Kluwer Arbitration Blog

Customary International Law Claims in Contract-based Arbitration

Patrick Fox (Three Crowns LLP) and Alexey Vyalkov · Tuesday, June 26th, 2018 · Three Crowns LLP

Without the rights and protections of a treaty, a foreign investor who suffers a wrongful act at the hands of a host State traditionally has no legal standing to pursue an international claim against that State.[1)] Instead, the investor must rely on the diplomatic intervention of its home State to protect the investor's interests—a corollary to the widely-accepted view that a State's obligations under international law may be engaged only by other States. However, in 1987, Stephen Schwebel argued that private parties in contract-based arbitrations may pursue certain customary international law claims in their own name.[2)] Decades on, there are now several examples of contract-based arbitrations – under both ad hoc and institutional rules – where investors have sought to invoke a State's breach of the minimum standards of treatment under customary international law as a separate head of claim.[3)]

Such claims have presented few jurisdictional problems in contract-based ICSID arbitrations, given that Article 25 of the ICSID Convention allows any kind of legal dispute to be referred to the Centre, so long as that dispute arises "directly out of an investment" and other jurisdictional preconditions are satisfied. But international claims pursued outside of the ICSID regime raise additional and fundamental issues of international legal theory, such as the power of private parties to pursue international claims where that power has not been delegated through a treaty analogous to the ICSID Convention, or the need to exhaust local remedies in the absence of a provision to the effect of Article 26 of the ICSID Convention.

Still, international claims in both ICSID and non-ICSID arbitrations present a number of common issues, and it is here that we would like to add a few thoughts. Kate Parlett has previously summarised as follows:

> the starting point of the analysis must be the scope of consent given in the arbitration clause. In a claim brought pursuant to a contract, it might also be relevant to consider the applicable law of the contract, since that law might incorporate customary international law.[4)]

Section A of this blog suggests an alternative approach to interpreting an arbitration clause for the purpose of determining whether the scope of the clause encompasses customary international law

claims. The essence of this approach is that any such interpretation should be consistent with and draw upon the developed jurisprudence for other types of non-contractual claims in contract-based arbitrations. Section B draws attention to the apparently-overlooked question of whether the tribunal has the power to decide if a particular standard of customary international law is incorporated into the law governing the contract.

A. Customary International Law Claims as Non-Contractual Claims for the Purpose of Determining the Scope of the Arbitration Clause

A tribunal's jurisdiction is limited by the scope of the parties' consent in the arbitration agreement, which establishes the subjective arbitrability of a claim. An arbitration agreement may be drafted expressly to include (or to exclude) customary international law claims, in which case it is suggested that the tribunal must apply the principle of *lex specialis* and decide its jurisdiction *ratione materiae* accordingly. Absent an express enunciation, however, the question arises as to what contractual language will allow a tribunal to hear such claims (with the caveat that principles of interpretation are determined by the applicable law). Once examined, parallels may be drawn with other non-contractual claims brought under similar contractual language.

In *Eurotunnel*, the tribunal concluded that it lacked jurisdiction to consider customary international law claims extrinsic to the provisions of a concession agreement. The jurisdiction clause provided that "any dispute between the [parties] relating to this Agreement" would be submitted to arbitration,[5)] but the tribunal held that its jurisdiction was limited to claims implicating the rights and obligations of the parties under the concession agreement. The contract in *Dunkwa* featured a similarly broad arbitration clause, covering "[a]ll claims … arising, whether directly or indirectly out of, or in connection with" a Ghanaian-law-governed project agreement.[6)] Contrary to *Eurotunnel*, however, the tribunal acknowledged that this formulation could include non-contractual claims (the implication being that the tribunal may have found jurisdiction *ratione materiae* over claims for wrongful expropriation under customary international law). In *Biloune*, the investor's claim for violation of his human rights was found to be beyond the tribunal's jurisdiction on the wording of an arbitration clause which provided that "[a]ny dispute … in respect of an approved enterprise … may be submitted to arbitration".[7)]

In the context of ICSID arbitration, the tribunal in *Cambodia Power* found that it had jurisdiction to hear customary international law claims where three English-law-governed contracts referred to "any dispute or difference aris[ing] out of or in connection with" the relevant contract.[8)] Moreover, the claimant was able to bring customary international law claims notwithstanding the designation of English law as the rules of law agreed by the parties pursuant to Article 42 of the ICSID Convention. The same interpretation of Article 42 was applied in *Caratube II*, where the jurisdiction clause covered "all disputes arising from the Contract"[9)] and the tribunal found, notwithstanding the choice-of-law clause, that it would be inconsistent with the aims of the ICSID Convention to disregard customary international law.

The above examples demonstrate that tribunals have not been entirely consistent in assuming jurisdiction over customary international law claims under broadly-drafted arbitration agreements. Moreover, this inconsistency does not sit easily alongside the position widely (although not universally) taken in respect of other non-contractual claims, e.g. tort, unjust enrichment, or statutory claims, which most tribunals have agreed to hear under arbitration clauses with similar

broad wording.[10] While the scope of even broadly-worded arbitration clauses must be determined with reference to the principles of interpretation existing in the applicable law, there appears to be no reason to differentiate between customary international law claims and other non-contractual claims for the purpose of this interpretation exercise. On the contrary, it seems only consistent for tribunals either to allow customary and other non-contractual claims to be heard under broadly-worded clauses, or to disallow both. Thus, when analysing whether a customary international law claim falls within the scope of an arbitration clause, it is submitted that tribunals should take into consideration the much richer jurisprudence pertaining to the permissibility of other non-contractual claims under broadly-worded clauses.

