Security Doctrine of Russia: Issues of Strategic Planning]' (2019) 4(55) Problems of National Strategy 187; Natalya Zhavoronkova and Yuriy Shpakovskiy, 'Пробелы в новой Доктрине энергетической безопасности России [Gaps in the New Energy Security Doctrine of Russia]' (2020) 9 Jurist 43. See also Bogoviz et al (n 53); Novikau (n 54) 107.

110. Natalya Morozova, 'The Oil and Gas Law Review: Russia' in Christopher Strong (ed), The Oil & Gas Law Review (8 ed, Law Business Research 2020).

111. Art 4(a) of the Energy Security Doctrine.

112. See similar discussion in Sergey Seliverstov, 'Energy Security of Russia and the EU: Current Legal Problems' (2009) Institut Francais des Relations Internationales (IFRI) Research Paper

113. Article 11(б) of the Energy Security Doctrine.

114. Novikau (n 54) 122.

115. Of more than 70 million tonnes of recoverable oil reserves or of more than 50 billion cubic metres of natural gas reserves. The list of such subsoil blocks is maintained by the Federal Subsoil Agency.

State Security".[116] Therefore, the law would automatically regard any entities involved in such activities as having strategic importance to the security of the state.

Moreover, in line with similar provisions enshrined in the Economic Security Strategy, Article 37(a) of the Energy Security Doctrine provides that state public authorities of constituent entities of the Russian Federation should, within their respective competence, implement and ensure energy security of the country. As noted before, this means that the Russian judiciary plays an active role in preserving energy security.

Given the above legal acts, it is clear that current Russian legislation provides a significant framework for the national security strategy, including in different sectors of the economy. The courts play an active role in the implementation of measures for ensuring that state interests and security are preserved. Thus, in the light of the latest Supreme Court clarifications local courts have substantial legal justifications for refusing the recognition and enforcement of arbitral awards due to the possible infringement of the sovereignty or, especially, security of the state.

A particular example of this can be found in the decision of the Supreme Court No. 305-ЭС18-20885 dated 23 April 2019. According to the facts of the case,[117] Banwell International Limited and Rosshelf were in dispute in relation to an agreement for the pledge of shares in Lotos Shipbuilding Plant. The dispute was submitted to the London Court of International Arbitration wherein the arbitral tribunal found in Banwell's favour. Banwell then sought to enforce the arbitral award in Russia. The first instance court approved recognition and enforcement of the award. However, Rosshelf promptly filed an appeal which was upheld. The matter went to the Supreme Court which denied recognition and enforcement of the award on the basis of violation of the public policy of Russia. According to the Supreme Court, Rosshelf is an entity of strategic importance with the Russian Federation being its ultimate beneficiary. Thus, the Supreme Court concluded, enforcement of this foreign arbitral award could potentially infringe the security of the state by causing damage to the Russian Federation: instead of transferring monies to the Russian state budget as per normal circumstances, the entity would be obliged to make payment to a foreign company. Hence, this essentially non-legal argument was decisive for the Supreme Court to resolve in favour of Rosshelf and refuse recognition and enforcement of the London Court of International Arbitration award.

Whilst the above Supreme Court decision concerned a shipbuilding enterprise, it seems that public policy consideration would be applied in a similar or even stricter manner for matters concerning the energy sector, particularly in the oil and gas sector. This is because Russian legislation and normative regulation place significant priority of the energy industry within the national security framework, including by developing a separate national security strategy for the energy sector.

Conclusion

Recently the legislative framework regulating international arbitration in Russia has been significantly amended in order to bring it to the best international standards.[118] It is now the task of the judiciary to ensure that the updated legislative provisions are applied in a consistent and appropriate manner and correspond to best international arbitration practice if the Russian Federation seeks to be regarded as an arbitration-friendly jurisdiction. As was noted nearly two decades ago, the pro-arbitration policy of Russian courts will undoubtedly lead to increased trust by foreign investors in the judicial system of the country,[119] and attract higher levels of foreign investment to its oil and gas sector.[120]

Regarding recognition and enforcement of arbitral awards, for a considerable time local courts in Russia

116. Federal Law the Russian Federation No. 57-ФЗ dated 29 April 2008 (as amended).

117. See also a comment in Alexander Vaneev, Dimitriy Mednikov and Maxim Kuzmin, 'Russia' in Global Arbitration Review, The European Arbitration Review 2020: A Special Report (Law Business Research 2019) 66-71.

