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After Failing To Cross The Jurisdictional Bridge: What Can We Learn From Kimberly-Clark v. Venezuela?

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Introduction

On November 2021, an Arbitral Tribunal issued the award in an investment arbitration case commenced by three subsidiaries of Kimberly-Clark against Venezuela. The claims where brought under the BITs between Venezuela and the Netherlands (Dutch BIT), Venezuela and Spain (Spanish BIT), and Venezuela and Belgium (Belgium BIT). The award, which is highly case-specific, established that the Tribunal lacked jurisdiction. In essence, the Arbitral Tribunal found that 1) Venezuela's consent to arbitration under the ICSID Additional Facility Rules (AF Rules) (in accordance with the relevant provisions of the applicable BITs) had expired, and that 2) it could not use the treaties' MFN clauses to extend the dispute resolution mechanism contained in BITs signed with other countries.

The Background

It was mid-2016 when newspapers published that Venezuela had occupied the headquarters of the company Kimberly-Clark, after the suspension of its production. According to the claimants, the dispute actually goes back to 2003 when Venezuela allegedly began implementing several measures which -by December 2015- ended up ruining the sustainability of Kimberly-Clark's business and the value of its investments.

In 2018 the arbitration was initiated. Claimants Kimberly-Clark Dutch Holdings, B.V. (Dutch), Kimberly-Clark S.L.U. (Spanish), and Kimberly-Clark BVBA (Belgian) appointed Mr. David Haigh as arbitrator. Venezuela appointed Prof. Brigitte Stern. The Chairman of the Administrative Council appointed Prof. Stephan Schill, a German national, as presiding arbitrator. However, Professor Stephan Schill resigned to act as president of the tribunal, due to challenges brought by Venezuela. The nation challenged Professor Schill's appointment based on his allegedly taking a prior written position on MFN clauses being interpreted expansively. He was ultimately replaced by Prof. Gabrielle Kaufmann-Kohler.

The arbitration was bifurcated. In what matters to this analysis, Venezuela argued that the arbitral tribunal lacked jurisdiction *ratione voluntatis* over the claims, as it did not consent to arbitrate disputes under the AF Rules. It claimed that the Spanish and the Dutch BITs contained a time-

limited offer to arbitrate under such rules which expired when Venezuela became a party to the ICSID Convention, and did not revive after Venezuela's denunciation of the Convention in 2012. As to the Belgian BIT, Venezuela argued that the treaty never contained an offer to arbitrate under the AF Rules.

In turn, Claimants contended that the Arbitral Tribunal had jurisdiction because all the BITs would contain Venezuela's consent to arbitrate under the AF Rules. They challenged Venezuela's contention that the offer to arbitrate under the AF Rules expired when the country joined ICSID.

In fact, in regard to the Dutch and Spanish BITs, the claimants asserted that the relevant issue would be that respondent is not a party to the ICSID Convention. This circumstance would determine that investors must refer their disputes to arbitration under the AF Rules, in accordance with the relevant provisions of the respective BITs.

The English version of the Dutch BIT, under Article 9, provides as follows:

> "*As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in Paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules)*".

The relevant section of the Spanish BIT provides the following under Article XI:

> "If the controversy cannot be resolved in this way within a period of six months, counting from the date of written notification mentioned in paragraph 1, it will be submitted, based on to the investor's choice: a) To the competent courts of the Contracting Party in whose territory the investment was made, b) To the International Center for Settlement of Investment Disputes (ICSID) created by the Convention for the Settlement of Investment Disputes between States and Nationals of other States, opened for signature in Washington on March 18, 1965, as long as each State party to this Agreement has adhered. In the event that one of the Contracting Parties has not adhered to the aforementioned Convention, the ICSID Additional Facility Rules will be used".

[Free translation from the original in Spanish]

As to the Belgian BIT, claimants argued that the treaty does not limit consent to arbitration according to the ICSID Convention, but contains Venezuela's consent to arbitrate either under the ICSID Convention or under the AF Rules. It would only refer to the ICSID Convention insofar as it created the Centre. Article 9(3) of the Belgian BIT, in its authentic Spanish version, provides the following:

> "*In the event of recourse to international arbitration, the dispute will be submitted to*

> *the International Center for Settlement of Investment Disputes (ICSID) created by the "Convention for the Settlement of Investment Disputes between States and Nationals of other States", opened for signature in Washington on March 18, 1965*".

