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Weighing the interests of host-state and investor — a further blow to domestic litigation provisions in BITs?

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In August 2011, the tribunal in *Abaclat and others v Argentina* decided (by a majority) that it had jurisdiction over claims brought by approximately 60,000 Italian investors, and that the claims were admissible.[1)] The Italian investors claim that Argentina has breached its obligations under the Argentina-Italy bilateral investment treaty (BIT) when it defaulted on and subsequently restructured its sovereign debt. The decision on jurisdiction and admissibility will no doubt be much debated because of the tribunal's discussion of the admissibility of mass claims under ICISD and its definition of "investment." But the decision is also of interest because of the approach the tribunal adopted when allowing the Claimants to avoid the 18 months litigation requirement contained in the Argentina-Italy BIT.

The Argentina-Italy BIT provides for three types of dispute resolution: amicable consultations, proceedings before the local courts, and international arbitration. With regard to the possibility to resort to international arbitration, Article 8(3) of the BIT provides that "[i]f, after 18 months from the notification of commencement of an action before the national courts … the dispute between the Contracting Party and the investors still continues to exist, it may be subject to international arbitration. …" It was undisputed that the Claimants had not submitted their dispute to the Argentinean courts before initiating arbitration proceedings.

The tribunal held that although Article 8 "did not provide for a mere 'pick and choose' solution" and that there was indeed the requirement to pursue litigation in local courts for 18 months before commencing arbitration proceedings, not complying with that requirement did not bar the Claimants from resorting to arbitration. This result in itself may not be surprising considering other decisions which have dealt with the same or a similar litigation requirement in other BITs, or indeed the Argentina-Italy BIT. Most of these decisions – among them *Impregilo v Argentina*, which concerned the Argentina-Italy BIT – have also allowed the investor to bypass the requirement to pursue its claims in local courts first. However, in contrast to these decisions, the tribunal in Abaclat chose a very different path to arrive at the result to admit the claims despite the Claimants' failure to have recourse to local courts before turning to arbitration.

Previous tribunals faced with similar or identical BIT provisions have used the Most Favoured Nation (MFN) clause contained in the relevant BIT to let the claimant sidestep the requirement to first pursue its claims in local courts. Thus, in *Impregilo v Argentina*, the majority tribunal permitted the Italian investor to rely on the MFN clause contained in the Argentina-Italy BIT in order to benefit from the US-Argentina BIT, which contained a six month consultation and waiting

period, but no requirement to pursue local remedies for a certain period of time.

The tribunal in *Abaclat* opted for a different approach. It considered that the language of Article 8 was not sufficient to determine the consequences of a breach of the requirement to pursue the claims in local courts. To answer this question, it was in the tribunal's opinion necessary to look at the purpose and aim of the dispute resolution system put in place by Article 8, as well as the object and purpose of the 18 months litigation requirement. The object and purpose of this requirement was held to be "to give the Host State the opportunity to address the allegedly wrongful act within the framework of its own domestic legal system and to provide a chance to resolve the dispute in a potentially shorter period than international arbitration."

In considering the question whether Argentina was deprived of a fair opportunity to address the dispute, the tribunal proceeded to weigh Argentina's interest to have this opportunity on the one hand, and the Claimants' interest in an efficient dispute resolution mechanism on the other. The tribunal held that the Claimants' interest would outweigh the host state's interest only if the non-compliance with the 18 months litigation requirement unduly deprived the host state of a fair – and not only theoretical – opportunity to address the issue through its domestic legal system. Applying this standard to the facts, the tribunal considered that Argentina could not have adequately addressed the dispute through its local courts. Therefore, the tribunal concluded that the Claimants' interest to resort to arbitration outweighed Argentina's interest to address the dispute through its domestic legal system.

The tribunal's "weighing of interests" approach constitutes an interesting way to allow the claimant to avoid a requirement which has, not unjustly, been called "nonsensical from a practical point of view" (*Plama v Bulgaria*), while at the same time avoiding the controversy surrounding the scope of MFN clauses and the much debated question whether they can be extended to procedural as well as substantive BIT protections.

