



Funder's role in failed ICSID claim comes to light

Sebastian Perry

07 May 2019



Punta del Este, Uruguay

An ICSID case that left an unsuccessful claimant saddled with a US\$6 million adverse costs award was financed by Australia-based disputes funder IMF Bentham, GAR has confirmed.

IMF Bentham's financing of Italba Corporation's ICSID case against Uruguay was disclosed between the parties but the funder's role in the case has not been publicised before now.

An ICSID tribunal chaired by Costa Rica's Rodrigo Oreamuno threw out Florida-registered Italba's claim on jurisdictional grounds in an award on 22 March, finding it had failed to prove its ownership of a telecoms business whose licence was revoked. Italba was ordered to pay US\$5.9 million towards Uruguay's costs.

Three days later, an IMF Bentham release to the Australian Stock Exchange announced the dismissal of an arbitration it funded in the United States, identified only as "USF Case 31".

IMF first announced in December 2015 that it was funding case 31 through its US subsidiary Bentham Capital, assigning it an "initial claim value" of A\$150 million (US\$105 million by

today's rates). Italba's notice of dispute, filed four months earlier, estimated damages at US\$100 million.

Italba filed its request for arbitration under the US-Uruguay bilateral investment treaty in February 2016. Its damages claim was eventually lowered to US\$65 million.

There is no indication in the final award that Uruguay raised the issue of third-party funding in the case. The award records that a legal counsel from Bentham Capital attended the ICSID hearing as part of the support staff for Italba, alongside the claimant's counsel team from Alston & Bird.

IMF Bentham said in its March release that there is "no cash impact" resulting from the dismissal of the arbitration. The Australian funder says it already recovered roughly A\$8.5 million from case 31 last year when it sold a majority of its US investment portfolio to Bentham IMF Fund LLC – a US investment vehicle partly funded by affiliates of Fortress Credit Advisors. The funder said in 2018 that the transaction allowed it to retain a "significant interest in any upside returns" from its US portfolio and "materially reduce the downside risk".

It remains unclear what arrangements are in place between Italba and the funder regarding liability for costs. IMF Bentham, Italba's lead counsel Alexander Yanos of Alston & Bird and Italba executive Gustavo Alberelli did not respond to requests for comment.

ICSID has yet to register any request by Italba to annul the award. The company has until late July to file such a request.

Headquartered in Australia, IMF Bentham also has offices in the US, Canada, Singapore and the UK. According to its website, it has had wins or settlements in 166 funded cases and losses in the other 18, as of the end of 2018. Its US arm, which now goes by the name Bentham IMF, recently hired ArbitralWomen president Dana MacGrath from Sidley Austin as an investment manager and legal counsel.

GAR reported last year on disputes funder Vannin Capital's role in financing a US\$100 million DR-CAFTA claim against Costa Rica that ended in a victory for the state and a US\$1 million costs award against the claimant. Vannin disclosed a US\$6.6 million loss on the case.

In 2017, GAR also revealed Burford Capital's role as funder of a pair of treaty claims against Pakistan worth US\$640 million that ended with the claimants being ordered to pay around £11 million in costs.

The claimants in one of the cases, the Progas group, ultimately withdrew an effort to set aside the award in the English courts last year after being ordered to pay security for costs. The claimant in the other case, an Iraqi former government minister, was denied permission to pursue a belated challenge to the award and has said enforcement would bankrupt him.

Italba Corporation v Oriental Republic of Uruguay (ICSID Case No. ARB/16/9)

Tribunal

Rodrigo Oreamuno (Costa Rica) (Chair)

John Beechey (UK) (appointed by Italba)

Zachary Douglas QC (Australia) (appointed by Uruguay)

Counsel to Italba

Alston & Bird (from October 2017)

Partner Alexander Yanos and counsel Carlos Ramos-Mrosovsky in New York and Washington, DC, foreign attorney Borja Alvarez Sanz\* in New York, senior associate Kristen Bromberek in Atlanta, and attorney Leticia Goñi in New York

\*left for Cuatrecasas Gonçalves Pereira in 2018

Hughes Hubbard & Reed (until October 2017)

Counsel to Uruguay

Foley Hoag

Partners Paul Reichler and Clara Brillembourg, with associates Patricia Cruz Trabanino, Melinda Kuritzky, Ofilio Mayorga and José Rebolledo in Washington, DC

Counsel to the US (non-disputing party)

US Department of State

Attorneys Lisa Grosh, Nicole Thornton, Terra Gearhart-Serna, Matthew Olmsted, Danielle Polebaum and Grayson Orsini

Expert witnesses for Italba

Santiago Dellepiane Avellaneda, Ariel Medvedeff and Federico Gonzalez Loray of Compass Lexecon

Luis Lapique of Lapique & Santeugini Abogados

Expert witnesses for Uruguay

Santiago Pereira of Rueda Abadi Pereira

Alejandro Paz of Uruguay's Ministry of Industry, Energy and Mining

Eugenio Xavier de Mello of Estudio Ramírez, Xavier de Mello & Albal

Louis Conti of Holland & Knight

Daniel Flores, Ettore Comi, Ivan Lopez and Eleanor Coates of Econ One Research