

How Can Investment Treaty Arbitration Useful for Construction Project?



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Investment treaty protections for construction projects

International Construction Projects Committee
(Lead)



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- Japan Bar (passed NY bar but not registered)
- LLM (Tokyo & Stanford)
- Society of Construction Law (UK)
- International Academy of Construction Lawyers (IACL)
- Former Country Rep, Dispute Resolution Board Foundation (DRBF)
- Recent Practice Focus
 - 85% Oversea Projects/Disputes: Construction, Railroad, Power Plant
 - 15% Inbound Projects/Disputes: Construction, Commercial Disputes
- Now studying at Architect Course

Investment Arbitration: Statistics

- Any reliable database?
 - ICSID
 - Category classified - “construction”
 - UNCTAD: Investment Policy Hub
 - Comparatively detail description of cases
- Any reliable classification?
 - ICSID: 40 cases are classified as “construction”
 - UNCTAD: 62 cases are classified as “construction”
- “Construction” cases from construction lawyers
 - Any issues which relate to construction/design/consultant contracts and bond & guarantees



Investment Arbitration: Statistics:

ICSID Registration before 2013



- [1] Gabon v Société Serete(1976); [2] Société Ouest Africaine des Bétons Industriels v Senegal(1982); [3] Société d'Etudes de Travaux et de Gestion SETIMEG v Gabon(1987); [4] Gruslin v Malaysia(1994); [5] MEC v Egypt(); [6] Mondev v USA (1999); [7] GRAD Associates v Venezuela (2000); [8] Generation Ukraine v Ukraine (2000); [9] Impregilo v UAE(2001); [10] AIG v Kazakhstan(2001); [11] MTD v Chile(2001); [12] Impregilo v Pakistan(2002); [13] Lafarge v Cameroon(2002); [14] Züblin v Saudi Arabia(2003); [15] Cemex v Indonesia(2004); [16] African Hldg v Congo(2005); [17] Scancem International v Congo(2006); [18] ALAS v Bosnia and Herzegovina(2007); [19] Pantechniki v Albania(2007); [20] CEMEX v Venezuela(2008); [21] Holcim v Venezuela(2009); [22] Kılıç İnşaat İthalat İhracat Sanayi v. Turkmenistan(2010); [23] İçkale İnşaat Limited Şirketi v Turkmenistan(2010); [24] Renée Rose v Peru(2011); [25] Tulip Real Estate v Turkey(2011); [26] Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti v Turkmenistan(2012); [27] IGB v Spain(2012); [28] Société Civile Immobilière de Gaëta v Guinea(2012); [29] Francisco Hernando Contreras v Guinea(2012)

Investment Arbitration: Statistics:

ICSID Registration in and after 2013



- 2013: 3 cases: [30] Vladislav Kim v Uzbekistan(2013); [31] Cementos La Union v Egypt(2013); [32] Cemusa v Mexico(2013);
- 2014: 4 cases: [33] Krederi v Ukraine(2014); [34] VICAT v Senegal(2014); [35] Ansung Housing v China(2014); [36] Beijing Urban Construction v Yemen(2014);
- 2015: 4 cases: [37] Samsung Engineering v Oman(2015); [38] Strabag v Libya(2015); [39] Lion Mexico v Mexico(2015); [40] Xenofon Karagiannis v Albania(2015)
- **Any reasons for the increase of newly registered cases?**



Investment Arbitration: Statistics:

Additional Search



- Other classifications may have more ‘construction-nature’ cases:
- Search by ‘Transportation’: **52** cases including:
 - Lanco v Argentina(97/6); Astaldi v Honduras(99/8); Salini v Morocco(00/4); Autopista v Venezuela(00/5); RFCC Morocco(00/6); ADF v USA(AF00/1); Fraport v Philippines(03/25); Inceysa v El Salvador(03/26); Bayindir v Pakistan(03/29); Jan de Nul v Egypt(04/13); Dessert Line v Yemen(05/17); Toto v Lebanon(07/12); ATA v Jordan (08/2); Inpregilo v Argentina(08/14); Malicorp v Egypt(08/18); Elsamex v Honduras(09/4); Corporación Quiport v Ecuador(9/23); Conviaal Callao v Peru(10/2); Fraport v Philippines(11/12); Garanti Koza v Turkmenistan(11/20); Getma v Guinea(11/29); Impresa Grassetto v Slovenia(13/10); Salini v Argentina(15/39); Abertis v Argentina(15/48); Iskandar Safa v Greece(15/20) etc