However, it is unlikely that this "weighing of interests" approach will constitute the end of the MFN clause debate with regard to the requirement to pursue local remedies for a certain period of time. Thus, the tribunal stressed that it was only because of the specific circumstances of the case that the investors' interest in an efficient dispute resolution mechanism outweighed Argentina's interest to address the claims through its local courts:

First, Argentina had during the restructuring of debts process enacted a so-called "Emergency Law" and other laws and decrees which prohibited the government from entering into any juridical, extra-juridical or private transaction. The tribunal held that therefore, "even in the case that Claimants would have won the case before the courts, the government would still have been under the impossibility to pay out the compensation." As to the possibility to have the Emergency Law declared unconstitutional, the tribunal concluded that this would have been highly unlikely to be achieved within the 18 months period. Second, the tribunal considered that although Argentina could have had the constitutionality of the Emergency Law examined, Argentina "did apparently not see the need to proceed with such examination." Finally, the tribunal took into account the fact that the claims in question where mass claims and that the Argentinean legal system did not generally provide for mass claim mechanisms. It would therefore have been "incredibly burdensome for [the Claimants] and for the courts" and would have caused "substantial delay" if the Claimants had needed to initiate individual claims before the local courts. Taking those considerations into account, the tribunal concluded that Argentina could not adequately address the dispute within the framework of its own legal system and that its interest was therefore outweighed

by the investors' interest to resort to arbitration.

The tribunal's conclusion is very case-specific and makes *Abaclat* distinguishable from cases like *Impregilo*, where there was no equivalent to the Emergency Law barring the government paying out compensation. Thus, in cases where the only argument would be that it was unrealistic or overly burdensome to have the dispute resolved before the local courts within 18 months, it is questionable whether a weighing of interests would allow the claimant to avoid the 18 months litigation requirement. Indeed the tribunal stressed that "the relevant question [was] not 'could the dispute have been efficiently settled before the Argentine courts?', but 'was Argentina deprived of a fair opportunity to address the dispute within the framework of its own domestic legal system because of Claimants' disregard of the 18 months litigation requirement?'" The tribunal also emphasized that its "weighing of interests" approach was not the same as applying the general principle of futility (which had in fact been one of the arguments advanced by the Claimants to justify their non-compliance with the 18 months litigation requirement).

At the same time, looking beyond the tribunal's emphasis that its decision was based on the specific circumstances of the case, the distinction which the tribunal attempts to draw between asking whether the dispute could have been efficiently settled before the local courts and asking whether the host state is deprived of a fair opportunity to address the dispute through its courts appears to be quite subtle.

In fact, the tribunal's reasoning comes in practice at least close to asking whether it would have been unrealistic that the dispute could be resolved before the local courts within 18 months. Thus, the tribunal stated that for Argentina's interest to outweigh the investors' there had to be "a real chance in practice that the Host State, through its courts, would address the issue in a way that could lead to an effective resolution of the dispute." And while the specific legal situation in Argentina made it difficult for Argentina to address the claims, the tribunal considered that it would not have been impossible, but highly unlikely within the 18 months timeframe (because it would have taken more than 18 months to have the Emergency Law declared unconstitutional). The tribunal also considered that Argentina did not see the need to have the constitutionality of the law examined (even though it was in principle in a position to do so). Similarly, the bringing of individual claims before local courts would not have been impossible, but burdensome and causing "substantial delay."

Indeed, looking at the tribunal's reasoning, the question arises how a host state could be said to be unduly deprived of the opportunity to address the dispute through its domestic legal system if there was no, or hardly any, chance of a final decision being rendered within 18 months. To put it differently, it is difficult to see how a government could address an investor's claim through its domestic legal system within 18 months if it is unrealistic for the dispute to be resolved in the local courts within that period – at least if, as the tribunal requested, this would have to lead to an effective resolution of the dispute.

