Kluwer Arbitration Blog

Lajún Corporation v. The Dominican Republic: Admissibility Issues Just Around the Corner?

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This post gives a bird's eye view of an imminent investment arbitration and forecasts procedural and/or jurisdictional hurdles to the case, by analyzing the dispute resolution provision and relevant precedents, with the intention of highlighting recurring inconsistencies on a key procedural issue and urging for more predictable outcomes for the benefits of the stakeholders in the international arbitration industry. At the moment, the case is at its early stage, as its 3-month cooling off-period expired on March 19, 2018.

The looming arbitration

On 19 December 2017, Jamaican tycoon, Mr. Michael Lee-Chin, served the Dominican Republic with a notice of intent to arbitrate under the Caribbean Community-Dominican Republic Free Trade Agreement (CARICOM-DR FTA) over alleged treaty breaches concerning the management concession agreement for the landfill facility called Duquesa.

The background

In 2013, Mr. Lee-Chin acquired equity participation in Lajún Corporation, a Dominican company operating the landfill and waste-to-energy plant on the basis of a 10-year concession agreement awarded on 1 March 2007 by the Municipality of Northern Santo Domingo. Mr. Lee-Chin holds 90% equity participation in Lajún Corporation throughout two entities – another Dominican corporation (Wilkison Company) and a Panamanian company (Nagelo Enterprises) – whose majority shareholder is Mr. Lee-Chin himself. The two entities supposedly hold title to the land where the landfill lied, however, the validity of the underlying land purchase and sale contract was challenged for alleged forgery.

Mr. Lee-Chin claimed that the Dominican Republic expropriated his investment in Duquesa, because the Municipality failed to abide by the concession agreement and apply the biannual increases to the tipping fees chargeable to the users for the disposal of the waste and the energy generated by the plant, and, ultimately, because on 27 September 2017 the High Administrative Court divested Lajún Corporation from the management of the Duquesa landfill, pending the decision on the breach of the concession agreement. Therefore, the Claimant seems to contend that

the Dominican Republic had violated Article XI of the Annex III to the CARICOM-DR FTA for having expropriated his investment without a fair compensation, seeking compensation of more than US$ 300 million.

On the other hand, the Municipality asserts that Lajún Corporation was not fulfilling its obligations under the concession agreement, causing environmental harms and jeopardizing the public health of the community living in Gran Santo Domingo. That's why the City Council of Northern Santo Domingo authorized the Mayor, Mr. René Polanco, to take Lajún Corporation to the High Administrative Court to terminate the agreement for noncomplying with it.

After hearing both parties, the High Administrative Court provisionally transferred, by means of its ruling 2030-17, the management of the landfill to a committee formed by the Municipality and the Ministries of Environment and Public Health on 27 September 2017.

The Dispute Resolution Provision in the CARICOM-DR FTA

The investor-state dispute resolution mechanism contained in Article XIII of the Annex III to the Treaty invoked by the Claimant envisages three options (in case conciliation fails and once a 3-month cooling-off period has elapsed): the host-state's courts, a domestic arbitration or an international arbitration. Should the parties to the dispute opt for international arbitration, then they may refer their differences to an ad-hoc single arbitrator or tribunal, to be appointed pursuant to a subsequent agreement or the UNCITRAL Arbitration Rules.

Even though no fork-in-the-road is expressively stated, because the outcome of each of these options final and binding effects, it is sensible to argue that the choice of one option precludes the others.

By entering an appearance as defendant and arguing the case about the concession agreement before the High Administrative Court of the Dominican Republic, and having the seized Court already issued a decision, the Claimant (in the forthcoming arbitration) might have tacitly chosen its option thereby waiving the two arbitration-based alternatives.

Relevant precedents: Roundabout or Fork-in-the-road?

Two main diverging lines of reasoning exist when it comes to allow or disallow a claimant to resubmit to an arbitral tribunal a dispute sharing the same background of a claim brought before a local court or previously adjudicated by another court or local arbitration.

One line of thinking revolves around the ***"triple identity test"*** and allows such a possibility as long as the claimant, the *causa petendi* and the *petitum* of the two disputes do not overlap. Therefore, even though the claimant and *petitum* in the two proceedings may often coincide, the *causa petendi* always differs, being rooted in special rights conferred on the basis of an international treaty and put forward as treaty claims (whilst in the court proceedings, the claimant would argue its case on the basis of national law provisions only). Some illustrative arbitral rulings of the application of the triple identity test are the 2003 Decision on Jurisdiction in *Champion Trading Company, Ameritrade International, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/02/9), and *CMS*

Gas Transmission Company v. The Republic of Argentina (ICSID Case No. ARB/01/8), and the 2004 Decision on Jurisdiction in *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3).

The other approach – which seems to be gaining ground based on the 2017 Award in *Supervision y Control S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/12/4) – relies on the ***"fundamental basis of a claim test"***. According to this test, if the dispute before the national court and the one before the arbitral tribunal share the fundamental cause of the claim, seek substantially for the same effects and are submitted by two different claimants, one, however, controlling the other through equity participation, then the claims presented before the national court are the same as the ones presented before the arbitral tribunal. This line of reasoning strives to avoid contradictory rulings between a national court and an arbitral tribunal on essentially the same dispute. Other precedents in favor of the fundamental basis of a claim test are the 2014 Award in *H&H Enterprises Investments, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/09/15) and the *2009 Award in Pantechniki S.A. Contractors & Engineers v. Republic of Albania* (ICSID Case No. ARB/07/21).

Curiously enough, tribunals that spouse the "*triple identity test"* tend to consider this matter a question of jurisdiction or competence, whereas tribunals that adopt the *"fundamental basis of a claim test"* look at this issue as a question of admissibility. Consequently, the former usually come to the conclusion that they have jurisdiction over the dispute and adjudicate the case, while the latter conversely hold that the claims are inadmissible and dismiss the case because, even if they assert jurisdiction, they deem it inappropriate to hear claims already heard by another adjudicatory body.

Other two non-fully aligned concepts to weigh in

Another two questions may come into play and conflict with each other in this case and right on this procedural point, so it would be worthy to recall them:

- On one hand, the well-established arbitrators' Kompetenz-kompetenz principle, *e.* the arbitral tribunal's power to hear and assess objections to its own jurisdiction;
- On the other, the determination of the time by which jurisdiction must be challenged (in favor of another adjudicatory body) to prevent implied prorogation of jurisdiction is inherently a prerogative of the court first seized, which will make such a determination on the basis of its rules of procedure and can actually render any arbitration agreement inoperative by the subsequent conduct of the parties, pursuant to Article II(3) of the 1958 New York Convention. Such reference to national law and deference to the court seized have been also upheld by conventions assigning jurisdiction in civil and commercial matters among different States (such as the 1968 Brussel Convention and the 1988 Lugano Convention, respectively, recast into and amended by Brussel I-bis Regulation and the 2007 Lugano Convention). Under this approach, the ball might be sent back to the Dominican Court's court, which will have to decide on the retention of its jurisdiction on the case.

Conclusion

Given the procedural and factual matrix of the imminent case as described above, the relevant dispute mechanism provision invoked and the conflicting arbitral precedents on this point, the looming arbitration in question may well fall within the applicability of either of such tests having to face the corresponding jurisdictional or procedural barrier. The choice of which test to deploy will ultimately rest with the arbitral tribunal, but equally the High Administrative Court might have its say on the case as to the viability of the arbitration agreement at this point in time.

The views expressed in this article are those of the author and DO represent those of the law firm Bottega DI BELLA.

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