Consent in Multiparty Investment Arbitration – The Most Recent Installment

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On November 17, 2014, the tribunal in *Alemanni v. Argentine Republic* issued its long-anticipated decision on jurisdiction and admissibility. *Alemanni* is the third in a series of large-scale arbitrations arising out of Argentina's default on its sovereign debt, and the most recent decision bears some resemblance to the preliminary awards rendered in the other two matters (*Abaclat v. Argentine Republic* and *Ambiente Ufficio v. Argentine Republic*). However, *Alemanni* puts its own distinctive stamp on the question of mass and multiparty claims in the investment context.

The facts in *Alemanni* are substantially similar to those in *Abaclat* and *Ambiente Ufficio* and therefore need not be discussed at length. Essentially, the three disputes involve claims asserted by varying numbers of Italian bondholders following Argentina's default on certain sovereign bonds. All three matters saw Argentina objecting to the arbitral proceedings on both procedural and substantive grounds. However, the number of claimants in each matter differed significantly. *Abaclat* involved by far the largest number of claimants (60,000), while *Ambiente Ufficio* and *Alemanni* saw much more modest numbers of claimants (90 and 74, respectively).

All three awards considered a variety of substantive objections relating to whether the types of claims at issue could be considered "investments" under the relevant treaties and whether the claimants could be considered "investors." Though interesting, these matters are not the subject of this post. Instead, the emphasis here is on certain procedural questions, particularly with respect to the consent of the respondent state.

In *Alemanni*, the parties argued the question of consent in a manner that was very similar to the positions adopted in *Abaclat* and *Ambiente Ufficio*. However, the tribunal in *Alemanni* noted that it was "not impressed by either of the two opposing arguments: either that a multi-party arbitration can only be brought where there has been a second, special consent to that effect; or (conversely) that the parties' (or the respondent's) specific consent is of no special relevance, in the particular context of a multi-party arbitration, to the establishment of the tribunal's jurisdiction." (para. 268) Instead, the tribunal indicated that "[i]n a BIT case . . . where the consent of the respondent State is in issue, the question for consideration remains simply: on the proper interpretation of the BIT, has the respondent, or has it not, given a consent which is wide enough in scope to cover the proceedings brought (as in this case) by the multiple group of co-claimants." (para. 269).

In deciding this and other questions, the tribunal relied heavily on the Vienna Convention on the Law of Treaties and noted in this context that Article 31(1) of the Vienna Convention speaks of interpreting a treaty in good faith and "in accordance with the ordinary meaning to be given to the terms of the

treaty." (para. 270) However, the tribunal did not believe that this aspect of the Vienna Convention contemplated the imposition of "a sort of lexicographical literalism." (para. 270) As a result, the tribunal in *Alemanni* decided that focusing primarily on whether the bilateral investment treaty in question used the word "investor" in the singular or plural was inappropriate, thereby rejecting certain aspects of both *Abaclat* and *Ambiente Ufficio* as well as the briefing of the parties.

Instead, the tribunal considered the key question to be whether "the words 'dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State' as they appear in Article 25(1) of the ICSID Convention [are] to be understood as meaning 'dispute between a Contracting State and one, but only one national or another Contracting State.'" (para. 270) The tribunal concluded that there was nothing in the context of the ICSID Treaty or additional materials to support importing the phrase "but only one" into the analysis. (para. 271)

As a result, the tribunal framed the question of the respondent's consent as turning on whether the large number of claims in this particular matter could be considered to constitute "a dispute." (paras. 273, 286) The tribunal in *Alemanni* believed that *Abaclat* did not address this issue at all, with *Ambiente Ufficio* only considering the matter "in a somewhat tentative way." (para. 290) Therefore, *Alemanni* departs from these other cases in a potentially significant manner.

The tribunal in *Alemanni* found the emphasis on "a dispute" to be subsumed within Article 25(1) of the ICSID Convention as well as both the ICSID Institution Rules (Article 2) and the ICSID Arbitration Rules (Rule 1). (para. 292) "The Tribunal . . . indicated that it is perfectly possible, in its opinion, for 'a dispute' to have more than one party on the claimant's side. But the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute." (para. 292).

In this case, the tribunal believed that "the substance of that jurisdictional issue is so closely entwined with the substantive disagreement between the Parties, both factual and legal, that it has to be joined to the merits." (para. 293) As a result, the tribunal indicated that it would delay its decision on this matter until after the merits phase.

The tribunal went on to decide a number of other matters relating to jurisdiction and admissibility. Many of these discussions are quite intriguing, particularly with respect to the extent to which the tribunal relies on or distinguishes reasoning found in *Abaclat* and *Ambiente Ufficio*. However, the decision with respect to consent of the respondent gives rise to a number of observations relating to the future development of large-scale disputes in investment arbitration.

The first two observations are positive in tone. First, by framing the question as one relating to the definition of "a dispute" rather than as requiring a detailed search for plural or singular nouns in the relevant bilateral investment treaty, *Alemanni* does much to advance the sophistication of the jurisprudence relating to large-scale arbitration. Furthermore, the *Alemanni* approach effectively avoids the debate about whether, in allowing mass, collective or multiparty arbitration, tribunals are elevating the "spirit" of the treaties over the language of the text. In so doing, *Alemanni* may help provide a more predictable and universally acceptable basis for decisions relating to multiparty disputes.

Second, *Alemanni* provides a rule that will be useful not only in cases involving so-called "mass" arbitrations such as *Abaclat* but also in cases involving smaller "multiparty" disputes such as *Ambiente Ufficio* and *Alemanni*. Since the future of large-scale investment arbitration more likely lies in these types of more modest cases, *Alemanni* could prove more persuasive than *Abaclat* in the coming years.

The third and final point inserts a note of caution and concern. Although the *Alemanni* tribunal's emphasis on the factual nature of "a dispute" makes sense as a matter of jurisprudence, this approach, if adopted by other tribunals, may very well delay many jurisdictional determinations. As a result, large-scale investment arbitration could become even more expensive and time-consuming, since tribunals may be increasingly inclined to delay their decisions about consent until the merits phase. Of course, some future matters may be more amenable than *Alemanni* is to a preliminary decision about the nature of "a dispute" with multiple claimants, but this type of fact-laden analysis could arise in other circumstances as well.

Although *Alemanni* may not generate as much discussion in the international community as *Abaclat*, the decision on jurisdiction and admissibility is well worth reading. Indeed, *Alemanni* demonstrates an increasing sophistication in the analysis of large-scale investment arbitration and may become more influential than *Abaclat* in the coming years.