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2024 PAW: The Interaction between the Merits of the Case and Ratione Temporis Issues

Lea Maalouf, Yasemin Topcan (Jones Day) · Thursday, March 21st, 2024

Kicking off the 2024 Paris Arbitration Week (PAW), Jones Day hosted a thought-provoking event exploring the nuanced "Interaction between the Merits of the Case and Ratione Temporis Issues" in Investor-State dispute settlement ("ISDS"). Claire Pauly (*Partner, Jones Day*) moderated the bilingual event that brought together distinguished speakers, where Jérôme Ortscheidt(*Special Counsel before the French Court of Cassation*) and Professor Sophie Lemaire (*Université Dauphine*) discussed the approach adopted by French courts concerning *ratione temporis* issues in investment arbitration disputes, in the context of annulment proceedings before the French courts. The second part of the event was held by two quantum experts, Alan Rozenberg(*Compass Lexecon*) and Marion Gady (*FTI Consulting*) who equally tackled the subject of *ratione temporis* issues from a damages perspective elaborating on different aspects that may or may not be taken into account in quantification of damages at the valuation stage in ISDS.

Is it an Issue of Jurisdiction or an Issue of Merits?

Mr. Ortscheidt started by laying the foundation of the distinction between jurisdiction *ratione temporis* and merits acknowledged by French courts in the context of arbitration proceedings that are seated in France and awards that are to be recognized or enforced in France, as they will be reviewed by the French judge. The review conducted by the French annulment judge is two-folded. He or she first characterizes *ex officio* the issues at stake based upon their own discretion and notwithstanding the characterization put forward by the parties or the tribunal, and then reviews whether jurisdiction had been properly assessed. Both professors relied on two recent French Court of Cassation rulings: *Oschadbank v. Russia*, dated 7 December 2022, and *Rusoro Mining v. Venezuela*, dated 31 March 2021.

The *Oschadbank* case rested itself on the interpretation of Article 12 of the Ukraine-Russia investment treaty ("BIT") which stipulated that: "*This Agreement shall apply to all investments made by the investors of one Contracting Party in the territory of the other Contracting Party as of 1 January 1992*".?Mr. Ortscheidt offered two approaches: while one could bind it as affecting every clause of the treaty, thereby amounting Article 12 to an arbitration clause, another way lies in not going beyond the wording used and reviewing whether or not there is a special provision. If a special clause defining jurisdiction *ratione temporis* is absent, then no *ratione temporis* limitation exists. Relying upon the French Court of Cassation's 2022 Annual Report, it was indicated that

such an analysis is justified by the principle of the separability of the arbitration agreement. As such, the French Court of Cassation held that Article 12 escaped the annulment judge's scrutiny of the arbitral tribunal's jurisdiction, as it provided for the *ratione temporis* scope of the treaty and not the jurisdiction *ratione temporis*. The *Oschadbank* solution is seen as rational as it applies the principles that 'w*here the law does not distinguish, neither should we distinguish*' and one does not add a condition to a treaty which does not provide for it.

Prof. Lemaire shed light on a commonly overlooked part of the case in which the court established an additional condition by holding the following: "*for the purpose of jurisdiction ratione temporis, the Court of Appeal only had to verify that the dispute arose after the entry into force of the treaty*". She noted that in the absence of any mention of the condition on the *ratione temporis* jurisdiction of the tribunal in the Treaty and the French judgments, the court most likely relied on Article 28 of the Vienna Convention on the Law of Treaties applied by French judges as customary law. It was lastly inferred from the present formula that the court may be setting out for future reviews.

As for the *Rusuro* case, both professors explained that it constituted an initial filtering by the annulment judge. The French Court of Cassation annulled the Paris Court of Appeal's ruling in which it had considered that a clause providing for facts prior to a certain date to be time-barred was a jurisdiction issue. The court had erroneously considered that by taking into account the measures before the set date in the assessment of damages, the arbitral tribunal had compensated the damages linked to those measures. Mr. Ortscheidt noted that, assuming that it was a matter of jurisdiction, taking into consideration events prior to the period covered by the jurisdiction *ratione temporis* amounts to assessing factual elements and would not affect the tribunal's jurisdiction.

Both professors proceeded to review various examples in the texts of the treaties. While some proved to be straightforward, drawing a distinction is not always as simple. That is because a clause pertaining to the treaty's temporal scope of application would not be clear enough with regard to the practical meaning of a 'dispute'. For instance, the dispute resolution clause may refer to a 'disputed measure' rather than the term 'dispute'. The issue that arises in such cases is that the parties may have opposing views on whether the 'disputed measure' is the actual 'dispute' that may be settled through arbitration under the investment treaty. The questions that one should also bear in mind are (i) what is a dispute? (ii) which date should be taken into account? (iii) what should be the starting point? On the definition of a dispute, Prof. Lemaire reminded the attendees of the widely recognized definition adopted in the Mavrommatis Palestine Concessions case. Regarding the other two questions, there is no clear-cut answer, as ISDS tribunals have adopted different approaches over the years regarding the date that should be adopted or the starting point to determine the emergence of the 'dispute' between both parties.

Ratione Temporis and Quantum Issues

Ms. Gady explained that the question of risk is a key issue because anything that limits the risk of an investment has a positive value – because risks are taken into account when calculating the value of an investment, meaning that anything that protects the investment should have some value. Interestingly however, results of certain surveys have shown that market practitioners – such as investors and insurance companies – do not necessarily deem BITs to have a considerable value when allocating damages, rather they perceive BITs as a means to legally structure their

investment and to deal with any future potential disputes arising out of or in connection with these treaties. According to Ms. Gady, this is quite peculiar and intuitive through the lens of financial experts.

Adding on to the value of risks, Ms. Gady noted that in practice some quantum experts have tried to allocate certain value to risks of expropriation. Some quantum experts have argued that States cannot benefit from their own wrongdoing, and in order to effectively apply this principle, a risk of expropriation should be taken into account when evaluating compensation. In *Gold Reserve v. Venezuela*, the tribunal considered the expropriation of the Canadian investor's investment to be unlawful and that the Respondent State allegedly breached the investor's right under the Canada-Venezuela BIT which amounted to a grave conduct against the investor's rights that had to be compensated while taking into account the risk of expropriation that was present at the time when the investment was made and prior to the act of expropriation. Nevertheless, Ms. Gady also highlighted a few contrasting views of other tribunals which held that BITs are not an insurance policy or a guarantee for the investor – which equally cannot 'over' benefit through compensation and claim damages for a value that is higher than that of the market – showing the diverging views in ISDS on this particular aspect related to the economic value of the BIT protection.

On his end, Mr. Rozenberg touched upon the Yukos cases to describe certain impacts that *ratione temporis* issues may have on quantum. Mr. Rozenberg recalled the acts committed by Russia over time, and which breached the Yukos shareholders' rights as an investor for the purpose of highlighting that investors may actually bring claims concerning acts that were committed by the State at the time of investing. Whether these claims would be successful or not is not the issue at stake. Rather, ISDS tribunals assess issues as such on a case-by-case basis. Overall, both panelists acknowledged that quantum experts will always try to advocate for any economic value that investment treaties would have when analyzing issues of quantum at the valuation stage.

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