

# Non-monetary relief in international arbitration

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# Outline

- Arbitrator's powers
- Which law applies
- Types of non-monetary relief
- Enforcement / Setting Aside of awards

# Arbitrator's powers

- Arbitration agreement
- National law
- Broad discretion

# Which law applies?

- Characterization of the remedy: procedural or substantive issue?
- Most civil law jurisdictions: substantive issue
- Most common law jurisdictions: procedural issue
- Possible solution: treat remedy issues in international arbitration as substantive ones

# 3 main types of non-monetary relief

- Performance
- Declaratory relief
- Formative relief

# Performance

- Most controversial form of non-monetary relief
  
- Examples
  - Order to transfer of patents and other IP rights
  
  - Specific performance of contractual obligation to deliver goods
  
  - Barring a Respondent from using the Claimant's technology outside of the licensed jurisdiction

# Performance – civil and common law perspectives

- Civil law systems: performance as principal remedy
- Common law systems: damages as principal remedy
- Convergence in limitations to grant of performance:
  - ✓ Obligations with personal character
  - ✓ Long-term obligations
  - ✓ Performance no longer objectively possible

# Performance in investment arbitration

- State retains right to pay monetary damages in lieu of performance: Art. 1135 NAFTA, Art. 26 (8) ECT
- Restitution as the primary remedy: ILC articles on State Responsibility (Art. 36)
- Examples
  - return of confiscated property
  - return of a right which was withdrawn (eg. a licence)

# Notable cases in international law

ICJ, *Case of Temple of Preah-Vihear (Cambodia v. Thailand)*, June 15, 1962

ICJ ordered Thailand to restore to Cambodia certain sculptures and other objects it had removed from the temple on the border.

*Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, *ad hoc* award of January 19, 1977

Arbitrator ordered restitution of the oil fields and installations which had been taken over by the State.

Caution: - Decision has been heavily criticized

- Claimants were expressly seeking a decision on matters of principle
- Different conclusion was reached in two other arbitrations on same set of facts

# Notable cases in international law (2)

*Libyan American Oil Co. (LIAMCO) v. The Libyan Arab Republic*, April 12, 1977

*BP exploration Co. (Libya) v. The Government of the Libyan Arab Republic*, October 10, 1973

Judge Lagergren said that although the nationalization was unlawful, nationalization is an exercise of territorial sovereignty and that, coupled with a low likelihood that the State will reprivatize the asset, the principle of restitution is in effect inapplicable.

# Notable ICSID cases

- *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador*, final award of July 1, 2004
- *Amco Asia Corporation and others v. Republic of Indonesia*, Decision of May 10, 1988
- *Antoine Goetz and others v. Republic of Burundi*, award of February 10, 1999
- *Enron Creditors Recovery Corporation v. Argentine Republic*, interim award of May 22, 2007
- *CMS Gas Transmission Company v. Argentine Republic*, award of May 12, 2005

# Declaratory relief

Relief which is simply declaratory of parties' rights

party validly exercised a call option

party validly terminated a contract

- Civil law systems are generally more restrictive
- Arbitral tribunals adopt a flexible approach

# Declaratory relief in investment arbitration

*Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Award of July 24, 2008

Declaratory relief may be awarded where compensation is not appropriate.

*Saudi Arabia v. Arabian American Oil Company (Aramco)*, *Ad hoc* award of 1963

Parties claimed only declaratory relief. The dispute was serious but neither party wished to jeopardize their relationship. Accordingly it was agreed that the award should be of declaratory effect only.

# Formative relief

Creation, modification or termination of a legal relationship or right

- **Award is constitutive:** it creates or transforms the legal right
  - fill gap in the contract
  - change a contract to meet changed circumstances
  - deal with a hardship situation
- **Switzerland:** Tribunals have express power to complete gaps in contracts (Supreme Court, December 19, 2001, 4P. 114/2001)

# Enforcement of non-monetary awards

- Awards for declaratory or formative relief may not need to be enforced but only recognized
- Enforcement issues arise typically for awards for performance

# Enforcement – 3 main pitfalls

## Lack of precision

- Bar to enforcement in many jurisdictions
- Specify: Object of obligation, Type of obligation , Extent of obligation, Timing

**Due process and ultra petita considerations also arise:** if tribunal has to award relief in different terms than relief sought

**Investment arbitrations:** additional pitfalls that non-monetary awards cannot be enforced under the ICSID Convention and issue of State sovereignty

# Enforcement – practical tips

- **Be precise** when drafting of prayers for relief at the outset
- **Check laws** of likely place of enforcement regarding specificity requirements
- Consider asking Tribunal to issue order as **continuing injunctive relief**
- Make **alternative request** for monetary relief

# Conclusions

- **Tribunals:** wide powers to award non-monetary relief.
- **Performance:** traditionally more commonly awarded in civil law jurisdictions than in common law jurisdictions, but there is a convergence in the field of international commercial arbitration.
- **Investment arbitration:** performance as a remedy is extremely rare.
- **Declaratory relief:** a useful tool for Parties in commercial arbitration but requested rarely in investment arbitration.
- Non-monetary remedies must be drafted with **precision** both in prayer for relief and award.
- **Pecuniary alternatives** should be provided and pleaded where non-monetary relief is requested.

# Thank You

For further information, please contact

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