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“Where There is a Right”, Is There an Effective Remedy? A Report on the 35th Annual ITA Workshop on Remedies in International Arbitration

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The 35th Annual ITA Workshop on “Remedies in International Arbitration: Wielding Arbitral Power for Effective Redress” took place in Austin, Texas from 15 to 16 June 2023. Co-chaired by Dr. Diane A. Desierto (Professor, University of Notre Dame Law School), Rachael D. Kent (Partner, WilmerHale, Washington, D.C.), and Thomas Voisin (Partner, Quinn Emanuel Urquhart & Sullivan, LLP, Paris), this year’s workshop discussed how international arbitration gives effect to the legal rights of parties through granting them different remedies. During the workshop, eminent arbitrators, in-house counsel, and arbitration practitioners analyzed the legal framework and arbitral practice of the current arbitration system to determine whether the system satisfied users’ expectations and whether changes are needed to provide more effective remedies.

This blog post will consider three major themes discussed during the workshop: (a) non-monetary remedies vs. monetary remedies; (b) non-monetary remedies available in international arbitration; and (c) the enforcement of non-monetary remedies and other efficiency considerations.

Non-Monetary Remedies vs. Monetary Remedies

The keynote speech, delivered by Abby Cohen Smutny, focused on non-monetary remedies. While a monetary award is the most common remedy in international arbitration, it is not always the best solution. Non-monetary remedies may be more effective in certain circumstances.

The types of remedies that the tribunal can grant ultimately depend on the consent instruments and the applicable law in each case. Although consent instruments are mostly silent on non-monetary remedies, it is well-established that the jurisdiction to establish liability also vests tribunals with the jurisdiction to select and grant the most appropriate reparation.

Non-Monetary Remedies Available in International Arbitration

The ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”) provide a framework for granting remedies in international arbitration. Article 34 of the

ILC Articles notes three forms of reparation: (a) restitution; (b) compensation; and (c) satisfaction, such as the acknowledgment or declaration of a breach, expression of regret, or common apology. While restitution is the primary relief under international law, as reflected in Articles 35 and 36 of the ILC Articles, compensation is by far the most common relief granted in international arbitration. Tribunals have, however, considered non-monetary remedies.

Restitution seeks to "*re-establish the situation which existed before the wrongful act was committed*" (ILC Articles, Art. 35). The requirements for restitution are that (a) it cannot be materially impossible; and (b) it cannot cause a burden exceeding the benefits. Although restitution is the primary relief, these requirements are often not met to make restitution available. For instance, in *Al-Bahloul v. Tajikistan*, the tribunal held that it could not order the respondent to issue exclusive licenses for hydrocarbon exploration because its implementation was materially impossible, given that (a) nine years had passed since the unlawful measures were adopted; (b) the licenses had been granted to other parties who had made investments under those licenses; and (c) the claimant had no activities in or had working relationship with Tajikistan (*see* ¶54). Similarly, the tribunal in *Siag v. Egypt* found that restitution of the claimants' investment was not possible because the property had already been conveyed to a third party (s*ee* ¶534).

Tribunals are sometimes reluctant to order restitution out of fear that this may end up interfering with the State's sovereignty. Such was the case in *LG&E v. Argentina*, where the tribunal noted that:

> "[t]he judicial restitution required in this case would imply modification of the current legal situation by annulling or enacting legislative and administrative measures that make over the effect of the legislation in breach. The Tribunal cannot compel Argentina to do so without a sentiment of undue interference with its sovereignty. Consequently, the Tribunal arrives at the same conclusion: the need to order and quantify compensation." (¶87)

Conversely, in *Enron v. Argentina*, the tribunal pointed out that it had broad powers to order injunctive relief and non-pecuniary remedies responding to the claimant's request to annul Argentine tax assessments prohibit their future collection, on the basis that they were unlawful under the U.S.–Argentina Bilateral Investment Treaty ("BIT") and Argentine law (*See* ¶79). [1)] The tribunal in *Pezold v. Zimbabwe* observed that the restitution requested in the case—which required the Zimbabwean government to reinstate the claimants' title to the properties at issue—was not legally impossible since it "*simply require*[d] *an administrative act on the part of the Government*." (¶728) Zimbabwe argued that the restitution of the claimants' title was impossible because settlers had occupied the properties. Although the tribunal admitted that some disturbance might arise from the claimants' seeking to exercise their rights over the properties, it held that:

