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The Guide to Construction Arbitration

General Editors
Stavros Brekoulakis and David Brynmor Thomas QC

Third Edition

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Editors

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Introduction

Stavros Brekoulakis and David Brynmor Thomas QC[1]

It is a pleasure to introduce the third edition of *The Guide to Construction Arbitration*. The *Guide* has evolved since its first edition to form, we hope, a valuable resource for clients, in-house counsel, experts and external counsel involved in construction arbitration, whether they are dealing with construction arbitration for the first time or have extensive experience in it.

The construction industry is a major contributor to economic growth worldwide. In the United Kingdom it has been estimated that every £1 investment in construction output generates £2.84 in total economic activity.[2] In India, the BJP, which now forms the government, proposed infrastructure spending of 100 lakh crore rupees (over US$1,300 billion) over the next five years in its 2019 manifesto.

The industry covers a wide range of different types of projects, from building offices, factories and warehouses, shopping malls, hotels and homes to major infrastructure projects that involve more complex civil engineering works such as the construction of harbours, railroads, mines, highways and bridges. Other construction projects involve specialist engineering works such as shipbuilding; bespoke plant and machinery such as turbines, generators and aircraft engines; or works that aim to support energy projects such as upstream oil and gas projects or renewables (wind, wave, solar) and nuclear plants.

These complex construction projects are rarely completed without encountering risks that lead to changes to the time and cost required for their execution. Those changes in turn give rise to disputes, the majority of which (possibly the vast majority) are submitted to alternative dispute resolution (ADR) processes and eventually arbitration. The reasons that lead construction parties to choose ADR and arbitration owe as much to the (perceived or

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2 Report of Economic Consultants LEK for the UK Contractors Group.

real) inefficiencies of national courts as to the (perceived or real) advantages of out-of-court dispute resolution. For example, with a few notable exceptions such as the Technology and Construction Court in England and Wales, most national courts lack construction specialist departments or judges with construction expertise and experience. Arbitration, on the other hand, allows construction parties to appoint arbitrators with the necessary specialised knowledge and understanding of complex construction projects. Importantly, arbitration allows construction parties to 'design and build' (to stay in tune with the theme of *The Guide to Construction Arbitration*) the dispute resolution procedure in a way that addresses a number of procedural challenges in construction arbitrations, including the typically large volume of documentary evidence, the most effective use of experts to address delay and quantum, as well as complex technical issues, and programme analysis. While the use of some ADR methods such as dispute adjudication boards has spread relatively recently,[3] arbitration has traditionally been included as the default dispute resolution mechanism for disputes arising out of international construction contracts.[4]

A question that often arises is: what is special about international construction disputes that they require specialist arbitration knowledge? In the first place, construction projects are associated with considerably more risk than any other typical commercial transaction, both in terms of the amount of risk allocated under them and the complexity of that risk. Their nature and typically long duration lead to risks including unexpected ground and climate conditions, industrial accidents, fluctuation in the price of materials and in the value of currency, political risks (such as political riots, governmental interventions and strikes) and legal risks (such as amendments in law or failure to secure legal permits and licences).

Further, time is very often critical in construction projects. An Olympic Games stadium must be delivered before the hard deadline that is the date of the games. If a shopping mall is not ready for the commercially busy Christmas period, significant amounts may be lost in seasonal retail trade. The late delivery of a power station can disrupt the project financing used to fund it.

Moreover, arguments as to causation, especially of delay, in construction projects are typically complex. Many phases of a construction project can run concurrently, which often makes it difficult to identify the origins and causes of delay. Legal concepts such as concurrent delay, critical paths and global claims are unique to construction disputes.

Equally, the involvement of a wide number of parties with different capacities and divergent interests adds to the complexity of construction disputes. A typical construction project may involve not only an employer and a contractor, but several subcontractors, a project manager, an engineer and architect, specialist professionals such as civil or structural engineers and designers, mechanical engineers, consultants such as acoustic and energy consultants, lenders and other funders, insurers and suppliers. A seemingly limited dipute arising on one subcontract may lead to disputes under other subcontracts and the main construction contract, and may have financial and legal consequences for many of the above parties, triggering disputes under much wider documentation such as shareholder agreements, joint operating agreements, funding documents and concessions. That often

3 Dispute adjudication boards were first introduced in FIDIC contracts (in the Orange Book) in 1995 and in ICE contracts as recently as in 2005.

4 Arbitration has been included in FIDIC contracts since the publication of the first FIDC contract in 1957.

gives rise to issues about multiparty arbitration proceedings and third-party participation in arbitration proceedings.

Another important feature of construction disputes is the widespread use of standard forms, such as the FIDIC or the ICE conditions of construction contracts. Efficient dispute resolution requires familiarity and understanding of the, often nuanced, risk allocation arrangements in these standard forms. Good knowledge of construction-specific legislation is necessary too. While the resolution of most construction disputes will depend on the factual circumstances and the provisions of the contractual agreement of the parties, legal issues may often arise in relation to statutory (frequently mandatory) warranty and limitation periods for construction claims, statutory direct claims by subcontractors against the employers,[5] statutory prohibition of the pay-when-paid and pay-if-paid provisions[6] and, of course, mandatory legislation on public procurement.[7]

Finally, as already mentioned, construction disputes are technically complex, requiring efficient management of challenging evidentiary processes, including document management, expert evidence, programme analysis and quantification of damages. The evidentiary challenges in construction disputes have given rise to the use of tools, such as Scott Schedules (used to present fact intensive disputes in a more user friendly format), that are unique in construction arbitrations.[8]

It is for all these reasons that alternative dispute resolution and arbitration of construction disputes require special focus and attention, which is what *The Guide to Construction Arbitration* aims to provide.