118. See the amendments to the Federal Law of the Russian Federation No. 5338-I "On International Commercial Arbitration" dated 7 July 1993 (as amended), the Federal Law of the Russian Federation No. 382- ФЗ "On Arbitration in the Russian Federation" dated 29 December 2015 (as amended) as well as the amendments to several procedural codes. See Alexey Yadykin, Martin Mekat and Noah Rubins, 'The Russian arbitration reform' (2016) 32(4) Arbitration International 641; Vladimir Orlov and Vladimir Yarkov, 'New Russian Arbitration Law' (2017) 2 Kazan University Law Review 6.

119. Vesselina Shaleva, 'The "Public Policy" Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 67, 93.

120. Amy Myers Jaffe and Robert Manning, 'Russia, energy and the West' (2001) 43(2) Survival: Global Politics and Strategy 133, 149.

have used violation of public policy as a primary reason for refusal of such requests. Moreover, unlike best international practice, the courts have interpreted public policy in a very broad manner which has resulted in highly inconsistent court practice and increased uncertainty as to whether an arbitral award could be recognised and enforced on the territory of the Russian Federation.

Recent clarifications issued by the Supreme Court of the Russian Federation should bring some uniformity to the application of public policy violation as a ground for refusal in the recognition and enforcement of an arbitral award. The Supreme Court has clearly identified a number of instances when the recognition and enforcement of arbitral awards would not affect the public policy of Russia.

At the same time, the two-stage test established by the Supreme Court for the examination of the possible violation of public policy requires a judge not only to consider non-legal aspects of the recognition and enforcement of an arbitral award, but also to evaluate whether there could be any potential infringement of the sovereignty or security of the state. Russian legislation has a somewhat sophisticated framework in place for determination of different aspects of state security. In addition, some sectors of the economy, such as energy (oil and gas in particular), are considered to be of strategic importance to the security of the state, which has resulted in the enactment of separate security policies. Respective provisions of such policies often contain a very broad description of what constitutes national security, national interest and any potential threats to them. Given such broad wording as well as the fact that the judiciary is part of the system responsible for the implementation of the security of the state, it seems very likely that any perceived violation of public policy will continue to be the most common ground for refusal of the recognition and enforcement of arbitral awards, especially in the energy sector. Moreover, according to the established test, the courts do not need to establish a direct infringement of state security, but even the mere possibility of such breach would suffice to dismiss an application for the recognition and enforcement of an arbitral award on the territory of the Russian Federation. Thus, a situation may occur when Russian courts would refuse in the recognition and enforcement of a perfectly compliant arbitral award for non-legal reasons since local judiciary has an active duty to participate in ensuring national security of the country.

6. Mehdi Lahouazi

Mehdi Lahouazi

International Commercial Arbitration in The Energy Sector for French Public Bodies

INTRODUCTION

In France, arbitration and public law have a complex relationship, tinged on both sides with misunderstanding, rejection or fear. Sometimes rightly, sometimes wrongly. So much so that it has been said that "*arbitration in administrative law may appear at first to the traveller as a land of despair*" . Despair of a part of the public law specialists which, 1 very often, fears that disputes involving public bodies will escape from State justice to the benefit of a lucrative and secret justice that is more favorable to private interests. Despair of a part of the private law specialists which, too often, fears that the intervention of the administrative judge in arbitration removes its particular conventional and autonomous nature and, in the case of the international arbitration, harms the so singular reputation of the place of Paris in this field. For two hundred years, French public bodies have not been able to resort to arbitration. As a rule, disputes concerning public bodies cannot be submitted to 2arbitrationeven when they conclude contracts with private operators. Thus, the scope of 3 this rule is wide. First of all, it concerns all public bodies : State, local authoritiesor 45 public establishments (national or local). Second of all, it concerns all public disputes related to unilateral administrative act , domestic and international administrative contracts or even shareholder agreements concluded by a French public body . Nevertheless, as we will see, many exceptions has been introduced into French public law. But although there are exceptions, the legislator has not provided for an arbitration regime and more specifically for the rules applicable to awards made in public law matters. In the absence of legislative intervention, this task inevitably falls to the administrative judge. Thus, as the number of cases has increased over the last decade, the administrative judge has succeeded, with difficulty, in building up the system of arbitration in public law that is so necessary for its acceptance and development. The purpose of the paper is not to describe all the issues arising from arbitration in public law. The focus of this paper is to explain on one hand, the possibilities for a public body to resort to arbitration (**I.**), then, on the other hand, the control of arbitral awards by the French administrative judge (**II.**). All of this into the energy field.