> "the tribunal [. . .] must operate on the assumption that there is sufficient rule of law to enable the Respondent to carry out whatever award the Tribunal decides upon, including an award of restitution." (¶732)

In some instances, non-monetary remedies may be the only suitable relief, as it is the only way to

achieve full reparation to put the injured party in the position it would have been in but for the unlawful act, including in cases where it is not possible to quantify the monetary loss caused by the breach in question. For instance, in *ATA Construction v. Jordan*, the tribunal ordered the reinstatement of the claimant's right to arbitrate a dispute, which had been retroactively extinguished by decisions of the Jordanian courts. The tribunal, having found a violation of the Turkey–Jordan BIT, ordered that (a) the ongoing court proceedings should be "*immediately and unconditionally terminated, with no possibility to conduct further judicial proceedings in Jordan or elsewhere on the substance of the dispute*" and that (b) ATA was entitled to bring its arbitration claim once more. (¶132) In short, it found that restoration of the right to arbitration was "*the single remedy which c*[ould] *implement the Chorzow standard* [*i.e.*, the full reparation standard]." (¶131)

Enforcement of Non-Monetary Remedies and Efficiency Considerations

As Professor John Crook stated in the workshop debate, it is believed that non-monetary remedies are not the preferred solution because they are difficult to enforce. However, as Lucinda A. Low countered, although the enforcement system is set up to favor pecuniary awards, the ICSID Convention requires compliance with all awards, monetary or non-monetary. Tribunals have been cognizant of the risk of non-pecuniary remedies not being enforceable. For example, in *Arif v. Moldova*, the tribunal hesitated to grant restitution given its inability to "*supervise any restitutionary remedy*" (¶571). Therefore, the tribunal instead ordered "r*estitution and compensation as alternatives, with the remedy of compensation suspended for* […] *90 days*", and if after which "*restitution* [was] *not possible, or the terms of* [the] *restitution proposed by* [the respondent] [were] *not satisfactory to* [the claimant]," then compensation would take place. (*Id.*) This, according to the tribunal, "*provides a final opportunity to preserve the investment, while also preserving* [the claimant's] *right to damages if a satisfactory restitutionary solution cannot be found.*" (*Id.*)

Nevertheless, as Professor George A. Bermann commented during the last panel, several tribunals have specified that the potential unenforceability of non-pecuniary remedies should not be a consideration in deciding whether to award them. In other words, tribunals should not refrain from issuing certain remedies merely because of potential enforcement risks. As the *Micula* tribunal stated:

> "the fact that such a remedy might not be enforceable pursuant to Article 54 of the ICSID Convention should not preclude a tribunal from ordering it. Remedies and enforcement are two distinct concepts." (¶166)

Another important factor to consider as to whether to award non-monetary relief is whether a request is time sensitive, because the requesting party usually wants the other party to act or desist from an activity or seeks to protect certain rights or property immediately. One panel focused on tools for granting non-monetary relief more effectively. One way to achieve this is through interim relief measures and emergency arbitrator proceedings. As Roberto J. Aguirre Luzi mentioned, provisional measures can help preserve claimants' rights and facilitate the effectiveness of non-pecuniary solutions, but are often subject to a high threshold. Under this high bar, tribunals generally require:

> "(A) that the adoption of such measures be necessary to preserve petitioner's rights, (B) that their ordering be urgent, and (C) that each party has been afforded an opportunity to raise observations." (¶ 54)

There is no doubt that there are other tools available to make non-pecuniary remedies effective. As Anne Véronique Schlaepfer noted, it is more a question of *how* we make the best out of existing tools *instead* of creating new tools.

In sum, granting effective remedies is a key concern for users of international arbitration. Some other questions that are worth further reflection are: Should tribunals be less reticent to order non-monetary relief? Should the losing party be given a choice of remedy, à la *Arif v. Moldova*, more often? Conversely, should parties be given more leeway to be creative and flexible when devising their requests for relief? There was consensus among the panelists that the necessary tools already exist. The challenge is to use them more effectively.

References

?1 The tribunal did not have to decide on the merits of the claimant’s request because that part of the claim was settled.

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