The Guide to Construction Arbitration is designed to appeal to different audiences. The authors of the various chapters are themselves market-leading experts, so it can provide a ready resource for specialist construction arbitration practitioners who already have a view of the information they seek. Beyond that, it has been compiled and written to offer practical information to practitioners who are inexperienced in international construction contracts or dispute resolution in construction disputes. For example, in-house lawyers who may be experienced in negotiating and drafting construction contracts but not in running disputes arising from them, or construction professionals who may have experience in managing construction projects but may lack experience in the conduct of construction arbitration, will find *The Guide to Construction Arbitration* useful. Lawyers in private practice who are familiar with arbitration, but lack experience in construction will also benefit. Last but not least, students who study construction arbitration will find it to be a helpful source of information.

While the main focus of *The Guide to Construction Arbitration* is the resolution, by arbitration, of disputes arising out of construction projects, Part I is devoted to important substantive aspects of international construction contracts. To understand how construction disputes are resolved in international arbitration, one has to understand how disputes arise out of a typical construction contract in the first place, and what are the substantive rights, obligations and remedies of the parties to a construction contract.

5 For example, in France, Law No. 75-1334 of 31 December 1975 on Subcontracting.

6 For example, in the United Kingdom with the UK Housing Grants Construction and Regeneration Act 1996.

7 For example, EU Directive 2014/24.

8 J. Jenkins and K. Rosenberg, 'Engineering and Construction Arbitration', in Lew et al. (editors) *Arbitration in England*, Kluwer (2013).

Thus, this book is broadly divided in four parts. Part I examines a wide range of substantive issues in construction contracts, such as The Contract: the Foundation of Construction Projects, Bonds and Guarantees, an Introduction to the FIDIC Suite of Contracts, Allocation of Risk in Construction Contracts, Contractors' and Employers' Claims, Remedies and Reliefs. Chapters valuably address the quantification of delays, the role of programmes and the various methods used for the computation of costs and damages in construction arbitrations, while an entire chapter is devoted to an examination, from a comparative law perspective, of the practically critical topic of concurrent delay.

Part II then focuses on dispute resolution processes in construction disputes. The aim of this Part is to look into special features of construction arbitration, and the following chapters are included: Suitability of Arbitration Rules for Construction Disputes, Subcontracts and Multiparty Arbitration in Construction Disputes, Interim Relief, including Emergency Arbitrators in Construction Arbitration, Organisation of the Proceedings in Construction Arbitrations, Documents in Construction Disputes and Awards, and the role and management of expert evidence.

Part III examines a number of select topics in international construction arbitration by reference to some key industry sectors and contract structures, including the nuclear sector, energy sector, concession contracts and turnkey projects. Part IV examines construction arbitration in specific jurisdictions of particular interest and with very active construction industries

We have taken the opportunity to add to the chapters in this third edition, to address matters identified by users of the first two editions. These include chapters examining dispute boards, ADR in construction contracts, agreements to arbitrate and interim relief in detail. There are chapters on pricing and payment, investment treaty arbitration in the construction sector, a discussion of the typical parties to a construction contract, further discussion of the organisation of expert testimony and a chapter on construction arbitration in Brazil.

Overall, the third edition of *The Guide to Construction Arbitration* builds upon the success of the first two editions and has been further expanded. The structure and organisation of *The Guide to Construction Arbitration* is broadly based on the LLM course on International Construction Contracts and Arbitration that we teach at Queen Mary University of London. The course was first introduced by HH Humphrey Lloyd in 1987 and was taught by him for more than 20 years. Humphrey has been an exceptional source of inspiration for hundreds of students who followed his classes, and we are personally indebted to him for having conceived the course originally and for his generous assistance when he passed the course on some years ago.

We want to thank all the authors for contributing to *The Guide to Construction Arbitration*. We are extremely fortunate that a group of distinguished practitioners and construction arbitration specialists from a wide range of jurisdictions have agreed to participate in this project. We further want to thank Gemma Chalk, Bevan Woodhouse and Hannah Higgins for all their hard work in the commission, editing and production of this book. They have made our work easy. Special thanks are due to David Samuels and GAR for asking us to conceive, design and edit this book. We thoroughly enjoyed the task, and hope that the readers will find the result to be useful and informative.

Part III

Select Topics on Construction Arbitration

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Investment Treaty Arbitration in the Construction Sector

Tony Dymond, Gavin Chesney and Laith Najjar[1]

Introduction

Perhaps more so than ever before, construction projects are cross-border in nature. Complex infrastructure and building requirements, particularly in rapidly expanding and developing economies, frequently draw upon expertise from around the world as contractors and sub-contractors. Funding for the projects comes from a range of domestic and international investors.

The complexity of the projects themselves means that they run for many months or years. Over that period, the projects will be exposed to many risks. One area of risk that is potentially of concern to international players in the sector is the risk that the project will be affected by actions taken by the state, its government or authorities in the jurisdiction in which the project is being or has been built, both where the state is a party to the project and where it is not. Construction projects, by their very nature, cannot be relocated elsewhere if the local environment becomes unfriendly.

Contractors and investors in such cases can feel particularly exposed to the risk that the state will favour its own interests and those of its nationals over those of foreign parties. Since the state is sovereign within its own territory, there may also be concerns that a contractor or investor will not be able to obtain adequate relief against harm it suffers.

Protections may be found for such contractors and investors in the form of investment treaties, entered into between states for the purpose of promoting and protecting foreign investment. Under the provisions of those treaties, foreign investors who qualify for protection may be able to seek redress against the state by bringing claims to an independent international arbitration tribunal, whose awards can order compensation or other remedies for investors who have been harmed.

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1 Tony Dymond is a partner, Gavin Chesney is an international counsel, and Laith Najjar is an associate at Debevoise & Plimpton LLP.

