Two Roads – Two Tribunals: Recent "Fork-in-the-Road" Interpretations

Kluwer Arbitration Blog
December 16, 2009

Lee A. Steven (White & Case LLP)

Please refer to this post as: Lee A. Steven, 'Two Roads – Two Tribunals: Recent "Fork-in-the-Road" Interpretations', Kluwer Arbitration Blog, December 16 2009, http://arbitrationblog.kluwerarbitration.com/2009/12/16/two-roads-two-tribunals-recent-fork-in-the-road-interpretations/

Until recently, no arbitral tribunal had found an investor's claim under a BIT to be barred by a fork-in-the-road clause. Previous tribunals have found that for a fork-in-the-road clause to apply, the same dispute between the same parties must have been submitted to the local courts before resort to international arbitration and have drawn clear distinctions between contract and treaty claims.* The recent award in *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, however, suggests a different path.

In *Pantechniki*, Albania argued that Article 10(2) of the Greece-Albania BIT, which provides that either the investor or the host State may elect to bring the dispute to the local courts or to an international tribunal, precluded the investor's claims because it had brought the 'same matter' before the Albanian courts. In defense, the investor argued that the dispute before the Albanian courts was not the same as the ICSID dispute.

The tribunal, consisting of Jan Paulsson as the sole arbitrator, determined that the relevant test, as taken from the *Woodruff* case (American-Venezuelan Commission) and the *Vivendi* Annulment decision, was whether the "'fundamental basis of a claim' sought to be brought before the international forum is autonomous of claims to be heard elsewhere." The tribunal cautioned that individual cases should be

regarded with discernment, but found that what is "necessary is to determine whether claimed entitlements have the same normative source" and whether a claim "truly does have an autonomous existence outside the contract."

Applying this formulation to the facts at hand, the tribunal found that the ICSID dispute arose out of the same purported entitlement to payment for contractual losses that the investor had brought before the Albanian courts. As such, because the investor had already elected to bring such claims in the local courts, it could not pursue its claim for the same payment before ICSID. The tribunal explained that this finding did not preclude the investor from bringing other claims based on the treaty, including for denial of justice based on alleged mistreatment at the hands of the Albanian courts. It also noted that an arbitration in this case could not proceed on a contractual basis in the absence of an umbrella clause in the treaty.

Commentators have suggested that the Pantchiniki case might lend practical effect to fork-in-the-road clauses by requiring parties to look at the "subject-matter of the claims" rather than simply indentifying their "legal character" as either contract or treaty claims.**

In an even more recent award, the tribunal in *Toto Costuzioni Generali S.P.A. v. Republic of Lebanon* issued a decision interpreting a fork-in-the-road clause that, although not discussing the *Pantechniki* award, directly contradicted it.

In this case, Lebanon argued that the investor's decision to initiate two proceedings before the Lebanese Conseil d'Etat on the basis of a contractual jurisdiction clause precluded its claims before the ICSID tribunal under Article 7(2) of the Italy-Lebanon BIT. That provision of the BIT allows investors to submit disputes to the local courts, ICSID arbitration or to an ad hoc UNCITRAL tribunal, with such election being "final." The investor argued in defense that the claims brought before the ICSID tribunal were different from those brought before the Conseil d'Etat.

Consistent with *Pantechniki*, Lebanon insisted that the investor's claims "have the same aim of obtaining compensation for extra costs incurred in the execution of the Contract." In contrast with the *Pantechniki* approach, however, the *Toto* tribunal determined that in order for the clause to preclude the investor's claims, the claims brought under the BIT should have "the same object, parties and cause of action" as those already brought before the local courts. Citing a long line of

cases, the tribunal noted that "[c]ontractual claims arising out of the Contract do not have the same cause of action as Treaty claims."

The tribunal also cited the *SGS v. Pakistan* tribunal's conclusion that nothing in the Swiss-Pakistan BIT conferred jurisdiction "over claims resting ex hypothesi exclusively on contract." From this, the *Toto* tribunal appeared to conclude that the reverse also is true, *viz*., that the relevant contract clause could not affect its jurisdiction because that clause covered only contractual matters and did not extend to treaty matters. Notably, the *SGS v. Pakistan* tribunal did not deal with a fork-in-the-road clause (as there was none in the relevant treaty); rather, it dealt with the issue of whether the tribunal had jurisdiction over contract claims. Nevertheless, the tribunal's final conclusion was that "when … actions are breaches of the contract and also violations of the Treaty, the Tribunal will have jurisdiction notwithstanding the Contract's jurisdiction clause."

These two recent cases interpreting fork-in-the-road clauses in investment treaties suggest that the interpretation of such provisions may attract greater attention in future cases.

By Lee A. Steven and Nicole Thornton

* *See, e.g*., Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses, and Forks in the Road*, 5/2 Journal of World Investment & Trade 231, 247 (2004) (citing cases).

** *See, e.g.*, Anthony Sinclair, Allen & Overy LLP, *Fork-in-the-road provisions in investment treaties*, 4 Nov. 2009, *available at* http://www.allenovery.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=53649&prefLangID=410.