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Misconduct & jurisdiction: Some cases from the history stacks

Luke Eric Peterson (Investment Arbitration Reporter) · Sunday, January 31st, 2010

In a recent post , Andrew Newcombe queried whether investor misconduct should be dealt with by arbitrators not as a jurisdictional issue, but rather at the merits, damages or costs phase.

His post was published as I was wading through 100's of pages of old international claims commission awards (for reasons too obscure to get into here).

It may be of some interest to readers of this blog to note that there are several interesting claims arbitrated by the US-Mexico General Claims Commission in the mid-1920s which discuss whether alleged misconduct of an alien should vitiate the Commission's jurisdiction to hear claims for breach of international law.

The Macedonio J. Garcia case may be the most eyebrow-raising insofar as the US Government, acting on behalf of Mr. Garcia, was seeking re-payment of $161,000 for loans tendered by Mr. Garcia to the (then) Governor of Mexico's Sonora province. The loans were to assist the Governor's efforts to seize power in Mexico by means of revolution. When the former Governor and friends ascended to power, Mr. Garcia insisted that he was entitled to repayment by the Mexican state for his loans to the revolutionary cause.

When no payment was forthcoming, the dispute fell to arbitration before the Commission. Perhaps not surprisingly, the Mexican authorities argued that the Commission had no jurisdiction over such a transaction:

"In behalf of the respondent Government it has been argued that, it being assumed that money was loaned by Garcia as described in the Memorial, that act was a participation by him in Mexican politics as a result of which, under international law he lost the right to invoke the protection of the United States, and the latter has no right to intervene in the case."

However, the Commission held otherwise:

"The Commission is of the opinion that no question of jurisdiction can properly be raised by the contentions made in behalf of the Mexican Government on this point which is one the pertinency of which could only be considered in connection with the question of the validity of the claim under international law."

Lest the somewhat-opaque language of the Commission leave any doubts as to its reasoning,

subsequent rulings of the Commission seem to make clear its view that at least some forms of misconduct were not sufficient to vitiate jurisdiction.

For instance, in the Chattin case (and 3 other parallel claims brought by former colleagues of Mr. Chattin) the Commission affirmed that certain forms of misconduct – in this case, the fact that the aliens allegedly escaped from Mexican prison custody – could not bar the U.S. from bringing an international claim against Mexico.

Notably, the Commission did weigh the "fugitive" status of the claimants at the *damages* phase of the arbitration:

"Taking into consideration, on the one hand, that this is a case of direct governmental responsibility, and, on the other hand, that Chattin, because of his escape, has stayed in jail for eleven months instead of for two years, it would seem proper to allow in behalf of this claimant damages in the sum of $5,000.00, without interest."

Another case on the Claims Commission docket which seems relevant in the context of investor misconduct is the Francisco Mallen case , brought against the United States, wherein the alleged mistreatment of a Mexican Consul at the hands of US policeman was at issue.

In objecting to the claim, the U.S. Government noted that Mr. Mallen had misrepresented and exaggerated events in his correspondence with Mexico, as well as in his submissions to the Commission. The U.S. also contended that Mr. Mallen – during the second of two run-ins with the same police officer – was carrying a pistol, in violation of Texas law.

The Presiding Commissioner rejected the claim that Mr. Mallen had breached local law by carrying the pistol, and further dismissed the U.S. argument that Mr. Mallen's misrepresentations or exaggerations should rob the Commission of jurisdiction. In a concurring opinion, another of the three Commission members noted that such considerations were not questions of jurisdiction at any rate:

"Neither the fact that Mr. Mallen violated the law of Texas nor the fact that he has furnished inaccurate or exaggerated statements can in any way affect the right of the Mexican Government to present against the United States a claim grounded on an assertion of responsibility under rules of international law, although obviously these matters are pertinent with respect to a determination of the merits of the claim, because account must properly be taken of them in reaching a conclusion regarding the nature and extent of the wrongs inflicted on Mr. Mallen. If he violated the law of Texas a charge of false arrest and imprisonment can not be maintained. And clearly the extent of his injuries and losses has been exaggerated by the testimony which he has furnished."

* * *

It's certainly possibble that adjudicators in subsequent years have scrutinized, and ultimately rejected, the approach of the US-Mexico General Claims Commission in the above cases. I've not undertaken a historical study of all relevant international rulings, and I offer no grand statements as to the legal force of the above judgments.

Moreover, given that these were all diplomatic protection claims, advanced by the home state – which would have been blameless of any misconduct alleged – one wonders if these cases offer useful guidance in the case of investor-state claims (which are brought by the very individuals

alleged to have engaged in misconduct). Indeed, in the Chattin case, the Commission touches on this issue:

"It is true that more than once in international cases statements have been made to the effect that a fugitive from justice loses his right to invoke and to expect protection—either by the justice from which he fled, or by his own government—but this would seem not to imply that his government as well loses *its* right to espouse its subject's claim in its discretion."

Only time will tell what relevance modern-day adjudicators will ascribe to these decisions – and perhaps other earlier arbitral rulings which still wait to be disinterred. Nevertheless, as an old history student, I find it quite interesting to discover that the above-mentioned rulings of the Claims Commission weigh in decisively on some of the questions which are so heatedly debated in contemporary investor-state arbitration.

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