Kluwer Arbitration Blog

Regulating Fraud in International Arbitration

Roger Alford (General Editor) (Notre Dame Law School) · Thursday, September 3rd, 2009

The recent ICSID arbitration award in Europe Cement Investment & Trade S.A. v. Turkey raise interesting questions of how to regulate fraud in international arbitration. Here is the key holding of the tribunal with respect to fraud regarding an alleged ownership interest in the relevant companies.

> 163. In the view of the Tribunal, the circumstances of this case as outlined above give rise to a strong inference that there was no transfer of shares in CEAS and Kepez to Europe Cement in May 2003 and that the Respondent is correct in its assertion that not only did the Claimant fail to prove that it had purchased the shares but that it never purchased the shares in fact. This carries with it the clear implication that the claim to share ownership was based on inauthentic documents and that the claim was fraudulent. If this were true, it would mean that the Claimant initiated a claim asserting that the Tribunal had jurisdiction on the basis of a false claim that it owned shares in Turkish companies and thus had an investment in Turkey.
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> 164. The Claimant could have rebutted this inference. It could have produced the originals of the share agreements. It could have produced the share certificates that it claimed it owned. Indeed, its response to Procedural Order No. 3 indicated that it had no objection to the production of certain documents and at that stage the Tribunal had no reason to believe that it would not do so. But, it never produced any documents. This contributes to the inference that the originals of the documents copied in its Memorial and on which its claim was based either were never in the Claimant's possession or would not stand forensic analysis, in which case the claim that Europe Cement had shares in CEAS and Kepez at the relevant time was fraudulent.

The interesting twist in the case is that the Claimants recognized that their case was headed south and they requested that it be dismissed several months before the award was rendered. Respondent opposed this maneuver, arguing that the dismissal would be without prejudice. Both sides agreed that the Tribunal lacked jurisdiction, but for different reasons.

> In the view of the Tribunal, the fact that the Parties agree on the outcome – dismissal for lack of jurisdiction – does not mean that they must be deemed to have agreed on

> discontinuance or that there is no dispute between the Parties. They differ in their reasons for the lack of jurisdiction – Europe Cement says that it is because it cannot produce share certificates to establish that it owns shares in CEAS and Kepez but the Respondent says that the evidence shows that Europe Cement never had shares in CEAS and Kepez.

Accordingly the Tribunal proceeded with the case and awarded $3.9 million in legal fees against Europe Cement. The Tribunal awarded these costs, recognizing that "full costs will go some way towards compensating the Respondent for having to defend a claim that had no jurisdictional basis and discourage others from pursuing such unmeritorious claims."

What I am curious about is whether the awarding of costs really creates any special disincentive against engaging in fraud when international arbitration already has a fairly strong tradition of awarding costs against the unsuccessful party. In other words, the system already creates disincentives against unmeritorious claims. In what way does the award of costs go further and police against truly malevolent misconduct such as fraud? If the same penalty applies to unmeritorious and fraudulent claims, are we really regulating fraud in international arbitration?

Roger Alford

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