That these protections are relevant to the construction sector is reflected in the current abundance of international arbitration cases registered in connection with construction disputes. Statistics published by the International Centre for the Settlement of Investment Disputes show that disputes in the construction sector have continuously represented 7–8 per cent of the total number of international investment arbitration cases registered by that institution. In 2018, 56 of its pending cases out of a total of 706 were construction disputes.[2] Statistics published by the United Nations Conference on Trade and Development also indicate that the number and range of investment disputes in the construction sector is growing, with 69 pending cases in 2016 rising to 96 pending cases in 2018,[3] and more new cases being registered in the construction sector than in any other.

This chapter provides an overview of what investment treaties are, of what a person or entity must do in order to take advantage of their protections, of the protections that they offer, and of the entities against whom they can be enforced. It does not provide a comprehensive analysis of each element discussed. Its intention instead is to provide a general overview of the main issues that parties in the construction sector should bear in mind when entering into international projects, or when investments in foreign projects encounter difficulties.

Investment treaties

Investment treaties are, broadly speaking, agreements made between states as to each state's treatment of investments made by individuals or companies that are nationals of the other states. They can be standalone treaties or they can be part of broader free trade agreements. Their intention is to promote cross-border investment by providing protections for international investments and reassurance against political risk. They come in two forms: bilateral investment treaties, entered into between two states (BITs), and multilateral investment treaties, negotiated and agreed between more than two states (MITs).[4]

Examples of MITs include: the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico; the Energy Charter Treaty, which has 56 members and 42 observers[5] and which aims to promote 'energy security through the operation of more open and competitive energy markets';[6] and the ASEAN Comprehensive Investment Agreement, signed by the ASEAN member states and aiming to promote investment among them.[7]

2 https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf, last accessed 5 September 2019.

3 https://investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search, last accessed 5 September 2019.

4 C. McLachlan QC, L. Shore and M. Weiniger QC, *International Investment Arbitration, Substantive Principles*, 2nd Edition (2017) Oxford University Press, paragraph 2.02-2.03.

5 Members and Observers of the Energy Charter Conference, as of 18 February 2019, https://energycharter.org/fileadmin/DocumentsMedia/AR/AR_2018.pdf, last accessed 5 September 2019.

6 The Energy Charter Treaty, https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/, last accessed 5 September 2019.

7 ASEAN Member States, https://asean.org/asean/asean-member-states/, last accessed 5 September 2019.

BITs are comparatively much more numerous, and are one of the most important sources of international law. Germany, the Netherlands, Egypt, the United Kingdom and China have each concluded over 100 BITs with other states,[8] and in total there are some 2,354 BITs currently in force worldwide.[9] Although the terms of these BITs vary and each must be considered individually, BITs are frequently based on models established by a particular state, and so contain similar provisions as to protections offered and the criteria for determining who qualifies for those protections.

The majority of existing MITs and BITs also provide for any disputes between member states and investors to be resolved through investor-state dispute settlement mechanisms (referred to as 'ISDS'), frequently requiring some period of negotiation followed by international arbitration. The precise form of international arbitration required depends upon the investment treaty in question, but most treaties provide either for arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID) established in accordance with the ICSID Convention, to which there are at present 163 contracting states,[10] or for arbitration in accordance with the UNCITRAL Rules.[11]

However, the embrace of MITs and BITs, or of international arbitration to resolve investment disputes, is not universal. Several states have avoided concluding international treaties that provide for any form of investor-state dispute resolution. Brazil is a notable example, whose preferred approach to investment agreements in recent years has instead been to agree 'Cooperation and Facilitation Investment Agreements'.[12] These do not provide for the protection of investments, but rather focus on state-to-state measures for facilitating investment in accordance with certain standards.[13]

Similarly, even in states in which MITs and BITs are accepted models for international investment agreements, questions have been raised about the continued use of international arbitration to resolve investor-state disputes. The Commission of the European Union has adopted the position that all BITs between Member States of the Union should

8 See Mapping BITs, http://mappinginvestmenttreaties.com/country, last accessed 5 September 2019.

9 International Investment Agreements Navigator, accessed from: https://investmentpolicy.unctad.org/international-investment-agreements/by-country-grouping, last accessed 5 September 2019. See also Database of Bilateral Investment Treaties, https://icsid.worldbank.org/en/Pages/resources/Bilateral-Investment-Treaties-Database.aspx, last accessed 5 August 2019; Bilateral Investment Treaties, https://oxia.ouplaw.com/search?ct=aea00be3-35c1-44af-b59e-e73cdae33391, last accessed 5 September 2019.

10 See About ICSID, https://icsid.worldbank.org/en/Pages/about/default.aspx, last accessed 5 September 2019; the Database of ICSID Member States, accessed from: https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx, last accessed 5 September 2019.

11 The United Nations Commission on International Trade Law Arbitration Rules 1976, as revised in 2010 and again in 2013.

12 In 2015, Brazil signed CFIAs with Mozambique, Angola, Malawi, Mexico, Columbia and Chile. See The Cooperation and Facilitation Investment Agreement, http://www.mdic.gov.br/arquivos/CFIA-Presentation-EN.pdf, last accessed 5 September 2019.

13 The Cooperation and Facilitation Investment Agreement, http://www.mdic.gov.br/arquivos/CFIA-Presentation-EN.pdf, last accessed 5 August 2019; IISD, Brazil's Innovative Approach to International Investment Law, https://www.iisd.org/library/brazils-innovative-approach-international-investment-law, last accessed 5 September 2019.

be terminated and no longer regarded as a source of law,[14] with the aim of promoting the exclusive application of EU law instead.[15] Recent case law from the European Court of Justice, in the 2018 *Achmea* decision and subsequently, has found references to arbitration in such intra-EU BITs to be incompatible with EU law,[16] with the consequence that relevant investors have been unable to enforce arbitral awards in the courts of EU Member States.

