Looking back on arbitration in 2018

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Hussein Haeri, partner and co-head of international arbitration at Withers, and associates Camilla Gambarini and Ruzin Dagli look back at 10 key international arbitration developments of 2018 and what to expect in the months ahead.

2018 was a particularly eventful year for international arbitration. While the investor-state dispute settlement system came under increased pressure reflected in jurisprudential, political and state-practice developments, it was also a year in which the arbitration community actively engaged with contentious topics such as the reform of ISDS, third-party funding and the Prague rules.

Equally importantly, it was a year of notable arbitral and domestic court jurisprudence, with several cases affirming the value and efficacy of arbitration to renew itself and resolve some of the most complex disputes on the planet.

1. Achmea: A turning point, or a twist of the tale?

On 6 March 2018, the Grand Chamber of the European Union Court of Justice issued a ruling under article 267 of the Treaty on the Functioning of the European Union finding that article 8 of the bilateral investment treaty between the Netherlands and the Czech and Slovak Republic, which provides for investor-state arbitration, is inconsistent with EU law.

The EU court's findings in the Achmea case have potentially far-reaching effects. While several arbitral tribunals constituted under other intra-EU BITs have not followed the ECJ's findings, on 31 October 2018 Germany's Federal Court of Justice set aside the UNCITRAL award rendered in favour of the claimant in the case in question, Dutch health insurer Achmea.

It is yet to be seen whether other European and non-European domestic courts will follow Achmea at the enforcement stage of investor-state awards brought under intra-EU BITs. While the case was by no means the first to peek into Pandora's box on the vexed question of the relationship between EU law and international law in the context of international arbitration, it was the one that most definitely lifted the lid.

The parameters and impact of the decision, such as on Energy Charter Treaty and ICSID cases involving intra-EU investment treaty disputes, as well as the enforcement of intra-EU BITs, are likely to feature prominently in arbitral and court jurisprudence in 2019.

2. One court to rule them all?

The Achmea judgment cannot be considered in isolation from the broader debates on the ISDS system and its potential reform, not least in Europe. 2018 also saw the EU Council openly express its commitment to the creation of a permanent multilateral investment court, adopting directives in March to authorise the EU Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes that could in principle supersede arbitration under BITs involving both EU and other parties. It is proposed that publicly appointed judges will replace arbitrators and there will be an appellate mechanism.

It is unlikely that all of the practicalities of this complex initiative will be developed in 2019, but further iterations of the project are likely to emerge.

3. The new Netherlands Model BIT

The trend for many states to update their model bilateral investment treaties in recent years, partly to address criticism of the existing framework, has reached the Netherlands – traditionally considered one of the clearest advocates of investment protection.

In May 2018, the Netherlands Ministry of Foreign Affairs drafted a new Dutch Model BIT that includes a stricter definition of investor, providing a list of elements to identify the investor's nationality based on substantial business activities.

While it doesn't impose obligations on investors, the model BIT contains provisions addressing the promotion of sustainable development and the importance of corporate social responsibility. It also refers to the host state's right to regulate to achieve legitimate policy objectives. This model will be used for renegotiation of existing Dutch BITs with non-EU states.

4. The engagement of the international arbitration community: theIBA sub-committee report on ISDS

The international arbitration community has also started to engage more fully in the debate on the reform of the ISDS system. In November 2018, the IBA sub-committee on investment arbitration published a report with the aim of improving it.

The sub-committee sought views from a variety of stakeholders, including state representatives, international organisations and practitioners in private practice. The report emphasises the need to address inconsistency, efficiency and transparency in international investment arbitration and concludes by acknowledging that challenges exist within the system but may be overcome if addressed in a disciplined and comprehensive manner.

5. International arbitration and third-party funding: ICCA-Queen Mary Task Force Report on Third Party Funding

The ICCA-Queen Mary Task Force Report on Third Party Funding was an important step in the engagement of the arbitration community with third-party funding, one of the most significant developments for practitioners over the last decade and a highly contested topic.

The ICCA-Queen Mary Task Force comprised leading international arbitration practitioners, academics, third-party funders and states that proposed principles to help parties, counsel and arbitrators to address issues that arise in the course of an arbitration when third-party funders are involved. The principles deal with disclosure and conflicts of interest, the issue of privilege and professional secrecy, security for costs, the final award and allocation of costs.

The report has facilitated a broader understanding of the use of third-party funding in international arbitration. Arbitral institutions, including ICSID, have also started to consider the regulation of third-party funding under their arbitration rules, another trajectory that looks set to continue in the year ahead.

6. When common law meets civil law in international arbitration: the Prague rules

An initiative carried out by leading practitioners from civil law jurisdictions proposed an alternative to the perceived dominance of common law-inspired practices regarding evidence in international arbitration proceedings. In December 2018 the Prague Rules on the Efficient Conduct of Proceedings in International Arbitration were launched, providing a framework for a more proactive role of arbitral tribunals with reference to features of an inquisitorial approach characteristic of civil law systems.

