Mustill & Boyd on Commercial and Investor State Arbitration (3rd)

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A Commercial Judge's Perspective on Court Challenges Arising From Investment Treaty Arbitration Awards

David Foxton

1. I should acknowledge at the outset of this short presentation that I am the least qualified member of the Mustill & Boyd editorial team to talk about investment treaty arbitration. I have never been involved in such an arbitration, and my only exposure to the phenomenon has been arguing court challenges at the end of my career at the bar, and now deciding them. I am also conscious that I have sent three investment treaty arbitration cases to the Court of Appeal, where they have yet to be determined, and that Males LJ who is a member of this panel has heard two of them.

2. Given that, I am going to avoid any specific controversies, but look rather more discursively at this interaction of international law and the supervisory or enforcement jurisdiction of the English court.

3. The reality is that those who have framed English arbitration law, and those of us who have contributed our input to those efforts, have paid insufficient attention to the unique challenges of investment treaty arbitration. The 1996 Act was silent on them. Their appearance in the 2024 Arbitration Bill came late, after two Law Commission Papers and two consultation processes,[1] when my co-author Peter Webster spotted the unintended consequences of the new s.6A of the 1996 Act on this particular field of arbitration, a penny which only dropped with me rather later. Now for ISCID arbitrations, that is not a problem because the Arbitration (Investment Disputes) Act 1966 presents an essentially closed system which leaves relatively little for the supervisory or enforcement court to do.

4. Not so, however, where the investment treaty arbitration takes place on UNCITRAL or similar rules outside the closed ICSID system. There, the English court has found itself being asked to re-hear and re-determine a range of issues under s.67 or 103 of the 1996 Act on the basis that they are jurisdictional for the purposes of s.30 of the Act: whether an investment was made;[2] who it was made by;[3] and where;[4] whether it

[1] Law Commission, *Review of the Arbitration Act 1996: A Consultation Paper* (LCCP 257, 2022); *Review of the Arbitration Act 1996: Second Consultation Paper* (LCCP 258, 2023); *Review of the Arbitration Act 1996: Final Report and Bill* (HC 1787, Law Com No 413, 223).
[2] See *Czech Republic v Diag Human SE* [2024] EWHC 2102 (Comm); *Korea v Dayyani* [2019] EWHC 3580 (Comm).
[3] *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm).
[4] *Gold Reserve Inc v Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm).

was made in the host state; whether it was made lawfully;[5] the nationality of the investor;[6] whether the host state had adopted a measure, and if so, whether the measure adopted related to the investor;[7] and whether the claim for breach of the investment treaty involved an abuse of right.[8] To the extent that any of these issues are jurisdictional, they will involve the supervisory court getting into the underlying facts of the dispute to an extent not generally encountered in international commercial arbitration, and they can involve a municipal court opining on the legality under international law of the sovereign acts of a foreign state. To date, jurisdictional challenges have largely been brought by states ordered to pay compensation by investment treaty arbitration tribunals. But of course, an unsuccessful claimant can re-open jurisdictional issues under s.67, with the result that it is not inconceivable that a state's liability for certain conduct emerges for the first time from a decision of a municipal court.

5. In determining whether those issues are jurisdictional, the court will generally have cited to it a range of investment treaty arbitration awards which use similar language, but where the consequences of determining whether an issue is "jurisdictional" or not is very different from such a determination by a court. The court will also be treated to extensive investment treaty award citations on what it is necessary to establish to show an investment – the so-called *Salini* test. Or what constitutes control for the purpose of nationality. Or the effect on the width of the agreement to arbitrate of a Most Favoured Nation clause. There are a vast number of investment treaty arbitration awards addressing these issues, and it seems to be a rare case in which each side is unable to point to a number of supportive decisions. The court is not assisted by a judicial hierarchy when deciding how to accord weight to those decisions. Merely weighing up the number cited by each side does not seem an appropriate response, and would merely exacerbate the existing problem of the courts being drowned in citations.

