THOMAS COOPER

Enforcement of International Arbitration Awards

25 November 2014

by George Lambrou FCIArb

LONDON
MADRID
PARIS
PIRAEUS
SÃO PAULO
SINGAPORE
WWW.THOMASCOOPERLAW.COM

Arbitration in Ancient Greece and Hellenistic period

- From the earliest times, settlement of disputes seems to have been the primary aim of even the most undeveloped legal systems in Greece. Arbitration was central to this.
- In Athens, Egypt and long before in Chios, there was legislation governing arbitration, to ensure proper procedures were followed.
- A party who had agreed to go to arbitration could not break that contract and appeal to the court against the arbitration agreement
- A party bound by an arbitration agreement was free to appoint anyone as an arbitrator with a third independent arbitrator appointed

Arbitration in Ancient Greece and Hellenistic period

"Against Dionysodorus": a shipping case in Athens of 323 BC

- Darius lent 3,000 drachmas to Dionysodorus on the security of Dionysodorus' ship on usual terms.
- The ship would sail from Athens to Egypt to load a cargo of corn and return back to Athens.
- On his return trip from Egypt, Dionysodorus found out that the price of corn in Athens dropped significantly and, in breach of his contract with Darius, Dionysodorus sold his cargo of corn in Rhodes.
- Darius was prepared to agree to a settlement, under the condition that any remaining amount in dispute would be referred to arbitration before "one or more merchants of the port".

THOMAS COOPER

Enforcement of Awards today

- Awards enforceable by Summary Enforcement (Arbitration Act 1996, S 66) and Actions on Award (breach of contract)
- Awards reciprocally recognised and enforceable by signatories to conventions on recognition and enforcement
  - 1958 New York Convention (NYC) – Ukraine is a signatory
  - Also 1988 Washington Convention relating to investment disputes (International Center for Investment Dispute Resolution – ICSID) – Ukraine is a signatory

Enforcement of Awards in England

- Court is not entitled to go behind Award
- Bound to recognise Award as made
- Court must seek to ensure Award is carried out
- Will issue order providing for enforcement
- Court may not amend any terms of the Award
- Will not stray into considering any aspect of the substantive reasoning of or intentions of Tribunal
- Basically “rubber stamps” New York Convention Award

Incapacity

- Usually refers to incapacity at time of agreement to arbitrate or of submissions of party opposing enforcement
- Examples of incapacity include serious illness rendering giving instructions to lawyers impossible
- “Technical” incapacity such as prohibition on entering into arbitration contained in Articles of Incorporation of a company commonly an issue
- Expert evidence of foreign law usual

Invalidity/Illegality

- Invalid arbitration agreement always fatal
- Validity determined by reference to law applicable to the reference or of country where agreement entered into
- Validity of the agreement is separable from any underlying contract which may be subject of dispute
- Validity of the subject contract may nevertheless affect enforceability of an Award

Invalidity/Illegality – Case Study:

- The lender shall have at its option the choice of international arbitration (ICC) or national courts. The Borrower must bring its claim in international arbitration (ICC).
- Russian Court held this was unfair to the Borrower and therefore an invalid arbitration clause.
- Different countries have different and changing laws on what is capable of being subject to arbitration.

Due Process/Natural Justice

- No proper notice of appointment of arbitrator/commencement of arbitration
- Enforcement under NYC may be set aside
- No definition exists of “proper notice” and it is largely dependent on law applicable where you are enforcing
- Whether or not notice given is a question of fact and Court will need to be persuaded
- Participation in proceedings in any way may amount to waiver of any irregularity

Due Process/Natural Justice

- Inability to present case after valid notice of commencement can stop enforcement
- A question of fact and very good reasons required to persuade Court
- Usually argued that procedures adopted were contrary to natural justice i.e. gave Respondent too little time to appoint arbitrator, or considered evidence Respondent had not seen/been able to deal with

Due Process/Natural Justice

- Court applies “audi alteram partem” principles – question is were the parties treated fairly by the Tribunal
- In England, not sufficient merely to complain procedures unreasonable or evidence relied upon not available to be dealt with or similar
- Must also be a denial of justice as a result of the conduct complained of before Court declines to enforce under NYC

