

Course outline – Introduction to Investment Arbitration

Background

Investment arbitration is possibly the fastest-developing area of international law, combining elements of private dispute settlement, treaty law and public policy. Due to the widespread geographical participation of States in investment treaties and the increased use of arbitration to settle disputes involving significant amounts of money, understanding the particularities and dynamics of investment law and arbitration is becoming increasingly important.

Introduction to Investment Arbitration is a four week course aimed at giving participants an overview of the specific issues relating to arbitration between foreign investors and host States, in particular under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) and Bilateral Investment Treaties (BITs).

The course covers four broad areas that are relevant for an understanding of investment arbitration: (1) specific instruments, mechanisms and procedure; (2) jurisdiction and admissibility; (3) substantive investor protections; and (4) award, enforcement and challenge. Each area is covered in a module where emphasis is laid on issues that are specific to investment arbitration, in particular those arising from the provisions of the ICSID Convention and BITs.

The first module is aimed at setting the scene, by discussing the concepts and instruments peculiar to investment arbitration. Treaty arbitration is compared to contractual arbitration and the evolution of investment arbitration is tracked. Consideration of the development and main features of BITs is followed by outlining the ICSID Convention and the International Centre for the Settlement of Investment Disputes. Applicable law is particularly important to investment arbitration and is thus considered before procedural issues peculiar to investment arbitration: bifurcation, interim measures and transparency (including amicus submissions and public hearings).

The second module addresses jurisdiction and admissibility. The issue of consent and how it is often formed by two separate instruments is considered first. The three jurisdictional requirements of *ratione temporis*, *ratione personae* (the definition of investor), and *ratione materiae* (the definition of investment) are discussed next under the dual requirements of the ICSID Convention and the applicable BIT. Admissibility requirements relating to the

procedure, such as cooling off periods and fork-in-the-road provisions are then reviewed, followed by a consideration of substantive inadmissibility arising from a host State denial of benefits. The module finishes with a discussion of the possibility of host States bringing counterclaims into investment arbitration proceedings.

The third module covers (a) contractual protections under investment contracts and (b) the main substantive protections provided to foreign investors under investment treaties. The treaty protections discussed have been chosen because they have been the ones most often relied upon in investment arbitration (such as expropriation and fair and equitable treatment) or because they have given rise to most controversy and uncertainty in interpretation (such as full protection and security, most-favoured nation treatment and umbrella clauses). The module will also consider defences available to the respondent State, such as abuse of rights, necessity and international public policy, and issues relating to attribution of actions to the State.

The fourth module focuses on the award, and what happens after it has been rendered. It considers first remedies that are available in investment arbitration and then the allocation of costs of the procedure. In discussing the annulment of awards, emphasis is placed on the system provided under the ICSID Convention, although some consideration is also given to the setting aside of other forms of investment arbitration awards. Enforcement of arbitral awards is an enormous topic in its own right, but since there are little differences between recognition and enforcement of commercial and investment awards under the New York Convention, the present course focuses on the specific enforcement regime under the ICSID Convention. The module ends with a consideration of a key element when dealing with sovereign states as disputing parties: immunity and its impact on the enforcement of awards.

The course uses up-to-date materials from treaty texts, case law and commentary to enable participants to evaluate the issues covered and to apply the legal doctrines discussed to future situations. As investment arbitration is a fast-moving area of the law and many questions remain presently unsettled, emphasis is placed on highlighting different and sometimes conflicting interpretations and decisions, inviting participants to consider and analyse them.

Learning objectives

After completing the course, participants should be able to:

- Recognise the distinctive characteristics of investment arbitration and compare those with commercial arbitration;

- Discuss and assess the salient procedural, jurisdictional and substantive features of investment arbitration;
- Apply the relevant law and principles in this area of international dispute resolution to issues and situations that may arise in their jurisdictions, whether on the State's side or the investor's side;
- Identify the place of investment arbitration in the development of international law and examine and analyse current and future trends and concerns; and
- Update their knowledge of the state of the law in the future.

Content and Structure outline

The course is divided into four modules, covering the following topics:

Module 1. Introduction and Procedure

- Introduction
- Contracts and Treaties
- BITs
- The ICSID Convention
- Applicable law
- Bifurcation
- Interim measures
- Amici* and confidentiality
- Other procedural issues

Module 2. Jurisdiction and admissibility

- Consent
- Ratione temporis
- Ratione personae
- Ratione materiae
- Cooling-off, fork-in-the-road and parallel proceedings
- Denial of Benefits
- Counterclaims

Module 3. Substantive Protections

- Contract claims
- Expropriation
- FET
- FPS
- MFN
- Umbrella clause
- Defences
- Attribution

Module 4. Award, enforcement and challenge

- Available remedies
- Costs
- Annulment
- Recognition and enforcement of ICSID awards
- Immunity