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A REPORT ON THE PANEL "COMMERCIAL ARBITRATIONS RELATING TO REGULATORY CHANGES"

by Lena Raxter

Keynote address delivered at the 2021 ITA-ALARB Americas Workshop, "Winds of Change: The Impact of Regulatory Changes in Latin America on International Arbitration" on 8 September 2021.

This panel discussed procedural and substantive issues in investment treaty arbitrations arising out of regulatory measures, such as the right balance between investors' rights and state regulatory powers, when regulatory measures give rise to treaty breaches; the relationship between local constitutional and/or administrative challenges and investment treaty claims; and the effectiveness of consultation processes between investors and Governments.

I. INTRODUCTION

In September 2021, the Institute for Transnational Arbitration (ITA) and the Latin American Association of Arbitrators (ALARB) held a virtual conference to discuss how recently enacted laws and regulations governing renewable energy, oil and gas, insurance, and mining industries impact contract and investment treaty rights. The first panel, titled "Commercial Arbitrations Relating to Regulatory Changes," addressed how regulatory changes across all sectors can affect and become part of commercial arbitration.

Mark W. Friedman (Debevoise & Plimpton, New York City/London) moderated the panel, which included Mónica Jiménez González (Secretary General, Ecopetrol S.A., Bogotá), Kate Brown de Vejar (DLA Piper, Mexico City), Fabiano Robalinho Cavalcanti (Sergio Bermudes Advogados, Rio de Janeiro), Elisabeth Eljuri (Independent Arbitrator, Elisabeth Eljuri, P.A., Miami).

In their discussion, the panelists address five important questions that arise from commercial arbitrations related to regulatory changes. First, what types of claims may the parties bring? Second, what defenses are available to the parties in a dispute with a state? Third, what remedies are available? Fourth, what defenses apply to purely private disputes resulting from regulatory changes? Lastly, fifth, what are the implications of commercial arbitration on other dispute resolution options? In

addressing these issues, the panelists lay out a comprehensive framework for how to approach commercial arbitrations that arise from regulatory changes.

II. COMMERCIAL ARBITRATION RESULTING FROM REGULATORY CHANGES

Mark W. Friedman began the conversation by addressing commercial arbitrations between state entities and private companies that arise due to a regulatory change imposed by the state. Such commercial arbitration with the state itself or state entities due to regulatory changes are not uncommon. Many contracts with states or state entities include arbitration clauses that are of a commercial nature, such as provisions to provide services like waste collection, electricity, or supplying products to a state or state agency. For example, in a contract for a natural resource concession—oil and gas, energy, or mining, for instance—between the state or state company and a private commercial party, there is an arbitration clause providing for some form of commercial arbitration. Afterwards the state does something that is of a regulatory nature, like imposing new tariffs or royalties, or shutting down production at the mine for environmental reasons. The question then arises: what does a commercial arbitration look like in such a situation?

D. *Types of Claims Parties may Bring*

To start off the conversation, Kate Brown de Vejar laid out the framework for what types of claims typically arise in commercial arbitration arising from regulatory change. She highlighted a recent example of this happening: the windfall profit taxes instituted during the exceedingly high petroleum prices that occurred from 2008 to 2012. During this period, the legal community had the benefit of seeing how the companies affected by these measures reacted to them—whether the effected companies brought any claims and, if so, in what fora.

Ms. Brown de Vejar went on to explain the steps to this analysis and the questions lawyers must address. Take, for example, an international company with a production sharing contract or concession with a state-owned entity in the natural resources sector. Suddenly, the government implements a regulatory measure that severely impacts the company. What should they do?

The first step is to look at the contract. What does it say about what the impact

of new regulations might be? A typical production sharing agreement may provide that the state-owned entity will absorb all taxes or that the international company may take its production share free of taxes.

The next question therefore is, what does this mean? Does it mean free of all taxes at the time the parties entered into the contract? Does it mean free of all taxes that may be implemented in the future? Would the state-owned entity even have the power to enter into an agreement that absorbs all future potential fiscal liability that a government may impose? Was the language of the contract backed by some legislation that permitted such an absorption? Was it backed up by a presidential decree or order of some sort? The key to answering these questions is the exact language used in the contract, as well as any legislative or executive frameworks that supported the contract. Is there language in the contract that attempts to either maintain the economic balance of the fiscal burden between the companies? Alternatively, is there a renegotiation or rebalancing mechanism in the event that there is a new fiscal measure? How effective is that language?