[Free translation from the authentic version in Spanish]

As mentioned earlier, the Tribunal sided with Venezuela and concluded that it did not have jurisdiction to hear the dispute because Venezuela's consent to arbitration was missing.

The parties disagreed on whether jurisdiction could be established through the MFN clause. Claimants asserted that under the MFN clause contained in the BITs, they could request the application of a more favorable dispute resolution provision contained in other treaties concluded by Venezuela. On the other hand, Venezuela argued that claimants could not invoke substantive provisions of the BITs, which include a MFN clause, if consent to arbitration is not priorly established. Venezuela quoted Judge Crawford's metaphor, according to which "*the investor is on one side of the bridge; the substantive provisions of the treaty (including MFN) are on the other; the bridge is made up of the jurisdictional provisions of the treaty – the investor can only cross if jurisdiction is established*".

The Tribunal also sided with Venezuela on this issue and decided that it could not use the treaties' MFN clauses to extend the dispute resolution mechanism contained in BITs signed with other countries.

Analysis

Regardless of the fact that the award was based on applicable provisions and naturally tailored to the case, the decision on jurisdiction comes with general lessons which are valuable for all stakeholders of the international investment arbitration arena.

First, the award shows the difficulties arising from interpreting a BIT that has more than one authentic version in place, in different languages. Regarding the Dutch BIT, for example, it had authentic versions drafted in Dutch, English and Spanish. Despite being a common practice because of the international nature of treaties, the issue is problematic for arbitral tribunals when faced with inconsistencies in their wording or when two interpretations of the same BIT can be advanced based on the differences in languages. In essence, since the issue was to determine whether Venezuela's offer to arbitrate under the AF Rules was limited to the pre-ICSID period or not; the expressions used in the Dutch BIT were highly sensitive. Both the English and Spanish versions used the present perfect tense "*has not become*" a Contracting State of ICSID; as opposed to the words used in the Dutch version of the same BIT, which were translated as "*is not a Contracting State*".

The arbitral tribunal noted the discrepancy, considered the difference material for the issues under analysis, and in the end chose one authentic version over the other. Accordingly, the first lesson is for those taking the position of negotiating BITs, as a policy consideration, because it is of the utmost importance to tackle these problems in advance.

Second, the award also provides a detailed analysis on the scope of application of the MFN clause.

In the end, the arbitral tribunal concluded that consent to arbitration cannot be formed by incorporating more favorable dispute resolution mechanisms contained in other investment treaties. This because, at that jurisdictional stage, the Arbitral Tribunal considered that it could not apply a BITs substantive content (including a MFN clause) before finding that it had jurisdiction to hear the case.

However, the question of whether procedural rules from a third-party treaty can be introduced is still open to discussion, especially when it has not been addressed by a BIT. In no way the award seems to settle the saga initiated with *Maffezini v. Spain*, which has been "*probably the most controversial effect of MFN before the tribunals*" according to recent reports. The issue has been identified as a "*circular question [that] has given rise to divergent answers*": Can arbitral tribunals assert jurisdiction based on the MFN clause, if a treaty does not give them jurisdiction and, therefore, allegedly the power to apply the MFN clause itself? The question is still open to discussion.

Finally, in third place, the award also shows the importance of the composition of the Arbitral Tribunal. The decision could have gone differently if German Professor Stephan Schill would not have resigned to act as president of the tribunal. We will never know. However, it is quite clear that issue conflicts in international investment arbitration are gaining a great deal of attention and will certainly cause much more challenges in the future.

This is why it is now the time to define a common approach to an arbitral tribunal's prior exposure to a legal or factual issue relevant for the adjudication of the dispute. Arbitral institutions have an excellent position to address this issue, as it is information that could be sensitive to disclose by arbitrators and that may be perceived by the parties as affecting the impartiality of the arbitrator.

Conclusion

The award provides several valuable lessons to all players in the investment arbitration arena. However, one issue was kept unresolved: the practical outcome was not considered by the Arbitral Tribunal; the availability -or lack of availability- of international arbitration for investment disputes was not properly balanced. Indeed, the Tribunal only noted the argument, but took little or practically no account to allegations that claimant could be left without a forum to arbitrate.

In any case, the international arbitration community must keep a close look to see how the dispute on the merits will be settled and in which forum. Apparently, at least the Spanish subsidiary would be able to file a new case under UNCITRAL Rules (in accordance with the Spanish BIT). It is essential to guarantee the basic principle of granting adequate and timely access to justice in a case that involves allegations of assets being seized and claims that would exceed USD 600 million.

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