

EXPROPRIATION CLAIM AGAINST ALGERIA HELD TO BE INADMISSIBLE

Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria
(ICSID Case No. ARB/12/35)

Introduction

In an award handed down on 31 May 2017, the ICSID Tribunal in *Orascom TMT Investments Sàrl v People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35) held that the claim brought by Orascom TMT Investments (“the Claimant”) was inadmissible as it was covered by an existing settlement of a previous UNCITRAL arbitration by a different entity within the same corporate structure. In the circumstances, the commencement of ICSID arbitration was itself an abuse of rights.

Background

On 15 November 2012, the Claimant (based in Luxembourg) commenced ICSID arbitration proceedings against Algeria under the Algeria-BLEU (Belgium-Luxembourg Economic Union) BIT seeking US\$4 billion for alleged harassment and interference with the business of Orascom Telecom Algérie SPA (“OTA”), amounting to expropriation. OTA was directly owned by Orascom Telecom Holdings (“OTH”), and, through several intermediaries, was ultimately owned by the Claimant (which was controlled by Mr. Naguib Sawiris, an Egyptian businessman).

In 2014, however, OTH had settled a US\$16 billion UNCITRAL arbitration claim against Algeria in respect of the same dispute. As part of that settlement, a strategic investment fund controlled by Algeria had signed a Share and Purchase Agreement (“SPA”) related to the acquisition of a 51% stake in OTA with a purchase consideration of approximately US\$2.64 billion.

In the ICSID proceedings, the Claimant attempted to maintain that the 2014 settlement had no impact on the instant proceedings – which it sought to characterise as parallel and distinct.

Decision

The Tribunal (comprising Professor Gabrielle Kaufmann-Kohler, President; Professor Albert Jan van den Berg, and Professor Brigitte Stern) held that it had jurisdiction over the dispute but that the claims were inadmissible.

Notwithstanding that the Sawiris group of companies was a vertically-integrated chain that contained several entities which were theoretically able to commence arbitration proceedings, such theoretical availability of legal grounds did not necessarily entail an entitlement to use the various arbitration clauses to commence proceedings in respect of the same measures and with a view to recovering the same economic loss. The instant dispute was identical to the dispute that was the subject of the UNCITRAL arbitration commenced by OTH. On the evidence, Mr. Sawiris had effectively caused the various corporate organs of OTH to “crystallize” the dispute at the level of OTH when the first notice of dispute was sent to Algeria.

The relief sought by the Claimant was either covered by the requests that were raised in the UNCITRAL arbitration, or had (or ought to have) been considered at the time of the sale of the investment. The settlement agreement ended the dispute brought before the tribunal in the same manner as an award would have. The Claimant had not suffered any harm itself and thus could not have availed itself of the dispute, regardless of the content of the settlement agreement and regardless of the sale of its investment before the settlement had taken effect.

In the circumstances, the Claimant’s conduct amounted to an abuse of process or abuse of rights. Availing itself of the existence of different treaties at different levels of its own corporate structure had been done “in a manner that conflicts with the purposes of such rights and of investment treaties”.

The Claimant was ordered to pay the entire costs of the arbitral proceedings and to reimburse 50% of the fees/expenses incurred by Algeria in connection with the arbitration.

Concluding Remarks

This decision highlights the importance of considering the identity of any proposed claimant where it is theoretically possible for several different entities within a single corporate structure to be the one that commences proceedings. The consequences of getting this wrong are demonstrably serious – as reflected in the tribunal’s findings on abuse of process/abuse of rights and costs.