



Abuse of Process in International Arbitration

KLADJOLA SPAHIU

KATEŘINA PALKOVSKÁ

International Arbitration



- International arbitration is not as homogeneous as it once was
- It has become more complex and fragmented and in some instances, more polarized than it used to be
- Parties are trying more and more to find grey areas to ensure their triumph and as a result they might be damaging/risking the Arbitration Process.

'Abuse of process'

- An abuse of process ought to be distinguished from a sheer violation of an established rule.
 - not violating any hard and fast legal rule and cannot be tackled by the application of classic legal tools.
 - can cause significant disadvantage to the party against whom it is aimed
 - can undermine the fair and orderly resolution of disputes by international arbitration.

First Type of Abuse of Process: Schemes Designed at Securing Jurisdiction under an Investment Treaty

- Corporate investors seeking to secure the jurisdiction of an arbitral tribunal
- Investors tend to design their corporate structure in such ways that allows them to maximize their protection by putting their investment under multiple investment treaties.

Jurisdiction *ratione temporis*

- Investor who is not protected by an investment treaty restructures its investment in order to fall within the scope of protection
 - Restructure of its investment in order to gain access to a dispute with the host State that is foreseeable, but may not yet have crystallized
- Fictitious investments in order to fall under certain treaties area
 - Investor change its seat in order to fall under protection of a certain BIT

A Second Type of Abuse of Process: The Multiplication of Arbitral Proceedings to Maximize Chances of Success

- To initiate more than one proceeding to resolve the same or related dispute in order to maximize its chances of success and to secure a tribunal that might render an award in its favor



1. excessive costs and delays
2. dozens of claims submitted in separate arbitrations by opportunistic claimants

- Might some of this abuse be even the fault of tribunal?

- Mr Yosef Maiman case



A Third Type of Abuse of Process: Gaining a Benefit Which Is Inconsistent with the Purpose of International Arbitration

Some parties recently try to initiating one or more arbitrations with no intention of resolving a genuine disputes. In fact they tend to go after another 'reward'.

Tools for Redressing Abuse of Process

- ▶ Arbitrators have a number of classic tools at their disposal
 - ▶ Full costs
 - ▶ Wide discretion regarding damages
- ▶ These tools will not deter investors from abusive tactics
- ▶ More effective tools are required

Lis Pendens?

- ▶ Not applicable in international arbitration
- ▶ Not effective in cases where a party submits only a portion of its claims to a first tribunal and its remaining claims to a second tribunal
- ▶ *Lauder/CME v Czech Republic*

The Duty to Concentrate a Dispute

- ▶ Requirement to raise all arguments and claims relating to the same dispute
- ▶ French Court of Cassation - Cesareo
- ▶ English flexible and discretionary rule
 - ▶ Henderson v Henderson

Abuse of Rights and Abuse of Process

- ▶ A party may have a valid right, and yet exercise it in an abnormal, excessive or abusive way
- ▶ Sole purpose of causing injury to another party
- ▶ Hunter v Chief Constable of the West Midlands Police
- ▶ Part of Public International Law
- ▶ Investment treaty tribunals relied on these principles when claimant investors exercised their procedural rights in a manner that undermines the arbitral process
- ▶ Phoenix Action v Czech Republic
- ▶ Renée Rose Levy and Gremcitel S v Republic of Peru

Conclusions

- ▶ Call for arbitral tribunals to apply and refine the doctrine of abuse of process
- ▶ Arbitrators should look beyond the literal application of the law
- ▶ Consider the entire context of a party's conduct