

Introducing Litigating International Investment Disputes - A Practitioner's Guide

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Chiara Giorgetti (Richmond School of Law)

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I am grateful for the opportunity to introduce to the readers of this blog my new edited book: Litigating International Investment Disputes - A Practitioner's Guide.

International investment arbitration is increasingly complex and specialized, and this book seeks to guide new and experienced practitioners through the workings and details of international investment arbitration proceedings - from whether and how to initiate arbitral proceedings to the unique features of selecting arbitrators, how to draft written submissions and conduct oral proceedings, and issues related to the enforcement of an award and available post-award remedies.

Indeed, recent decisions have underscored the importance international investment arbitration can play in providing redress to investors (see i.e. Yukos), and highlight the importance of understanding the unique characteristics of international investment arbitration. In this vein, understanding the role of legal and technical experts, the unique elements of attribution and mastering enforcement and set aside proceedings is central for any practitioner.

This book seeks to provide guidance and advice to practitioners in all these issues.

I had the privilege to work with an extraordinary group of people for this book. Indeed, contributors are all highly experienced experts and practitioners, who have acted as counsel, arbitrators, and served in institutions which routinely administer international investment arbitration proceedings, many of whom are familiar names to the readers of this blog.

Essentially, the book follows the structure of an arbitration and this makes it quite unique and easy to consult. It begins with a brief outline of the essential arbitral procedure in international investment cases, by Bart Legum and Anna Crevon.

The following several chapters consider different kinds of preliminary issues. First, Tom Johnson and David Pinsky analyze the specific pre-arbitral considerations for claimants, including bases of jurisdiction, possible substantive claims and the overall important question of whether claimant can prove damages. The unique issues of representing a respondent State are considered by Jeremy Sharpe. Some essential questions arise from how to get organized and select counsel, the arbitrator and ensuring a lead agency, to what are the unique challenges faced by states in arbitral proceedings. Eloise Obadia and Frauke Nitscheke review in detail the central role played by the Secretariat in arbitral proceedings, including its role in the institution of proceedings, assistance with the constitution of the tribunal and assistance in the course of proceedings. Given the paucity of

publications that actually explain in detail the role of the secretariat, this is a very important contribution, especially for new practitioners. A chapter of the selection and replacement of arbitrators follow, which I authored. The selection of arbitrators is a fundamental decision made by each party, and this chapter discusses how the selection is made and what are the necessary and desirable qualities of an arbitrator. The chapter also explains the procedures related to challenges and replacement of arbitrators. Andrea Carlevaris then assesses preliminary matters which may arise at the outset of the arbitration, including the screening role of arbitral institutions, possible bifurcation of preliminary issues, summary judgments of unmeritorious claims, and requests for interim measures.

The next four chapters review and explain some of the core issues related to the conduct of the arbitration. Mark Clodfelter clarifies the importance of written proceedings within the overall structure of the investment arbitration and explains the types of written submissions relevant to jurisdiction and the merits, and provides useful explanations on common issues related to written submission, including sequencing, number of rounds, and time, lengths and content limits. Catherine Amirfar deals with oral proceedings, and gives important suggestions on how to organize and structure oral presentations, highlighting the unique flexibility of arbitral proceedings and how to best use them at the advocate's advantage. Andrea Kay Bjorklund addresses the overall central question of the applicable law in international investment disputes and analyses first the rules on applicable law in investment proceedings, and then the application of substantive law in practice. Key evidentiary issues that arise in the investment arbitration context are addressed and explained next by Rahim Mooloo, including general procedures relating to evidence discovery and presentation and unique issues related to investment disputes (such as obtaining evidence, evidentiary issues related to corruption and amicus curiae submissions). Brooks Daly and Fiona Poon address the fundamental issue of technical and legal experts, who play such an important role in international investment arbitration. Issues considered in this chapter include the types of experts, how to select and appoint them, and procedural issues related to controlling of expert evidence, including ethical standards, joint expert reports and experts conferencing.

On more general and overarching terms, transparency of the proceedings and third party participation are discussed with clarity by Neale Bergman. Michelle Bradfield and Guglielmo Verdirame clarify and explain essential issues related to costs, explaining first what are the costs involved in investment treaty arbitration, and, then, who will likely have to pay for those costs, based on through review of recent jurisprudence.

The final section of the book addresses issues related to the award and its enforceability. John Crook first examines the effect of the award and analyses in details the awards' formal elements and arbitrator's responsibility to produce an enforceable award. The issue of discontinuance and default are also addressed in this chapter. Carolyn Lamm and Eckhard Hellbeck then discuss and assess the basic question of the enforcement of awards under both ICSID and the New York Conventions, and possible state's defenses to recognition. The specific challenges of executing an award are also addresses, including sovereign immunity and separate legal personality. Last but not least, post-award remedies are reviewed in details by Veijo Heiskanen and Laura Halonen. They first introduce the avenues for challenging awards in both ICSID and non ICSID awards and evaluate the grounds for review; they then usefully compare ICSID annulment with setting aside of non-ICSID awards, before assessing other methods of review (correction, interpretation and revision).

I believe this is a unique and useful book, which provides a comprehensive analysis of the arbitral proceedings and examines in the details the unique characteristics of investment arbitration. I would very much welcome comments from readers!