I. Recourse to arbitration by public bodies in the energy sector

A. History

Historically, the energy sector has always been a good place for commercial arbitration. Indeed, two arbitration procedures had been imposed by law in 1946 for the nationalisation of the energy sector and the creation of two national public establishments Electricité de France (EDF) and Gaz de France (GDF)or the nationalisation of the 10 mineral fuels sector and the creation of the national public establishment Charbonnages de France (CDF) and many public coal mines. The purpose of these procedures was to settle disputes arising from the compensation by the French State of private owners following these nationalisations. Then, since 1975 , the French Civil code Provides, at article 2060, that «*categories of public establishments of an industrial or commercial character may be authorized by decree to enter into arbitration agreements ».* The purpose of this provision is to take into account the economic dimension of these public entities and to enable them to be on an equal footing with State companies under private law regime which could use arbitration. These provision was used only once, by the decree of January 8 January 2002 authorizing a category of public establishments in the energy sector to recourse to arbitration. These were the following establishments: Charbonnages de

France, les Houillères de Bassinsand, finally, EDFand GDF. However, this decree has become obsolete due to the transformation of EDF and GDFinto private companies and the dissolution of Charbonnages de France and the Houillères de Bassins .

B. Nowadays

Arbitration in the energy sector can be used in many situations by public bodies especially for international matters. First, domestic law provides exceptions to the general principle of prohibition of arbitration agreements in domestic administrative contracts conclude by public bodies. All these exceptions can be transposed to international administrative contracts. The French Public Procurement Code allows arbitration in two cases. The article L. 2197-6 provides that financial difficulties relating to the performance of a public works or supply contract may be the subject of an arbitration agreement. This provision concerns public contracts conclude by State, local authorities and local public establishments (not national establishments) and can be related to supply of electricity and gas, the construction of heating networks or the construction of wind turbines or photovoltaic power stations. The article L. 2236-1 provides that all the difficulties (not only financial this time) resulting from the execution of a public private partnership conclude by any public bodies can be submit to arbitration. It confirms a former exception created by the Government Act which introduced, more generally, public private partnership in French law in 2004 . This kind of contracts allows the conclusion of public works contracts 20 providing for the financing, design, construction, operation and maintenance of public infrastructure like LNG terminal or for energy performance. The Conseil d'Etat (French Supreme Administrative Court) stated that recourse of arbitration for partnership contracts is justified by the complexity of these contracts (duration, global nature of the tasks, different financing mechanisms, etc.) 21 An other exception has been created in 1986for contracts whose purpose is to 22 carry out an operation of national interest. But in reality, the scope is very limited. Indeed, the contract must be concluded jointly by several public persons (State, local authorities and local public establishments) with a foreign company. Moreover, the notion of "operation of national interest" has not been defined by the law. But, for us, the construction of an energy power plant or an energy infrastructure could be easily qualified of national interest. Furthermore, domestic law provides exceptions for some international administrative contracts. For instance, arbitration is admitted for research contracts concluded with foreign organisations by public scientific and technological establishments such as the French Alternative Energies and Atomic Energy Commission (CEA) . To finish with domestic French law, since a law of 1919, the French State can 25recourse to arbitration for all disputes that may arise on hydroelectric power concessions. Allowing arbitration in such a technical and economic field will also have the consequence of reassuring economic operators in their investments in a market whose opening up to competition is planned under European Union Law. Second, it appears that sometimes, under international law, French public bodies can recourse to arbitration for their international contract (we set aside investment arbitration) . Indeed, the Geneva Convention on International Commercial Arbitration of April 21 1961 expressly provides that "*legal persons governed by public law may conclude arbitration agreements*". This derogation is, however, limited to "*transactions in international trade between legal persons having, at the time of the conclusion of the agreement, their habitual residence or their seat in different Contracting States* ». A Cour Administrative d'Appel (French Administrative Court of Appeal) ruled that a public procurement contract could be a transaction in international trade within the scope of the Geneva Convention. Thus, that Convention could be easily used by French public bodies for contracts concluded in the energy sector. 5 Then, beyond contract disputes, a national public establishment of an industrial or commercial character has been authorized to recours arbitration for all its disputes : the French Institute of oil and new energies (IFPEN). This presentation therefore demonstrates the complexity for French public operators to resort to arbitration in the energy sector. There is a general principle of prohibition and a lot and disparate exemptions. This complexity becomes stronger by the position of the judicial courts (such as Cour de Cassation) and arbitration tribunals, 27 28which consider that the principle of prohibition of recourse to arbitration by public entities does not apply in the international sphere. But even if a public entity can recourse to arbitration, there are no specific