Careful consideration therefore needs to be given to any MIT or BIT under which an investor might seek protection. A party wishing to obtain the protection of a treaty should consider not only whether a relevant MIT or BIT exists, but whether it has come into force, whether it remains in force and whether there are any foreseeable circumstances in which it might cease to have effect.

If an investment treaty offering protections is available, the questions that follow are:

- who is entitled to the benefit of those protections;
- against whom can the protections be enforced; and
- what protections are available?

Who can be an investor?

An investment treaty offers protections to 'investors'.[17] To determine who is an investor, the relevant MIT or BIT has to be considered. Typically, however, the test has two requirements: that the individual or entity be a national of one of the state parties, and that it has made an investment into the other state party. If the treaty provides for disputes to be resolved through ICSID arbitration, the requirements of Article 25 of the ICSID Convention must also be satisfied. The person or entity claiming to be an investor bears the burden of proving their entitlement.

Nationality

When discussing nationality, it is important to distinguish between the state party into which the investment was made, referred to here as the 'host' state, and the state party from which the investment was made, referred to here as the 'home' state. Investment treaties typically only offer protections to investors from the home state, and exclude nationals of the host state (who are left instead with domestic remedies against their own state). In international construction projects, where it is common to find joint ventures between nationals of both the home and host states, this can lead to some investors in the project being protected while others are not.[18]

14 Capital Markets Union: Commission provides guidance on protection of cross-border EU investments, 19 July 2018, http://europa.eu/rapid/press-release_IP-18-4528_en.htm, last accessed 5 August 2019.

15 L. Carpentieri and F. Gillion, 'Construction Arbitration and BITs: Is There Still A Future for Intra-EU Investment Arbitration?' *International Construction Law Review* (2018) 167–181, p.168.

16 *Slovak Republic v. Achmea B.V.*, Case C-284/16, Judgment of the Grand Chamber, 6 March 2018, paragraphs 58–59, See also, L. Carpentieri and F. Gillion, 'Construction Arbitration and BITs: Is There Still A Future for Intra-EU Investment Arbitration?' (2018) *International Construction Law Review* 167–181, p.173.

17 C. McLachlan QC, L. Shore and M. Weiniger QC, *International Investment Arbitration, Substantive Principles*, 2nd Edition (2017) Oxford University Press, paragraph 5.01.

18 *Tulip Real Estate and Development (Netherlands) BV v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award 10 March 2014, where a Dutch investor was protected under the Netherlands–Turkey BIT, but its Turkish joint venture partners were not.

For natural persons, the nationality requirement is usually that the person is a national of the home state. Where a person holds more than one nationality, they are generally entitled to rely upon any of those nationalities to satisfy the criteria. Some BITs, however, disqualify an individual from being an 'investor' if they are a national of both the home and the host state. Article 25(2)(a) of the ICSID Convention, for example, expressly disqualifies an individual from being an 'investor' where they are a national of both state parties.[19]

For legal persons, nationality is typically determined by the place of incorporation. In many cases, this requirement can be satisfied simply by having a holding company incorporated within the relevant jurisdiction. Singapore's BITs, for example, do not impose any requirement beyond that a corporation is incorporated in Singapore, and there is no requirement that the corporation have any real economic presence or any staff, nor that it act as any form of administrative headquarters – a 'letter-box' corporation will generally suffice.[20] Other treaties, by contrast, require that the corporation be involved in real economic activity before it can invoke the treaty protections – Switzerland, for example, does not recognise 'letter-box' companies for its BITs.[21] How much economic activity is required in those cases depends upon the terms of the particular BIT.

It is also usually the case that neither the identity of the shareholders of a corporation nor the place where majority control is in fact exercised make any difference to its nationality.[22] However, some investment treaties include provisions that disqualify a company from being an investor when its shareholders are all nationals of the host state. Conversely, it is possible for BITs to permit an entity incorporated in the host state to be an investor if it is under the control of nationals of the home state,[23] as expressly recognised in Article 25(2)(b) of the ICSID Convention.[24]

A question arises as to when the relevant corporation must have been incorporated within the home state, and in particular whether it is acceptable for a new corporation to be created and interposed into an existing investment holding structure in order to benefit from a BIT. Generally, this is an acceptable practice. Corporations may restructure their holdings for the purpose of benefiting from treaty protections, and this is a step that all parties involved in large international construction projects should consider. This freedom is, however, subject to requirements that, at the time of the restructuring, there is no foreseeable dispute between the investor and the host state, and accordingly the investor is not seeking to create a BIT claim in abuse of rights or in bad faith.[25] While restructuring to take advantage of a

19 Article 25(2) of the ICSID Convention.

20 L. Carpentieri and F. Gillion, 'Construction Arbitration and BITs: Is There Still A Future for Intra-EU Investment Arbitration?' *International Construction Law Review* (2018) pp.167-181, p.180.

21 id.

22 See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, paragraph 69; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Jurisdiction, 29 June 1999; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, paragraph 222 (this case was dismissed on jurisdiction because the investor did not have a qualifying investment).

23 For example, the Netherlands–Kuwait BIT (2002).

24 Article 25(2) of the ICSID Convention.

25 C. McLachlan QC, L. Shore and M. Weiniger QC, (2017) International Investment Arbitration, Substantive Principles, 2nd Edition, Oxford University Press, paragraph 5.198

treaty for future purposes is a legitimate goal, a restructuring that takes place after a dispute has arisen, for the purpose of taking advantage of a BIT that would not otherwise apply, is regarded as 'an abusive manipulation of the system of international investment protection'.[26]

Investment

If an investor meets the nationality requirement, the next question is whether they have made a qualifying investment in the host state.

