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MULTI-PARTY CLAIMS IN INTERNATIONAL INVESTMENT ARBITRATION AS NATURAL EXTENSION OF INTERNATIONAL INVESTMENT ARBITRATION

In recent years so called "mass" claims gained a lot of attention in the perspective of international investment arbitration. All this was caused by the two cases which slowly but firmly became the cornerstones for the new possibilities for parties of international investment arbitration proceedings.

Author of this work decide to choose term "multi-party" claims as one of the less confusing term for the institution. In *Abaclat* case, which will be examined later on, term "mass" was used, but it was seen simply as a technical term because there are no strict measures saying when number of claimants is giving ground to use the term "mass" or not [1], because of that in second most known case concerning multi-party arbitration – *Ambiente* the term "mass" was replaced by the term "multi-party", so not to make any confusion [2]. Some authors are using term "collective proceedings", which is also not missleading [3].

Before coming to the strict topic of the work, it is useful to show the solutions concerning collective claims in international commercial arbitration, especially that they can give better understanding of the discussion present in international investment arbitration.

It should be noted that the nature of arbitration in international commercial perspective is contract-based one, so as a result different methods and approaches to the admissibility of the multi-party claims are used. Generally three forms of regulating question of consolidation can be found in domestic arbitration acts [4]. The first one is stating that multi-party arbitration is allowed simply when question of the same fact and law is present, irrespective

to the intention of the parties to issue a multi-party claim. An example of this approach can be found in §1281.3 of the California Civil Procedure Code. Another approach is stating that multi-party arbitration is allowed but at the same time parties can exclude this possibility in their contract. As an example of this kind of approach, Australia's International Arbitration Act 1974 can be given. The third approach is less liberal than previous and allows multi party claims only if parties agreed in the contract to have one. This kind of approach seems to be one of the popular and is present for example in the art. 35 of English Arbitration Act, in the Art 15(4) of UNCITRAL Arbitration Rules etc. There is also fourth approach which consists of silence in the area, so arbitration acts simply do not provide answer to the question at all. To give an example, the 1985 United Nations Commission on International Trade Law Model Law on International Commercial Arbitration does not include regulation concerning consolidation [5].

Above written evidence that question of multi-party claims is a subject differently regulated in domestics laws and by that is a topic of discussions in commercial arbitration literature.

Problematics of the multi-party claimants are relatively new for international investment arbitration. Discussion concerning consolidation has its recent origins in two famous cases: *Abaclat v Argentine Republic (Abaclat) and Ambiente v Argentine Republic (Ambiente).*

Both of those cases have the same factual background. In 90th Argentina was trying to gain more foreign investments in order to improve Countries' economy. In order to do that Argentina had to provide safe investment environment by signing numerous BIT's. One of those BIT's was concluded in May 1990 between Argentina and Italy - "Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments" [6]. Argentina issued bonds in order to raise sources for its economy development, at the end of XXth century Country faced a severe economic crisis which resulted in a default of Argentina in 2001. Country announced deferral of USD 100 billion of external bond debt [7]. Argentina sold bonds to approximately to 600 000 Italian citizens[8]. In order to get those money, 8 Italian banks formed so called Task Force Argentina (TFA), which ought to defend the rights of Italian bondholders.

Parties tried to come to an agreement through negotiations, but they did not provide any reasonable solution to the problem. Finally 60 000 bondholders decided to start proceedings [9]. The first meeting of the arbitration was held on the 10th of April, 2008. Proceedings were divided into two parts. First part concerned jurisdictional phase and the second one – merits phase [10].

This article is examining only the jurisdictional phase, which concerned admissibility of the multi-party claims in international investment arbitration.

In both *Abaclat* and *Ambienten* proceedings Tribunals allowed multi-party claims in investment arbitration process without requiring any direct consent or additional one from Argentina.

In *Abaclat* the majority of members of the tribunal firstly started with presenting classification of multi-party proceedings. First type, was representative proceedings where the number of claims were produced as one action, as a result many claimants are represented by one representative. Second one was aggregate proceedings, where claims were aggregated for example by the courts and afterwards managed together in order to gain the aim of the procedural efficiency [11]. What is unique for the approach presented by the majority, is that model in both *Abaclat* and *Ambiente* is neither strictly representative, nor aggregative. They constructed the hybrid model in which feature of aggregated proceedings were present through awareness and agreement to take part in ICSID system. On the other hand, the majority mentioned that examined action was also of representative character. Every member had the possibility to make a choice and to participate in the proceedings, instead of that they chose to be represented by the third party – TFA[12].