6. These difficulties arise because investment treaty arbitration awards exist as a non-systemised body of law, with no doctrine of precedent, and in which many arbitral tribunals do not refer to, and may not have been referred to, investment treaty awards later cited to the court. While the body of awards is sometimes said to share the characteristics of *jurisprudence* in a civil law system, with a sufficient and consistent number of awards to the same effect establishing a source of law as a *jurisprudence constante*,[9] my own impression is that the system is more fluid than this, not least because it lacks the hierarchy of civilian court systems of appeal and cassation courts, and because a longer term view seems to show particular views gaining and losing traction with new generations of investment treaty arbitration lawyers.

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[5] *Czech Republic v Diag Human SE* [2024] EWHC 503 (Comm).
[6] *Czech Republic v Diag Human SE* [2024] EWHC 2102 (Comm); *Ruby Rox Agricol LLP v Kazakhstan* [2017] EWHC 439 (Comm).
[7] *Korea v Elliott Associates LP* [2024] EWHC 2037 (Comm).
[8] *PAO Tatneft v Ukraine* [2018] EWHC 1979 (Comm).
[9] E.g. *BayWa re Renewable Energy GmbH et al. v. Kingdom of Spain* ICSID Case No. ARB/15/16. Decision on Jurisdiction, Liability and Directions as to Quantum 2 December 2019.

7. The problem is that when these issues reach the courts, they do enter a precedential and systematised legal system. Issues of international law are not determined by the courts as issues of fact, in the way issues of foreign domestic law are, but as part of the law of England and Wales in its wider sense. The issue of whether an investment treaty arbitration party could bring an appeal under s.69 of the 1996 Act on an issue of international law is canvassed in the third edition of Mustill and Boyd,[10] and it can only be a matter of time before someone tries.

8. Not only do we as judges tend to handle the investment treaty awards cited to us as some form of case law, but our own decisions undoubtedly have precedential effect in our system, only presumptively for first instance decisions cited to fellow first instance judges,[11] but formally for the Court of Appeal decisions we will increasingly see in this area. And yet those same decisions will not have the same normative effect in the investment treaty arbitration system itself, where they are at best simply another award, and at worst, something less. I remember asking an experienced investment treaty practitioner what investment treaty arbitration tribunals made of the efforts of Commercial Court judges like me when opining on these issues. They told me that municipal court judgments might well not be cited, and, if they were, would have limited traction. As they endearingly put it, "well, it's not like a Jan Paulsson award, is it?"

9. So we face the risk of a fluid system of law, with considerable scope for ebb and flow as ideas, preconceptions and fashions change, having superimposed on it in the supervisory or enforcement context a less flexible precedential system, and the risk over time of an increasing divergence between the two.

10. The idea of a special Commercial Court investment treaty arbitration jurisprudence troubles me, as do some of the issues judges may have to traverse when hearing jurisdictional challenges to investment treaty arbitration awards. I have no easy answer for this. Due to our collective investment treaty arbitration blindness, we have missed the boat on carving out a special sub-regime of English arbitration law to address their peculiarities. There are, of course, extensive ongoing discussions as to the future of the investment treaty arbitration eco-system, including how best to achieve some form of uniformity in the content of the substantive rules applied. Whether the entire investment treaty arbitration system should become a closed system, like the ICSID Convention, is a natural part of that debate, and would provide an alternative answer. Another possible approach would be for the English courts to recognise that court decisions on the meaning and effect of investment treaties should be "precedent-light", with greater scope to respond to trends and developments in the investment treaty arbitration world.

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[10] *Mustill & Boyd: Commercial and Investor State Arbitration* (LexisNexis, 2024), [14.5.6].
[11] *Willers v Joyce (No 2)* [2016] UKSC 44, [9].

11. In the meantime, we will continue to do our inadequate best, and wait to see what guidance the Court of Appeal gives us.