The main criteria are found in the relevant MIT or BIT. Investment treaties typically contain lists of the types of investments that will be protected by the host state. Such lists tend to be broadly drawn, and investments can be either tangible or intangible property. Under the US Model BIT, for example, an 'investment' means:

> *Every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:*
> *(a) an enterprise;*
> *(b) shares, stock, and other forms of equity participation in an enterprise;*
> *(c) bonds, debentures, other debt instruments, and loans;*
> *(d) futures, options, and other derivatives;*
> *(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;*
> *(f) intellectual property rights;*
> *(g) licences, authorisations, permits, and similar rights conferred pursuant to domestic law; and*
> *(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.*[27]

Where a BIT refers disputes to ICSID arbitration, Article 25 of the ICSID Convention has been interpreted by ICSID tribunals as requiring that an investment must also meet additional objective criteria. The extent of these additional criteria is, however, a matter of some debate.

The first award fully to consider the meaning of 'investment' was *Fedax NV v. Republic of Venezuela*,[28] which was considered and applied subsequently in the construction context in *Salini Costruttori SPA v. Kingdom of Morocco*,[29] a dispute arising out of the construction of part of the Rabat-Fez highway in Morocco. Finding that the contractors' commitment to construct the highway was sufficient to constitute an 'investment', the *Salini* tribunal concluded that:

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26 *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, paragraph 205, citing *Phoenix Action, Ltd. v The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, paragraph 144.

27 Article 1 of the 2012 US Model Bilateral Investment Treaty.

28 *Fedax NV v. Republic of Venezuela* (Jurisdiction) 5 ICSID Rep 183 (ICSID 1997).

29 *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* (Jurisdiction) 6 ICSID Rep 398 (ICSID 2001).

> *The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction… In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition. In reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, these various criteria should be assessed globally…*[30]

This decision has come to be referred to as the '*Salini* test', and has been noted in many subsequent awards. However, there is some debate about its status. Where it has been applied, the tendency has been not to follow it slavishly, but rather to regard the *Salini* criteria as indicative of the general characteristics that an investment will have.[31] In other cases, the *Salini* decision has been criticised as being too narrow[32] and tribunals have declined to follow it,[33] even going as far as to say that its importance is 'very doubtful'.[34] What does appear clear, however, is that to the extent the *Salini* test is not followed, the tendency is for a lower set of criteria to be applied.

In the construction sphere, there has been some debate as to whether a contract to build something in a host state can legitimately be regarded as an investment. Critics note that generally contractors provide only materials and services in return for a fixed sum, including profit, with no ongoing commitment to the host state once the construction is complete.[35] However, it now appears to be settled that, at least where the construction project involves the contribution by the contractor of large sums, know-how and personnel over a significant period of time,[36] that will often be sufficient to constitute an investment in the host state.[37]

30 *Salini*, op. cit. 29 at paragraph 52.

31 *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia* (ICSID Case No. ARB/05/10), Decision on the Application for Annulment, 16 April 2009.

32 *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008; *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, paragraph 110 where the tribunal considered the only necessary criteria were a contribution, a certain duration and an element of risk.

33 *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, paragraphs 82–86.

34 *Philip Morris Brands Sàrl, Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013, paragraph 204.

35 K.V. Nathan, 'Submissions to the International Centre for the Settlement of Investment Disputes in Breach of the Convention.' *Journal of International Arbitration* (1995) 12(1) 27.

36 *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 considered that 23 months was a sufficiently long contract duration to constitute an 'investment'.

37 *Bayindir Insaat Turizm Ticaret Ve Sanayi, AS v. Islamic Republic of Pakistan*, ICSID Case No. Arb/03/29, Decision on Jurisdiction, 14 November 2005.

Arbitral tribunals have accordingly found that the following construction projects amounted to an investment:

- dredging of a canal;[38]
- construction of a highway;[39]
- construction of bridges;[40]
- construction of an airport;[41]
- building and launching satellites;[42]
- building a golf course;[43]
- construction of power plants powered by renewable sources;[44]
- construction and operation of blood plasma fractionation facilities;[45]
- construction of roads;[46]
- construction of infrastructure and services for gold and copper mining exploitation;[47]
- building a hazardous waste landfill;[48]
- construction of an hotel;[49]
- building a self-sufficient satellite city;[50]
- construction of a real estate development;[51] and
- reconstruction of an hotel and renovation of an hotel.[52]

Against whom can the protections be enforced?

Investment treaty protections do not apply to commercial disputes between two private parties. Only an action taken in exercise of the sovereign authority of the state is sufficient to constitute a breach of the protections offered by an investment treaty: a mere contractual breach that could be committed by any non-state contracting party will not be enough.[53]

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38 *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November.

39 *Salini* op. cit 29.

40 *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016.

41 *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017. See also, *ADC Affiliate Limited and ADC & ADMC Management Limited v. the Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

42 *Deutsche Telekom v. India,* PCA Case No. 2014-10, Interim Award, 13 December 2017.

43 *Ansung Housing Co. Ltd v. People's Republic of China*, ICSID Case No. ARB/14/25, 9 March 2017.

44 *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016.

45 *David Minnotte and Robert Lewis v. Republic of Poland*, ICSID Case No. ARB(AF)/10/1, Award, 16 May 2014.

46 *Desert Line projects LLC v. the Republic of Yemen*, ICSID Case No. ARB/05/17, 6 February 2008.

47 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, Award, 22 September 2014.

48 *Metalclad Corporation v. the United Mexican States,* Case No. ARB(AF)/97/1, Award, 30 August 2000.

49 *Sistem Mühendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009.

50 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, Case No. ARB/01/7, Award, 25 May 2004.

51 *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014.

52 *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010.

53 *Toto Costruzioni Generali SPA v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012; *Impregilo SpA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction,

Accordingly, a claim under a BIT or MIT can only be brought against a host state or against an entity that is an emanation or organ of the state, to which the entity's acts can be attributed.