Argentina objected in both cases to the jurisdiction based on the lack of its consent to multi-party proceedings. Tribunals had to decide whether general consent to the arbitration given by the signature of BIT is also a consent to proceedings with more than one claimant [13].

In *Abaclat* the majority stated that, assuming Tribunal's jurisdiction in the case, majority saw no difficulties in accepting multi-party proceedings:

"… to conceive why and how the Tribunal could lose such jurisdiction where the number of Claimants outgrows a certain threshold. First of all, what is the relevant threshold? Secondly, can the Tribunal really 'lose' a jurisdiction it has when looking at Claimants individually?" [14].

Similar approach was presented in *Ambiente* case. By performing textual examination of the Argentina – Italy BIT and the ICSID Convention Tribunal come to the conclusion that multi – party proceedings are not forbidden by those Treaties [15].

It was stated that consent to investment arbitration is unique in its nature. Basic ground for the investment arbitration is BIT, which is not of contractual character. It does not name particular investors, but most of BITs contain a state consent to arbitrate. In other words state gives universal consent to arbitration and the role of investor is to give consent to the arbitration in every case by

taking actions which lead to commencing arbitration. Many commentators underlined the form aand timeline asymmetry in giving consent to investment arbitration: host state gives it in BIT and on the other hand - investor had to express consent in every case separately. Going further, country by giving consent in BIT does not need to give the second consent to the multi-party arbitration:

"… a special/secondary consent would clearly 'overturn the equilibrium' of investment arbitration, where the host State's consent to arbitration 'given in advance' has to be seen as a procedural guarantee for stimulating and protecting foreign investments."[16]

The majority in *Abaclat* stated that multi-party question was only the question of procedure in the frame of ICSID arbitration, in minority's opinion multi-party claimant question was of substantive nature, so is the issue of whether Argentina contested to ICSID arbitration.

Arbitrator Abi-Saab stated that the difference between regular two-party arbitration and multi-party proceedings were fundamentally different. He wrote:

"… a mere acceptance to arbitrate does not cover collective mass claims actions (regardless of the denomination) and that a special or secondary consent is needed for such collective actions." [17]

Arbitrator Santiago Torres Berdirdez in his dissenting opinion in Ambiente underlined that due to the silence of the ICSID basic texts. He stated that in case of aggregated presentation there is a possibility, but still this situation was not applicable because Argentina did not give its second consent [18].

Arbitrators in both cases underlined that ICSID Convention is silent on the issue of multi-party claims. The majority in *Abaclat* recognized that the ICSID system indeed does not regulate the question of multi-party proceedings, but still did not see it as a problem. Majority stated that it would be contrary to the BIT and contrary to the spirit of ICSID to interpret the silence as a sign of prohibition of the multi-party proceedings. Majority concluded that gap should be filled and Tribunal had a power to do this. Basis for this were found in history of issuing the Convention, where the discussions regarding multi-party arbitrations did not give answer whether to reject or accept multi-party proceedings. Going further, majority explained that ICSID system provides standard arbitration system which has some general characteristics, which ought to be filled by the Tribunal in each and every particular case if its needed [19]. The same arguments were used in *Ambiente* case. Majority explained that the ICSID Convention, drafting history of drafting the Convention no answer was found concerning question of conditions which should be fulfilled in order to have multi - party proceedings.

In his dissenting opinion, *Abaclat* Arbitrator Abi-Saab, wrote that the silence on that matter in the Convention means that Tribunal cannot extend its jurisdiction over multi-party proceedings. Similarly, the dissenting opinion in *Ambiente* stated that extensive interpretation of ICSID Convention silence cannot found grounds in public international law [20].

Next point analyzed, was whether the claims were sufficiently similar in order to be presented in one case and to form multi-party arbitration. Tribunal had to examine the factual and legal similarity. Majority explained that the rights of the parties derives from the investments and Argentina was obliged to give the same level of protection to each investor on the basis of the Argentina – Italian BIT. Secondly and secondly, each claim has its origins in the same financial operation – purchase of bonds, which was affected by the actions of Argentina. *Ambiente* majority also found the link between the claims. Arbitrators pointed out, that claimants complained about the same illegal action allegedly committed by Argentina; their claims were based on the same legal grounds: Argentina BIT and the ICSID Convention.; prayers of relief were identical; and finally, factual basis were also almost the same [21].