Jurisdiction/Composition of Tribunal

- Award must confine itself to issues agreed for determination
- Parts of Award dealing with matters beyond scope of arbitration agreement may be severable i.e Award partially enforceable
- Award will not be enforced where Tribunal not constituted in accordance with agreed procedure, or failing that the law applicable

Jurisdiction/Composition of Tribunal

- In England, procedure adopted by Tribunal must be materially difference from that agreed; and
- Unreserved continued participation in proceedings where there has been a departure from agreed procedure may amount to waiver
- Departure from procedure must affect adversely the ability of the objecting party to present his case

Ukraine 2011 -2012 – most common reasons to refuse enforcement

- No proper notice of appointment of arbitrator
- Award set aside (relatively rare)
- Arbitration procedure was not in accordance of what was agreed by the parties – included failure to negotiation prior to commencing arbitration
- 10% refused in 2011, 6% refused in 2012 however…

Case Study: Ukraine 2011 -2012

- 60% (2012) and 62% (2011) of requests were left unconsidered
- Required documents not provided
- “improper” provision of documents
- lack evidence of proper notice – sent by email?

PRACTICAL POINTS TO REMEMBER

- Get security for your claim as soon as possible
- Know where you are likely to enforce and get advice on local enforcement practices to be sure the London arbitration procedure complies with that practice (not just the law).
- If payment is not made voluntarily, you might be in for a long and difficult fight -
- the New York Convention helps, but is no guarantee of enforcement
- Consider settlement options even after obtaining the arbitration award – winning the arbitration might be half the battle

Is there another way?

A new system of Dispute Resolution for foreign investments – the 1965 Washington Convention

Created

Over 155 countries are signatories including Ukraine

A new, independent International Arbitration forum

How does it work?

- Today, Friendship, Commerce and Navigation treaties have largely been superseded by Bilateral Investment Treaties or "BITs"
- A BIT is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in another state.
- The first BIT was signed in 1959.
- Other BITs were entered into sporadically until the 1980's
- Huge growth since 1987
- Of the over 2,500 BITs more than 1,900 were signed after 1987

Why are BITS important?

- The dispute resolution provision of most BITS provides for an option of independent international arbitration, between the foreigner and the country, *even if* the contract contains a completely different law and jurisdiction provision;
- BITS establish separate and distinct guarantees based on internationally accepted objective standards. Typically, these include:
  - Fair and Equitable Treatment of the Asset
  - Full Protection and Security of the Asset
  - Non Discrimination
  - Protection from Expropriation of the Asset

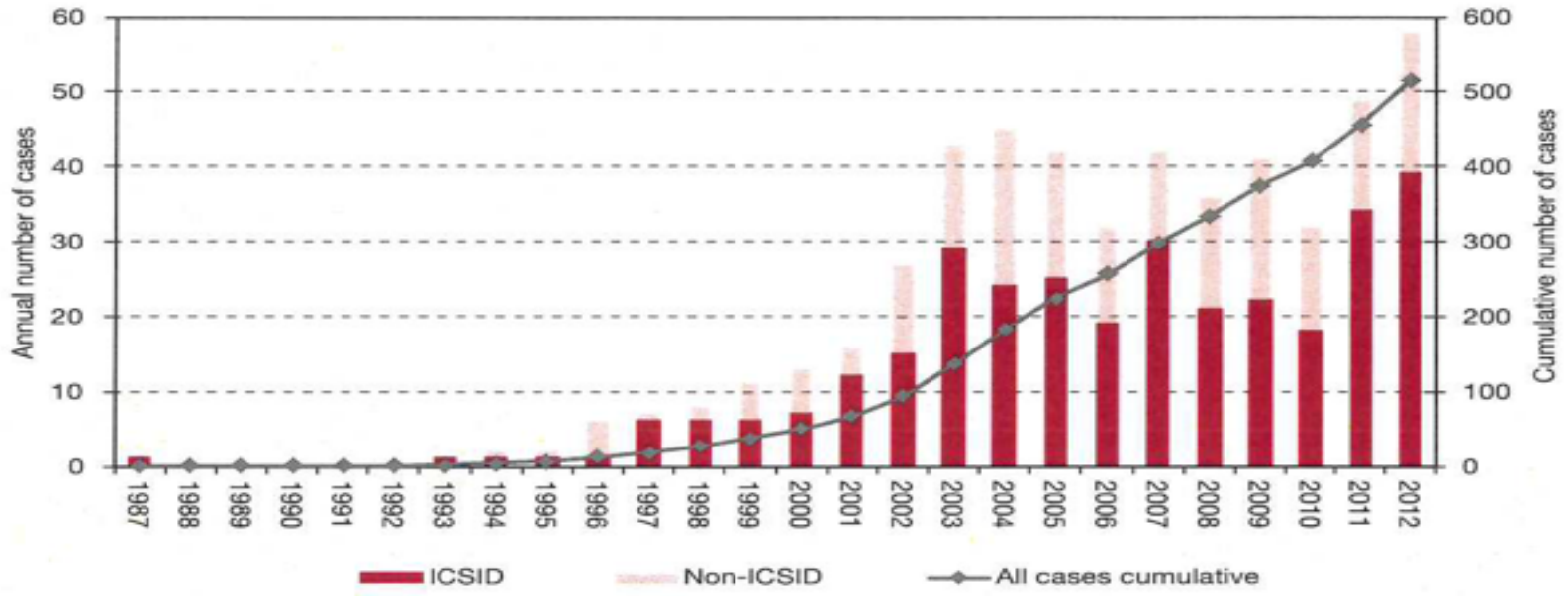
Why are BITS important?