With respect to attribution, the host state will typically be liable where an action has been taken by an entity under the effective control of the state, or where the state has significant involvement in the commission of the act. In *Jan de Nul NV v. Egypt*, the tribunal developed a two-limbed test for 'effective control': the state should have general control over the person or entity; and the state should have specific control over the act in question.[54] In addition, in certain cases (particularly claims that the host state has breached a duty to provide full protection and security), the state may be liable for failure to prevent acts by third parties even if those third parties are not themselves necessarily attributable to the state.[55]

In the construction context, claims under investment treaties are most likely to arise where the owner or employer is a state or a state emanation, or in circumstances where the state is independent of the construction contract but has taken actions which negatively impact upon the project.

Types of protection and claims

The precise protections available vary from treaty to treaty, but many treaties include the same or similar protections. The most common ones are discussed briefly in turn below.

Expropriation

Expropriation is the act of a state of taking property from its owner. Under international law, expropriation is not unlawful or wrongful per se. Consistent with the principle of territorial sovereignty, host states have the right to expropriate property for economic, political, social or other reasons. Importantly, however, any expropriation must be carried out on a lawful basis.[56] An expropriation is only legal if:

- it serves a public purpose;
- it is not arbitrary or discriminatory;
- the procedure follows principles of due process; and
- it is accompanied by prompt, adequate, and effective compensation.[57]

Most investment treaties prohibit expropriations that do not meet these criteria.

A wrongful expropriation can be direct or indirect.

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22 April 2005.

54 *Jan de Nul NV and Dredging International NV v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, paragraph 173. See also Chapter II, Articles 4–11 of the International Law Commission's 'Articles on Responsibility of States for Internationally Wrongful Acts'.

55 *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 paragraph 33(a), 86; *American Manufacturing & Trading, Inc. v. Republic of Zaire*, Award, ICSID Case No. ARB/93/1, Award, 21 February 1997, paragraphs 6.07, 6.13.

56 C. Schreuer and R. Dolzer, *Principles of International Investment Law*, 2nd Edition (2012) Oxford University Press, p.99.

57 C. Schreuer and R. Dolzer, *Principles of International Investment Law*, 2nd Edition (2012), Oxford University Press, p.99.

Direct expropriation is relatively easy to recognise, but also relatively rare. The central element of direct expropriation is deprivation of property by the state.[58] It arises, for example, when 'governmental authorities take over a mine or factory, depriving the investor of all meaningful benefits of ownership and control'.[59] This can be the result of any action by a state body or authority to seize, or to deprive the investor of, property.[60]

Indirect expropriation is more subtle, requiring not a single seizure, but actions that result in a substantial deprivation that renders the investor's property rights useless.[61] The test is whether the effect of the state's actions is to deprive the investor 'in whole, or in significant part, of the use or reasonably-to-be-expected economic benefit of property'.[62] This can arise, for example, through increases in regulation that substantially deprive the investor of the ability to use its property.[63]

In the construction context, expropriation can arise through the direct taking of land, premises or machinery; through revocation of necessary permits, licences or agreements;[64] or through the removal or effective termination of contractual rights.[65]

Fair and equitable treatment

The fair and equitable treatment (FET) standard is one of the most common treaty protections.[66] FET does not have a set definition, but generally it is applied to protect the legitimate expectations of investors against unfair actions by the state. As such, it can apply in a broad range of circumstances.[67] Examples from previous cases include circumstances in which the host state has unexpectedly changed its legislation in a manner detrimental to the investor; [68] where the state sought to coerce the investor into agreeing to an unfavourable settlement agreement;[69] where the state unfairly failed to ensure that a contract

58 C. Schreuer and R. Dolzer, *Principles of International Investment Law*, 2nd Edition (2012) Oxford University Press, p.104.

59 *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paragraph 100.

60 In *Saipem S.p.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, paragraph 129, it was found that Bangladesh had directly expropriated an investor's contractual right through inappropriate interference by the Bangladeshi courts.

61 *Starrett Housing Corp v. the Government of the Islamic Republic of Iran*, Award No. ITL 32-24-1, 4 Iran–US C.T.R. 162, 1983, p.115.

62 *Metalclad Corporation v. the United Mexican States,* ICSID Case No. Arb (AF)/97/1, Award, 30 August 2000, paragraph 103.

63 For example, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, 5 ICSID Rep. 153.

64 For example, *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010.

65 *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007.

66 R. Walker and J. Randhawa, 'The Resolution of Construction Claims Through Investor-State Dispute Settlement: Alternative Opportunities for Relief for International Contractors', *International Construction Law Review* (2019) 255–283, p.262.

67 C. Schreuer and R. Dolzer, *Principles of International Investment Law*,2nd Edition (2012) Oxford University Press, p.130.

68 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paragraph 107.

69 *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, IIC 319 (2008), Award, 6 February 2008.

signed by the state with an investor would be compatible with local laws;[70] or where a state processed and rejected an application for a necessary permit in a manner that breached legitimate expectations of a fair and predictable legal process. [71] It could also be available where a contract has been terminated as a result of the host state's unwillingness or inability to continue to pay to complete the project; where the state has applied unfair or improper financial penalties; or where it has not administered a contract in good faith.[72]

Denial of justice

A particular form of FET claim concerns 'denial of justice', which occurs when the host state fails to provide 'adequate judicial protection for the rights of aliens'.[73] It can arise where the host state's courts refuse to entertain a legitimate claim, subject it to unnecessary delays, or administer justice in a seriously inadequate way, including through the malicious misapplication of the law.[74] A denial of justice can occur in both civil and criminal legal proceedings.[75] A denial of justice is usually fact-specific, but the principles as such have been generally recognised.[76]

However, a denial of justice claim typically may only be brought under a MIT or BIT if the investor has first exhausted all local remedies in the courts of the host state. As said in *Loewen*, a case that arose under NAFTA:

> *no instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court when there was available an effective and adequate appeal within the State's legal system.*[77]

Only once all possible avenues of appeal against an unfair court judgment have been pursued can a denial of justice claim under an investment treaty be considered.[78]

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70 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, paragraph 138.

