

Kluwer Arbitration Blog

Issuance of an Anti-Arbitration Injunction by a Contract-Based Tribunal in Relation to Proceedings Before a Treaty-Based Tribunal: Republic of Mozambique and Patel Engineering Limited

Thomas R. Snider (Al Tamimi & Company) and Aishwarya Suresh (Paxus LLP) · Saturday, March 4th, 2023

In November 2022, a contract-based arbitral tribunal [issued](#) an anti-arbitration injunction with the aim of enjoining parallel investment treaty proceedings between the parties. This post examines this injunction – which was [ignored](#) by the investment-treaty tribunal – and its implications.

Background

In March 2020, Patel Engineering Limited (“PEL”), an Indian-incorporated infrastructure and construction service company, [commenced](#) an arbitration under the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”) against the Republic of Mozambique (the “UNCITRAL Arbitration”). The arbitration was filed under the 2009 India-Mozambique Bilateral Investment Treaty (the “BIT”), which, [reportedly, was unilaterally denounced by Mozambique](#) that same month.

The arbitration was commenced following the awarding of a USD 3,000,000,000 project to build a 500-kilometre rail-to-port logistics corridor in Mozambique to a third-party. This, PEL claimed, was contrary to a memorandum of interest (“MOI”) that it signed with the Mozambique Ministry of Transport and Communications (“MTC”). PEL contended that, pursuant to the MOI, Mozambique was required to issue a concession of the project in favour of PEL provided that Mozambique was satisfied with the results of a pre-feasibility test undertaken by PEL. PEL contended that, despite Mozambique’s subsequent approval of PEL’s prefeasibility test, Mozambique reneged on its contractual obligation and awarded the project to a third party. PEL claimed that this amounted to a breach of the BIT.

In May 2020, Mozambique (along with the MTC) [commenced](#) an arbitration against PEL under the Arbitration Rules of the International Chamber of Commerce (the “ICC Arbitration”) arising from the same set of facts. The ICC Arbitration was commenced in accordance with the arbitration clause found in the MOI. In this arbitration, Mozambique sought, amongst other things, declarations that PEL could not assert claims under the BIT, that Mozambique had not violated the BIT, and that PEL was not entitled to any rights, relief, or damages under the BIT.

Since their commencement, both arbitrations have continued in parallel with the parties' active participation. While no formal applications for the consolidation of the arbitrations were raised, PEL was willing to consolidate the two proceedings and made several proposals to Mozambique in this regard. Mozambique did not agree to consolidate. Both parties had also sought to have the other arbitration suspended; PEL applied to do so once in the ICC Arbitration, and Mozambique made three such applications in the UNCITRAL Arbitration. Mozambique's first stay application before the UNCITRAL tribunal was [rejected](#) since, amongst other things, "the respective causes of action appear to be quite different" and, therefore, a stay would be "unjustified" (para. 57). Mozambique's second stay application, filed less than a year later, was [rejected](#) because the tribunal found that "the circumstances [had] not changed since the First Stay Decision" (para. 16). As is discussed in further detail below, Mozambique's third stay application, filed some months later on the strength of an anti-arbitration injunction obtained from the ICC tribunal, was similarly rejected by the UNCITRAL tribunal.

Mozambique's Application for an Anti-Arbitration Injunction

In May 2022, Mozambique filed an application with the ICC tribunal requesting the tribunal to issue an interim measure enjoining PEL from proceeding with the UNCITRAL Arbitration until a final award is issued in the ICC arbitration, *i.e.*, an anti-arbitration injunction. This application followed the rejection of similar previous applications by the ICC tribunal with the most recent rejection coming in the form of a partial award on jurisdiction issued by the ICC tribunal in February 2022.

In November 2022, however, a [majority](#) of the ICC tribunal [granted](#) Mozambique an anti-arbitration injunction enjoining PEL from "pursuing the determination of any matters in dispute between the Parties arising out of the MOI in any other forum, even if only accessorially for the purpose of the adjudication of Treaty Claims" (the "Order", para. 101). A [corrigendum](#) issued shortly thereafter clarified that the injunction would only be in place until the ICC tribunal had taken its decisions on the relevant matters. The third arbitrator on the ICC tribunal issued a [dissenting opinion](#) to the Order (the "Dissenting Opinion") and to the corrigendum.

According to the ICC tribunal, the dispute in the UNCITRAL Arbitration arose from the MOI. Therefore, pursuant to the arbitration agreement in the MOI, which extends to "[a]ny dispute arising out of this memorandum" (and does not contain a broader formulation encompassing disputes "relating to or in connection with" the MOI or similar language) (Order, para. 52), the tribunal reasoned that it had exclusive jurisdiction over the dispute as opposed to concurrent jurisdiction over it with the UNCITRAL tribunal. Per the ICC tribunal's reasoning, the fact that PEL's claims in the UNCITRAL Arbitration were treaty-based claims was immaterial since the claims "seem to be in part based on, or at least concern, the [p]arties' dispute arising out of the MOI" (Order, para. 76). According to the ICC tribunal, "[t]o the degree that the resolution of the Treaty claims depends on the adjudication of a dispute arising out of the MOI and properly before an ICC Tribunal with (exclusive) jurisdiction ... this Tribunal needs to insist on deciding these issues exclusively" (Order, para. 84).