Lastly, what do you do if you are unable to renegotiate terms that maintain an adequate or acceptable economic balance between the parties? If the parties cannot amicably decide what to do with new regulatory measures, then that is where the commercial arbitration arises. In the commercial arbitration itself, the parties are asking for interpretation of the contract terms. For instance, interpretation may be used to determine whether the language of a stabilization clause is effective. Interpretation may also be necessary to determine whether the contract is actually impacted by the new measure and, if so, how. Moreover, where there is language like "all taxes are to be paid by the state-owned entity," the meaning of this phrase in the contract and within the regulatory regime is a matter of interpretation. Does it mean all taxes at the time the parties created the contract, or all future taxes and other fiscal measures imposed upon the production activities in that country?

In concluding, Ms. Brown de Vejar highlighted the importance of understanding that there are many available dispute resolution options. Companies affected by these measures always have the option to go to local courts to challenge the new

measure, perhaps on the grounds of its constitutionality. For example, in Mexico and many other Latin American countries, companies have the option of an *amparo* challenge,[1] which can—in some circumstances—result in the immediate suspension of the measure.

Additionally, companies may attempt to bring parallel proceedings before multiple arbitral tribunals. This was the case when Algeria implemented a windfall profits tax that heavily affected the production sharing agreements of companies like Mærsk and Anadarko.[2] As a result, these two companies brought parallel UNCITRAL[3] and ICSID[4] arbitrations under their contract with the state-owned entity, Sonatrach S.P.A. The companies justified the parallel proceedings by arguing that the new measures breached a stabilization clause, which then breached the obligations under the contract in terms of legitimate expectations and umbrella clause obligations. These cases demonstrate the importance of considering all dispute resolution options available to the parties.

E. *Defenses Available in a Commercial Arbitration with a State*

Elisabeth Eljuri continued the discussion by addressing what defenses are available to states and state entities during a commercial arbitration. In a true, purely commercial relationship with a state company, a private party may raise any of the traditional commercial defenses.

Many times, the state companies wait until arbitration to file a claim against the contractor or the investor company. Once the contractor or investor company brings an arbitral claim, the state files a corresponding counterclaim. For example, maybe a

[1] *See generally* Gloria Orrego Hoyos, *The Amparo Context in Latin American Jurisdiction: An Approach to an Empowering Action* (Apr. 2013), https://www.nyulawglobal.org/globalex/Amparo.html; David Hoyos & Ana Catalina Mancilla, *The Amparo: Key Factor in the Arbitration Scene of Central America and Mexico* (Aug. 28, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/28/the-amparo-key-factor-in-the-arbitration-scene-of-central-america-and-mexico.

[2] ANNOUNCEMENT—SETTLEMENT OF ALGERIAN TAX CLAIMS, https://investor.maersk.com/news-releases/news-release-details/settlement-algerian-tax-claims.

[3] Anadarko Algeria Co. & Maersk Olie, Algeriet A.S. v. Sonatrach S.P.A., UNCITRAL (discontinued in 2012).

[4] Mærsk v. Algeria, ICSID Case No. ARB/09/14, https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/09/14 (initiated in 2009).

state did not pay the contractor precisely because it was a breach of the quality of the performance that they had expected. As a result, the state will file a counterclaim based on lack of performance. It is common to see such claims.

As a first step, though, a lawyer must determine whether the defense available is jurisdictional or whether the defense goes to the merits of a claim.

1. Jurisdictional challenge: Arbitration clause

Ms. Eljuri introduced the issue of challenges against the arbitration clause itself. This may be the case when the state party or the state itself raises issues that are constitutional; or the issue may arise from the commercial arbitration law of the state or even arise from the bylaws of the particular state-owned company. Sometimes the challenge against an arbitration clause is based on a technicality and other times it may be more of a substantive argument.