Investment Arbitration: Statistics:

Additional Search



- Other classifications may have more ‘construction-nature’ cases:
 - Search by ‘Water’: [28](#) cases including:
 - Salini v Jordan(02/13: dam construction);
 - LESI v Algeria(03/8: dam construction)
 - Majority of ‘Water’ related projects are projects of ‘concession’ framework
 - Most of concession projects may have ‘construction’ phase
 - However, it is not necessarily true that the concessionaire submit claims in connection with the ‘construction’ dispute



Investment Arbitration: Statistics:

UNCTAD Database



- Search by “Construction”: [62](#) cases including:
- [1] Gruslin v Malaysia(94/1); [2] Lanco v Argentina(97/6); [3] Salini v Morocco(00/4); [4] RFCC v Morocco(00/6); [5] Generation Ukraine(00/9); [6] ADF v USA(AF00/1); [7] Impregilo v UAE(01/1); [8] Hussein Nauman Sourfraki v UAE(02/7); [9] Salini v Jordan (02/13); JacobsGibb v Jordan(02/12); [10] LESI v Argentina(03/8); [11] Züblin v Saudi Arabia(03/1); [12] Bayindir v Pakistan(03/29); [13] Berschader v Russia(SCC); [14] Walter Bau v Thailand(UNCITRAL); [15] Saipem Bangladesh(05/7); [16] Parkerings v Lithuania(05/8); [17] Dessert Line v Yemen(05/17); [18] African Hldg v Congo(05/21); [19] Técnicas Reunidas v Ecuador(06/17); [20] Sistem Mühendislik v Kyrgyz(AF06/1); [21] Rail Wrold v Estonia(06/6); [22] Toto v Lebanon(07/12); [23] Railroad Development v Guatemala(07/23); [24] Pantechniki v Albania(07/21); [25] Hochtiff v Argentina(07/31)

Investment Arbitration: Statistics:

UNCTAD Database



- Search by “Construction”: [62](#) cases including:
- [26] Alpha v Ukraine(07/16); [27] Malicorp v Egypt(08/18); [28]Karmer v Georgia(08/19); [29]Bosh Intl v Ukraine(08/11); [30] ATA v Jordan(08/2); [31] Railway System v Jordan(09/13); [32] Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan(10/1); [33] İçkale İnşaat Limited Şirketi v. Turkmenistan(10/24); [34] Convia Callo v Peru(10/2); [35] DP World v Peru(11/21);[36]Koza v Turkmenistan(11/20); [37] Detroit v Canada(PCA12/25); [38] Muhammet Çap & Sehil İnşaat Endustri ve Ticaret v Turkmenistan(12/6); **[39]LSF-KEB v Korea(12/37)**; [40]IGB v Spain(12/17); [41]Contreras v Equatorial Guinea(AF12/2); [42]OKKV v Kyrgyz(MCCI); [43]KBR v Mexico(UNCITRAL); [44]Grassetto v Slovenia(13/10); [45] Exeteco v Peru(UNCITRAL); [46] Erhas v Turkmenistan(UNCITRAL); [47] Ossama Al Sharif v Egypt(13/3); [48] Krederi v Ukraine(13/17)...