provisions for arbitration in public law, unlike the French Code of Civil Procedure. However, there is nothing to prevent reference to them. Indeed, most of the principles of the arbitration process, with a few exceptions (like confidentiality), are compatible with the principles of the administrative process.

II. Control of arbitral awards by the French administrative judge into energy sector

A. General overview

Since 2010, the application for annulment of an award related to an international public contract conclude by a French public body and a foreign private entity has to be heard by the French administrative supreme court. And since 2017, the same is true for 29the application for enforcement (wether the award has been made in France or abroad). The international public contracts covered by this rule are public procurement contracts (public works, concessions, public private partnerships) or public real estate contracts. It is up to the Conseil d'Etat to rule on applications for annulment of awards made in France and to the Tribunal Administratif (first instance court) on applications for 31 enforcement awards made in France and abroad. It as to be noticed that the control of 32the administrative courts is the same for annulment or enforcementand it is a limited 33 control. Indeed, its purpose is to set aside an award or to refuse enforcement of an award only because of a serious irregularity . 34 Firstly, the review of the French administrative courts related to the following elements : - the possibility to bring the dispute before an arbitration tribunal (here, the award can be set aside because the French public body could not recourse to arbitration) ; - some elements relating to the regularity of the procedure, such as the compliance of the tribunal with its jurisdiction and mission, the correct composition of the tribunal, the compliance with the principles of independence and impartiality of judges, or the principle of adversarial proceeding and the obligation to mention explicitly the reasons of the award. Secondly, the review has to ensure that the award is not contrary to a mandatory rule of French public law such as : - the lawfulness of the subject matter of the contract ; - defects in consent ; - the prohibition on granting public donations, alienating public property, waiving certains prerogatives as public authorities (unilateral changes or termination of the public contract, the power of the public body to carry out itself the public work or entrust it to a third party at the contracting party's expense). Thirdly, the award has to respect mandatory rules of European Union law (especially competition law and in particular state aid or prohibition of the cartels) . 35 It is thus a very remote control because only a few irregularities can lead to the annulment of the award. But this review by the administrative judge is not minimalist (as the judicial judge has been accused of doing) . In concrete terms, the judge virtually re-36 examines the case on the basis of all the factual and legal elements, and then compares his solution with the award in terms of public policy .

B. A specific case in the public energy sector : the Fosmax case

In that case, a public contract for the construction of an LNG terminal at Fos-sur Mer was concluded in may 2004 by the national public establishment Gaz de France (GDF) with the STS consortium (including an Italian company). GDF then transferred the contract, with retroactive effect, to one of its private law subsidiaries, the Fos-Cavaou LNG terminal company, which became Fosmax LNG. In 2011, the parties decided to insert an arbitration clause in the contract under the rules of the International Chamber of Commerce. Following the emergence of a dispute relating to delays, defects and additional costs, an arbitration award was made on February 2015. The STS consortium was ordered to compensate Fosmax for 68 million euros and Fosmax LNG had to compensate the consortium for 128 million euros. But Fosmax LNG requested the Conseil d'Etat to set aside that arbitration award. Foremost, even if the contract bound two private parties (Fosmax LNG and STS consortium), it was ruled by public law because it was firstly concluded by the French public establishment GDF (that is the rule for the transfer of a public contract in French law even after the transfer to a private entity). So the question arose as to whether fosmax LNG could resort to arbitration. Indeed, when a public contract is transferred, the beneficiary of the transfer has the same rights and duties than the public entity.

