

Trustee not able to benefit from investment treaty protection in ICSID arbitration

A trustee's claim for alleged investment expropriation and other violations of obligations under a bilateral investment treaty (the **BIT**) between Barbados and Venezuela has been dismissed due to the trustee's lack of standing in the ICSID¹ arbitration of *Blue Bank v Venezuela*.²

Background

The compensation claim by the Barbados-incorporated Blue Bank (the **Claimant**) against Venezuela (the **Respondent**) had been brought by the Claimant in its capacity as trustee for the Qatar International Authorised Purpose Trust (the **Qatar Trust**), a trust under the laws of Barbados. The Claimant had alleged that the Respondent, by frustrating the business of two Venezuelan companies in which the Qatar Trust held indirect shareholdings and destroying valuable rights belonging to those companies, had breached the investment protections afforded to those assets by the Barbados-Venezuela BIT.

The arbitral tribunal decided to deal with the matter of ICSID's jurisdiction and the tribunal's competence to hear the dispute as a preliminary issue. In its award of the 26 April 2017, the tribunal considered the effects of Venezuela's denunciation of the ICSID Convention in 2012, and whether the Claimant qualified as having made an "investment" pursuant to the Barbados-Venezuela BIT.

The tribunal's analysis of the relationship between the Claimant and the investment

The Barbados-Venezuela BIT protects investments made by Barbadian nationals or companies in the territory of Venezuela, and vice versa. The claim was brought by the Claimant as trustee for the Qatar Trust rather than for its own account or on its own behalf. Both the Claimant and the Respondent agreed that the Qatar Trust itself lacked the legal personality to bring the claim, and the tribunal found that the ordinary meaning of the words "nationals" or "companies" provided in the BIT did not extend to trusts.

As for the Claimant, i.e. the trustee, the tribunal considered that the central question to be determined for jurisdictional purposes was whether it had made an "investment" under the Barbados-Venezuela BIT. The tribunal found that the Claimant:

1. in actual fact and law, was not "an owner in any relevant sense of the word" of the shares that were the subject-matter of the trust;
2. ultimately simply performed a service to third party interests in exchange for a fee; and
3. had not "committed any assets in its own right" or brought the claim on its own behalf and so had not incurred any risk, or shared the loss or profit resulting from the investment.

As a result, the tribunal reached the conclusion that the Claimant had not invested the relevant assets under the terms of the BIT. Interestingly, the tribunal also considered that the party coming closest to satisfying the requirement of "ownership" with regard to the assets of the Qatar Trust was a Bahamian entity which was the beneficiary of the trust pursuant to the trust deeds.

¹ The International Centre for Settlement of Investment Disputes.
² *Blue Bank International & Trust (Barbados) Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017.

Conclusion

In its award, the tribunal held that the Claimant lacked standing since it had not invested assets in Venezuela, compelling the dismissal of the Claimant's claims for lack of jurisdiction. The case provides an interesting insight into the potential limits on the protection afforded to cross-border investments under investment treaties. In particular this decision, if followed, would restrict the ability of investors to take advantage of an investment treaty simply by incorporating a trustee or establishing a trust in a jurisdiction which enjoys treaty rights. Investors that want to take advantage of treaty rights need to ensure that their chosen vehicle will fall within the treaty's remit.

If you have any questions or require specific advice on any matter discussed in this update, please contact:

Raid Abu-Manneh

Partner, London

E: rabu-manneh@mayerbrown.com

T: +44 20 3130 3773

Catherina Yurchyshyn

Associate, London

E: cyurchyshyn@mayerbrown.com

T: +44 20 3130 3962

Americas | Asia | Europe | Middle East | www.mayerbrown.com

MAYER • BROWN

Mayer Brown is a global legal services provider advising many of the world's largest companies, including a significant portion of Fortune 100, FTSE 100, CAC 40, DAX, Hang Seng and Nikkei index companies and more than half of the world's largest banks. Our legal services include banking and finance; corporate and securities; litigation and dispute resolution; antitrust and competition; US Supreme Court and appellate matters; employment and benefits; environmental; financial services regulatory and enforcement; government and global trade; intellectual property; real estate; tax; restructuring, bankruptcy and insolvency; and wealth management.

Please visit www.mayerbrown.com for comprehensive contact information for all Mayer Brown offices.

Mayer Brown comprises legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown Mexico, S.C., a sociedad civil formed under the laws of the State of Durango, Mexico; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consultancy services, not legal services.

"Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

© 2017 The Mayer Brown Practices. All rights reserved.

Attorney advertising. Prior results do not guarantee a similar outcome.