Kluwer Arbitration Blog

Washington Arbitration Week 2022: Class and Collective Action in Investment Arbitration – Old Issues, New Rules

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This post highlights the Third Edition of the Washington Arbitration Week 2022 panel on "Class or Collective Action in Investment Arbitration," held at the offices of Crowell & Moring LLP on December 2, 2022. The panel was moderated by WAW Co-Founder Mr. Ian Laird (Crowell & Moring/Georgetown Law). He was joined by Mr. Matthew Drossos (White & Case), Dr. Kabir Duggal (Arnold & Porter/Columbia Law), Mr. Robert Houston (The Global Pro Bono Bar Association), and Ms. Lisa Snow (Kroll). The panel discussed the following main topics: (i) Historical context and the early Claims Commissions; (ii) Consolidation of Investment Arbitration cases under NAFTA and issues of consent; (iii) Class Action Claims in Investment Arbitration and the *Abaclat* case; and (iv) Mass Claims as a Collaborative Response to Injustice.

Mr. Laird kicked off the discussion by highlighting the importance of identifying the categories of claims that shareholders, bondholders, or individuals affected by a common cause of action could use in an arbitration as part of the dispute resolution process. Such a methodology, in his opinion, achieves two objectives: (i) efficiency in minimizing time and costs assumed by the parties and (ii) avoiding contradictory or inconsistent decisions from parallel and multiple arbitration proceedings (read more about class and mass arbitration here).

I. Historical context and the early Claims Commissions

Claims Commissions represent a very unique and relevant form of international adjudication established to consider claims resulting from significant international war-related and traumatic historical events. Claims Commissions primarily aim to determine compensation to individuals and states for certain losses, damages or injuries. (See, generally, Howard Holtzmann and Edda Kristjánsdóttir (eds), International Mass Claims Processes: Legal and Practical Perspectives, Oxford University Press, 2007).

Dr. Duggal began the discussion by elaborating on the historical context of Claims Commissions. For instance, in the earliest known Claims Commission – established in the Jay Treaty (1794) between Great Britain and the U.S. – the treaty provided for the redressal of border disputes, shipping rights, and debts owed to British merchants before the appointed Commissioners, but turned out to be a failure with the next War of 1812 (read more about War and Arbitration here). The U.S. – Venezuela Mixed Claims Commission (1903) provided a mechanism for claims by U.S. citizens against Venezuela which had not been settled by diplomatic agreement or by arbitration.

The General Claims Commission (1923) between Mexico and the U.S., which was later abandoned in 1934, provided for the adjudication of claims by citizens of Mexico and the U.S. for losses suffered due to the acts of one government against nationals of the other. The U.S. citizens' hostage crisis in Iran and the freezing of Iranian assets in the U.S. resulted in the Algiers Accord (1981), and led to the creation of the Iran – U.S. Claims Tribunal, which is still operational. Iraq's invasion and occupation of Kuwait led to the creation of the United Nations Compensation Commission (1991).

II. Consolidation of Investment Arbitration: Cases and the Issue of Consent

Mr. Laird stated that the tool of consolidation, in addition to achieving the twin objectives noted in his introductory remarks, positively addresses the issue of res judicata between overlapping subject matters in claims between common parties. However, it is important to have party consent for consolidation. He further elaborated by describing the procedural posture adopted in *Khan Resources and Others. v. Mongolia*, PCA Case No. 2011-09, in which he acted as the claimants' counsel and where the parties negotiated to consolidate their claims into one proceeding.

Dr. Duggal highlighted the contrasting decisions in the NAFTA context, which permits consolidation under Article 1126. For instance, the tribunal in *Canfor v. U.S.*, administered under UNCITRAL Rules, allowed the U.S.'s consolidation request of Tembec v. U.S. and Terminal Forest Products v. U.S. into a common proceeding, as all the Canadian claimants were softwood lumber producers affected by the countervailing duty and anti-dumping measures imposed by the U.S. However, the tribunal in *Corn Products v. Mexico*, ICSID Case No. ARB (AF)/04/1 rejected Mexico's request to consolidate claims brought by ALMEX shareholders against Mexico in relation to the same tax measures on soft drinks containing high fructose corn syrup.

III. *Abaclat* as the Paradigmatic Case for Class Action Claims in Investment Arbitration

While the 2006 version of the ICSID Rules did not contain an explicit provision for consolidation, the arbitral tribunal in *Abaclat (formerly Giovanna a Beccara) and Others v. Argentina*, ICSID Case No. ARB/07/5 ("*Abaclat*") took a creative approach by consolidating 60,000 bondholders' claims into one common proceeding. Mr. Drossos addressed this case, which arose out of the 2001 Argentinian international sovereign bond default affecting thousands of bondholders. As a practical takeaway of having acted as counsel to the claimants, he highlighted the coordinated efforts to establish the burden of proof on a massive scale in order to satisfy jurisdictional, merits, and damages requirements such as personal information, nationality, consent, and bond holdings of individual claimants. Collecting a database with standardized consolidation of mass documentation into usable, confirmable form is a necessary procedural step, which can then be verified using underlying evidence for due process purposes by an independent database verification expert. In *Abaclat*, the tribunal appointed Dr. Norbert Wühler for that precise purpose.