Further, if it is a multi-tiered clause, there may be some defenses related to whether the claimant has exhausted the required pre-requisites for dispute resolution. For example, some contracts require the parties to participate in negotiations prior to bringing an arbitration claim. However, this pre-requisite can add a layer of complication to any dispute when the counterparty refuses to participate in negotiations. Because these criteria are mandatory, refusal to participate in the negotiations may create a barrier to dispute resolution.[5]

2. Jurisdictional challenge: Choice of Venue

Mr. Friedman introduced another jurisdictional challenge based on choice of venue clauses. Some contracts include clauses that designate the proper court based on the subject matter of the dispute. For example, a clause may state that a dispute regarding technical matters can go to arbitration, but all disputes regarding legal issues must go to the local courts.

Mr. Friedman then asked Fabiano Robalinho Cavalcanti to elaborate on his experience with this type of clause. Mr. Cavalcanti explained that he often sees various kinds of jurisdictional limitations in dispute resolution clauses. This type of

[5] *See generally* Marisa Marinelli & Andrew N. Choi, *When Pre-Arbitration Requirements Lead to Disputes Over Dispute Resolution Clauses*, N.Y.L.J. (Mar. 13, 2017), https://www.hklaw.com/en/insights/publications/2017/03/when-prearbitration-requirements-lead-to-disputes.

clause presents some advantages because parties often face technical issues when executing a contract, which often only arise during construction, for instance, or later during operation. If a dispute arises that is exclusively about technical issues, this type of clause works pretty well. However, if a dispute arises where it is difficult to disassociate the technical and legal matters, a clause designating technical and legal issues to different jurisdictions will add a significant degree of complexity to the dispute.

For a practical example, imagine a contract for the creation of a hydroelectric plant. If the parties disagree about whether the engine should run clockwise or counterclockwise, and the contract and the technical specifications are silent on the issue, this type of clause might offer a quick and efficient solution for the dispute. However, if one of the parties argues that the engine should run clockwise because the contract establishes that the operation should follow a certain standard, then the dispute is no longer merely or exclusively about technical issues and parties begin to spend time disputing about the proper jurisdiction, which is not their focus. An effective way to prevent this problem is to establish that, in the absence of an agreement between the parties on the jurisdiction of quasi technical and legal disputes, the provision that grants the broadest jurisdiction should prevail.

Another frequent problem arises from clauses that establish a regime where some disputes go to arbitration, and some go to the court. This distinction was quite common in disputes where a party needed an injunction before the constitution of the arbitral tribunal. It was quite useful because the parties had to be able to resort to a court to get a remedy before the constitution of the tribunal. However, this is much less necessary nowadays considering that many arbitral institutions offer emergency arbitrators.

There are some contracts that establish different jurisdictions based on the merits of the dispute, which may be overly complicated. For example, a contract may exclude from the jurisdiction of the arbitral tribunal claims related to economic imbalance. However, unless the law of the state prohibits the specific matter from being resolved by arbitration, this kind of distinction adds unnecessary complexity to

the dispute. For example, a party may have a claim for economic imbalance and a claim for termination of the contract, which would be difficult to isolate one from the other. If the contract requires that separate jurisdictions must address the two elements of the dispute, there will be a problem.

Ms. Gonzalez followed up on Mr. Cavalcanti's comments by explaining that, for state-owned companies, the first step is to maintain a good relationship with your contractors because you may be working with these companies for a long time. On the other hand, the company must stay competitive because, even if it is a state-owned enterprise, there are other shareholders, and the company wants to be competitive at a national and international level.

If a contract requires parties to bring technical and legal disputes in different venues, but the dispute in question is both technical and legal, the action the company should take depends on the circumstances of the dispute. A state-owned company knows that it may have cases before a variety of venues—administrative courts, national courts, arbitral tribunals, etc. For state-owned companies, it may be better to go before a local court. However, ultimately, competitiveness is important, so these companies put international arbitration clauses into their contracts to attract investment.

Moreover, a company must move fast. Therefore, a contract may include a jurisdiction limitation clause for technical issues to help resolve these issues faster without delaying the project or program. With respect to international arbitration, parties must also bear in mind the potential of investor-state arbitration where multiple proceedings may occur. In the end, the choice of venue depends on the contract and the relationship the parties have.

Companies may also have private contracts with regulators that are governed by private law. In that case, the parties must be careful to clearly establish that their relationship is private in nature and governed by private law. Nevertheless, in these private disputes, parties will sometimes raise defenses or claims that are more public-related. In such a situation, the lawyers must look at the language of the full contract, not only the arbitration clause.