However as we saw, there is a general principle of prohibition of arbitration for French public bodies. But, since 2002, GDF had benefited from a derogation to resort to arbitration. 39As a consequence, Fosmax LNG could resort to arbitration. Nevertheless, the award was annulled. The arbitral tribunal had ruled that Fosmax LNG could not decide to carry out the work itself or to entrust it to a third party, at the contractor's expense, on the grounds that the contractor had not fulfilled its obligations under the contract. For the arbitral tribunal, the contract only required the prior termination of the contract before Fosmax LNG could decide to carry out the work itself or to entrust it to a third party. However, a public works contract always includes such a capacity; it is a mandatory rule that applies even if no provision is made in the contract (which was the case here). On this point, the Conseil d'Etat annulled the award. It should also be mentioned that in 2021 the Conseil d'Etat had to review another award in this case and stated that it did not have to control whether the conditions for carrying out the works by the public authority or entrusting them to a third party were fulfilled . To sum up, the Council of State only has to verify that the public authority 40 does not give up its right to manage the works. It does not check whether the conditions for putting the work under public control have been applied by the court. In conclusion, we can see that although arbitration of public disputes in the energy sector is not very common in France and its regime is not well defined by the legislator, it does exist and is even set to develop thanks to the the Conseil d'Etat. This one is truly committed to constructing a real system for arbitration in public law matters.

7. Serhat Eskiyörük

Serhat Eskiyörük

State's Perspective on Settlement of Foreign Investment Disputes by Mediation

Abstract

The paper reviews the Investor State Dispute Settlement mechanisms. Then it highlights the pre-arbitral settlement mechanisms to avoid a dispute maturing into arbitration, and whether the "cooling off" period may be utilized to lead a settlement. The paper examines the impacts on the relationship with the sovereign and the foreign investor, when a dispute resolution mechanism initiated. The article analyzes the potential of amicable ways, in particular mediation and the current developments in ISDS, including the introduction of ICSID mediation rules. The article also discusses the soft laws for mediation of investment disputes, potential obstacles and makes prediction for its usage.

Introduction: ISDS mechanisms

Investor-State Dispute Settlement (ISDS) is a process for resolution disputes arising out of investment between foreign investors and the Host States. Dispute resolution mechanism are held in most of the bilateral investment treaties (BITs)[121], international agreements and multilateral treaties such as the Energy Charter Treaty (ECT)[122]. Such dispute resolution provisions generally allow three arbitration options for the claimant, namely ICSID, an international institution such as ICC or SCC, and ad hoc arbitration.[123] The involved parties have been discussing the improvement of current mechanism in the recent years.[124] Since the average period for resolution of investor state disputes is more than four years and almost cost just four million dollars for the parties.[125] When the paper refers to investment disputes, it may involve a State, State entity or Regional Economic Integration Organization.

Alternative Dispute Resolution in Investment Agreements

The alternative dispute resolution mechanisms have become globally popular, due to their advantages of cost, time and flexibility. More than 70% of the investment treaties held cooling-off periods, thereby provide amicable settlement process before initiation of arbitration.[126] These periods are grounds for parties for negotiation, mediation or conciliation. In addition, UNCTAD Report states that 23% of the investment dispute cases have been settled and 10% have been discontinued.[127] Thus, the statistics shows the good potential of amicable dispute settlement in investor state disputes.

Mediation and Investor State Disputes

121. Turkey is signatory to 108 BIT's, https://www.sanayi.gov.tr/anlasmalar/yktk

122. The Energy Charter Treaty, https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/

123. For instance; Turkey- Mogolistan BIT Articel 7, dated 16.03.1998

124. United Nations Commission on International Trade Law (UNCITRAL) Working Group III https://uncitral.un.org/en/working_groups/3/investor-state, UNCTAD https://investmentpolicy.unctad.org/publications/132/latest-developments-in-investor-state-dispute-settlement

125. Damaged & Costs in Investment Treaty Arbitration Revisited, GLOBAL Arbitration Review (Dec. 14, 2017), https://globalarbitrationreview.com/article/1151755/damages- and-costs-in-investment-treaty-arbitration-revisited

126. https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping.

127. UNCTAD 2019 Report; statistics reflect the period from 1987 to 2018.

Mediation is an alternative dispute resolution way, where an independent and impartial third party, namely the mediator assists the parties to negotiate and reach an agreement in order to resolve their dispute.[128] Mediation is a voluntary process and the success of process depends on the co-operation of the parties. Mediation offers investors and states the opportunity to resolve their disputes themselves. The mediator does not have an authority to impose a binding decision on the parties.[129] Mediation agreement can be a separate agreement or it can be held as a clause in an investment contract or treaty.

