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Summary Dismissal under ICSID Arbitration Rule 41(5) – The Global and RSM Awards

John Willems (White & Case LLP) · Wednesday, February 2nd, 2011 · White & Case

On December 1, 2010, an ICSID tribunal composed of Sir Franklin Berman (President), Prof. Emmanuel Gaillard, and J. Christopher Thomas, QC, in *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine* [Disclosure: White & Case LLP was counsel to Ukraine in this case], became the first tribunal ever to dismiss a case under the summary dismissal provisions established by ICSID Arbitration Rule 41(5). The tribunal ruled that the claims asserted in the arbitration were "manifestly without legal merit" within the meaning of Rule 41(5). Nine days after the Global Award was issued, the tribunal in *RSM Production Corporation and others v. Grenada* granted Grenada's preliminary objection under Rule 41(5) and dismissed the claimants' claims in their entirety. The *RSM* tribunal consisted of J. William Rowley, QC (President), Edward W. Nottingham, and Prof. Pierre Tercier.

In *Global*, the claims were submitted by two US companies, Global and Globex, which had entered into several contracts with a private Ukrainian company for the delivery and sale of poultry products. After the Ukrainian company allegedly failed to pay for and take delivery of most of the poultry products shipped to the designated port, Global and Globex filed claims against Ukraine under the Ukraine-US BIT, seeking compensation of US$ 34.8 million. Shortly after the tribunal was constituted, Ukraine filed a preliminary objection under Rule 41(5), which permits the accelerated dismissal of claims that are "manifestly without legal merit." Ukraine argued that the claimants' claims were manifestly without legal merit, because the poultry contracts did not constitute or relate to an "investment" as that term is defined in the Ukraine-US BIT or understood under Article 25(1) of the ICSID Convention, but rather were pure commercial transactions, involving only the cross-border sale of goods.

Acknowledging the novelty of the summary dismissal procedure embodied in Rule 41(5), the *Global* tribunal was "particularly conscious of its responsibility to contribute to shaping both an understanding of the Rule itself and of the procedure which ought to be followed under it." (*Global* para. 29) The tribunal first considered whether Rule 41(5) extends to jurisdictional objections. In this regard, the tribunal shared the view of the tribunal in *Brandes Investment Partners, LP v. Venezuela* and found no objective reasons why Rule 41(5) "should be limited to an evaluation of the merits of the case and should not also englobe an examination of the jurisdictional basis on which the tribunal's powers to decide the case rest." (*Global* para. 30 citing *Brandes* para. 52)

Turning to the applicable procedure under Rule 41(5), the *Global* tribunal observed that "Rule 41(5) is sparse in its indications to a tribunal as to the procedure to be followed when an objection

is lodged," suggesting that "it is no doubt for each individual Tribunal to fill in the gaps by exercising the general procedural powers given to it by Rule 19." (*Global* para. 32) In that respect, the tribunal noted that "it would not be right to non-suit a claimant under the ICSID system without having allowed the claimant (and therefore the respondent as well) a proper opportunity to be heard, both in writing and orally," particularly if the objection is granted. (*Global* para. 33) The tribunal thus permitted two rounds of written submissions, followed by two rounds of oral argument, on Ukraine's preliminary objection.

The *Global* tribunal further observed that, in order to meet the requirements of due process, "it would seem that the tribunal is under an obligation, not only to be sure that the claim objected to is 'manifestly without legal merit,' but also to be certain that it has considered all of the relevant materials before reaching a decision to that effect, with all the consequences that follow from it." (*Global* para. 34) Ultimately, the tribunal concluded that, in the case at hand, it was "unable to see what further materials relevant to the question at issue, be it in the shape of legal argument or authority or in the shape of witness or documentary evidence, either Party might wish to, or be able to, bring forward at a later stage." (*Global* para. 34)

With respect to the standard of review under Rule 41(5), the Global tribunal examined the meaning of the word "manifestly" stating that it had "nothing of its own to add" to the analysis made by the tribunal in *Trans-Global Petroleum, Inc. v. The Hashemite Kingdom of Jordan* that "the ordinary meaning of the word requires the respondent to establish its objection clearly and obviously, with relative ease and despatch." (*Global* para. 35 citing *Trans-Global* para. 88) Applying the relevant standard, the tribunal found that neither the poultry contracts, nor the moneys expended by Global and Globex in financing their performance, "can by any reasonable process of interpretation be construed to be 'investments' for the purposes of the ICSID Convention," and thus concluded that the claims advanced by Global and Globex in the arbitration were manifestly without legal merit within the meaning of Rule 41(5). (*Global* paras. 56-58) The tribunal declined, however, to issue an award on costs, finding that, "given the newness of the Rule 41(5) procedure and given the reasonable nature of the arguments concisely presented to it by both parties . . . the appropriate outcome is for the costs of the procedure to lie where they fall." (*Global* para. 59)

In *RSM*, the claim was brought by RSM, a US company, and its three shareholders under the Grenada-US BIT and concerned a 1996 petroleum exploration agreement concluded by RSM and Grenada. A previous ICSID tribunal had dismissed a contractual claim brought by RSM under the same petroleum exploration agreement. In the new arbitration, the claimants argued that their claims under the Grenada-US BIT were not precluded by the findings of the previous ICSID tribunal, because, in the claimants' view, bilateral investment treaties provide an independent source of rights. Grenada filed a preliminary objection under Rule 41(5), arguing that the claimants' claims were manifestly without legal merit because the legal and factual contentions upon which they depended had been fully determined in the previous ICSID arbitration.

Like the *Global* tribunal, the tribunal in *RSM* agreed with the standard set out in *Trans-Global* and *Brandes* for preliminary objections under Rule 41(5). Underscoring the finality of summary dismissal under Rule 41(5), the *RSM* tribunal further observed that,

> given the potentially decisive nature of an Article 41(5) objection, we would add that, for a tribunal faced with such an objection, it is appropriate that a claimants' [sic] Request for Arbitration be construed liberally and that, in cases of doubt or

> uncertainty as to the scope of a claimant's allegation(s), any such doubt or uncertainty should be resolved in favour of the claimant. (*RSM* para. 6.1.3)

Drawing from the principle of collateral estoppel and Article 53 of the ICSID Convention, the *RSM* tribunal held that it was bound by the conclusions of the previous ICSID tribunal and granted Grenada's preliminary objection under Rule 41(5), concluding that "each of Claimants' claims is manifestly without legal merit." (*RSM* para. 7.2.1)

With respect to costs, the *RSM* tribunal observed that, in view of its conclusions that the claimants' claims were manifestly without legal merit and that it was impermissible for the claimants to advance such claims in new ICSID proceedings, it was "appropriate that Respondent should be fully indemnified for all of its costs, reasonably incurred or borne, in this proceeding." (*RSM* para. 8.3.4) Unlike the *Global* tribunal, the *RSM* tribunal appears to have taken the view that the very nature of an award pursuant to Rule 41(5) warrants an award of costs in favor of the respondent State.

The *Global* and *RSM* awards will likely encourage respondent States to use Rule 41(5) in the future to dismiss, on a summary basis, BIT claims that appear baseless on their face. These two awards show that Rule 41(5) can achieve a cost-effective and prompt result. It remains to be seen, however, whether future ICSID tribunals will be inclined to sanction unsuccessful claimants with an award of costs for asserting claims that are manifestly without legal merit.

John Willems, Kristen Young, and Noor Davies

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