71 *Metalclad Corporation v. the United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paragraph 74 et seq.

72 R. Walker and J. Randhawa, 'The Resolution of Construction Claims Through Investor-State Dispute Settlement: Alternative Opportunities for Relief for International Contractors', *International Construction Law Review* (2019) pp.255–283, p.263.

73 J. Paulsson, *Denial of Justice in International Law* (2005) Cambridge University Press, p.60, citing A.V. Freeman, 'The International Responsibility of States for Denial of Justice', (1938) pp.182–183.

74 *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, paragraph 103.

75 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Award, 26 July 2007, paragraph 133.

76 A.V. Freeman, 'The International Responsibility of States for Denial of Justice', (1938), in C. Schreuer and R. Dolzer, *Principles of International Investment Law*, 2nd Edition, (2012) Oxford University Press, p.180.

77 *Loewen Group, Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, paragraph 154.

78 J. Paulsson, *Denial of Justice in International Law* (2005) Cambridge University Press, p.100, citing the International Law Commission (Crawford), Second Report on State Responsibility, UN Doc. A/CN.4/498 (1999), paragraph 75 ('an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not in itself amount to an unlawful act'.).

Full protection and security

A 'full protection and security' obligation typically is concerned with the failure by the state to exercise due diligence to protect the investor from property damage, physical violence or harassment, whether by state actors or third parties. This is not a guarantee of constant and complete security, but a commitment to provide reasonable and proportionate security for investors.[79] As such, it is a standard that is of potential relevance to construction projects in jurisdictions where there may be civil unrest or another significant security risk.

The full protection and security standard has been considered in three prominent cases. In *AAPL v. Sri Lanka*, the local security forces destroyed the investment in the course of a counter-insurgency operation. The tribunal held that these actions were attributable to the state, excessive, and that the investor was entitled to compensation.[80] In *Wena Hotels v. Egypt*, the tribunal found the host state liable under the full protection and security standard because a state entity had seized the investor's hotel. The police authorities had been made aware of the seizure but had not acted to protect the investor either before or after the seizure, and the tribunal considered this a breach of the standard.[81] In *AMT v. Zaire*, the host state was held liable under a protection and security clause in the applicable BIT after looting incidents by armed forces.[82]

Umbrella clauses

An umbrella clause is a provision in an investment treaty that guarantees the host state will perform any obligations assumed to the investor, including obligations assumed under a contract.[83] It potentially has the effect of elevating a breach of contract to the level of a breach of the relevant treaty.[84] In a construction treaty claim context, umbrella clauses will be particularly relevant to parties contracting directly with the host state.

The effect of turning a contract breach into a treaty breach is, however, controversial. Some tribunals considering umbrella clauses have declined to find that a 'mere' contractual breach can be elevated to a treaty breach in this way, unless there is very clear language in the relevant investment treaty to that effect.[85]

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79 See *Pantechniki SA Contractors & Engineers (Greece) v. the Republic of Albania*, ICSID Case No ARB/07/21, Award, 30 July 2009.

80 *Asian Agricultural Products Ltd v. Republic of Sri Lanka*, Award, 27 June 1990, paragraph 45 et seq, 78 et seq.

81 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, paragraph 84.

82 *American Manufacturing & Trading Inc. v. Republic of Zaire,* Award, 21 February 1997, paragraph 6.02 et seq.

83 *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, paragraphs 186–187.

84 C. McLachlan QC, L. Shore and M. Weiniger QC, *International Investment Arbitration, Substantive Principles*, 2nd Edition, (2017) Oxford University Press, paragraph 4.132.

85 See *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, paragraph 167, and, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, paragraph 125.

Other tribunals have taken alternative approaches, finding that:

- an umbrella clause can elevate a contract breach to a treaty breach, but only where the contractual breach arises out of the exercise of sovereign acts by the host State;
- the umbrella clause transforms the contractual obligations into a treaty obligation, subjecting them to international law and the jurisdiction of investment arbitral tribunals; or
- an umbrella clause is considered apt to confer jurisdiction upon a treaty tribunal, but that such clause does not change the parties or the proper law of the contract.[86]

The extent of the protections offered by umbrella clauses, therefore, is not settled. In cases involving a host state directly as a party to any contracts on construction projects, however, they are likely to remain an important protection that investors would be well-advised to seek out.

Stabilisation clauses

A stabilisation clause is a provision in a contract between an investor and the host state in which the state undertakes not to take certain actions that would negatively affect the investor. Although not themselves provisions of any treaty, they can be important in the investment treaty context by giving an investor a basis to argue that the host state has breached the FET standard, or has breached an umbrella clause. They can appear in the form of freezing clauses, economic equilibrium clauses and hybrid clauses.

A freezing clause, as the name suggests, requires the host state not to change certain legislation that affects the investor, frequently tax or royalty legislation. This is often in the form of a commitment that the state will ensure that new legislation will not apply to the investor, unless otherwise agreed.[87]

Alternatively, an economic equilibrium clause usually does not prohibit the host state from changing its legislation, but provides that the state will indemnify the investor against the costs associated with complying with new laws.

A hybrid clause is a combination of both the freezing and economic equilibrium clauses. Here, foreign investors may be, but are not automatically granted an exemption from the new laws. Hybrid clauses may also provide for compensation of costs associated with compliance with new laws by the investor.

Stabilisation clauses are potentially important in the construction context where the relevant contract is with the host state or one of its organs. The potential power of the protection offered to the investor by such clauses has been confirmed in several cases.[88]

86 C. McLachlan QC, L. Shore and M. Weiniger QC, *International Investment Arbitration, Substantive Principles*, 2nd Edition, (2017) Oxford University Press, paragraphs 4.132–4.134.

