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EDITOR'S PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another. The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more lawyer hours of reading than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled for analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world is consumed with debate over whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
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Chapter 1

RECENT TRENDS IN INVESTMENT ARBITRATION

Miriam K Harwood, Simon N Batifort and Anna V Kozmenko[1]

I INTRODUCTION

This chapter reviews developments in investment arbitration in 2012 and early 2013. In this period, arbitral tribunals addressed several pivotal issues, in particular consent to arbitration and the outer limits of fair and equitable treatment ('FET'). This period also saw the issuance of the largest known award in ICSID history as well as several efforts to adapt procedural rules to investment arbitration.

Sections I and II analyse recent decisions issued by arbitral tribunals on jurisdictional and substantive issues. Section III presents cases related to procedural issues and noteworthy changes in arbitration and mediation rules.

II JURISDICTIONAL ISSUES

i Jurisdiction ratione voluntatis

Many investment treaties require that investors fulfil certain conditions before they may pursue international arbitration.[2] Seven new decisions addressed the effects of

1 Miriam K Harwood is a partner and Simon N Batifort and Anna V Kozmenko are associates at Curtis, Mallet-Prevost, Colt & Mosle LLP.

2 For example, these provisions may require investors to first submit their claims to the courts of the host state for a specified period of time, or to negotiate with the host state, before seeking international arbitration. See, e.g., Treaty Between the Federal Republic of Germany and the Republic of Argentina for the Promotion and Reciprocal Protection of Investments dated 9 April 1991, http://unctad.org/sections/dite/iia/docs/bits/germany_argentina_sp.pdf, Article 10; Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey dated 27 March 1986, http://unctad.org/sections/dite/iia/docs/bits/netherlands_turkey.pdf, Article 8(2).

such preconditions.[3] These decisions contribute to existing jurisprudence on three fundamental issues.

First, the new decisions addressed the issue of whether preconditions to arbitration constitute jurisdictional or admissibility requirements. Five of the new decisions found that the preconditions constituted conditions to the tribunal's jurisdiction.[4] For instance, the tribunal in *Daimler v. Argentina* held that preconditions to arbitration 'set forth the conditions under which an investor-state tribunal may exercise jurisdiction with the contracting state parties' consent'.[5] In *Ambiente Ufficio v. Argentina*, the tribunal adopted a different approach, finding that a claimant's failure to comply would result in dismissal regardless of whether preconditions related to jurisdiction or admissibility.[6]

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3 *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award dated 22 August 2012 ('*Daimler v. Argentina*'); *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, UNCITRAL, PCA Case No. 2010-9, Award on Jurisdiction dated 10 February 2012 ('*ICS Inspection v. Argentina*'); *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty dated 7 May 2012 ('*Kılıç v. Turkmenistan*'); *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue dated 5 March 2013 ('*Tulip v. Turkey*'); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction dated 19 December 2012 ('*Urbaser v. Argentina*'); *Ambiente Ufficio S.P.A. and Others v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility dated 8 February 2013 ('*Ambiente Ufficio v. Argentina*'); *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction dated 21 December 2012 ('*Teinver v. Argentina*').

4 *Daimler v. Argentina*, Paragraph 193; *ICS Inspection v. Argentina*, Paragraph 262; *Kılıç v. Turkmenistan*, Paragraphs 9.21 and 9.31; *Tulip v. Turkey*, Paragraph 72; *Urbaser v. Argentina*, Paragraph 123. The United States Court of Appeals for the District of Columbia Circuit issued a decision in January 2012 holding that preconditions to arbitration constitute mandatory jurisdictional requirements. The court set aside an award on the ground that the arbitral tribunal incorrectly exercised jurisdiction despite the claimant's failure to comply with the preconditions to arbitration contained in the applicable BIT requiring prior submission of the dispute to the courts of the host state. United States Court of Appeals for the District of Columbia Circuit, *Republic of Argentina v. BG Group PLC*, 665 F.3d 1363, Decision dated 17 January 2012 (petition for writ of *certiorari* filed, No. 12-138, 2012 WL 3091067 (27 July 2012)). See also Bruce G Paulsen and Jeffrey M Dine, *Republic of Argentina v BG Group, PLC: US Appellate Court Vacates International Investment Award for Failure to Comply with Condition Precedent*, 17(2) IBA Arbitration News 94 (2012); Case Note, *D.C. Circuit Vacates Investment Arbitration Award against Argentina*, 106 *American Journal of International Law* 393 (2012).

5 *Daimler v. Argentina*, Paragraph 193.

6 *Ambiente Ufficio v. Argentina*, Paragraph 575. In *Teinver v. Argentina*, the tribunal referred to the relevant preconditions as 'admissibility requirements', but did not outline the consequences of this characterisation. *Teinver v. Argentina*, Paragraph 177.

