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Managing Eurozone risk through BIT planning

The value of bilateral investment treaty ("BIT") protection should not be underestimated in today's turbulent economic times. Uncertainty in the global economy, not just in "risky" emerging markets, but also within Europe, has made corporate risk management and contingency planning all the more important. Whether embarking upon a new investment in the troubled Eurozone, or seeking to enforce rights in respect of an earlier investment, BITs ensure that foreign investors receive certain guarantees. The deepening Eurozone crisis (hot on the heels of the Arab Spring) is re-focusing attention on investment treaty coverage. In the case of Greece, to take one example, it remains to be seen whether aggrieved bondholders have recourse to and will seek to enforce treaty rights, as they did in the case of Argentina over the last decade.

A "BIT" of protection in uncertain times

Bilateral investment treaties protect investors from one state who invest in another state that is also party to the relevant treaty. BITs (of which there are now approximately 3000 in force, involving some 180 countries) allow aggrieved investors to pursue claims directly against sovereign states in order to protect their investment, rather than having to rely on domestic courts that might lack independence.

While most claims have traditionally been brought through ICSID (the International Centre for the Settlement of Investment Disputes), arbitrating under the UNCITRAL, SCC, or ICC Rules (where permitted by a particular BIT) has recently become more popular.

Qualifying for treaty protection

A right to BIT protection depends on:

- the nationality of the investor
- the existence of an "investment", and
- completion of any pre-arbitral steps

As to nationality of the investor, this generally means (for a legal entity) being incorporated in one of the state parties to the BIT. If no BIT exists with

the state of the immediate investor or ultimate parent, it may be possible to rely on a BIT in force with the state of an intermediary company in the corporate structure, subject to any specific restrictions in the BIT.

As to what constitutes a relevant investment, this is generally defined broadly to include any kind of asset, present (in more than transitory fashion) in the host state. Some BITs contain non-exhaustive lists of qualifying investments (and often include "debt, including bonds").

As to procedural formalities, a case earlier this year highlighted the danger of ignoring any pre-arbitral requirements set out in a BIT (in that case a requirement to pursue local litigation for a certain period of time before initiating international arbitral proceedings).[1]

Intra and extra-EU BITs

When treaty planning, a preliminary step is to determine which applicable BITs in force may provide investors with adequate protection. Within the EU, the landscape of applicable BITs between member states is currently at a cross roads following the European Commission's intervention in some recent arbitration cases[2]. The tribunals in those cases nevertheless decided that the BITs remained valid (and that they did therefore have jurisdiction to determine the disputes) despite the later accession of the respondent states to the EU. However the Commission views intra-EU BITs as inconsistent with the primacy of EU law and has urged Member States to take "concrete steps" to bring such reciprocal agreements to an end.

Some member states have already agreed to end their BITs (e.g. the Italy-Czech Republic; Denmark-Czech Republic; and Italy-Hungary BITs). As a result, European companies investing within the EU and/or EU accession countries or candidates should take up-to-date BIT planning advice.

As for extra-EU BITs (i.e. those between member states and non-EU countries), since the Lisbon Treaty gave the EU exclusive competence for issues of foreign direct investment, it is expected that individual BITs will at some point be replaced by an EU-wide international investment agreement, although exactly how remains to be seen.

What rights can be claimed under BITs?

Depending on the particular scope and wording of the BIT(s) relied upon and the facts of a given case, aggrieved investors can potentially bring claims in relation to:

- A lack of fair and equitable treatment ("FET"). This is the most commonly-invoked substantive right and includes protection for an investor's legitimate expectations which arguably include the provision by the state of a stable and predictable environment for the investment. FET also includes a right to non-discrimination and non-arbitrary conduct by the host state, and the application of transparency and consistency
- Compensation for expropriation of assets, including the outright seizure of property as well as "indirect expropriation" where, for instance, new regulatory measures deprive the investor of the economic benefit of his property
- "Most-favoured nation treatment" ("MFN") by which investors are treated no less favourably than investors from any other state, or, in the case of "national treatment", as compared to domestic investors. Importantly, MFN clauses can be used to import provisions from other, more favourable investment treaties. Attempts to extend this to the import of procedural rights (e.g. to use an MFN clause to latch onto a right to arbitration in another treaty) have met with mixed success
- In addition to the three main substantive provisions listed above, BITs often also provide for (i) full protection and security; (ii) free transfer of funds and assets; and (iii) protection through so-called "umbrella clauses" against breach by the state of contractual undertakings

Could Greece be the new Argentina?

Investment treaty arbitration took off following Argentina's economic crisis a decade ago. Approximately fifty ICSID claims were brought against Argentina under a variety of BITs, with investors – many of them energy and utility companies – having varied success in recovering their losses. With the Argentinian experience in mind, many investors are now weighing up their options with regard to potential investment treaty claims against troubled Eurozone members.

Bondholders are reportedly taking advice in relation to potential BIT claims against the Greek state[3] and it remains to be seen whether they decide to rally together and bring a mass action. Of the many ICSID claims against Argentina, three cases were brought by bondholders. Last year, the first of these cases (the "*Abaclat*" case) passed the jurisdiction phase, allowing the 60,000 Italian holders of bonds issued by the Argentine government to proceed with their claims arising out of Argentina's default on its sovereign debt obligations and subsequent debt restructuring. These bondholders had refused to participate in the 2005 exchange offer under which existing bonds were exchanged for new bonds on revised terms.

In the case of Greece, this case could potentially set an example for holders of bonds who opposed the

1 *ICS Inspection & Control Services (UK) v Argentine Republic (2012).*
2 *Eastern Sugar v Czech Republic (2007) and Eureko v Slovakia (2010).*
3. Greece has signed over 40 BITs. Reports suggest that claims are contemplated under the Greek-German BIT – see Financial Times, 12 March 2012.

recent so-called private-sector involvement ("PSI") as part of the Greek government's debt-restructuring plan.

Faced with a BIT claim, a Eurozone state might seek to claim a "state of necessity" (whether based on wording in a particular BIT and/or on customary international law) in order to excuse it from performing an international obligation. In the case of Argentina, the opinions of international tribunals diverged as to whether the situation in Argentina was sufficiently serious to warrant reliance on the defence. In light of this, while respondent Eurozone states might seek to rely on similar arguments, the success of such arguments is difficult to predict.

What next?

Whatever transpires in relation to potential claims in the context of the current Eurozone crisis, the troubled economic landscape has refocused investors' minds on the relevance of treaty planning as part of a comprehensive risk strategy.

Whether used as leverage in the event of a dispute with a foreign government (in part due to potential adverse publicity), or whether the investment dispute process is triggered and potentially progressed through to final award, having BIT protection over the lifespan of an investment is critical in today's changing world.

We can advise you on optimal planning for and/or enforcement of treaty protection, whether at the time of making an investment, after an investment has been made, or subsequently in the event of a dispute.

If you would like further information, please contact us.

Further information

If you would like further information on any issue raised in this update please contact:

Devika Khanna
E: devika.khanna@clydeco.com

Miranda Karali
E: miranda.karali@clydeco.com

Maurice Kenton
E: maurice.kenton@clydeco.com

Clyde & Co LLP
The St Botolph Building
138 Houndsditch
London EC3A 7AR

T: +44 (0)20 7876 5000
F: +44 (0)20 7876 5111

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