

Kluwer Arbitration Blog

Agarwal and Mehta v. Uruguay: Second Round?

Santiago Gatica (Freshfields Bruckhaus Deringer) · Tuesday, September 5th, 2023

On August 6, 2020, an arbitral tribunal composed of Andrés Rigo Sureda (P), O. Thomas Johnson, Jr., and Pierre Mayer (the **Tribunal**), constituted under the [agreement between the United Kingdom and Uruguay for the promotion and protection of investments \(the BIT\)](#), issued an award in *Prenay Agarwal, Vinita Agarwal and Ritika Mehta v. Uruguay* (PCA Case No. 2018-04) declining jurisdiction to hear the case (the **Award**). The Tribunal found that at the time of the alleged breaches, the discretionary beneficiary interests that the three claimants (the **Claimants**) had in a Cayman Islands trust were not a protected investment under the BIT, and that when the discretionary trust was converted into a fixed trust, the alleged breaches had already occurred. However, on February 21, 2023, the *Cour d'Appel de Paris* (the **Court of Appeal**) annulled the **Award**, concluding that the only temporal limitation on the Tribunal's jurisdiction included in the BIT is its date of entry into force, not the date of completion of the investment, which is a substantive issue. This saga is important because the Award decided an unprecedented issue (whether a discretionary beneficiary interest under a trust is a protected investment) and the upcoming judgment of the *Cour de Cassation* (the **Court of Cassation**) will be one more pearl in the necklace of decisions to be considered when considering Paris as a seat in investment arbitrations.

This post analyzes: (i) the Award issued in the PCA Case No. 2018-04; (ii) the Court of Appeal's annulment decision; and (iii) finally, the current state of French case law that could determine the decision to be rendered by the Court of Cassation.

Act I – Opening Scene: The Award

Investment. The dispute relates to the failure of an iron ore mining project in the Valentines area (the **Valentines Project**) by the Uruguayan company Minera Aratirí S.A. (**Aratirí**). The feasibility study commissioned by Aratirí in 2011 valued the investment at between US\$3 and US\$6 billion. As a reference, these amounts represented between 6% and 12% of Uruguay's GDP at the time.

Investors. The indirect holder of 100% of Aratirí's shares was a trust established in the Cayman Islands in 2008 by Indian tycoon Pramod Agarwal (**Mr. Agarwal**), who designated his four children as discretionary beneficiaries and reserved the right to revoke the trust at any time. A few days after the trust was constituted, Mr. Agarwal sent a letter of wishes (*carta de deseos*) to the trust's protector instructing that the assets be destined for the exclusive benefit of his children. The trustees had discretion as to the payment of the income generated or the principal of the trust fund

in favor of one beneficiary to the exclusion of others, and even to the exclusion of any of them. In 2012, Mr. Agarwal made the trust irrevocable, but any of the beneficiaries could still exclude themselves from the trust, as one of his daughters did in 2015, resulting in three Claimants, all of whom were British nationals. Finally, on August 1, 2016, the trust was converted into a fixed trust.

Alleged measures. Between 2010 and 2012, Aratirí applied for concessions to exploit the Valentines Project, but in 2013, Uruguay enacted the Large-Scale Mining Law which included a special regime for projects of this type. Aratirí then applied for a concession under this new law in 2013, but the legal deadline to execute the concession agreement expired in 2015 without an agreement, so then-President Vázquez declared Aratirí's mining titles to have lapsed. In 2016, Vázquez also declared that the deadline for negotiations with a successor to Aratirí had expired. In parallel, Aratirí had unsuccessfully attempted to obtain tax benefits, a concession for a port terminal and an environmental authorization. The Claimants argued that this was a government strategy to expropriate the value of the Valentines Project, while Uruguay argued that it gave its full support to the project in the hope of seeing it succeed.

Jurisdictional objections. Uruguay raised four objections: (i) the Claimants did not have an investment at the time of the alleged breaches (*ratione temporis*); (ii) the Claimants did not make any investment under the BIT (*ratione personae*); (iii) the alleged investments were transferred to third parties (*ratione loci*); and (iv) the Claimants breached the domestic litigation requirement (*ratione voluntatis*). The Tribunal upheld the first objection and did not consider the others for reasons of procedural economy.

Uruguay's position. Uruguay argued that at the time of the alleged breaches, the Claimants were discretionary beneficiaries of the trust and therefore had no ownership rights over the trust assets, as the letter of wishes was not binding. According to Uruguay, the Claimants obtained an immediate, absolute and unconditional interest only in August 2016 when the trust became fixed. By that time, the Valentines Project had already been dissolved and the alleged breaches had already occurred, so the Tribunal had no jurisdiction.

Claimants' position. The Claimants sustained that when they initiated the arbitration in July 2017, they had already become fixed beneficiaries of the trust and therefore the objection would be a matter of admissibility, not jurisdiction. In any case, the text of the BIT does not include an "ownership" requirement, but rather a broad definition of "investments" that would be satisfied by Claimants' economic interests in the trust. According to the Claimants, the letter of wishes and the distribution of the trust assets show that Mr. Agarwal intended to benefit his children. Finally, the Large-Scale Mining Law would be a continuing event or default that continued after the trust became fixed.

