

# Waivers in Investor-State Contracts: Bringing Certainty to Investors and States

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## Outline:

- What are waivers?
- Why do waivers matter?
- Can one waive the unwaivable?
- Waivers of waivers

Waiver is...

- “intentional relinquishment of a known right”

BUT

- “The term *waiver* is one of those words of indefinite connotation in which our legal literature abounds; like a cloak it covers a multitude of sins.” (William R. Anson, Principles of the Law of Contract)

## Why do waivers matter?

### ➤ To the investor:

- ❖ waivers help bring a State counterparty to a more equal footing by limiting exercise of sovereign powers by contract; and as such
- ❖ provide more certainty and comfort in dealing with the States

### ➤ To the state: waivers may help retain the jurisdiction over specific matters

## Typical waivers by State parties (express and implied):

- Waiver of jurisdiction of its own:
  - ❖ entering into agreement to arbitrate
  - ❖ waiver of sovereign immunity
  - ❖ extraterritorial concessions (esp. in the past)
  - ❖ waiver of the “local remedies” rule by IIAs

## Waivers by investor parties:

- Waiver of diplomatic protection
- Waiver of investment treaty rights

One cannot waive the unwaivable:

- **Article 139** of the 1979 Constitution of Islamic Republic of Iran
- **Article 2060** of the French Code Civil
- **Article 2** of 1972 UN GA Resolution Resolution 3281 (XXIX)

Or can he?

- **Article II(1)** of the 1961 European Convention on International Commercial Arbitration
- **Article 4** of 1962 UN GA Resolution 1803 (XVII)
- **Article 177(2)** of the 1987 Swiss PIL
- *Gatoil v National Iranian Oil Company*, Paris Court of Appeal, 17 December 1991



# Mitigating the “waiving of the unwaivable” risks by...

## ➤ Choice of lex fori/lex arbitri:

- ❖ A state, or an enterprise held by, or an organization controlled by a state, which is party to an arbitration agreement, cannot invoke its own law in order to contest its capacity to arbitrate or the arbitrability of a dispute covered by the arbitration agreement (*Article 177 of Swiss PIL*)

## ➤ Choice of applicable law:

- ❖ Equitable doctrines of English law
- ❖ Good faith doctrine in French law

## Waiver of IIA rights:

- Precedents mostly from the pre-investment arbitration era (*Calvo clause*, etc.)

### **BUT**

- the implied waiver of the investment arbitration rights in umbrella clauses cases: *SGS v Pakistan*, *El Paso v Argentina*
- more balanced view of *SGS v Philippines* line of cases

## Waivers of IIA waivers

- Tailoring the DR clauses to preserve the IIA rights concurrently with contract rights
- Selection of forum which can consolidate the IIA claims and the contract claims

# Thank you!

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