

CAFTA tribunal corrects award and terminates arbitration (Berkowitz v Costa Rica)

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Arbitration analysis: Emilie Gonin, of Doughty Street Chambers, examines the reasons why the arbitral tribunal in *Berkowitz v Costa Rica* corrected its award more than six months after it was handed down.

Original news

Berkowitz and others v Costa Rica (Procedural Order on Correction of the Interim Award and Termination of the Proceedings), ICSID Case No UNCT/13/2, 30 May 2017

An arbitral tribunal (Daniel Bethlehem (president), Mark Kantor and Raúl E Vinuesa) constituted under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules 2010 (the Rules) in an arbitration administered by the International Centre for Settlement of Investment Dispute (ICSID) issued a procedural order which corrected an interim award it had made in arbitral proceedings brought by the claimants against Costa Rica and which also terminated the proceedings.

What had the arbitration been about?

The arbitration had been commenced by claimants who alleged that Costa Rica's development of a national park had unlawfully deprived them of real estate property investments in 26 plots of land.

They argued that the expropriation of their plots breached the expropriation and minimum treatment standards of Chapter 10 of the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA).

Costa Rica objected to the jurisdiction of the tribunal, arguing that:

- the claimants had failed to initiate proceedings within the three-year limitation period from the date on which they had, or should have, first known of the alleged breach and alleged loss or damage, and/or
- the alleged breaches had occurred before the entry into force of the CAFTA between Costa Rica and the United States, ie 1 January 2009

On the merits, Costa Rica maintained that if the claimants' property was expropriated, the expropriations were not uncompensated and that it did not violate its obligation to provide due process of law, much less in a manner rising to the level of a breach of the CAFTA's minimum standard of treatment.

On 25 October 2016, after a hearing which took place in April 2015, the tribunal issued an interim award whereby:

- in respect of a first category of 18 properties, it held that it had no jurisdiction to entertain any of the claims, having found that the alleged conduct relied on to support these claims fell afoul of the requirement that the proceedings be initiated within the three-year limitation period and that the alleged breaches had not occurred prior to 1 January 2009
- in respect of a second category of five properties which were the subject of compensation judgments of the Costa Rican courts, it held that it had jurisdiction to entertain claims for breach of the minimum standard of treatment
- in respect of a third category of three properties which were subject to compensation judgments rendered after the beginning of the arbitral proceedings, it held that parties should be allowed to present their views as to whether or not it had jurisdiction
- it did not make any decision on liability

On 30 May 2017, the tribunal issued a procedural order correcting the interim award, terminating the proceedings and ordering each party to bear its own costs.

What was the background to the procedural order?

The key point of interest in the procedural order is that it corrected the interim award more than six months after it was issued.

The correction arose out of the parties' failure to put before the tribunal the relevant information as to the status of the Costa Rican domestic court proceedings in respect of one of the plots of land (Lot B1).

This failure was all the more flagrant as the parties had been given several opportunities to update the tribunal in respect of these proceedings. During its deliberations, the tribunal wrote to the parties and asked them, *inter alia*, to clarify the status of the proceedings.

The claimants responded that the proceedings had been suspended before any judgment was issued. Costa Rica indicated that the claimants had requested a suspension of the proceedings which had been denied and that no judgment had been handed down thus far (the latter appears to have been an accurate reflection of the status of the proceedings at that time).

In the interim award, the tribunal noted that the B1 court proceedings had been suspended following the commencement of the arbitration and only restarted on 4 January 2016, which meant there was no compensation judgment to consider. As a result, it included Lot B1 in the first category of properties over which it had no jurisdiction.

In its letter transmitting the interim award to the parties, the tribunal noted the heavy factual detail of the case and requested that the parties draw its attention to 'any error in computation, any clerical or typographical error, any error or omission of a similar nature' within 30 days of receipt of the interim award so that the tribunal could consider whether any correction was appropriate, pursuant to Article 38 of the UNCITRAL Arbitration Rules 2010.

Both parties explicitly indicated in writing to the tribunal that they had not identified any errors in the award. In fact, a judgment had been handed down in the B1 proceedings four months earlier, on 10 June 2016. It was not recorded in the interim award, as a result of which Lot B1 was wrongly classified in the first category of properties rather than the third category.

The claimants then sought to rely, *inter alia*, on this error to challenge the interim award before the US District Court for the District of Columbia. The tribunal rejected their request of a stay of the arbitration proceedings, pending the conclusion of the US proceedings.

In the course of the correspondence relating to the next stages of the arbitration, the fact that a judgment had been handed down in the B1 court proceedings came to the tribunal's attention. The tribunal noted that the documentation relating to the B1 court proceedings showed an error or omission of a factual nature, pursuant to Article 38 of the Rules, which should have been drawn to its attention and proposed to correct the interim award.

