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What is the Role of the Abuse of Process Doctrine When the Illegitimate Commencement of Investment Arbitration Proceedings is Concerned?

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Investment tribunals are well-known to examine the abuse of rights doctrine in various contexts, including illegitimate corporate restructuring (*Phillip Morris v Australia*, para. 588; *Lao Holdings v Laos I*, para. 70; *Alverley v Romania*, para. 380), bad faith conduct (*Phoenix v Czech Republic*, paras.143-44*;* *WCV World Capital Ventures Cyprus Ltd v Czech Republic*, paras. 477-478), and parallel proceedings (*Ampal v Egypt*, para. 331).

Most recently, the tribunal in *WM Mining v Mongolia* faced a question of whether the abuse of process doctrine (a derivative of abuse of rights) applies when the claimants seek to obtain an illegitimate advantage by commencing investment arbitration. This contribution examines the tribunal's reasoning in light of a broader context of investment disputes.

Background

The foreign investor (and claimant in this dispute) is WM Mining Company LLC, a US-incorporated company. The respondent is the Government of Mongolia. In 2008, the claimant owned a Swiss subsidiary, WMM AG, which bought Ikh Tokhoirol LLC, an owner of mining licenses in Mongolia (Award, para. 51). The Mongolian Government adopted a law that limited mining operations near all rivers (Award, para. 53). This regulatory change negatively impacted the investor's licenses by reducing their boundaries (Award, paras. 57-58). Such change prompted the claimant to file a notice of dispute in 2013 (Award, para. 126). In 2015, Mongolia reversed its position and restored the boundaries under the licenses (Award, para. 64). Subsequently, given the claimant's silence, Mongolia was under the impression that the dispute was resolved. Despite Mongolia's actions, the claimant, however, filed a second notice of dispute in 2021 after not communicating with the Mongolian government for several years (Award, para.185).

In the meantime, the Swiss Court of Olten-Gösgen ordered the liquidation of WMM AG, the claimant's Swiss subsidiary, and assigned a liquidator (Award, para. 63). The claimant never notified Mongolia of this matter (Award, para. 128). Shortly after, the claimant entered a number of transactions with different companies to alter the debt priority in the bankruptcy proceedings and secure an undue advantage over other creditors (Award, paras. 129, 133). This fact is

important since the tribunal would deem these transactions bad faith “schemes” (Award, para. 133).

In 2020, the liquidator sent a notice of dispute to the Government of Mongolia on behalf of WMM AG, alleging breaches of the Switzerland-Mongolia BIT. In 2021, the claimant also filed a notice of arbitration against the Government of Mongolia under the USA-Mongolia BIT (Award, para. 71). Here, the claims’ timing is crucial. The claimant filed for arbitration when the bankruptcy proceedings were still ongoing, the claimant’s transactions failed to achieve their purpose, and only after the liquidator filed its claim against Mongolia (Award, paras. 130-34). In its 2021 claim, the investor limited the right of Mongolia to reply to 21 days and ignored the six-month waiting period set by the BIT under the pretext that the 2021 notice of arbitration constituted a “renewal” of the 2013 claim (Award, para. 185).

The Parties’ Positions

The respondent raised an abuse of process objection. The main charge of the respondent against the claimant is that the claimant (1) delayed the commencement of the arbitration process and (2) filed the arbitration claim to gain an illegitimate advantage in the bankruptcy proceedings (Award, para. 99). The delay resulted in several consequences. Specifically, it negatively impacted the respondent’s ability “to present its case” (Award, para. 103). Further, as per Mongolia’s submissions, the claimant attempted to take an unfair advantage of the arbitration process. Specifically, the claim against the respondent was filed without the liquidator’s authorization, an action “harmful” to the WMM AG’s shareholders (Award, para. 105). In other words, the claim was not pursued with the genuine intention of seeking recovery but rather to “unduly interfere” with the bankruptcy proceedings. This approach is “abusive” and runs against the “purpose of international arbitration” (Award, para. 106).

The claimant denies the validity of the respondent’s arguments. With respect to the delay, the claimant notes that it was caused by its efforts to mitigate damages after the respondent restored licenses. The claimant justifies the delays by referring to difficult circumstances, such as the need to search for counsel and funding as well as the COVID-19 pandemic (Award, para. 110). The claimant notes that the application of the abuse of rights doctrine has been narrowly limited only to corporate restructurings and breaches of host state law (Award, para. 111). The claimant argues that its arbitration claim does not impact the rights of creditors or anyone else engaged in the bankruptcy proceedings (Award, para. 115). Notably, it relies on *Ampal v Egypt* to assert that parallel proceedings are insufficient to establish abuse of process (Award, para. 116). In *Ampal*, the tribunal acknowledged that an investor abused the treaty system by launching two claims against the same respondent in relation to the same economic interest (Award, para. 330). However, it permitted the claimant to “cure” its abuse by selecting one claim to proceed (Award, para. 331). The tribunal’s permission was based on a lack of bad faith on behalf of the investor (Award, para. 331).

