Kluwer Arbitration Blog

The Conduct of Bad Faith in Arbitration by States

Nikos Lavranos (NL-Investmentconsulting) · Wednesday, April 20th, 2016

A recent order of an ICSID tribunal in the US$1.4 billion dispute regarding Argentina's nationalisation of two airlines brings to the focus the ways and means of States to conduct the arbitration proceedings in bad faith. Indeed, the complaints by the Claimants highlight some of the tools of the toolbox which are available to States in order to intimidate and pressurize not only Claimants, but also their lawyers and even their third party founder.

In their request for a provisional order the Claimants listed the following – rather serious and troubling – allegations against Argentina:

- Threatened criminal prosecution against Claimants' and Air Comet's legal representatives for their participation in this arbitration, including the execution of the Assignment Agreement and the Funding Agreement;
- Threatened King & Spalding with criminal prosecution for its role in representing Claimants in this arbitration;
- Threatened Burford, the capital provider in this arbitration under arrangements repeatedly recognized by the competent Spanish courts, and Burford's directors personally with criminal prosecution;
- Issued a formal Petition for Investigation (the TAG Complaint) in that regard necessitating the retention of Argentine criminal defense counsel and interfering with freedom of travel to Argentina;
- Summoned [the Treasury] Attorney General before a domestic criminal court to answer preliminary accusations of failing to discharge its obligations by not earlier investigating Claimants; and
- Engineered media coverage about this matter, including a particularly inflammatory article labelling King & Spalding and Burford as a "fraudulent ring" and calling Claimants' submissions to this Tribunal the product of a "vultures and crows committee.

The claimants argued that these actions threaten the immunity, which Articles 21 and 22 ICSID Convention grant to persons appearing in ICSID arbitration proceedings with respect to acts performed by them in the exercise of their functions. In particular, Article 22 grants immunity from legal proceedings to the parties and their lawyers when acting in the context of ICSID proceedings.

Claimants also argued that the criminal proceedings initiated by the Argentinian authorities are undermining the integrity of the process by having recourse to an alternative forum, which would

be in violation of the exclusivity provided for in Article 26 ICSID. Additionally, Claimants raised concerns that the actions of Argentina could create obstacles to the recognition and enforcement of the award, thus violating Article 53 ICSID Convention.

From the outset, the tribunal distinguished this situation from other previous ICSID cases because the request for provisional measures in this case was "near the end of the proceedings" (para. 163). According to the tribunal, in the present case, "the oral hearing has been completed, the Parties have submitted their post-hearing briefs and submissions on costs and what remains is for the Tribunal to formally close the proceedings and issue its award. Further, each of the Claimants and their related corporate entities are in some form of insolvency proceedings in Spain".

The tribunal continued by underlining that

"Given the timing of Claimants' Application, it does not address the "usual" arguments made in this type of application like the possible effect that the criminal proceedings at issue could have on the obtaining of evidence, the possible intimidation of witnesses or other effects which would impede the procedural progress of the arbitration. Rather, Claimants say the Complaints and the criminal investigation, together with the publicity that Respondent has given to these, have affected or threatened to affect rights related to this arbitration which are entitled to protection, despite the late stage of the proceedings".

In fact, the late timing of the request was the main reason for the tribunal to refuse to grant any of the provisional measures because the tribunal did not see any direct and imminent danger for the arbitral proceedings.

Nonetheless, the tribunal expressed on several occasions its concerns about the conduct of the Argentinean authorities and its potential effects – in particular on the lawyers and their reputational damage.

While the tribunal expressly stated that it was aware of the distinction between BIT claims and criminal proceedings, it nevertheless concluded that "there is a direct relationship between the Complaints and the criminal investigation commenced by the Federal Prosecutor and this ICSID arbitration such that certain rights of Claimants in this arbitration may warrant protection".

Moreover, whereas the tribunal accepted that the State has the right to commence criminal proceedings, it underlined at the same time that "such powers must be exercised in good faith, respecting a Claimant's rights to have its claims fairly considered and decided by an arbitral tribunal".

Indeed, the tribunal stated that "the power abuse of the sovereign of a State to pursue criminal proceedings may give rise to damage and a claim for the breach of rights protected by a BIT or international law, more generally".

At the end the tribunal concluded that

"the criminal investigation initiated by the Federal Prosecutor of Respondent do not sufficiently threaten the exclusivity of these ICSID proceedings such that the provisional measure requesting the suspension of the criminal proceedings should be granted. (para. 197)

The tribunal then zoomed into the question who is protected by Articles 21 and 22 ICSID

Convention. In light of the heavy punishment which Argentinian criminal can impose, namely up to 25 years imprisonment for fraudulent lawyers, the tribunal noted that:

"the threat of criminal proceedings against counsel in the circumstances of this case places substantial pressure on counsel. This, in turn, threatens to affect Claimants' right to be represented by counsel of their choice in this arbitration. Similarly, the possible prosecution of Claimants' court-appointed receivers places pressure on them to choose between continuing their court-mandated function of representing Claimants and pursuing the latter's claims in this arbitration and withdrawing from their role or desisting in pursuing Claimants' claims. Each of these possible threats is of concern".

The tribunal deferred a final determination with regard to Articles 21 and 22 ICSID Convention, except that it was not "persuaded that the immunity provided in Article 22 of the ICSID Convention applies to Burford" (the third party funder).

However, for the tribunal "the joint, televised press conference held by the Treasury Attorney General and the head of the PROCELAC on 14 September 2015 was of particular concern".

Indeed, the tribunal concluded that the press conference and the matters described and commented upon by representatives of Respondent, including details of this arbitration and the alleged conduct of counsel and the court-appointed receivers for Claimants, was inconsistent with the Tribunal's repeated prior orders to the Parties not to aggravate the dispute.

Accordingly, the tribunal felt it necessary to issue a provisional measure ordering Argentina to refrain from further aggravating the dispute by publicizing the filing of the Complaints or the criminal investigation and any relation they may have to this arbitration, whether by way of the press or otherwise, is appropriate.

This at least is one point on which the Claimant was successful.

In essence, this request for provisional order highlights the fact that investment arbitration proceedings are not taking place in isolation. Instead, they are embedded in a more general context, which also includes the domestic arena. In fact, it is the domestic arena where the State clearly is the more powerful party.

This is so because the State can direct all its various authorities, such as tax authorities, public prosecutor, environmental agencies etc., in a coordinated fashion against the foreign investor who brought an investment arbitration claim against that State. In addition, the State can actively generate a media campaign against that foreign investor and his lawyers by organizing press conferences, strategically leaking (false or forged) documents to the media as well as distributing allegations of fraud, corruption etc.

The combined effect of such a conduct can be disruptive. It could not only impact the arbitral proceedings, but can affect the professional and even physical integrity of the Claimant and his lawyers. In the worst case scenario, the Claimant may even withdraw from the arbitration proceedings.

In light of such a potentially huge impact on a dispute, it would have been preferable if the tribunal had taken a more explicit position against the use of these harassment tools.

Prima facie, the tribunal may not have been wrong in refusing to grant the provisional order by referring to the fact that the arbitral proceedings are indeed in the final stages and thus the danger of influencing the outcome of these proceedings is limited. However, as the tribunal itself admitted, the harassment and damage extends in particular to the domestic arena.

Accordingly, a stronger message – not only to Argentina but to all States – that the actions of States and its authorities against Claimants at the domestic level could easily lead to the conclusion of a bad faith conduct of the arbitral proceedings, would have been very welcome indeed.

This entry was posted on Wednesday, April 20th, 2016 at 12:33 am and is filed under Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.