When the dispute has underlying technical issues, but the ultimate consequences are legal in nature, the choice of venue all depends on the contract. The contract would need to define the scope of the litigation carefully—*e.g.*, specifically define how specialized a "technical" issue must be and any related time limits for the proceeding. If the scope is not well determined, the dispute almost always defaults to a "legal dispute." What the company does not want is to have parallel proceedings that involve both issues. Accordingly, the contract needs to specifically limit what "technical" means and who is actually deciding this. Otherwise, it could be a vastly different adjudicator for these types of issues.

Lastly, the parties need to understand whether, by law, the venue chosen can make a final and binding expert determination on the technical issue. Many times, the venue does not have this capacity because "final and binding" in principle applies to decisions of an arbitral tribunal. Thus, on a practical level, the lawyer needs to understand the contract. For example, is this technical expertise a precondition to being able to file an arbitration? Is it meant to be final and binding as a matter of law? Assuming the answer to these questions is yes, then there is the issue of a contractual breach that has a technical element.

This analysis is very factually specific. For example, in Mexico, the hydrocarbons law[6] passed in 2013 has a provision that says that certain contractual breaches must go to the Federal Court systems while other breaches may go to international arbitration. It is exceedingly difficult to think that a dispute involving a major multi-million-dollar project will be split into multiple venues, but sometimes the legislation itself creates this situation. This specific example is a clear contractual dispute; however, disputes can be even more complex than that.

3. Defenses on the Merits: Force Majeure

Another defense explained by Ms. Eljuri was a defense on the merits claiming

[6] *See generally* Bradly J Condon, *Mexican energy reform and* NAFTA *Chapter 11: Articles 20 and 21 of the Hydrocarbons Law and Access to Investment Arbitration*, 9 J. WORLD ENERGY L. & BUS. 203 (2016); *cf.* José Ramón Cossío Díaz & José Ramón Cossío Barragán, *The Ruel of Law and Mexico's Energy Reform: The New Energy System in the Mexican Constitution*, BAKER INST. PUB. POL'Y AT RICE U. (2017), https://www.bakerinstitute.org/media/files/files/68d55ed8/MEX-pub-RuleofLaw_JR2-042417.pdf (examining the legal issues created by Mexico's energy reform measures in 2013 and 2014).

force majeure.[7] In such a situation, the key question is whether the parties that drafted the contract were careful enough to exclude acts of the state from the definition of force majeure. To the extent that the drafters did not exclude state acts within this definition, the state itself may use a force majeure clause as a valid excuse to take an otherwise impermissible action. While typically you would think there is a separation between the regulator and the state company that signed the contract, the issues of attribution and piercing arise regarding whether the state's action truly was "beyond the party's control" and unforeseeable, as required when a party argues force majeure.[8]

4. Defense on the Merits: Administrative Contracts

Ms. Eljuri also introduced the set of defenses that arise from administrative contracts in civil law jurisdictions specifically.[9] Contracts with a state may qualify as administrative when the contract is based on national interest considerations, or it involves sizeable infrastructure or energy resources. In this case, states have a set of defenses that arise from the administrative nature of the contract. One such notable defense is that the state party has the power to make unilateral changes to the contract as a matter of exorbitant powers. If the state exercises this power, the next question is whether the unilateral changes may apply retroactively. This question raises a new set of complex issues regarding local law and retroactivity.

5. Defense on the Merits: Stabilization Clause

Ms. Eljuri then introduced the defenses that result from the interplay between stabilization clauses and changes in law. Contracts may expressly include stabilization clauses, or they may result from a provision in the local law. Contracts for natural resources often include this type of clause, but the clauses are rare for other types of projects. Whatever the origin of the stabilization, a party may

[7] *Force Majeure*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/force_majeure (last visited Dec. 2, 2021).

[8] *See generally* Merner Melis, *Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration*, 1 J. INT'L ARB. 213 (1984).

[9] This is true for civil law jurisdictions, but not for common law jurisdictions. *See generally* Maged Shebaita, *The Notion of Administrative Contracts in Civil Law System vs Common Law System* (Oct 6, 2020), https://ssrn.com/abstract=3706353.

challenge the clause because its scope does not cover what is being argued or simply from a legal perspective. For an example of the latter, a stabilization clause may be invalid because it does not meet the formalities that the local law requires.