- Awards are directly enforceable – no need to go to local courts
- Countries rarely fail to comply with ICSID Awards
- ICSID has close links to the World Bank

Rapid growth in investor-state arbitration

- Investor – State treaty based disputes have reached significant numbers only within the last 10 years

Figure 3. Known investor-State treaty-based disputes, 1987-2012

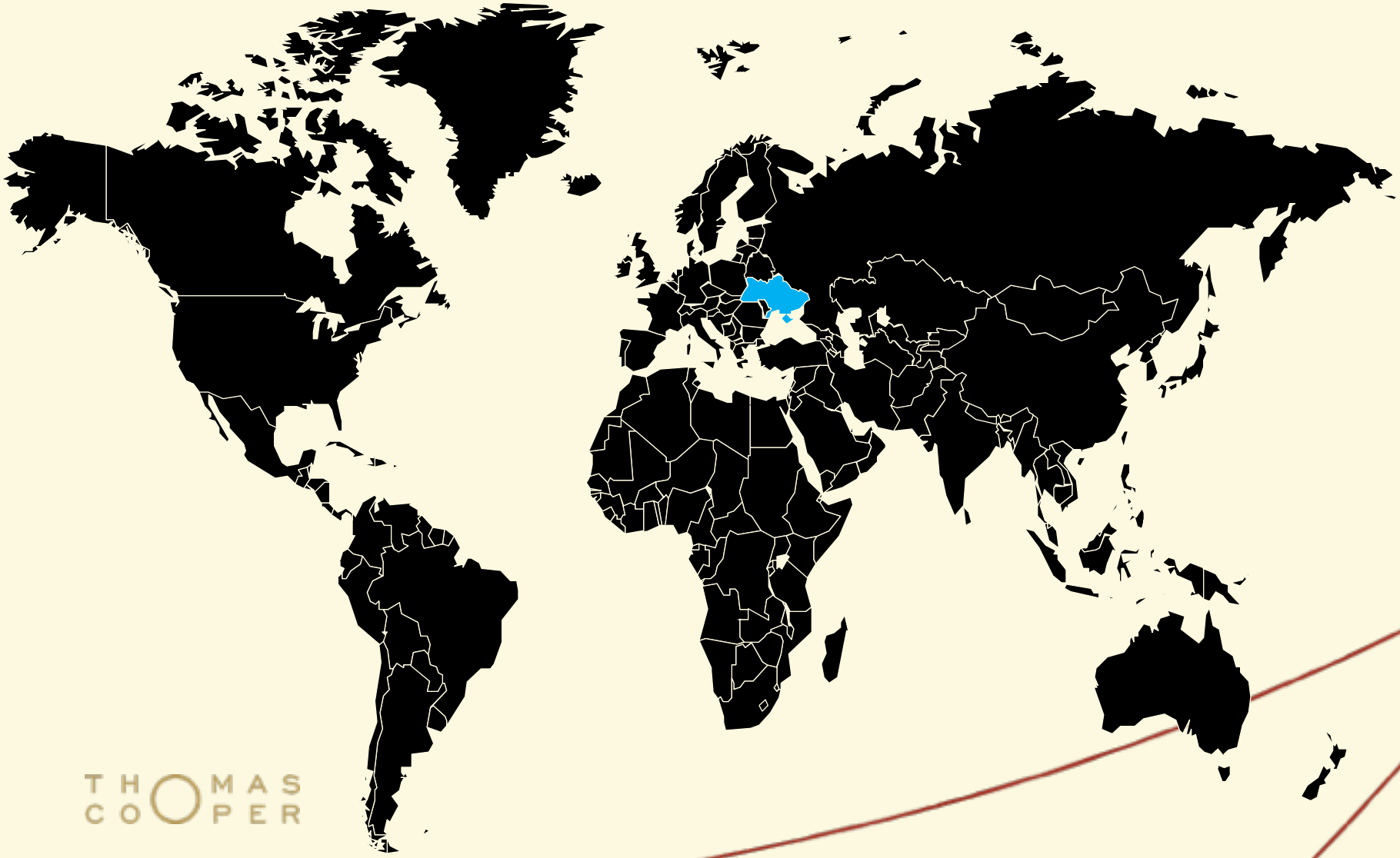


Source: UNCTAD.

- Access to ICSID or other international arbitration forums is either
  - By contract