B. The Power of the Tribunal to Decide on the Incorporation of a Customary International Law Standard into the Law Governing the Contract

To the extent that a choice of national law to govern the contract may indeed suffice to open the door to claims based on customary international law, a number of issues remain to be resolved for such claims to be sustained. Kate Parlett has written that, for the purpose of presenting a customary international law claim in a contract-based arbitration:

(i) the relevant customary standard of treatment should be incorporated in the body of municipal law chosen to govern the contract;
(ii) the standard relied on should indeed be of customary nature; and
(iii) this standard should be capable of being invoked by the private party in its own capacity.[11]

To these three important prerequisites one might add a further issue of incidental nature. As noted by Dr Parlett, for a customary international law claim in contract-based arbitration to be successful, the customary rule relied on should form part of the body of national law applicable to the contract. However, as a matter of jurisdiction, it is not always clear, first and foremost, whether the arbitral tribunal should have the power to decide if the invoked rule of supposedly-customary nature forms part of the national law chosen by the parties. This issue appears analogous to the one debated by Jan Paulsson and Pierre Mayer—namely, whether an arbitral tribunal should be deemed competent to exclude certain rules from the body of substantive law agreed by the parties where such rules are demonstrated to be in contradiction with the constitution of the State of the agreed applicable law.[12]

By analogy with the Paulsson / Mayer debate, one may be naturally inclined to answer the above threshold question with reference to the powers of the court of the State of the agreed applicable law. In this respect, the courts of some (not necessarily monist) legal systems are completely autonomous in deciding whether the relevant customary rule forms part of the national law. However, the courts of other (not necessarily dualist) legal systems may be prevented from deciding such issues altogether as a matter of law, or be allowed to resolve them only where the parliamentary body explicitly permits it.[13] At the same time, if the arbitral tribunal holds that it lacks jurisdiction to decide on the incorporation of the invoked customary rule in the substantive law chosen by the parties, it may thereby fail to determine the content of the applicable law and, accordingly, violate its duty to apply the law. This is therefore a further issue capable of determining the fate of a customary international law claim in a contract-based arbitration, which in our view merits further consideration.

Patrick Fox is an associate at Three Crowns LLP. Alexey Vyalkov is a trainee at the Stockholm

Chamber of Commerce. The views expressed in this post are the authors' personal views and do not necessarily reflect those of Three Crowns LLP or the Stockholm Chamber of Commerce.

To make sure you do not miss out on regular updates on the Kluwer Arbitration Blog, please subscribe here.

References

?1 *Case Concerning the Barcelona Traction, Light & Power Company Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, 44.

?2 E.g., denial-of-justice claims: see S Schwebel, *International Arbitration: Three Salient Problems* (Grotius Publishing 1987) ch 2.

?3 *Channel Tunnel Group Limited and France-Manche SA v Secretary of Transport of the United Kingdom and Secretary of Transport of France* (PCA Case No. 2003-06) Partial Award, 30 January 2007, (Eurotunnel); *Dunkwa Continental Goldfields Limited & Continental Construction and Mining Company Limited v The Government of the Republic of Ghana* (ICC Case No. 18294/ARP/MD/TO) Award, 9 July 2015 (Dunkwa); *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana* (UNCITRAL) Award on Jurisdiction and Liability, 27 October 1989, 95 ILR 184 (Biloune); *Cambodia Power Company v Kingdom of Cambodia* (ICSID Case No. ARB/09/18) Decision on Jurisdiction, 22 March 2011, (Cambodia Power); *Caratube International Oil Company LLP & Mr Devincci Salah Hourani v Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award, 27 September 2017, (Caratube II).

?4 K Parlett, Claims under Customary International Law in ICSID Arbitration (2016) 31(2) ICSID Review 434.

?5 *Eurotunnel* (n 3) para 97.

?6 *Dunkwa* (n 3) para 337.

?7 *Biloune* (n 3) 188.

?8 *Cambodia Power* (n 3) para 336.

?9 *Caratube II* (n 3) para 27.

?10 See, e.g., G Born, *International Commercial Arbitration* (Second Edition) (Kluwer 2014) 1345–1355.

?11 Parlett (n 4) 441–447.

?12 J Paulsson, *Unlawful Laws and the Authority of International Tribunals* (2008) 23(2) ICSID Review 215; P Mayer, *L'arbitre International et la Hiérarchie des Norms* (2011) 2 Revue de l'Arbitrage 361; JS Betancourt, *Understanding the 'Authority' of International Tribunals: A Reply to Professor Jan Paulsson* (2013) 4(2) Journal of International Dispute Settlement 227.

?13 See AJ Belohlavek, "Czech Republic" in D Shelton, *International Law and Domestic Legal Systems* (OUP 2011) 202; EA Alkema, "Netherlands" in *ibid*, at 420.