The tribunal's distinction between the weighing of the interests at stake and the application of the futility principle seems also subtle. Argentina's interest was outweighed by the investors' because Argentina "was not in a position to adequately address the … dispute within the framework of its domestic legal system" – this seems in practice not very different from allowing the investor to avoid the litigation requirement because pursuing the claims in local courts would have been futile.

There are plausible reasons why the tribunal in *Abaclat* drew the distinctions it did, and why it

chose to frame its "weighing of interests" approach in a rather narrow way. To frame it more broadly by stating for example that an investor's interest in an efficient dispute resolution mechanism might outweigh the host state's interest if there was no or very little chance that a resolution of the dispute could be achieved within 18 months would leave very little room for the application of the 18 months litigation requirement. To apply the futility principle on the other hand would not have provided the flexibility of the "weighing of interests" approach.

For these reasons it seems not very likely that future tribunals will apply the approach adopted by the tribunal more liberally, if they choose to apply it at all. The "blow" to the domestic litigation provision seems therefore a light one, and claimants will most likely continue to have to rely on the MFN clause of the BIT in question if they wish to avoid the 18 months or similar litigation requirements.

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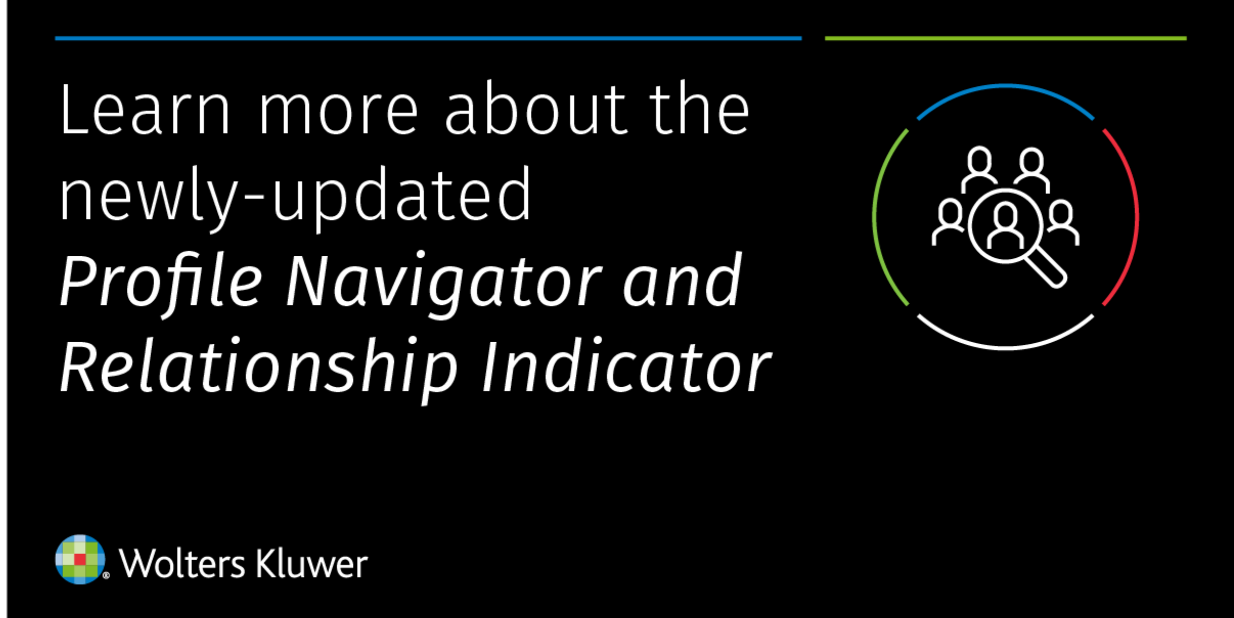

References

?1 Argentina has in the meantime requested the disqualification of the two arbitrators responsible for the decision and the proceedings are currently suspended.

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