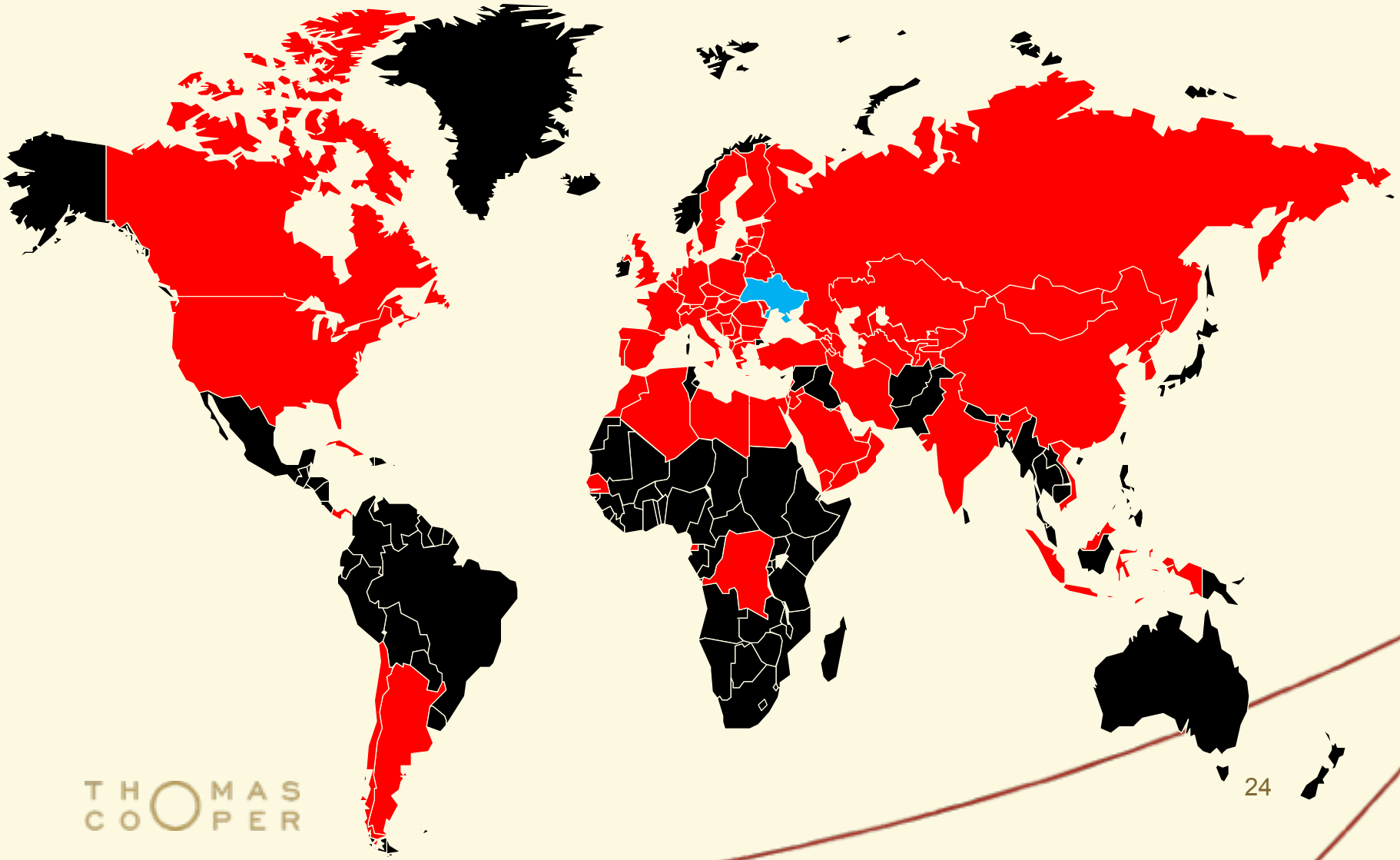
  - By treaty

Ukraine



THOMAS COOPER

Ukraine – Yemen (2001)



THOMAS COOPER

Why have we never heard about these treaties in the maritime world?

- A perception among lawyers that shipping is not an "investment" in a foreign country

What is an “investment”? Maritime precedents

A dredging operation in the Suez canal (*Jan de Nul v Egypt 2008)*

What is an “Investment”? Maritime precedents

Conversion, equipping and operation of three fishing vessels (*Atlantic Triton C v People’s Revolutionary Republic of Guinea 1986)*

What is an "Investment"? Maritime precedents

- *Middle East Cement Shipping and Handling Co. SA v Arab Republic of Egypt 2002*
- A Greek company invested in a floating silo, the "M/V Poseidon 8" to import and store bulk Portland cement for packing and dispatching within Egypt. All licenses obtained.
- Egyptian government then bans imports of Portland cement
- Assets were prohibited from leaving Egypt including the" M/V Poseidon 8", on a time charterparty, which was arrested and sold at auction
- Claim brought under the Greece - Egypt BIT before an ICSID international arbitration tribunal
