

ICSID TRIBUNAL DECLINES JURISDICTION ON GROUNDS OF ABUSE OF PROCESS

Renée Rose Levy de Levi and Gremcitel v. Republic of Peru, ICSID Case No. ARB/10/17

Introduction

In a decision handed down on 9 January 2015, an ICSID tribunal declined jurisdiction over a treaty claim on the basis that the Claimants' transfer of shares was undertaken to obtain access to the ICSID arbitration process and thus constituted an abuse of process.

Background

The dispute related to three parcels of land (called "La Herradura", "Punta del Sol", and "La Chira"), located along Peru's Pacific Coast near Lima, within the Municipality of Chorrillos. During 1995, Gremco, a Peruvian company belonging to the Levy Group, acquired the three parcels of land, which were subsequently transferred to the Peruvian company Gremcitel, one of the two Claimants in this arbitration.

Disputes subsequently arose between the parties, with the Claimants alleging that actions taken by the Respondent in 2007 rendered the Claimants' ownership of the property and associated projects "meaningless".

On 17 May 2011, the Claimants filed a Request for Arbitration with ICSID, alleging breach of the fair and equitable standard set out in the bilateral investment treaty between France and Peru. The Claimants claimed that they fulfilled the nationality requirements set forth in Articles 25 of the ICSID Convention and 1 of the BIT on the basis that Ms. Levy held French nationality (and did not hold Peruvian nationality), and has owned and controlled Gremcitel, a Peruvian company, indirectly since 2005 and directly since 2007.

The Respondent disputed that the Claimants qualified as investors for the purposes of the BIT and the ICSID convention, alleging that the hurried transfer of shares which allegedly made Ms. Levy the controlling shareholder of Gremcitel constitutes an "abuse of process", having been carried out for the sole purpose of attracting the France-Peru BIT protection at a time the dispute had either already arisen or was at least entirely foreseeable.

Decision

The Tribunal (comprising Prof. Gabrielle Kaufmann-Kohler as President, with Dr. Eduardo Zuleta and Prof. Raúl E. Vinuesa) held that it was precluded from exercising jurisdiction over the dispute.

In particular, the Tribunal held that the transfer of shares to Ms. Levy had been carried out in order to access the ICSID arbitration process and, on the facts of the present case, thus constituted an abuse of process:

- Having considered existing arbitral authorities on abuse of process (including Phoenix Action Ltd. v. The Czech Republic, ICSID Case No. ARB/06/5 and Tidewater et al. v. Bolivarian Republic of Venezuela, ICSID Case No ARB/10/5), the Tribunal noted that a restructuring carried out with the intention to invoke the treaty's protections at a time when the dispute is foreseeable may constitute an abuse of process depending on the circumstances.
- The threshold for a finding of abuse of process was high, as a court or tribunal would obviously not presume an abuse, and would affirm the evidence of an abuse only "in very exceptional circumstances".
- In the current case, that threshold was satisfied. The Tribunal did "not see how transferring shares to a family member with a foreign nationality would internationalize the project. What was sought to be internationalized was the soon-to-be-crystallized domestic dispute. In other words, the only purpose of the transfer was to obtain access to ICSID/BIT arbitration, which was otherwise precluded."

In respect of costs, the Tribunal was of the view that a finding of abuse of process justified an award of costs, and accordingly ordered that the Claimants pay for the entirety of the costs of the proceedings against the unsuccessful party and also make a contribution to the legal costs of the Respondent. The Claimants were not ordered to pay the full legal costs of the Respondent, on the basis that while the Claimants sought to minimize the costs of the proceedings, the Respondent had not (which was evidenced by the disparity of the costs figures).

3 February 2015