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International Commercial Arbitration
Autumn 2011 – Lecture I

International Commercial Arbitration and Investment Arbitration
– Common Ground and Key Differences
Investment Arbitration: Main Characteristics

• Not (necessarily) a clearly defined topic, i.e. no clear distinction towards ordinary commercial arbitration

• Still, certain unique characteristics
  – Involvement of a state or state entity as party
  – Disputes relating to “investments”

• Distinction between two different kinds of investment arbitration
  – Arbitration based on an investment contract (“contract arbitration”)
  – Arbitration based on an investment treaty (“investment treaty arbitration”)
Investment Arbitration and International Commercial Arbitration: Comparison

- Different jurisdictional basis (sometimes, but not necessarily)
- Common procedural model and framework
- Main difference: function and concerns
Differing Function and Concerns (Cont.)

• Remedy against state power – “political risk”

• Pervasive importance of public interests and concerns

• Joint application of (public) international law and the host state’s municipal law
History and Development: Key Points

• Merger of two traditions
  – International law tradition of home state protection of nationals
  – International commercial arbitration

• Adoption of the ICSID Convention in 1965

• The development and practice of bilateral investment treaties (BITs) from the 1960s
The International Law Tradition (cont.)

• The law of state responsibility for injuries to aliens and diplomatic protection
  – Home state right – cf the Mavromattis Palestine Concessions case (PCIJ, 1924):

  "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a state is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law"

• The practice of international claims commissions
  – The Iran – US Claims Tribunal as the most famous example
The Transformation of International Commercial Arbitration

• Early arbitral cases involving states as parties
  – The *Lena Goldfields, Sapphire* and *Aramco* cases

• The theory of ’internationalization’
  – The mechanism – detachment of the contract from the host state law
  – The Libyan oil arbitration cases (*Texaco v Libya, BP v Libya, Liamco v Libya*)

• Reference to arbitration as the key factor of internationalization
The Current Arbitral Framework: two parallel regimes

• The 1958 New York Convention – i.e. the ordinary framework of international commercial arbitration
  – Arbitral proceedings governed at the outset by municipal law

• The 1965 ICSID Convention – separate procedure and enforcement regime applicable to “investment disputes”
The Arbitral Framework (Cont.): the ICSID Convention

- ICSID – permanent secretariat and agency of the World Bank
- Arbitral procedure based on the modality of international commercial arbitration, but:
  - Self-contained procedural system
  - Unconditional requirement of enforceability under municipal legal systems
Jurisdictional Requirements under the ICSID Convention

• ICSID article 25 (1)

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

• Four basic requirements
  – Consent to the Convention – i.e. both the host state and the home state must be parties to the convention
  – “Consent in writing” in respect of the individual dispute
  – ”Legal dispute”
  – ”Arising directly out of an investment”
Arbitral Powers and the Applicable Law: ICSID Art 42

• General concepts of ICA apply – e.g. competence competence, severability etc
  – But consent is binding directly on the level of int law – ICSID art 25 (1) i.f.

• The applicable law – art 42

  “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.”

  – Main rule is party autonomy
  – In the absence of a choice of law – the host state law and international law

• Is the power to apply international law always implied or can it be excluded?
Enforcement under the ICSID Convention – Articles 53-55

• Obligation upon the parties to recognise and comply with the award – Art 53
  – Also applies to the investor’s home state – cf Art 27

• Obligation upon each member state to recognise and enforce the award under its own legal system – Art 54

• Subject to principles of state immunity against execution – Art 55

• Implemented in Norwegian law through the Investment Disputes Act (Investeringstvistloven) 8 June 1967 no 3
The Annulment Procedure – ICSID art 52

• Replaces power of national courts to rely on exceptions under the NY Convention art V

• Grounds of annulment – art 52 (1)
  a) Tribunal not properly constituted
  b) Manifest excess of powers
  c) Corruption of a member of the tribunal
  d) Departure from a fundamental rule of procedure
  e) Failure to state reasons

• Constitution and powers of the Annulment Committee – art 52 (3)
The annulment procedure (cont.) – practical importance

• The “manifest excess of powers” and “failure to state reasons” grounds of annulment:

• In practice basis for appeal on substantial points in some cases
  – Failure to apply the applicable law (Klöckner v Cameroon
  – Failure to assume jurisdiction (CAA (Vivendi) v. Argentina, Malaysian Historical Salvators v Malaysia)
Using international commercial arbitration for investment protection: State Contract Arbitration under the NY Convention

- Ordinary framework of ICA – i.e. based at the outset on a municipal law

- Application of international law by commercial arbitral tribunals
  - Implied competence?

- State contract awards are in principle enforceable under the NY Convention
  - But subject to municipal arbitrability and ordre public in the lex fori
  - . . . as well as state immunity against execution
Arbitration under the NY Convention (Cont.): Applicable Law

• Party autonomy as the general principle
• Generally recognised that an international commercial arbitral tribunal is not strictly bound to apply a specific municipal law
• Can an ordinary commercial arbitral tribunal apply international law?
  – Assumes that international law does apply, abundant practice
  – Depends on state consent – but may be implied?
  – Relation to the NY Convention – art V (1) c)?