- The Tribunal held….

What is an “Investment”? Maritime precedents

- The Vessel was an investment falling within the meaning of Art. 1.1 of the Greek - Egypt BIT "*movable and immovable property*".
- The time charter of the vessel fell within the Art 1.1 meaning of property, including *"goods that under a leasing agreement are placed at the disposal of a lessee in the territory of a Contracting Party in conformity with its laws and regulations."*
- Awarded damages for the expropriation of the M/V POSEIDON 8
- Awarded compensation for lost profits from the cement supply agreements that could not be fulfilled

What is an "Investment"? Maritime precedents

- *Inmaris v Ukraine 2012 -* The "Khersones" bareboat charterparty by a Ukrainian educational institution to German investors
- Germans undertook expensive repairs
- When the repairs were complete, a change of regime in Ukraine.
- Vessel prohibited

from leaving Ukraine

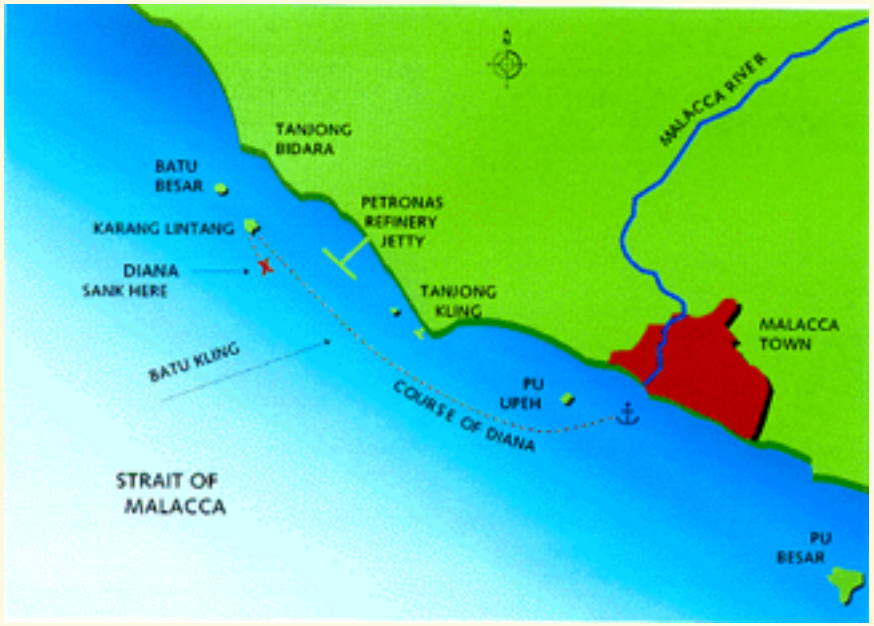
Tribunal held…

What is an “Investment”? Maritime precedents

- The bareboat charterparties were “investments”
- Ukraine ordered to pay Euro 3 million to the German bareboat charterers.