87 C. Schreuer and R. Dolzer, *Principles of International Investment Law*, 2nd Edition, (2012) Oxford University Press, p.82.

88 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, paragraph 332. See also, *EDF (Services) Ltd v. Romania*, ICSID Case No. ARB/05/13, IIC 392, Award, 8 October 2009.

Non-discrimination

BITs often prohibit discrimination by the host state against investors from the home state. Such provisions generally require the host state to treat the foreign investors no less favourably than its own nationals.

Remedies

Awards issued by tribunals in international investment arbitration are final and binding on all parties to the dispute. The remedies ordered are usually damages intended to compensate the investor for the losses that it can prove it has suffered as a result of the breach of the relevant treaty. Primacy is given in many investment treaties to damages as a remedy. Article 1135 of NAFTA, for example, provides that a tribunal may award only monetary damages or the restitution of property, in which case the state concerned may elect to pay monetary damages in lieu of restitution.[89] Similarly, Article 26(8) of the Energy Charter Treaty provides that an award concerning an action of a government or authority shall provide that the state pay monetary damages in lieu of any other remedy granted.[90]

Some cases have found that non-compensatory or moral damages may be available where the state's actions are found to be particularly wrongful.[91] Where not expressly prohibited by the relevant investment treaty, it is also thought that it is possible in principle for tribunals to award non-pecuniary relief, such as orders requiring states to do or refrain from doing something.[92] In practice, however, most investors seek only pecuniary relief, and questions may be raised as to whether non-pecuniary relief could effectively be enforced against a state.

An arbitral award will typically be enforceable against any assets of the host state in a large number of jurisdictions around the world. Article 54(1) of the ICSID Convention provides:

> *each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.*[93]

Conclusion

Investment treaties are an important part of the international legal framework. By offering protection to parties who meet the necessary 'nationality' and 'investment' criteria, they provide reassurance for investors engaged in cross-border projects and protect against political risk. The ability to bring arbitration proceedings against any state that breaches the protections is an important potential tool for any investor, bringing the advantages that

89 Article 1135 of the North American Free Trade Agreement.

90 Article 26(8) of the Energy Charter Treaty.

91 *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, IIC 319, Award, 6 February 2008, paragraph 289; C. McLachlan QC, L. Shore and M. Weiniger QC, *International Investment Arbitration, Substantive Principles*, 2nd Edition, (2017) Oxford University Press, paragraph 9.147.

92 C. McLachlan QC, L. Shore and M. Weiniger QC, *International Investment Arbitration, Substantive Principles*, 2nd Edition, (2017) Oxford University Press, paragraph 9.147.

93 Article 54(1) of the ICSID Convention.

such claims will not be barred by any time limitation provisions; the proceedings will be public, which may affect the actions of the parties; and it may give an investor a viable claim in circumstances where a contractual claim under domestic law would be frustrated.[94]

The nature and size of many modern construction projects, which see very significant investments of time and money, frequently draw upon contractors and sub-contractors from across the world, and are liable to be affected by the actions of the host state even if the state is not itself a party to the project, mean that parties in the construction sector would be well-advised to consider whether investment protection may be available, and to take steps to structure investments appropriately.

94 R. Walker and J. Randhawa, 'The Resolution of Construction Claims Through Investor-State Dispute Settlement: Alternative Opportunities for Relief for International Contractors', *International Construction Law Review* (2019), pp.255–283, p.274.

Appendix 1

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Tony Dymond is co-chair of Debevoise's Asia arbitration practice and a partner in the firm's London and Hong Kong offices. His practice focuses on complex, multi-jurisdictional disputes in both litigation and arbitration. He has advised clients in a wide range of jurisdictions, having spent the past 20 years in London, Hong Kong and Seoul. He is widely acknowledged as a leading lawyer in high-value disputes arising from large-scale projects, particularly in the energy and infrastructure sectors, where Mr Dymond has advised on some of the largest, most complex, market-shaping disputes.

Mr Dymond is consistently recognised by the legal directories as a leader in his field. He is included in *The Legal 500*'s inaugural International Arbitration Powerlist, and in *The Legal 500 UK* he has been recommended for commercial litigation, international arbitration and construction disputes. The guide has hailed him as a 'prolific, top-class strategic thinker'. *Chambers UK* also recommends Mr Dymond for his construction disputes work. The guides have previously described him as 'an excellent communicator and advocate who is an excellent problem-solver' and as 'a "clever and commercially astute" practitioner. Clients find him "very sound and a safe pair of hands"'. *The Legal 500 UK* has stated 'Tony Dymond is "excellent at the overall strategy of a dispute"'. He is named by *Who's Who Legal* among its Thought Leaders in construction, and by *Expert Guides* as one of the UK's leading construction law practitioners.

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Mr Chesney has represented a wide variety of clients including major corporations, high net worth individuals and sovereign states in a range of complex, high-value disputes across sectors including construction, mining, power, oil and gas, defence and financial services. He has appeared in ICSID, UNCITRAL, ICC, LCIA, SIAC and AAA arbitration proceedings, as well as in ad hoc arbitrations and litigation proceedings in the English and other common law courts. He has been recognised as a 'next generation lawyer' by *The Legal 500 UK* for his work in the construction sector.

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Mr Najjar was admitted as a solicitor of the Senior Courts of England and Wales in 2012. He is also admitted as a solicitor advocate, with rights of audience before the higher courts.

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Edited by the academics who run a course on construction contracts and arbitration at the School of International Arbitration, Global Arbitration Review's *The Guide to Construction Arbitration* brings together both substantive and procedural sides of the subject in one volume. Across four parts, it moves from explaining the mechanics of FIDIC contracts and particular procedural questions that arise at the disputes stage, to how to organise an effective arbitration, before ending with a section on the specifics of certain contracts and of key countries and regions. It has been written by leaders in the field from both the civil and common law worlds and other relevant professions.

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