6. Defenses on the Merits: Corruption

Ms. Eljuri concluded her remarks by explaining the common defense that corruption caused the retention of the contract. This argument goes to the heart of whether there is a valid contract to begin with or whether the contract can be annulled. For example, a state may claim that a significant contract was obtained by corruption and therefore should be annulled.

Mr. Cavalcanti then followed up on this defense by explaining its application in Brazil. A state may raise a corruption defense when the state enterprise essentially eliminates obligations under a contract and evades what would otherwise be a contractual liability. In Brazil, there are many cases in which state entities, particularly the federal government, raise the claim that the relevant contract is derived from corruption.

This claim often arises in two distinct situations, and the approach to addressing it varies accordingly. In the first, the contract was created as a result of the corruption itself, but it is an existing contract that has been executed. In the second, the contract is the means of corruption, such as paying a kickback. These two discussions generate two different solutions because, in the case of the latter, the underlying contract does not exist since there is no rendering of services. The contract is only a means for paying for the corruption.

F. *Remedies Available in Disputes with States*

Mr. Friedman followed up the defense discussion by asking Ms. Brown de Vejar to explain the remedies available to parties. Specifically, are commercial arbitrators able to give effective kinds of non-monetary remedies or relief when a regulatory change causes significant disruption to an ongoing project? Is it possible for commercial arbitrators to essentially injunct the regulatory change to prevent it from taking effect, thereby providing the parties a chance to fully address all the legal rights and get a binding final award?

Ms. Brown de Vejar responded that she has never seen a commercial arbitral tribunal attempt to suspend the measure itself in that context. Moreover, she struggled to think of a scenario where they would have jurisdiction to do so, and she could imagine a court challenge coming very quickly if an arbitral tribunal even attempted to do so. The fact is, the state has enacted a measure, the state actor is obviously compelled to comply with that measure, and the arbitral tribunal can of course look at the economic impact and assess whether there are damages available to the harmed party. However, in terms of whether the arbitral tribunal could order a provisional measure that would stop the effect of that measure on the relationship, the answer is probably no. For that, the parties would need to go to the courts of jurisdiction.

For Mexico and Latin America, the best and quickest solution to this issue would be an amparo challenge[10] or other constitutional challenges that can effectively suspend the measure. There are numerous examples of companies in the Mexican renewable energy sector where players apply to the local courts for amparos to stop the impact of new measures on their businesses.[11] These cases are a good example of this mechanism working better than trying to get a provisional measure from a commercial arbitration.[12]

Ms. Brown de Vejar then introduced a second scenario where a contract exists between two private actors, which is somehow impacted by a state measure. In this case, the parties probably have more of a chance to obtain a provisional measure that helps them cope in the interim period as they work out how the measure will impact their relationship. It would not actually suspend the effect of the measure, though. For example, an arbitrator would certainly be able to suspend interest running on overdue payments or put disputed monies in escrow if there is sufficient urgency or

[10] *See supra* note **Error! Bookmark not defined.**.

[11] *See generally* Carlos Loperena Ruiz, *The Process of Amparo in Commercial Matters*, 6 U.S.-MEX. L.J. 43 (1998).

[12] *But see Regulatory Develops in the Mexican Power Sector—Chapter 3: Tipping the Scales in favor of State-owned Companies*, SHEARMAN & STERLING (Mar. 1, 2021), https://www.shearman.com/Perspectives/2021/03/Regulatory-Developments-in-the-Mexican-Power-Sector-Chapter-3.

danger. Such a danger could be a risk of bankruptcy to one of the parties if they are forced to comply with the new measure in a way that would impact them irreparably. In terms of regulating the economic impact between the parties, there is more of a chance to obtain injunctive measures suspending the effects of the regulation.

G. *Defenses in Purely Private Disputes Resulting from Regulatory Changes*

Mr. Friedman then followed up on the second situation proposed—in a purely private contractual relationship, could the parties invoke changed circumstances? For example, Company A buys products from Company B, who manufactures the products. A state then implements an environmental safety regulation banning a certain component used to produce the products, making it much harder for Company B to manufacture the products. There may be challenges at the state level about the arbitrariness or rationality of the regulatory measure, but, as between Companies A and B, how do they deal with the regulatory change? Can the regulatory change give rise to legal or contractual defenses even between private commercial parties that are not state or state enterprises?