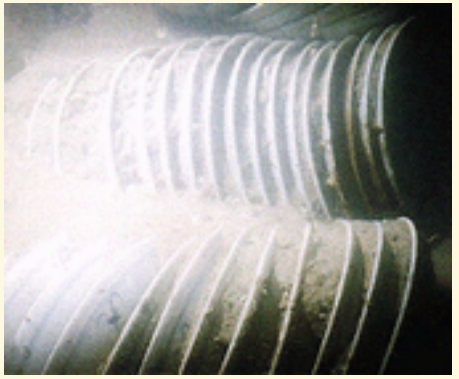
What is an “Investment”? Maritime precedents

- A salvage operation - The Diana sunk in 1817
- *Malaysian Historical Salvors, SDN, BHD [British] v. The Government of Malaysia 2007*



What is an “Investment”? Maritime precedents

Sole arbitrator held that a salvage operation was not an “investment” because it did not benefit the Malaysian public interest in a material way, but only in a cultural and historical way.



However…

The Award was annulled by an ICSID committee which held that the salvage contract is an “Investment” under the UK - Malaysian BIT

BITs might be used for

- Shipbuilding disputes
- Salvage
- Liner trade
- Offshore projects
- Time Charterparties, and bareboat Charterparties

- Remedy for
  - Arbitrary state actions
  - Lack of due process
  - Discriminatory or unfair treatment
  - Arrest and sale of a vessel (expropriation)

Is an London LMAA arbitration award and "investment"?

- awards are de facto and de jure functional equivalents of court judgments and therefore an asset
- interference of judicial or other state authorities with the enforcement of a foreign arbitral award may be a trigger for investment protection
- A number of recent cases rely on investment treaties to establish jurisdiction against states which aggressively and arbitrarily or negligently and willfully refuse to enforce an award with a foreign party beneficiary.

THOMAS COOPER

Arbitration Finance

- Specialty corporate finance that is focused on arbitration claims as assets
- Over the past few years we have seen the professionalization of arbitration finance as a class of asset
- A diverse range of third party funders, from investment funds, to law firms
- Arbitration Finance is particularly suitable for Investor – State Arbitration because these are large claims with little risk at the enforcement stage.
- They allow a claimant to release the value of unresolved claims
- Claimants can proceed to arbitration while controlling the risk of a loss

THOMAS COOPER

Arbitration Finance – how does it work?

Step 1 Analysis, both legal and financial

Step 2 Presentation of analysis to appropriate specialist Arbitration Funders

Step 3 Arbitration Funders undertake their own due diligence and legal advice – at their own cost.

Step 4 Agree financing with the Claimant;

- % of recovery or
- % of their legal expenditure

Investment Treaty claims – Example

- Ukrainian Shipowner has a substantial claim against the Chinese government with respect to shipbuilding contract because of the mandatory closure of a state-owned yard.
- A small settlement offer is made, which reflects the negotiating imbalances between the opponents, but not the merits of the case.

Investement Treaty claims – Example

- Experienced Investment treaty lawyers can step in to allow the Shipowner to make a credible threat of Investor-State arbitration, thereby substantially increasing the settlement with the government.

Conclusion

- We are rapidly entering a new international world order
- Individuals, companies and shareholders have real substantive and procedural rights to be paid compensation from foreign governments which breach international standards
- “Investors” potentially includes many players in the maritime industry
- The litigation costs can be borne entirely by specialist finance on a “no win/ no fee” basis

For further information or advice, please contact:

George Lambrou FCIArb
Email: george.lambrou@thomascooperlaw.com

LONDON
MADRID
PARIS
PIRAEUS
SÃO PAULO
SINGAPORE
WWW.THOMASCOOPERLAW.COM

THOMAS COOPER