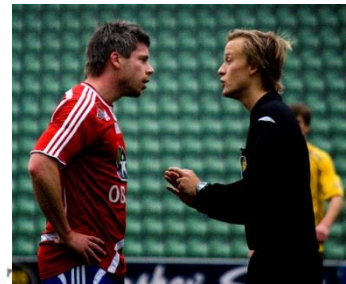
Investment Arbitration: Statistics: Analysis



- UNCTAD Database is the most comprehensive
- However, even UNCTAD Database include many non-construction context disputes
 - Concession, or Operation & Maintenance Phase
 - Exeteco v Peru, Detroit Intl v Canada, Convial Callao v Peru, İçkale İnşaat Limited Şirket v Turkmenistan, Railway Systems v Jordan, Impregilo v Argentina, Malicorp v Egypt, Parkerings v Lithuania, Walter Bau v Thailand, ADC v Hungary, Hussein Nauman Soufraki v UAE, Lanco v Argentina
 - Property Taking, Shareholder's Control
 - Ansung Housing v China, Krederi v Ukraine, OKKV v Kyrgyz, IGB v Spain, Alpha v Ukraine, Rail World v Estonia, Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz, African Hldg v Congo

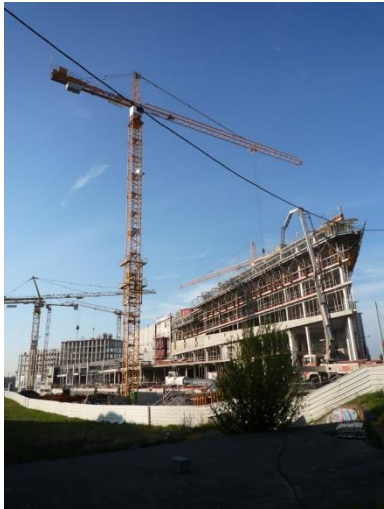
Is Investment Treaty Arbitration Useful for “Construction” Projects?

- Typical scene where the Contractor is frustrated by the Government/Government Affiliate
 - In a project where the Government/Government Affiliate is an Owner
 - Delay in approving the design/drawings
 - Delay in giving access/possession of the site - typically, by the delay of site acquisition
 - Delay in giving legal approval of the operation/material preparation/import/transportation
 - Unreasonable/Untimely variation to the design/employer's requirement and rejection of additional payment
 - Delay in giving taking-over/completion/final certificate
 - Delay of payment due to inter-government frictions
 - Change in legislation/tax
 - Disruption/acceleration claims



Is Investment Treaty Arbitration Useful for “Construction” Projects?

- Typical scene where the Contractor is frustrated by the Government/Government Affiliate
 - Whomever the Owner is, the Government/National Court intervene enforcement/arbitration procedures based on the construction contract
 - Denial of arbitral tribunal’s/court’s jurisdiction
 - “Sabotage” of the courts
 - Denial of the application of specific provision of the contract based on “unreasonable” interpretation of national mandatory laws and regulations
 - Discharge of foreign/national arbitrator
 - Ordering suspension of arbitration procedure
 - Setting aside the arbitral award
 - Declining enforcement of the arbitral award



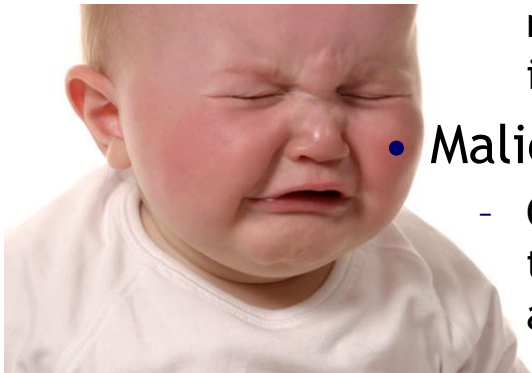
Is Investment Treaty Arbitration Useful for “Construction” Projects?