1. Changed Circumstances

Ms. Eljuri agreed that changed circumstances would be a natural defense for Company B in a claim brought by Company A. However, the exact criteria necessary for the defense would depend on whether the parties are in a common law or civil law jurisdiction. A lawyer would start with the contract and see what the contract says—*e.g.*, is there a force majeure clause? If the parties are in a large complex project, are there multiple contracts? Are the force majeure provisions consistent in the contracts? The lawyer would need to look at the force majeure provisions in detail, as well as the exact requirements for unforeseeability, causation, and, particularly, mandatory notice provisions.

2. Doctrines that Apply as a Matter of Law

Outside of the contract, some of these doctrines apply as a matter of law. Typically, in a common law dispute, parties may make arguments of either force

majeure, frustration, or impossibility.[13] In civil law, parties would claim things like hardship,[14] which is sometimes contemplated by the law[15] and sometimes borrowed from soft law.[16] Whatever its title and source, the important thing is understanding what the contract and the applicable substantive law[17] say about the potential availability of the defense. For example, occasionally an unforeseeability defense cannot also have an argument for force majeure if the event was perfectly foreseeable. This topic has been discussed extensively post-pandemic.[18] However, these discussions often overlook a key question—was the force majeure the spread of COVID or was it the resulting lockdown?

3. Risk Allocation Clauses

Another set of comparable provisions are risk allocation clauses.[19] If the event is force majeure, and it is no one's fault, the question is how the contract allocated that risk. Similarly, with limitation of liability clauses that contain a financial cap on the liability, who bears the risk for intentional harm, for instance. Generally, however,

[13] Mayukh Sircar, *Business Interruption and Contractual Nonperformance: Common Law Principles of Frustration, Impracticability and Impossibility*, HUTCHISON PLLC (Apr. 9, 2020), https://www.hutchlaw.com/blog/business-interruption-and-contractual-nonperformance-common-law-principles-of-frustration-impracticability-and-impossibility.

[14] *See*, *e.g.*, Frederick R. Fucci, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance*, AM. BAR ASSOC. (2006), https://www.arnoldporter.com/-/media/files/perspectives/publications/2006/04/hardship-and-changed-circumstances-as-grounds-fo__/files/publication/fileattachment/hardship_excuse_article.pdf.

[15] For example, in France and Brazil. *See* French Civil Code, art. 1195; *Contract Law: Force Majeure and Hardship in Brazil*, LAWS OF BRAZIL (Mar. 18, 2020), https://lawsofbrazil.com/2020/03/18/contract-law-force-majeure-and-hardship-in-brazil.

[16] *See*, *e.g.*, UNDROIT PRINCIPLES, CHAPTER 6: PERFORMANCE—SECTION 2: HARDSHIP, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/chapter-6-section-2 (last visited Dec. 2, 2021).

[17] The applicable substantive law is not always the law of the seat. *See* Franco Ferrari & Linda Silberman, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, *in* Franco Ferrari & Stefan Kröll (eds.), CONFLICTS OF LAWS IN INTERNATIONAL COMMERCIAL ARBITRATION (2019).

[18] *See*, *e.g.*, S Esra Kiraz & Esra Yildiz Ustun, *COVID-19 and* force majeure *clauses: an examination of arbitral tribunal's awards*, UNIFORM L. REV. (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7798591.

[19] *Cf.* Mark Gelowitz, Geoffrey Hunnisett & Elie Farkas, *Force majeure clauses: Contractual risk allocation and the COVID-19 pandemic* (Dec. 8, 2020), https://www.osler.com/en/resources/critical-situations/2020/force-majeure-clauses-contractual-risk-allocation-and-the-covid-19-pandemic.

limitation of liability clauses are set aside if there is gross negligence or willful misconduct.

H. *Implications of Commercial Arbitration on other Dispute Resolution Options*

Mr. Cavalcanti raised another significant problem that the parties may face. What happens when there are parallel proceedings where one case involves the private party and the state entity, and another is purely between two private parties. For example, Company A brings a claim against the State based on a regulation and Company B brings a claim against Company A for a failure to fulfill a contract as a result of the regulation. In that scenario, how do you organize those proceedings? One is a consequence of the other, and the decision of one proceeding may impact the other. This is an issue of dispute resolution in general because this problem happens both in arbitration and in courts when there are several types of proceedings ongoing.