The Tribunal’s Conclusions

The tribunal ruled that the claims were inadmissible (Award, para. 119) and constituted an abuse of process. The tribunal achieved this conclusion for the following two reasons. First, the claimant

ignored the waiting period under the BIT. It presented the 2021 notice of arbitration as a "renewed" attempt to settle the dispute that was initiated (and subsequently abandoned) by the 2013 notice of arbitration. The claimant's framing of the issue as "renewed" allowed the claimant to justify bypassing the waiting period (Award, para. 182). The tribunal reasoned that the investor's conduct contradicted the good faith principle (Award, para. 188).

Second, according to the tribunal, the claimant made "persistent efforts to obtain benefits from the […] licenses" for over 6 years and filed the arbitration claim only after other "schemes" it undertook "failed" (Award, para. 134). The tribunal deemed that the purpose of the claim was "to collect funds and gain undue advantages over other creditors by taking precedence over WMM AG's Liquidator in a treaty claim against the Respondent" (Award, para. 135). From the tribunal's perspective, such an exercise of a right to file an arbitration claim contradicted the purpose of international arbitration (Award, para. 194).

Most notably, the claimant's history of "scheming" played a determinative role in the tribunal's analysis. In this context, the investor's claim was "a culmination" in the series of actions to gain an undue advantage over the liquidator and the creditors (Award, paras. 135, 199). For these reasons, the tribunal deemed the claim an abuse of process (Award, paras. 200-01).

This approach echoes the reasoning in *Orascom v Algeria* and *Impregilo v Argentina*. In *Orascom* (as the tribunal in *WM Mining* acknowledges), the tribunal confirmed that "abuse of rights […] prohibits the exercise of a right for purposes other than those for which the right was established" (Award, paras. 193, 200). The tribunal in *Orascom* addressed the doctrine of abuse of rights in light of the commencement of the proceedings (see section D(4)(d)). When discussing the facts, the tribunal emphasized the investor took advantage of multiple treaties along its vertical corporate chain to launch the arbitration proceedings (Award, para. 545). The tribunal noted that the host states did not sign the investment treaties to permit multiple recoveries concerning the same economic loss (Award, para. 543). Such a use of the treaty system would constitute an abuse of rights because it is contrary to the purpose of investment arbitration.

In *Impregilo v Argentina*, Argentina also made an argument that Impregilo delayed arbitration for "speculative purposes", an action that ultimately constitutes (at least according to the respondent) an abuse of process (Award, para. 59). The tribunal ultimately ruled that the delay was not "unreasonable" given the explanations furnished by the claimant (Award, para. 91). In other words, the tribunal required the investor to justify the delay. Since no speculation was established, the tribunal refused to find abuse of process.

The "Nuggets" of the Tribunal's Reasoning

Some aspects of the tribunal's reasoning in *WM Mining* deserve scrutiny since they highlight the conceptual development of the doctrine of abuse of process in international investment law.

First, the tribunal ruled that abuse of process turns claims inadmissible and does not concern jurisdiction (Award, paras. 100, 119). The tribunal highlighted that this determination is fact-specific (Award, para. 119). This finding aligns with the conclusions of other tribunals (*Pugachev v Russia*, para. 251; *Phillip Morris v Australia*, para. 588). The arbitral practice has no consistent approach on whether a finding of abuse of process results in a lack of jurisdiction or admissibility, as the tribunal acknowledged (Award, para. 119). Professor Gaillard explained this lack of

consistency by suggesting that the conclusion in each dispute depends on the specific right abused (footnote 109).

Second, the arbitrators stressed that tribunals could apply the abuse of process doctrine to a broader set of circumstances than corporate restructuring (Award, para. 122). The tribunal also acknowledged that there was no fixed "list" of the "situations" that would qualify as abuse of rights or abuse of process (Award, para. 122). It referenced "corporate restructuring" to secure jurisdiction and "multiplication of proceedings," as well as using the arbitration process inconsistent with the purpose of the treaty as examples of "abusive" conduct. The latter category potentially broadens the application of the doctrine.

Third, the tribunal provided some conceptual clarity on the doctrinal place of abuse of process in investment arbitration. Specifically, it explained that the doctrine is a derivative of abuse of rights arising from violations of a good faith principle (Award, para. 98). These observations echo the reasoning in *Ampal* (para. 328), *Caratube v Kazakhstan* (para. 376), and *Gramercy v Peru* (para. 357). They also correspond to the ICJ jurisprudence (paras. 139-150) and the conclusions of the late Hersch Lauterpacht (p. 286).

Finally, *WM Mining* clearly shows that schemes and machinations undertaken by investors to gain unfair access to or take unfair advantage of investment arbitration will be limited by the tribunals if they contradict the purpose of international arbitration, a conclusion consistent with some previous scholarly findings.

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