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Covid-19 and Investment Treaty Claims by Insolvency Administrators

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COVID-19 has already destroyed many businesses, and insolvencies will only increase as governments withdraw temporary protections. Recent decisions highlight the potential for external administrators of these insolvent companies to use investment treaty arbitration to recover assets, even from the state that appointed the administrators.

Generally, external administrators are appointed by directors, creditors or courts to administer companies that are unable to pay their creditors. Those administrators can either help the company try to survive or liquidate the company's assets to pass on to creditors. Either way, insolvency administrators often pursue claims on behalf of the companies. Sometimes, these claims are under investment treaties.

Such claims have been less controversial when the insolvency administrator had the same nationality as the foreign investor. So, for example, Thailand did not object to the claim by the German company, Walter Bau, under the investment treaty between the two countries, even though it was pursued by a German insolvency administrator (but Thailand – like other respondent states in similar situations – did argue that the insolvent claimant should provide security for any adverse costs award). Indeed, the administrator ultimately won an award of over €30 million for Walter Bau's creditors.

However, claims pursued by administrators of the same nationality as the respondent state have been more controversial.

Such claims are facilitated by investment treaties that confer a right on a company in the state hosting the investment to claim against that state, so long as it is controlled by an investor from another party to the treaty. Thus, Article 26 of the Energy Charter Treaty ("ECT") gives standing to claim against a "Contracting State" to a "national of another Contracting State", but provides that such a national includes a local company so long it is "controlled by Investors of another Contracting Party". Indeed, the ICSID Convention, which provides the platform for many investment treaty arbitrations, contains similar wording in Article 25(2)(b).

These provisions were recently relied on by the Italian administrator of the Italian company to pursue a claim against Italy – the very state whose courts appointed it.

Eskosol was one of many companies affected by some European countries withdrawing incentives to produce solar energy. After Eskosol became insolvent, its administrator commenced arbitration with Italy in 2015 under the ECT. Even though Eskosol and the administrator were Italian, Eskosol argued it had standing to claim against Italy under the ECT and ICSID Convention provisions noted above because it was 80% owned by a company incorporated in Belgium (which, with Italy, is a party to the treaties).

Italy challenged that standing, arguing that Eskosol could not be foreign controlled as it had an Italian administrator. The tribunal the challenge (but ultimately denied the merits of the claim).

The tribunal acknowledged at paragraph 234 that "[i]t is of course true that a bankruptcy receiver exercises significant influence over the management of a company's *assets*, under the supervision of a bankruptcy court, while the company remains in bankruptcy proceedings". But it went on to state that "the receiver does not exercise such authority *on his own behalf*, making him the ultimate party-in-interest to the company's fate, and therefore supporting some conclusion that it is *his* nationality that properly should govern for ECT and ICSID Convention purposes".

For the tribunal, "the receiver acts essentially as trustee or agent – not as a principal – on behalf of those with dominant legal and financial interests in the company (e.g. shareholders and priority creditors)". Moreover, "[t]hat agency … is a temporary power, not a permanent one, and it remains in place only so long as the entity remains in bankruptcy".

The tribunal was also guided by the objects and purposes of the ECT and the ICSID Convention, which, according to the arbitrators, include "facilitating the neutral resolution of disputes between investors and States, regarding those States' treatment of investments made within their borders". The tribunal said in paragraph 236 that it would be inconsistent with this object and purpose "to divest local companies that indisputably were owned by foreign investors from the ability to pursue potentially well-founded ECT claims, simply because of a collapse in the company's economic fortunes, particularly in circumstances where it is alleged that the collapse was attributable to the State's own wrongful conduct".

These conclusions of the tribunal are consistent with another recent decision.

In the dispute between the Latvian company PNB Banka and Latvia under the Latvia-United Kingdom investment treaty, the tribunal considered an argument by British shareholders of the bank that their lawyer, rather than the bank's Latvian insolvency administrator, was the proper representative of the claimant in the arbitration. In a January 2020 procedural order, the tribunal allowed the administrator to represent the bank, at least until the end of the jurisdictional phase when it would revisit the issue if required.[1)]

While *PNB Banka* and *Eskosol* highlight the possibility of using investment treaties as a means for external administrators to recover insolvent companies' assets, even from the states that appointed them, the precise scope for investment treaties to provide

relief in these circumstances is still not yet known. Public decisions until now have not addressed critical questions that naturally arise from such claims. For example, no tribunal has yet publicly addressed if there are any limits to an insolvency administrator pursuing a claim in which its own appointment is one of the state's measures that is challenged in that claim. Accordingly, the precise utility of investment treaties to external administrators of the many companies that have been, and that will be, ruined by COVID-19 is also not yet known.

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References

↑1 The details of the January 2020 order are reproduced in AS PNB Banka and others v Republic of Latvia, ICSID Case No ARB/17/47, Decision on the Proposals to Disqualify Messrs James Spiegelman, Peter Tomka and John M. Townsend, 16 June 2020, at paragraph 43.

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