Abi-Saab suggested that claims were individualized and as result they cannot be seen as multi-party claim. He criticized that majority did not take into account questions of price, date of purchase, place of purchase, currency, applicable law etc. [22].

Abaclat and *Ambiente* decisions on jurisdiction are still the subject of many discussions. They are seen as those presenting liberal way of thinking about the borders between substantive and procedural issues in the area of jurisdiction in the investment arbitration proceedings and at the same time they are introducing multi-party claims into the world of international investment arbitration under the ICSID mechanism. This trend is good in its core, but still frivolous approach in the area can cause more harm than good. To authors opinion Tribunals should examine the issue of multi-party claims from case to case weather there are solid grounds for claims to be examined by the Tribunal in same proceedings. Problem is of bigger importance, because of the character of investment proceedings which are mostly based on the BIT's and as result they are not of contractual character and by that the need of consent to arbitration is needed only on the side of claimant and cannot be seen from the perspective of international commercial arbitration. Problem still exists what should tribunals do in cases in which for example parties have the same factual background, but the arbitration is commenced on a different legal basis (different BITs and ICSID Convention).

1. *Abaclat v Argentine Republic (Decision on Jurisdiction and Admissibility, 4 August 2011) para 119 (hereinafter Abaclat)*
2. *Ambiente v Argentine Republic (Decision on Jurisdiction and Admissibility, 8 February 2013) para 122 (hereinafter Ambiente)*

"For reasons of clarity and to avoid any confusion in this area which is highly prone to a "terminological imbroglio", the Tribunal will in its subsequent reasoning stick to qualifying the present proceeding as a "multi-party action" or "multiparty proceeding"."

3. *Manish Aggarwal, Simon Maynard "Investment treaty arbitration post-Abaclat: towards a taxonomy of 'mass' claims", p. 8 (source: http://joomla.cjicl.org.uk/journal/article/pdf/228, acessed on 18th of September 2015)*
4. *Edwin Tong Chun Fai, Nakul Dewan "Drafting arbitration agreements with 'consolidation' in mind?", Asian international arbitration journal, volume 5, number 1, p. 79. (source: https://www.kluwerlawonline.com/abstract.php?area=Journals&id= AIAJ2009003, accessed on 18th of September 2015)*
5. *Ibid. p. 81*
6. *Abaclat paras 273-78.*
7. *Ibid. ¶ 56, 58*
8. *Abaclat para 64*
9. *Abaclat para 217*
10. *Abaclat para 127*
11. *Abaclat para 483*
12. *Abaclat para 486, 487, 488*
13. *Abaclat para 489, Ambiente para 145.*
14. *Abaclat para 490*
15. *Ambiente paras 131-133*
16. *M Steingruber, 'Case Comment, Abaclat and Others v Argentine Republic: Consent in Large-scale Arbitration Proceedings' (2012) ICSID Review (Fall 2012) 27 (2), p. 237, source: http://icsidreview.oxfordjournals.org/content/27/2/237.full. pdf+html, accessed on 18th of September 2015.*
17. *Abaclat para 190*
18. *Ambiente paras 100-101.*
19. *Abaclat paras 518-520.*
20. *Abaclat para 166, Ambiente para 76*
21. *Abaclat para 543, Ambiente paras 152-162*
22. *Abaclat paras 141-144.*

Wróbel A. Multi-party claims in international investment arbitration as natural extension of international investment arbitration

This article concerns one of the topics which heavily discussed at the same time in the international commercial arbitration and in the international investment arbitration: commencing arbitration by the party which consists of more than one or claimants. That type of arbitration is called "mass claims arbitration", "collective claims arbitration" or "multi party arbitration".

It is important to see the nature of the problem in international commercial arbitration as older and more "experienced". It is pierced with national law order and by that varies from country to country. In some countries question of multi-party claims depends on parties' consent in arbitration clause, in others parties in order to exclude mass claims need to exclude it in agreement etc.

Situation seems to be slightly more complicated in international investment arbitration commenced under the ICSID Convention. As almost hermetic system its independence gives no direct answer to the question. Answers given by case practice is in favor of mass claims as a natural instrument in ICSID system, which does not need any consent in order to be accepted and by that co have an arbitration case with multi-party claimant. Minority view is presenting opposite attitude according to which mass claim arbitration can be accepted only when both parties agreed to it.

Discussion is still in progress, but according to author's opinion multi-party claimant is a natural extension of the unique ICSID system.

Keywords: multi-party claims, international investment arbitration, ICSID Convention