1. From a State-Owned Company's Perspective

Monica Jimenez Gonzalez continued this discussion by explaining how a state-owned company's commercial arbitrations may fit into the overall network of dispute resolution options. First, to be clear, there are distinct categories for each party: the private companies, the companies whose shareholders include the state, and the regulators that are part of the state. This distinction is important because state-owned companies are not always in agreement with how the state is functioning. Specifically in respect to regulation, the state-owned company is in a hard place because it needs to maintain its competitiveness and contractual relationships, and sometimes the state's regulatory measure may make it difficult for the company to achieve this goal.

Regarding the available proceedings, first there is the administrative proceedings where one party challenges the regulatory measure. Some states also allow for constitutional challenges, as well as administrative challenges. Then there are the commercial arbitration clauses that may be included in the contract. Additionally, there may be relevant bilateral investment treaties under which the parties may bring a claim.

There are many complications that may arise when a company is deciding which proceeding to use. For a state-owned company, there is a level of pressure which arises from the nature of the employees of that company, who are deemed public servants. State-owned entities may also have other authorities that look at how they manage funds that come from the state and how the company deals with disciplinary actions. It is extraordinarily complex.

Consequently, it all comes down to strategy—what is the objective? What is going to happen with the counterparty? We have found ourselves in positions where we need to delay or make sure the investor-state arbitration will take a long time, given that we needed to first try to resolve the local proceeding or the commercial arbitration. This is not easy because, first of all, there may be different tribunals, which brings in the importance of having arbitrators in the commercial arbitration that will understand the details of the country where the proceedings are happening. In this situation, the company will also need an order with the state so that its defense is not put in jeopardy.[20] Thus, this depends on evidence, timing, the tribunal, the council that is representing you in both arbitrations, and the council you are using locally. It depends on what side you are on. Strategically, you must map out all of this and make sure everyone understands the overall strategy.

Ms. Gonzalez concluded by explaining that a party may need to take inconsistent positions in the different fora. That said, the good news is the different fora all look at different issues, so that defense is available to explain that the positions may be contradictory but they each address different issues. However, if you foresee that there will be a contradiction between these various proceedings, then the key is timing. You must make sure that you go fast in the commercial arbitration so that it will not impact whatever comes up in the investor state arbitration. It is vital to bear in mind sequence, strategy, timing, what remedies are available in each proceeding,

[20] *See* David Roney & Benjamin Moss, *Summary Dispositions in International Arbitration – A Procedural Tool with Both Benefits and Risks*, SIDLEY (Dec. 16, 2020), https://www.sidley.com/en/insights/publications/2020/12/summary-dispositions-in-international-arbitration-a-procedural-tool-with-both-benefits-and-risks (explaining the arbitral tribunal's power to render summary dispositions to ensure that the arbitration is both prompt and efficient).

and the council strategy map.

2. From a Private Company's Perspective

In her final remarks, Ms. Brown de Vejar responded to Ms. Gonzalez's comments by explaining their application for private companies. Strategy, timing, who your arbitrators are—the considerations are all the same. In a situation where a regulatory change creates claims that the harmed party may bring under arbitral clauses, under a bilateral investment treaty, or through the courts, how does the lawyer choose how to proceed?

The first step is addressing what provisional measures the company needs, which often may only be granted by local courts. The company could also look at emergency arbitration if that is an option under the contract. In deciding between these two options, the company must ask whether the considered proceeding would be capable of granting the desired provisional measure. If both can, then the company should ask whether one has better decision makers than the other.

If the two options are a commercial arbitration or an investor-state arbitration, the second step is considering the relationship with the state. The continuity of the company's operations with the state is a primary concern. A company should not sue the state lightly; it should only sue the state if it is at the point of exit. This would occur when the company's value in the country is destroyed and the relationship with the administration has deteriorated significantly.

We do see examples of claimants strategizing and pursuing one avenue of proceedings only to realize it was not the correct strategy. For example, a company may prioritize a treaty claim because they think this would allow the company to avoid a limitation on damages provision in the contract. The ultimate strategy, however, depends on the facts of the case and the desired outcome.

III. CONCLUSION

The panel provided an in-depth view of the substantive issues arising from regulatory changes and outlined the positions of the major stakeholders, giving the audience a brief, yet complete view of the state of play in the relationship between investor-state arbitration and states regulatory interests.

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THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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