- Can Contractors win in investment treaty arbitration?
 - “Successful” cases in “Concession” “O&M” “Property Taking” etc
 - OKKV v Kyrgyz (USD2.3m)
 - Alpha v Ukraine (USD2.9m)
 - Railroad Development v Guatemala (USD11.3m)
 - Rail Workd v Estonia (Settled, USD200m)
 - Sistem Mühendislik İnşaat Sanayi ve Ticaret A.Ş. v. Kyrgyz (USD8.5m)
 - Walter Bau v Thailand (USD29.2m)



Is Investment Treaty Arbitration Useful for “Construction” Projects?

- Can Contractors win in investment treaty arbitration?
 - Lost cases in “Concession” “O&M” “Property Taking” etc
 - Hussein Nauman Soufraki v. UAE (USD580m claim denied)
 - Claims arising out of the cancellation by the respondent of a concession agreement between the Dubai Department of Ports and Customs and the investor for the purpose of developing, managing and operating the Port of Al Hamriya and its surrounding area.
 - Parkerings v Lithuania (USD25.9m claim denied)
 - Claims arising out of the alleged repudiation by the Lithuanian municipality of Vilnius of an agreement entered into with the investor concerning a public parking system.
 - Malicorp v Egypt (denied)
 - Claims arising out of the Government's rescission of a contract for the construction and operation of the Ras Sudr international airport in Sinai.



Is Investment Treaty Arbitration Useful for “Construction” Projects?

- Successful cases *in construction context*
 - Against all expectations, “very limited”
 - Dessert Line v Yemen(USD7.2m)
 - Claims arising out of disagreements over amounts owed for executed works under several road construction contracts concluded between the claimant and the Government of Yemen, which led to the suspension of works, arbitration proceedings before the Yemeni Commercial Court, the arrest of personnel and the subsequent signature of a settlement agreement under alleged duress.

Is Investment Treaty Arbitration Useful for “Construction” Projects?

- Successful cases *in construction context*
 - Against all expectations, “very limited”
 - Saipem v Bangladesh(USD6.3m)
 - Claims arising out of the actions of the State-owned entity Petrobangla and of the courts of Bangladesh allegedly aimed at sabotaging an ICC commercial arbitration proceeding and the subsequent non-enforcement of the award concerning the breach of a contract concluded between the claimant and said State-owned entity for the construction of a long-distance gas pipeline.
- Successful cases are mostly “post-arbitration” investment treaty arbitration - *is it too late for the relief of the contractors?*

Is Investment Treaty Arbitration Useful for “Construction” Projects?

- Non-successful cases:
 - Contreras v Equatorial Guinea
 - Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan
 - Bosh International v. Ukraine
 - Pantechniki v Albania
 - Berschader v Russia
 - LESI v Egypt
 - Salini v Jordan
 - ADF v USA
 - RFCC v Morocco



Thresholds for Construction Cases

- Arbitration agreement and Investment treaty arbitration
- SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6
- Decision of the Tribunal on Objections to Jurisdiction (29 Jan 2004)
 - <http://www.italaw.com/cases/documents/1019#sthash.XpCLJz4E.dpuf>
 - Case Summary: Claims arising out of alleged breaches of an agreement concluded between the investor, a corporation which provided verification, testing, monitoring and certification services, and the Philippines.
 - The Agreement had the following provision:
 - “All actions concerning disputes in connection with the obligations of either party to this Agreement shall be filed at the Regional Trial Courts of Makati or Manila.”

Thresholds for Construction Cases

- “155. To summarise, in the Tribunal’s view its jurisdiction is defined by reference to the BIT and the ICSID Convention. But the Tribunal should not exercise its jurisdiction over a contractual claim when the parties have already agreed on how such a claim is to be resolved, and have done so exclusively. SGS should not be able to approbate and reprobate in respect of the same contract: if it claims under the contract, it should comply with the contract in respect of the very matter which is the foundation of its claim. The Philippine courts are available to hear SGS’s contract claim. Until the question of the scope or extent of the Respondent’s obligation to pay is clarified—whether by agreement between the parties or by proceedings in the Philippine courts as provided for in Article 12 of the CISS Agreement—a decision by this Tribunal on SGS’s claim to payment would be premature. “

Thank you for your attention
