

Proprietary 

TV Azteca arbitration tribunal competence in bondholder USMCA case likely decided in June-July

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A decision from an International Centre for Settlement of Investment Disputes (ICSID) arbitration tribunal on whether the body is able to hear the case of TV Azteca creditors Cyrus Capital Partners and Contrarian Capital Management against the Mexican government is expected as soon as June or July, according to two sources close to the matter.

An affirmative decision would trigger ICSID's acceptance of the case. The complaint was registered with the ICSID on 11 August 2023, as reported.

“The famous principle of *kompetenz* in arbitration requires the tribunal to determine its own jurisdiction, which necessarily requires the determination as to the validity of the conditions by which the parties, in this case, the US, Mexico and Canada, agreed to arbitrate, precisely as per the terms of the [North American Free Trade Agreement] NAFTA sunset clauses,” the first source close said. “Mexico is strongly contending that the demand for arbitration in this case failed to abide by the timing requirements and deadline for submitting a claim.”

NAFTA's Sunset Clause allows for the protection of NAFTA legacy investment after the replacement of NAFTA by the United States-Mexico-Canada Agreement (USMCA) 1 July 2020. The sunset period protecting legacy investment ended 30 June 2023.

“[The complaint] alleges denial of justice by the Mexican government, apparently due to the highly remarkable injunctions emitted by Mexican courts blocking any serious attempt to litigate in Mexico,” said the first source.

“This is not the prototypical investment arbitration dispute in which an aggrieved foreign investor brings a claim against a foreign state for expropriating its investment directly or constructively through state action,” said Ivan Bilaniuk, Head of the International Dispute Resolution Practice at US law firm Dinsmore & Shohl, which is not involved in the case. “Here in the TV Azteca case, the dispute is between private parties - TV Azteca and its foreign creditors. The foreign credit holders are TV Azteca bondholders and they were unable to prevail in litigation before local Mexican courts when TV Azteca sought relief from having to make payments during the COVID-19 epidemic.”

“We surmise that in such a dispute between private parties of a national of one country and a foreign investor in that national, and where there is a decision issued by a local court against the foreign investors, that a denial of justice claim against Mexico under the USMCA is a prominent claim that the foreign investors have made,” added Bilaniuk. “This is a claim grounded in customary law in which a host state has not protected a foreign investment via a court system that fails to comply with international standards of justice. Such a claim is supported by investment arbitration case law.”

TV Azteca has been ordered by a Mexican court not to release to the public any information regarding its financial information and has received injunctions excusing missed interest payments in Mexican courts on the basis that, among other things, the outbreak of the COVID-19 pandemic and subsequent related orders by the Mexican government represented “Acts of God and Force Majeure events,” as reported.

“There have been multiple such investment arbitrations under NAFTA with some cases finding in favor of the host state, but at least one case finding in favor of the investor,” added Bilaniuk. “But, under NAFTA, an investor was required to exhaust local remedies in the host state legal system before filing an investment arbitration and in some cases, the investors lost because the tribunal ruled it had not exhausted such remedies.”

The three-person arbitration tribunal consisting of David J.A. Cairns for the claimants, Zachary Douglas for the respondents and Lawrence Collins appointed by the parties was constituted in February, according to the ICSID website.

Cyrus Capital and Contrarian Capital Management are represented by Akin Gump Strauss Hauer & Feld, according to the ICSID website.

"Based on studies of costs and our own experience, administrative costs including shared costs of the tribunal will be USD 1m or less, and each party will pay several million dollars in legal counsel fees – one study estimates USD 4m-USD 5m per party, on average," Bilaniuk said.

Negotiations between the company and bondholders have not advanced, according to the second source close to the matter.

A representative for TV Azteca declined to comment on the matter.

by Feike de Jong

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TV Azteca SAB de CV

Likely To Distress Location
Mexico

Relationships

Issuer
TV Azteca SAB de CV

Financial advisor
Moelis & Co

Lawyer
Paul Weiss Rifkind Wharton & Garrison LLP

Trustee
Bank of New York Mellon Corp

Unsecured Bondholders
Cyrus Capital Partners LP
Sandpiper Ltd

Unsecured Bondholder Advisor
Ducera Partners LLC

Unsecured Bondholder Counsel
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