In the Dissenting Opinion, the dissenting arbitrator expressed that he was "deeply troubled" by the "breathtaking proposition" that the ICC tribunal could enjoin PEL from proceeding with the determination of matters before the UNCITRAL tribunal and thereby effectively "decide[] the

scope of the [UNCITRAL tribunal's] jurisdiction" (Dissenting Opinion, paras. 1, 56, 88). The dissenting arbitrator took the view that the injunction against the Respondent and, consequently, against the UNCITRAL tribunal is unprecedented both in its nature and its legal basis. Indeed, the Order provided no prior instances of this practice in support of the decision contained therein while, as enumerated in the dissent, there is consistent practice to the contrary.

The UNCITRAL Tribunal's Consideration of the ICC's Anti-Arbitration Order

Armed with the Order, Mozambique filed its third stay application with the UNCITRAL tribunal. As the application was filed just four days before the final evidentiary hearing in the UNCITRAL Arbitration was set to commence, the UNCITRAL tribunal decided to hear the application as a preliminary item on the first day of the hearing after which the hearing would continue.

The UNCITRAL tribunal issued its [decision](#) (in the form of a procedural order) shortly thereafter. The tribunal rejected Mozambique's stay application and expressly declared that "its right to establish its own jurisdiction is unfettered by the ICC Injunction" (para. 51). The UNCITRAL tribunal observed that it "remains convinced that the ICC and UNCITRAL Arbitrations are based on different agreements (*i.e.*, the MOI and the BIT, respectively) and concern different causes of action", reflecting the tribunal's implementation of the *Vivendi* principle discussed further below (para. 46).

Legality of the Order

An order by an arbitral tribunal enjoining another arbitral tribunal, governed by a different arbitration agreement, from proceeding with its arbitration is exceptionally rare (indeed, the authors are aware of no such other examples). The prevailing position is represented by an [unreported ICC arbitration](#) from 2003, in which a tribunal had refused to enjoin a party from pursuing a second arbitration (albeit against a third party) on the grounds that it did not have the power to interfere with another arbitration, in particular because the latter had arisen out of a separate arbitration agreement. The Order, by going against this position, appears to be inconsistent with a cornerstone of international arbitration — the principle of *competence-competence*.

Since the [Annulment Committee decision](#) in *Vivendi v. Argentina*, investment tribunals have consistently held that they have jurisdiction to base decisions upon contractual terms "so far as necessary in order to determine whether there had been a breach of the substantive standards of the BIT" (para. 110). The Order thus appears to run counter to twenty years of consistent jurisprudence, a point emphasised in detail in the Dissenting Opinion.

Consistent with the approach set out in *Vivendi*, investment tribunals have rarely refrained from deciding a treaty claim solely because doing so would require consideration of an investment contract. As explained in the Dissenting Opinion, *SGS v. Philippines* was an example where an investment tribunal stayed its own proceedings so that the judicial forum agreed in the parties' contract could interpret the contract first, but even this approach, a more restrained one than the approach taken by the ICC tribunal in this case, has been "largely renounced" by the international arbitration community (Dissenting Opinion, paras. 68-69).

Another aspect of the Order that is unsatisfying is the apparent *volte-face* in the tribunal's own thinking. When previously confronted with a similar application to enjoin PEL from pursuing the UNCITRAL Arbitration, the ICC tribunal rejected the application noting that contractual issues could be considered by the UNCITRAL tribunal to the extent that these issues were “merely accessory and preliminary” to determining the treaty-based claims (Dissenting Opinion, para. 13 (quoting the ICC tribunal's Partial Award on Jurisdiction, dated 16 February 2022, para. 139)). The majority did not provide a satisfactory explanation for why, within a few months, its reasoning changed.

The corrigendum subsequently issued by the majority raises further questions. By clarifying that the majority's intention was to impose the injunction only until the ICC tribunal had decided the claims before it, it is unclear how the ICC tribunal could be said to hold exclusive jurisdiction – as the majority repeatedly emphasizes in the Order – over claims arising from the MOI.

What Next?

The hearing in the UNCITRAL Arbitration drew to a close a few days after the UNCITRAL tribunal issued its decision on Mozambique's third stay application. While the UNCITRAL tribunal has chosen to ignore the ICC's injunction, the wider ramifications of this remain to be seen. In particular, how the ICC tribunal will proceed and whether the UNCITRAL tribunal's final award will be challenged remain open questions. More long-term, there may also be difficulties at the enforcement stage if PEL seeks enforcement of the UNCITRAL award in Mozambique as noted, albeit briefly, in the Dissenting Opinion. The outcome of the two arbitrations will also determine the impact of the Order on future arbitrations as parties may feel emboldened to pursue similar arguments in future investment disputes.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



Wolters Kluwer

This entry was posted on Saturday, March 4th, 2023 at 8:25 am and is filed under [Anti-arbitration Injunction](#), [Commercial Arbitration](#), [Investment Arbitration](#), [Parallel Proceedings](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.