Among other efficiency-driven elements, the Prague rules discourage the use of extensive document production. A specific article on the principle of iura novit curia has been included, providing that arbitral tribunals have discretion to apply legal provisions not pleaded by the parties, including on public policy, provided that the tribunal seeks the parties' views on the legal provisions that it intends to apply.

Parties and arbitral tribunals may decide to apply the Prague rules as binding provisions or exclude the application of some sections. They look set to be a hot topic of discussion in 2019.

7. A case for ISDS? Chevron v Ecuador

Notwithstanding the ISDS headwinds of 2018, the award in the long-running dispute between Chevron and Ecuador provided a fillip for many who consider that investor-state dispute settlement continues to perform an important role in international adjudication.

The dispute included Chevron's allegation that a judgment of an Ecuadorian court against Chevron (concerning alleged pollution of the Amazon by a subsidiary the oil company) was procured by fraud. After extensive linguistic expert and other analysis, the arbitral tribunal composed of Horacio Grigera Naón, Vaughan Lowe QC and VV Veeder QCdeclared that material parts of the Lago Agrio judgment were "ghost-written" by one or more of the Lago Agrio plaintiffs' representatives in return for a bribe to the judge who had to decide the dispute in the Ecuadorian courts.

By maintaining as enforceable the judgment and knowingly facilitating its enforcement outside Ecuador, Ecuador committed a denial of justice under both the fair and equitable treatment standard and the treatment required by customary international law under the US-Ecuador BIT.

8. Arbitrators and disclosure: Halliburton Company v Chubb Bermuda Insurance Ltd

Arbitrators, disclosure obligations and grounds for challenging tribunal members also came under scrutiny in 2018. Perhaps no case attracted as much attention to the difficulties surrounding them as Halliburton Company v Chubb Bermuda Insurance Ltd, which arose out of an explosion of an oil well in the Gulf of Mexico in 2010.

In the underlying dispute, Halliburton failed to obtain compensation under an insurance policy signed with Chubb Bermuda and commenced arbitration proceedings against it. The High Court of England and Wales appointed the third arbitrator.

Halliburton objected to the presiding arbitrator's frequent appointment by insurers and failure to disclose that Chubb Bermuda had appointed him to hear two different claims made by the owner of the oil well in relation to its own settlements arising from the same accident. The High Court dismissed the application holding that such involvement was not evidence of bias.

In 2018, Halliburton appealed the decision, but the Court of Appeal upheld the High Court judgment and added that the failure to disclose was an

innocent oversight. The UK Supreme Court will hear the appeal in 2019 and will have to rule on whether an arbitrator should have disclosed their involvement in cases relating to the same incident. The decision will likely have important effects on arbitrators' disclosure obligations regarding real and perceived conflicts.

9. Libyan court decision supports arbitration

Numerous court decisions in 2018 demonstrated support for arbitration in various ways. A remarkable example occurred in an ad hoc arbitration seated in Benghazi, Libya, related to the construction of the Libyan European Hospital. In that case, the East Benghazi Court of First Instance assisted an Italian construction company, Gemmo, to overcome the inaction of Libyan-registered Peaktrade Holdings, the respondent, by appointing an arbitrator on its behalf.

The arbitral tribunal comprised Mohamed Abdel Wahab of Zulficar & Partners in Cairo appointed by the claimant, Fathi Ageila of House of Experience in Libya, appointed by the Libyan court on behalf of the respondent, and Rabab Yasseen of Mentha Avocats in Geneva as president, jointly nominated by the two arbitrators.

Another notable feature of the case was the rendering of the award – which was in favour of Gemmo – within three months of the constitution of the tribunal, as required by the Libyan Code of Civil and Commercial Procedure.

10. Award enforcement in Ukraine

Another significant domestic court decision in support of international arbitration – this time relating to enforcement of an award – was the decision of the Kiev Court of Appeal to enforce a US$159 million investment treaty award in favour of Everest Estate and other Ukrainian investors under the Ukraine-Russia BIT.

In May 2018, an UNCITRAL tribunal composed of Andres Rigo Sureda, Michael Reismanand Rolf Knieper issued an award finding that Russia had violated the Ukraine-Russia BIT because of the illegal expropriation of various real estate holdings in Crimea following Russia's annexation of Crimea in 2014. The Kiev Court of Appeal also ordered seizure of the shares of the Ukrainian subsidiaries of Russian state-owned entities highlighting the continued efficacy of arbitration for enforcement.

These and many of the other notable arbitration developments in 2018 suggest that, despite challenges, reports of arbitration's light fading are exaggerated and that its prospects for 2019 remain undimmed.

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Authors

Hussein Haeri

PARTNER | LONDON

Litigation and arbitration

+44 20 7597 6675

hussein.haeri@withersworldwide.com

Ruzin Dagli

ASSOCIATE | LONDON

Litigation and arbitration

+44 20 7597 6289

ruzin.dagli@withersworldwide.com

Camilla Gambarini

SENIOR ASSOCIATE | LONDON

Litigation and Arbitration

+44 20 7597 6082

camilla.gambarini@withersworldwide.com