The claimants indicated that the proper remedy was annulment of the award in the US proceedings and asked that the arbitration be terminated. Costa Rica also asked that the arbitration be terminated with costs and fees awarded to it. It agreed to the factual correction but noted that it would not affect the tribunal's conclusions as the claimants had not complained about the amount awarded in the B1 court proceedings.

In the procedural order, the tribunal corrected the interim award so as to include Lot B1 in the category of properties which were subject to compensation judgments rendered after the beginning of the arbitration to reflect the judgment rendered in the B1 court proceedings. It also terminated the arbitration and ordered that each of the parties bear its own costs.

On what grounds did the tribunal correct the interim award? What are your views on the approach taken?

The tribunal's reasoning in respect of the correction revolved around three key points.

First, the tribunal considered that the issuance of the interim award, which dealt with jurisdiction in respect of Lot B1, did not render it *functus officio*. It explained that the interim award was not a final award and that it contemplated further proceedings in respect of the claimants who owned Lot B1. It also noted that there had been no risk of the type of outside communication or unilateral influence affecting the conduct of the tribunal, against which the doctrine of *functus officio* was intended to protect.

Secondly, it held that its authority to correct an award on its own initiative could not be limited to its exercise within the time periods set out in Article 38 of the Rules (ie within 30 days of the communication of the award), as this would be an abuse of right. It relied on:

- a quote from another arbitral tribunal which set out the principle that in all systems of law there were concepts, known under different names, framed in order to avoid the misuse of law, eg 'good faith', 'misuse of power' or 'abuse of right' (*Venezuela Holdings BV and others v Bolivia (Decision on Jurisdiction)* ICSID Case No ARB/07/27, 10 June 2010)
- Article 32 of the Rules which essentially provided that a party which did not object promptly to lack of compliance with the Rules or with requirements of the arbitration agreement was deemed to have waived the right to make such an objection

Thirdly, it decided that it had authority in the exercise of its inherent competence in the administration of justice to correct an involuntary mistake resulting in potentially inconsistent treatment and to clarify the resulting ambiguity in its interim award once that error had finally been disclosed to it. In this respect, it relied on one academic article.

The principle that a tribunal has the inherent power to ensure the integrity of its process, including that the parties arbitrate fairly and in good faith, is by no means new in the investment treaty context. While the tribunal relied on an award where this principle was used in relation to the corporate restructuring of the investor, there are examples of arbitrations where it has been used in relation to the parties' procedural conduct (eg *Libananco Holdings Co Ltd v Turkey (Decision on Preliminary Issues)*, ICSID Case No. ARB/06/8, 23 June 2008 and *Methanex Corporation v United States of America (Final Award)*, UNCITRAL, 3 August 2005).

The original feature of this case is that the tribunal sought to rely on this inherent power to correct its interim award, six months after it had issued it and in apparent breach of Article 38 of the Rules.

This is likely to further existing avenues and open new ones in support of the claimants' challenge before the US domestic courts.

The claimants will continue to argue that the tribunal was *functus officio* in respect of the issues decided in the interim award. In this respect, they will rely on US authorities which, they will say, support the argument that when a tribunal issues an interim award it becomes *functus officio* in respect of those issues (eg *United Bd. of Carpenters & Joiners of Am v Tappan Zee Constructors, LLC*, 804 F.3d 270, 277 (2d Cir. 2015)).

There is support for such a principle within the case law of other domestic courts (eg English courts: *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Ltd* [2015] EWHC 1452 (Comm), [2016] 1 All ER (Comm) 517, Singapore courts: *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] SGCA 46).

One of the key justifications for this principle is the finality of awards, which, noticeably, was not discussed by the tribunal in the procedural order.

Arbitration rules which, like Article 38 of the Rules, allow tribunals to correct awards provide for similarly short time limits (eg Article 36(1) of the International Chamber of Commerce (ICC) Arbitration Rules March 2017 provides for 30 days from the date of the award and Article 27.2 of the London Court of International Arbitration (LCIA) Arbitration Rules 2014 for 28 days).

This is because the principle of rendering an award containing no error needs to be balanced against the principle of finality of awards. The fact that the tribunal disregarded this time limit may provide the claimants further grounds for challenge.

This being said, the US courts are unlikely to be impressed by the claimants' conduct, whose challenge is essentially founded on an error caused by their failure to bring the relevant information to the tribunal's attention.

Where has the procedural order left the proceedings?

The procedural order terminated the arbitral proceedings. At the time of writing, the challenge to the interim award continues in the US proceedings.

What lessons for parties can be learned from the arbitration?

The unusual set of circumstances which gave rise to the procedural order is unlikely to be a regular occurrence. However, this decision is a warning to parties who fail to disclose information to arbitral tribunals, or deliberately withhold it, that the principle of procedural good faith may be enforced after the issuance of an (interim) award.

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Interviewed by Robert Matthews.

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