Second, some tribunals addressed the issue of whether the claimant's failure to satisfy a precondition can be excused if efforts to comply would have been futile. The tribunal in *Ambiente Ufficio v. Argentina* upheld a futility exception, even though the applicable bilateral investment treaty ('BIT') did not contain such an exception.[7] However, the tribunal in *ICS Inspection v. Argentina* rejected the futility argument, refusing to 'create exceptions to treaty rules [...] having no basis in either the treaty text or in any supplementary interpretive source'.[8] In *Urbaser v. Argentina*, which involved an obligation to submit the dispute to domestic courts, the tribunal viewed the relevant test as not one of futility but whether or not the investor had a 'fair chance of obtaining satisfaction' in the courts.[9]

Third, several tribunals analysed the hotly debated question of whether a claimant can invoke a most-favoured-nation ('MFN') clause to bypass preconditions to arbitration. Two of the new decisions held that MFN clauses may not be used in this way.[10] In another case, the majority ruled that the claimant had complied with the relevant preconditions but nevertheless analysed the MFN clause at length and determined that it could be invoked to bypass preconditions.[11]

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7 *Ambiente Ufficio v. Argentina*, Paragraph 603. In *Daimler v. Argentina*, the tribunal recognised the futility exception in principle, but rejected the argument because futility had not been established on the facts of the case. Id., Paragraph 198.

8 *ICS Inspection v. Argentina*, Paragraphs 265–273. In *Tulip v. Turkey*, the tribunal did not answer the claimant's contention that a futility exception existed but nevertheless observed that preconditions 'are required strictly to be complied with and not to be ignored'. *Tulip v. Turkey*, Paragraph 135. In *Teinver v. Argentina*, the tribunal found that the requirement of negotiation was subject to a futility exception but did not take a position on the relevance of futility with respect to the obligation to submit the dispute to domestic courts. *Teinver v. Argentina*, Paragraph 126.

9 *Urbaser v. Argentina*, Paragraph 131.

10 *ICS Inspection v. Argentina*, Paragraph 326; *Daimler v. Argentina*, Paragraph 281. In *Daimler v. Argentina*, the arbitrator appointed by the claimant dissented on this issue. See *Daimler v. Argentina*, Dissenting Opinion of Charles N Brower dated 15 August 2012.

11 *Teinver v. Argentina*, Paragraphs 159–186. The dissenting arbitrator, appointed by Argentina, criticised the majority both for engaging in an unnecessary discussion of the MFN issue and for its holding. *Teinver v. Argentina*, Opinion of Dr Kamal Hossain dated 21 December 2012, Paragraphs 10–18. In two other cases, the tribunals did not deem it necessary to address this issue because they had already found that the claimant had complied with the preconditions. *Ambiente Ufficio v. Argentina*, Paragraph 629; *Urbaser v. Argentina*, Paragraph 203. Two other decisions involving applications for summary dismissal under ICSID Rule 41(5) addressed the material scope of a state's consent. In both cases, the applicable BITs limited recourse to arbitration to disputes arising out of expropriation. The claimants nevertheless argued that the tribunals had jurisdiction over claims for breaches of customary international law. In one case, the tribunal rejected the claim and found that an MFN clause 'should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties'. *Accession Mezzanine Capital L.P. and Danubius Kereskedöház Vagyonkezelö*

The other notable case dealing with the issue of state consent was *Tidewater v. Venezuela*, which followed other tribunals in finding that Venezuela's Foreign Investment Law did not contain a unilateral offer of consent to ICSID jurisdiction.[12] The tribunal, however, found that it had jurisdiction over certain claims brought under the Venezuela–Barbados BIT.

ii Jurisdiction ratione materiae

Definition of 'investment'

Several new decisions addressed the crucial and recurring question of the definition of 'investment'. These decisions followed the predominant approach in cases brought under the ICSID Convention, requiring that the claimant demonstrate the existence of an investment not only under the applicable BIT but also under the ICSID Convention.[13] The tribunals in these cases also analysed the relevance of the '*Salini* criteria' in defining the term 'investment' in the ICSID Convention. Most tribunals agreed that the criteria of contribution, duration and risk set forth in *Salini* were relevant,[14] but some rejected

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Zrt. v. Hungary, ICSID Case No. ARB/12/3, Decision on Respondent's Objection under Arbitration Rule 41(5) dated 16 January 2013, Paragraph 73. The second case involved two applicable BITs with slightly different wording. The tribunal rejected the claim with respect to one of the applicable BITs, but refused to find that it was 'manifestly without legal merit' with respect to the other. *Emmis International Holding, B.V., Emmis Radio Operating, B.V., Mem Magyar Electronic Media Kereskedelmi És Szolgáltató Kft v. Hungary*, ICSID Case No. ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) dated 11 March 2013.

12 *Tidewater Inc. et al. v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction dated 8 February 2013.

13 *Ambiente Ufficio v. Argentina*, Paragraphs 437–439; *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction dated 27 September 2012 ('*Quiborax v. Bolivia*'), Paragraph 211; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award dated 31 October 2012 ('*Deutsche Bank v. Sri Lanka*'), Paragraphs 293–295; *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability dated 30 November 2012 ('*Electrabel v. Hungary*'), Paragraphs 5.39-5.60; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction dated 12 February 2010 ('*SGS v. Paraguay*, Jurisdiction'), Paragraphs 91–108 (although this last decision is dated 2010, it falls within the scope of this chapter because it became publicly accessible only when the award on the merits was issued in 2012). A sole arbitrator also examined whether the investment was covered under the ICSID Convention in a case arising out of a contract. *Elsamex, S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, Award dated 16 November 2012 ('*Elsamex v. Honduras*'), Paragraph 253.

14 *Ambiente Ufficio v. Argentina*, Paragraphs 481-487; *Elsamex v. Honduras*, Paragraph 261; *Quiborax v. Bolivia*, Paragraph 219; *Deutsche Bank v. Sri Lanka*, Paragraphs 294-295; *Electrabel v. Hungary*, Paragraph 5.43.

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