The New Frontier: Traded Investment Claims and Awards

Kluwer Arbitration Blog
October 15, 2019

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Please refer to this post as: Kathleen Claussen, 'The New Frontier: Traded Investment Claims and Awards', Kluwer Arbitration Blog, October 15 2019, http://arbitrationblog.kluwerarbitration.com/2019/10/15/the-new-frontier-traded-investment-claims-and-awards/

For all the talk about third party funding, little has been said about the buying and selling of claims outright – what I call "claims trading". A forthcoming article is the first to survey all the known instances of claims trading in international investment arbitration. It reviews more than forty decisions in which tribunals or courts faced a transferred or assigned claim whether before the arbitration proceedings began, during, or after proceedings were over, such as with the purchase and transfer of an award. This review suggests that the outcomes vary, but that tribunals tend to reject traded claims – to the detriment of the system. This post highlights some of the major points made in the forthcoming article.

Cases dealing with traded claims often disguise themselves as addressing other legal issues, leading to a haphazard series of doctrines that tends to obscure the trade. Some of the haphazardness is the result of the diversity of timing in or nature of the transfer. Transfers and assignments of claims or awards take place at various stages and in various forms. In considering pre-arbitration claims trading, for example, tribunals have followed three primary doctrines that typically lead them to reject such trades: first, a sort of exclusionary standing doctrine which has evolved from the concept of treaty shopping; second, an abuse of process doctrine; and, third, a state consent doctrine. No provision in investment treaties sets out a bar on trades; rather, in applying these doctrines, those tribunals have either looked to general principles or to customary international law or they have forced an examination of the trade through the jurisdictional terms available to

them.

The post-arbitration claims trade, which deals with transfers of awards, is seen by some commentators as a different animal all together – to be specific, a vulture — though the concepts are the same. There are many fewer decisions and fewer still academic articles that have examined such assignments at all. Part of the reason for this dearth of analysis may be the fact that such assignments need not be disclosed for enforcement purposes or any other legal purpose. In the few cases that are known, courts notably have not seen trades as detrimental to enforcement; they have largely not had occasion to examine the trade at all. What is clear, however, is that there is a growing consensus among practitioners and scholars that post-arbitration trades are harmful.

The consensus against post-arbitration trades has led some states to take action such as by passing legislation that puts limits on recovery in these circumstances. The media and certain nongovernmental organizations have played a role in creating sympathy for respondents that are pursued by so-called vulture funds. Despite these criticisms, the market for claims – whether post- or pre- arbitration – is not going away; it will simply become less transparent. A better way is for states to acknowledge and regulate claims trading.

Regulating claims trading could take many different forms. One option would be to amend language in investment instruments to clarify the scope of permitted trades. Amending instruments would allow states either to permit or prohibit expressly assignments at particular points in a dispute.

A second option is to follow the model of U.S. bankruptcy law and institutionalize claims trading. In large part, bankruptcy manages claims trading through disclosure and some narrow judicial empowerment. Ultimately, an exact replica of the bankruptcy framework is not practical for the investment framework, but at a minimum, institutionalization in investment arbitration could provide the arbitral tribunal with guidelines as to which claims would be permissible and would provide added transparency.

Finally, a third option would be to bring in more parties to the investment arbitration exercise than just the two litigants to help tribunals and courts consider a trade. In other words, states could add more opportunities for feedback to the system. This option is less helpful in that it would not necessarily resolve the

doctrinal murkiness from which the field suffers now; it would merely offer tribunals and courts additional considerations according to which they may evaluate trades.

Still, adopting any of these changes or considering additional options would demonstrate that states and other influential players in the design of investor-state dispute settlement are taking claims trading seriously. Claims trading today has become a feature of international investment law and ought to be seen as a part of what makes international investment law *work*. While opponents have argued that "vulture funds" are engaged in illegitimate or even illicit activity in trading claims, careful analysis reveals that there are a few contexts in which states lose, fail to pay, and may be subject to predatory treatment as those opponents suggest. But even in those few remaining cases, there are other paths forward for regulating the claims trade than barring enforcement as some states have done.

Theoretical debates – such as how investment law facilitates social justice or redistribution of wealth – can make it appear as though there are irreconcilable conflicts among claims trade trends and civil society's priorities. Yet analysis of each legal context in which claims trading has been reviewed suggests fewer conflicts in practice. Some claims trades may actually facilitate a better redistribution than no trade. Further, rather than requiring dramatic legal changes or novel theories that give certain sovereigns special treatment, protection of developing states and their outstanding debts may require only moderate limitations on assignments. While some states and commentators challenge this trend, on a closer look, it is apparent neither that claims trading poses a substantial risk to developing states nor that legal options are binary.

Indisputably, the international claims trade poses challenges to legal interests, but these challenges are not insurmountable, and accommodating the phenomenon somehow is now beginning to seem inevitable.