Kluwer Arbitration Blog

Global Perspectives on Teaching International Investment Arbitration: Teaching the Financialization of International Investment Arbitration

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One could be forgiven for thinking that teaching international economic law in the United States ("U.S.") is challenging these days. The U.S. has disabled the World Trade Organization's ("WTO") Appellate Body. In the United States-Mexico-Canada Agreement ("USMCA"), the parties (following a transition period) eliminated Investor-State Dispute Settlement ("ISDS") between the U.S. and Canada and curtailed the types of claims that could be brought against Mexico and the U.S. by the investors of the other.

These developments, as significant as they are, can obscure for students the major role that U.S.-based lawyers and law firms continue to play in international dispute resolution. Moreover, practicing law is a business, one that can have complex financial underpinnings. This is especially true of international investment arbitration, whether based on international investment treaties or contracts between foreign investors and States. As in other areas of complex commercial litigation, the legal finance industry has come in to provide funding for cases in which the claimant may not have the capital to pursue a claim or may simply prefer to deploy their funds to other business endeavors and divest from affected operations without taking on the risks and costs associated with dispute resolution. The large awards in investment arbitration offer a potentially significant financial reward for investors willing to bear the risks associated with the outcome of an arbitration dispute and the potential uncertainties around enforcing an award. The financialization of international investment arbitration is also leading to the introduction of a range of new products designed to reallocate the risk associated with legal proceedings, ranging from different means of monetizing the value of a claim or award to insurance products that protect against specific legal risks, including the potential inability to enforce an award.

To give students a fresh look at international investment arbitration, we taught a class in Spring 2025 at Duke Law School organized around these issues, entitled "International Investment Law: The Protection and Financialization of Foreign Investments." This post first outlines our teaching goals and then discusses how such a course on the financialization of foreign investments can be organized and presented to achieve its objectives.

Why Study the Financialization of Investment Arbitration?

Our objectives were two-fold. First, as in a standard investment arbitration course, we sought to give students a grounding in the substantive protections for foreign investment, as well as the jurisdictional issues that can arise in arbitration. We thus spent most of the first four weeks of the course covering the basic disciplines, including rules on expropriation, fair and equitable treatment, as well as the jurisdictional requirements contained in both investment treaties and the ICSID Convention. In so doing, we focused on complex issues derived from disputes in the financial sector, including the protection of derivative products, project financing, and sovereign debt. We also discussed the jurisdictional implications (and potential advantages) of complex corporate structures.

Second, and even more innovatively, we sought to explore these substantive and jurisdictional issues through the lens of financial stakeholders in investment arbitration other than only the claimant and the State, as is more common. We focused in particular on how a third-party funder would evaluate jurisdictional and merits claims in deciding whether and how to fund a claim or allow its monetization pursuant to the terms of a funding agreement. Scholarly study of the role of the legal finance industry in investment arbitration is modest to date, with some notable exceptions (see here, here, and here). Discussion of these issues in awards is even rarer. Indeed, discussions of legal finance in this context have mostly come up in national court decisions regarding enforcement of awards. Nonetheless, recent changes in various international arbitration rules requiring disclosure of certain finance arrangements may change this.

Looking at Arbitration through the Eyes of a Funder

After the sessions on merits and jurisdictional issues, we brought in arbitration practitioners and experts on five topics to help students understand the funding process: fraud investigations, damages, third-party funding, litigation insurance, and asset tracing and enforcement. We organized the sessions to track the order in which financial stakeholders other than the claimant might approach with and engage an investment claim. Because evidence of corruption or other serious illegality can create a jurisdictional bar to hearing a dispute (e.g., by violating the "legality" requirement in many investment treaties or enabling contractual defenses under national laws), funders will typically want to be as sure as they can be that no basis for a credible jurisdictional challenge exists. Forensic accountants, for example, can offer funders some assurances that the claimant's books do not create cause for concern. Damages experts, of course, provide funders some sense of the likely value of an award. As teaching tools, these topics offered a range of issues for students to engage with. We found that economically-minded students wanted to explore issues like how to build a discounted cash flow model for businesses that had yet to begin operating, while other students asked about ethical standards aimed at ensuring the independence of experts, law firms, and funders. Discussing asset tracing and enforcement issues also allowed students the opportunity to see, in the context of ongoing litigation over the scope of sovereign immunity from the enforcement and execution of awards, how investment arbitration intersects with the appellate litigation issues that form the core of so much of U.S. legal education.

Teaching the funding process itself, as well as more innovative financial products such as litigation insurance, was the highlight of the course. Representatives from third-party funders—themselves former arbitration practitioners—gave us an inside look at how a funder might evaluate the jurisdictional, merits-based, and quantum aspects of a dispute. Part of this discussion involved explaining to students the range of financial products available to claimants. For example, funders may pay some or all of the upfront costs associated with the arbitration or enforcement proceedings in exchange for a percentage of any recovery, or they might advance a percentage of the potential recovery to the claimants, allowing such capital to be deployed for other business purposes. In some circumstances, claimants could sell the affected investment or a subsidiary corporation that holds the right to bring a claim, thus potentially transferring that right, to either a specialized funder or another business. Insurance products can also allow claimants and funders to hedge against certain legal issues, including those affecting recovery, which could lower the ultimate cost of funding arrangements. In lively question-and-answer sessions, the students pushed the funders in an effort to better understand the benefits of funding, the relationship between funders and claimants, and the relative merits of different funding models. Students were especially interested in the amount and means of control over arbitrations that funders exert.

Combining Arbitration and Finance

A long running joke is that students come to law school to escape math. Discussing the standard underwriting process for these products showed the students that they do not need to be afraid of math. Indeed, for many it was a revelation to see that the litigation finance business is staffed with lawyers, some of whom shared the attorney's paradigmatic aversion to math when they started law school. As students were able to appreciate, this process is—or should be—based on likelihood of recovery and the strength of a claim, for which detailed legal analysis is paramount. That legal analysis is then essentially an input into the underwriters' model, allowing funders to estimate the possible recovery, the uncertainty associated with that recovery during the arbitration process, and the risks and delays entailed in the enforcement process. To that end, students wrote final papers on any topic related to the course. Although some students wrote traditional research papers, we also gave students the option of writing a memo that an attorney might prepare as part of helping a client evaluate whether third-party funding could be a good option. Students enjoyed the practical aspects of that format, and it also gave them valuable experience doing the kind of writing that firms expect—an increasingly important skill as firms look for attorneys who are more practice-ready.

Conclusion

Ultimately, our goal was to teach a class that would appeal both to prospective international investment and arbitration lawyers, as well as to students interested in finance and its relationship to legal practice.

The opportunity to broaden how we teach investment arbitration, to draw in students with a range of backgrounds and interests, and to give students a sense of how the business of complex litigation works, was an incredibly rewarding experience.

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*To see our full series of posts on Teaching International Investment Arbitration, click **here**.*

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