Though *Abaclat* was ultimately settled, it is highly discussed whether any future claims commission can use the same standards and procedure to handle massive data for the consolidation of claims. In *Abaclat*, Argentina argued that it did not consent to arbitrate the consolidated claims, but the tribunal in the majority referred to its gap-filling power in Article 44 of the ICSID Convention to allow the procedure to go ahead, keeping in mind the fundamental principle of access to justice. The recently amended 2022 version of the ICSID Arbitration Rules provide for consolidation at Rule 46(2) and coordination at Rule 46(3), but they do not explicitly address how and whether a mass claim can be filed against a common Respondent for the same or similar

subject matter of dispute.

From her perspective as a damages expert, Ms. Snow focused her presentation on the valuation of mass claims and highlighted the ability of the respondent to pay ultimately as a determining factor in the settlement negotiations, as witnessed in the *Abaclat* case. The recent example of Sri Lanka's financial situation and bankruptcy would raise solvency issues if any investor-state claim is brought against it in the near future. In *Corn Products v. Mexico*, ICSID Case No. ARB (AF)/04/1, however, the decision to not consolidate was beneficial to the companies involved from a damage's perspective.

IV. Mass Claims as a Collaborative Response to Injustice

Mr. Houston introduced the efforts of the Global Pro Bono Bar Association titled "Project Treaty Justice", which seeks to assist investors with financing collective claims against Russia. In response to international sanctions, Russia published and has actively updated a list of "unfriendly countries," which empowers the government to introduce countermeasures against countries determined to have engaged in "unfriendly" actions against Russia (and investors from those "unfriendly countries"). Such measures include: currency transfer restrictions, transaction approval requirements, prohibition of foreign currency export, debt repayment restrictions, export and import prohibitions, and non-enforcement of intellectual property rights (read more about sanctions here). The 27 "unfriendly countries" with whom Russia has BITs in force are Albania, Austria, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Lithuania, Luxembourg, Netherlands, North Macedonia, Norway, Romania, Singapore, Slovakia, South Korea, Spain, Sweden, Switzerland, Ukraine, and the United Kingdom (read more about Russian BITs here).

Mr. Houston explained the main three objectives of Project Treaty Justice are to (i) bring justice to those negatively impacted by Russia's actions where they otherwise may have no recourse, (ii) deter future acts of aggression by Russia or other states in order to promote the international rule of law as well as international peace and security, and (iii) democratize the practice of investor-state arbitration around the world by affirming the value of individual investors' investments. Therefore, Project Treaty Justice is in the process of developing a mechanism to help those affected individuals by Russia's economic measures, who have no other avenue for access to justice to bring an ISDS claim, even if their claims are smaller in size as long as their rights are protected under any of the 27 BITs with Russia (read more about small value claims here).

Mr. Laird flagged the UN General Assembly Resolution of 14 November 2022 on the furtherance of remedy and reparation for aggression against Ukraine, which amongst many aspects envisioned the creation of a "record of evidence" with a statement of "Claims information […] caused by internationally wrongful acts", documentary evidence of "damages, loss, or injury," and expert evidence if required. The scope and extent of the record is all damages, including human rights and commercial losses, to the State of Ukraine and all natural and legal persons concerned (read more about the peaceful resolution of disputes here).

Dr. Duggal highlighted the potential diplomatic issues with the freezing of assets and its reciprocal treatments from an international peace and security perspective (read more about asset freezes here). Since this is an issue that, from his perspective, needs to be addressed by the UN Security Council – where Russia can and will exercise its veto powers – the efficacy of the mass claims process remains questionable.

Conclusion

Collective actions in arbitration have been relatively rare and scarce. This is not to say that such actions did not exist, as the panel took stock of cases of collective actions in investment arbitration with particular attention to *Abaclat*. However, in recent years the cases and scenarios for group arbitration have increased considerably.

Although the recent ICSID Arbitration Rules 2022 remarkably provide for consolidation of arbitral proceedings at Rule 46(2) and coordination of arbitral proceedings at Rule 46(3), other intricate aspects are still to be tackled, such as the issue of filing mass claims against a common respondent for similar, but not identical, subject matters of dispute, which might raise questions regarding consent.

Despite the challenges involved with such large-scale claims, collective actions could prove useful in addressing systemic issues that arise in arbitration proceedings affecting several parties: (i) efficiency in minimizing time and costs, (ii) avoiding contradictory or inconsistent decisions from parallel and multiple arbitration proceedings, and (iii) the issue of *res judicata* between overlapping subject matters in claims between common parties. Resorting to collective actions can be a viable option for small value claims, and thus enhance access to arbitration and ultimately, to justice.

Kluwer Arbitration Blog's full coverage of Washington Arbitration Week (WAW) is available here.

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