Tribunal's decision. The Tribunal understood that under Cayman Islands law, the Claimants, as discretionary beneficiaries, had only a right to be considered by the trustee in the distribution of assets, but did not possess any rights, proprietary or otherwise, over the trust assets. The Tribunal also understood that the letter of wishes was not binding and did not confer a beneficial interest. The Tribunal then noted that no other tribunal had faced the question of whether a discretionary beneficiary interest constituted an asset under the BIT. As the Claimants had no rights in the trust assets, but only the expectation of benefiting from them, the Tribunal concluded that the Claimants' discretionary interests were not assets for the purposes of the BIT and therefore the Claimants lacked standing prior to August 1, 2016, when they became beneficial owners. Finally, the Tribunal concluded that there was no event after August 1, 2016 that could have materialized

into a dispute.

Act II – The Plot Thickens: Annulment by the *Cour d’Appel de Paris*

The Claimants requested the annulment of the Award under Article 1520,1° of the French Civil Procedure Code (“[a]n award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; [...]”). The Court of Appeal sided with the Claimants and annulled the Award.

As indicated by the Court of Appeal in its judgment, under Article 1520,1°, it could look at “all the legal and factual elements that enable the scope of the arbitration agreement to be assessed” (namely, a *de novo* review). In doing so, the court noted that the only *ratione temporis* restriction included in the BIT is the one stated in Article 1: “[t]he term ‘investment’ includes all investments, whether made before or after the date of entry into force of this Agreement, but this Agreement shall in no case apply to disputes which arose before its entry into force.” The court said that in Article 1 “the [BIT] does not make the arbitral tribunal’s jurisdictional power subject to a temporal condition concerning the making of the investment, which does not appear [in the BIT], but limits the benefit of its procedural protection to disputes arising after its entry into force.” So Article 1 “does not set out a condition of consent to arbitration but a substantive condition of the protection provided by the [BIT] affecting this investment, a condition which the court is not to review.” As the BIT entered into force in 1997, the court concluded that “[t]he date of the investment does not preclude the dispute from being submitted to a[n] [...] arbitral tribunal.”

The Court of Appeal rejected the other three jurisdictional objections raised by Uruguay because: (i) the BIT does not require the investment to be actively “made” and does not exclude mere passive detention of an investment (*ratione personae*); (ii) the BIT does not exclude indirect investments (*ratione loci*); and (iii) the BIT’s 18-month domestic litigation is an admissibility requirement, not a jurisdictional one (*ratione voluntatis*).

Act III – Finale(?): Awaiting for the *Cour de Cassation*

When analyzing the decision of the Court of Appeal and speculating on the direction of the decision to be rendered by the Court of Cassation, it is important to understand the current state of French case law in order to identify the trends that have influenced the former and could determine the latter, even if there are no precedents for the exact issue decided in the Award. In this sense, it is opportune then to refer to the judgments that the Court of Cassation rendered one year apart, in December 2021 in *Garcia Armas v. Venezuela* and in December 2022 in *Oschadbank v Russia*.

Garcia Armas v. Venezuela. The Court of Appeal had first partially annulled the successful award against Venezuela in respect of those investments made by the investors while they did not have Spanish nationality. The investors later (and prior to the dispute) acquired Spanish nationality, but the partial annulment by the Court of Appeal meant that it was insufficient to hold qualifying investments at the time of the dispute. Those investments would only be protected if they qualified as protected investments at the time of their *acquisition* as well. However, the Court of Cassation reversed the annulment because “in so ruling, the court of appeal, which added a condition to the treaty that it does not provide for, violated [Article 1520,1° of the Civil Procedure Code] text.” On

27 June 2023, the Court of Appeal on remission confirmed the Court of Cassation's conclusion that no condition requiring that the investments be protected at the time of acquisition could be added to the treaty language and so Venezuela's attempt to annul the award on that basis failed.

Although the decision in *Garcia Armas* dealt with *ratione materiae* and not *ratione temporis* as in *Agarwal*, in annulling the Award in the *Agarwal* case, the Court of Appeal seems to be following the reasoning of the Court of Cassation in the *Garcia Armas* case (subsequently confirmed by the Court of Appeal on remission) in the sense of limiting itself to interpreting the treaty per its ordinary meaning. In doing so, the Court of Appeal is looking at whether there was a qualifying investor and investment at the time of the dispute, without adding requirements not expressly provided for in the text of the treaty.

Oschadbank v. Russia. The Court of Appeal had first annulled this award because Article 12 of the Russia-Ukraine BIT states that it applies to investments made "as of January 1, 1992," but the investment had been made before that date. As such, "the temporal condition laid down in article 12 [...] containing the offer of arbitration has not been met, so that the arbitral tribunal has wrongly upheld jurisdiction to hear the dispute." However, in December 2022 the Court of Cassation reversed the annulment because "article 12 did not set out a condition of consent to arbitration on which the jurisdiction of the arbitral tribunal depended, but rather a substantive rule, [so that] the court of appeal, which was only required to verify, having regard to *ratione temporis* jurisdiction, that the dispute had arisen after the entry into force of the treaty, violated [Article 1520,1° of the Civil Procedure Code]."

Conclusion: What's Next in the Agarwal Saga?

In view of the time the Court of Cassation took to decide in *Garcia Armas* and *Oschadbank*, we could expect its decision in *Agarwal* by August-November 2024 (18-21 months). Additionally, the Court of Appeal appears to have followed the general criteria set by the Court of Cassation in *Garcia Armas* (and the Court of Appeal on remission) and *Oschadbank*, despite being faced with a novel issue. If the Court of Cassation upholds the annulment, it would be the first time that, to our knowledge, it annuls an investment arbitration award declining jurisdiction, and the saga will move to its next act.

To be continued...

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