Mediation has become more popular due to its advantages. Mediation are argued to provide a flexible and confidential procedure, speedier and less costly, avoids the escalation of disputes and allows the investment relationship to continue and may provide creative outcome for dispute resolution. Queen Mary University of London survey held in December 2019 states that 64% participants favors mediation as a helpful mechanism to resolve, mitigate or prevent disputes. The settlement of the case during the pendency of ISDS proceedings is important for not to harm the investment relationship for future operations in the host state. In addition, a court or arbitration proceeding may negatively jeopardy the attitude of the defendant and even cause hostility.

Mediation are included in an increasing number of international investment treaties ("IIAs"), Model Bilateral Investment Treaties ("BITs") and multilateral investment treaties. Statistics show that 24% of all BITs provide for mediation or conciliation for settlement of investor state disputes.[130] For instance; Comprehensive and Progressive Agreement for Trans–Pacific Partnership ("CPTPP")[131], Canada–European Union Comprehensive Economic and Trade Agreement ("CETA")[132], European Union – Singapore Investment Protection Agreement of 2018 refers to mediation.

Soft Law: Mediation Rules and Guidelines

Due to popularity and growing number of reference to mediation, there has been guidance and protocols in terms of assistance on mediation process and proceeding, drafted by international organizations. IBA adopted Rules for Investor–State Mediation on 4th of October 2012. The Energy Charter Conference adopted the Guide on Investment Mediation on 19th July 2016. Energy Charter Treaty Art 26 (1) encourages amicable settlement of the parties where possible. In case the dispute is not settled amicably within the three months cooling-off period, there will be conciliation according to Article 26 (3). ECT Council also recommended Model Instrument on Management of Investment Disputes on December 2018. There have been developments in ICSID since 2018. ICSID proposed ICSID Mediation Rules and Additional Facility Rules of Procedure for Mediation Proceedings.

Most noteworthy international developments about mediation is the Convention on International Settlement Agreements Resulting from Mediation, known as Singapore Convention.[133] The Convention provides the recognition and enforcement of mediation settlement agreements.[134] Turkey has become party to the Convention on 11 October 2021, with the Presidential Decree no. 5235.[135]

Impediments to Mediation in Investor State Disputes

Although there has been rising interest on commercial disputes, States may still be reluctant to use in investor state disputes due to the nature of the disputes, involvement of multi parties and national political reasons. There was a survey on settlement of investor state disputes, which held that the 70% participants believe the states are reluctant for settlement.[136] The survey listed legislative and policy impediments for

128. Tanrıver, Süha, Hukuk Uyuşmazlıkları Bağlamında Arabuluculuk, Yetkin 2020

129. Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Art 2

130. https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping

131. Comprehensive and Progressive Agreement for Trans–Pacific Partnership art. 9.18, Dec. 30, 2018

132. Article 8.20 of the CETA

133. United Nations Convention on International Settlement Agreements Resulting from Mediation, https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf

134. United Nations Convention on International Settlement Agreements Resulting from Mediation, 7 August 2019, G.A. Res. A/73/198

135. Presidential Decree no. 5235, published in the Official Gazette no. 31761, dated 25 February 2022.

136. Seraphina Chew, Lucy Reed, & J. Christopher Thomas, Report: Survey on Obstacles to Settlement of Investor–State Disputes, SSRN 1 (Sept. 11, 2018), https://

settlement in investor state conflicts. For instance; The government officials may prefer to defer the decision responsibility to a third party. The barriers may also include public criticism, fear of corruption allegations, short of time for bureaucratic process, political and legal encouragement and legal authority.

Conclusion

Mediation has significant potential for effective resolution of international investment disputes. The parties, including the national systems increasing recognize the use of mediation, particularly due to advantages on the cost, time and providing positive environment for foreign investment. The Singapore Convention on enforcement of mediation settlement agreement will likely have further impact

ssrn.com/abstract=3247492 (NUS Centre for International Law Research Paper No. 18/01).

TURKEY ARBITRATION WEEK SCIENTIFIC PRESENTATION (TAW) 2021