The Risk Management of Superior Award in International Investment Arbitration in the Method of Categorization

Xia DING

China University of Political Science and Law

Keywords: Risk management, International investment arbitration, Categorization.

Abstract. Due to the inconsistency of interpretive path and applicable methods, the award made by the international investment arbitral tribunal cannot naturally be recognized by both parties, which are always the risk of disqualification and annulment. To control the questioned risks of the award, the arbitral tribunals shall make “superior award” which could be recognized by both parties as far as possible. Explaining the superior award in the method of categorization is able to analyze a series of awards under the procedure or substantial issues of same type or the procedural or substantial contents of specific issue arguments on the individual cases. The application of the method could proceed from two angles: The micro categorization means the content of arbitral award should be divided into the “superior part” and “inferior part” in terms of the reasonableness of the individual award. The former has the value of being invoked while the latter should be excluded. The macro categorization studies the categorization of a series of awards in the range of the same legal relationship, and the separation of superior and inferior award makes its appearance. However, the analysis of award through the empirical method may further determine the inherent characteristics of superior award – the integrity of the logic clues and the hierarchy of the argument should be put more emphasis on the argument, and adequate and rigorous demonstration should be made combined with specific facts of the case. If the pro-portion of superior award in the investment arbitration award can be improved, the possibility that the parties finally accept the award will be increased, and the risk of disqualification and annulment could be controlled.

Introduction

Nowadays, international investment arbitration has become the main way to settle the international investment disputes. The quantity of cases International Center for the Settlement of Investment Dispute has accepted has exceeded 600. However, the issue relevant to the quality of international investment awards has become the important topic of the development of international investment law system, initiating a series of discussion in both academia and practical circle.

In fact, the final awards play decisive roles in respect to the quality of awards in international investment arbitration. The arbitral tribunal should analyze all the controversial points in details and differentiate legal liability of both parties. While it may cause any party to apply for the annulment procedure even the award to be annulled finally if an award failed to argue clearly and sufficiently, an award which has a clear consecution and sufficient argument could convince both par ties spontaneously and enable itself to go into force. If the situation of annulment occurs frequently, not only the reasonable expectation of investor and host country to settle investment disputes by the procedure of international investment arbitration could be affected, but also the risk of instability of investment dispute settlement mechanism increases.

In the practice of international investment arbitration, the quality of awards, the spontaneous result, relies on the judgment of arbitral tribunal in individual case. In academic field, discussing quality of awards needs analysis to reel silk from cocoons. Therefore, clarifying the applying path of superior awards in international investment arbitration and deducing the element of making superior awards aim at inducing legal standards and extract superior awards. The guideline which could be abstracted from awards effectively lead arbitral tribunals to avoid the phenomena of arguing unclearly and
insufficiently and then control the risk relevant to annulment of awards and instability of international investment arbitration mechanism.

**Superior Awards in the Method of Categorization**

The essence of superior awards, aims at analyzing a series of awards under the procedural and substantial issues of the same type, i.e., procedural or substantial contents in the light of specific controversial points. In fact, it is just as looking for a needle in a haystack as pursuing which award belongs to superior case in substantive cases. Also, it is not helpful to merely discuss whether the argumentative structure in some certain award is superior. Therefore, it is necessary to limit the category before conclude superior cases. The method of categorization should be adopted when the author tries to explore the category of superior cases. The role of cases categorization could be divided into micro-scale categorization and macro-scale categorization.

**Superior Part and Inferior Part in Individual Award**

On a micro level, the part of legal reasons and arguments often involve procedural or substantial contents in individual award in the field of international investment arbitration such as Indirect Expropriation, National Treatment, Fair and Equitable Treatment and Exception Clause et cetera. It would be unfair to treat different issues as the same or limit to fixed paradigms when judging the reasonableness of individual award. According to article 52 of Washington Convention, annulling awards could have several reasons. There might exist superior argumentative parts even in the awards which have been annulled by ad hoc committee. After all, the situation arbitral tribunals totally lack reasonable analysis hardly happy while partial reasonable awards appear frequently. The categorization on a micro level, means the content of individual award should be separated into superior part and inferior part rather than super and inferior award in an absolute sense when estimating the reasonableness of awards. The superior part in awards should be invoked while the inferior part excluded in future cases. On the procedural or substantial issues of the same type, arbitral tribunals cite the analytical process of some certain issue instead of the whole award.

The research object in this part specifically refers to supporting points in the range of procedural and substantial issues of same type in awards. The essence of superior awards bases on the supporting points under procedural and substantial issues. The supporting part in terms of specific controversial point is not the whole contents of individual award, but evaluating the superior and inferior quality based on the research of categorization. The author makes a comparative study of the superior and inferior parts on the issue of Fair and Equitable Treatment, Expropriation, Essential Security Exception Clause et cetera rather than adopt the ab-solute opinion when clarifying the superior parts as example of LG&E v. Argentina.

**Superior Award and Inferior Award**

On a macro level, unlimited phenomena of “superior award” or “inferior award” in the absolute sense are rare when making a historic view of the international investment arbitration award. It is not biased only through analyzing the process of all award results formed by the same type of issues in a series of cases to draw the conclusion whether the award is superior. The studies are carried out on relevant awards collected by the author. The objects of study are not all contents of specific awards, but the argumentation section of multiple awards under the same type of procedural or substantial issues. Therefore, the “macro-scale categorization” should compare the argumentation process of completely the same or opposite award results of the fact under the same type of issues in different cases to summarize and induce in the same range of legal relationship and determine which award belongs to the superior one and inferior one.

At present, there are some categorization studies on specific issues (such as fair treatment of equity, exception clauses issue) in academic circle. It is a pity that such discussions were mostly tasted, and stopped at the micro and static-level of classification of procedural or substantial issues, failed to
refining the analysis approach of superior award within the range of same legal relationship on the macro and dynamic level. In this section, the study is carried out on the superior award, and the generation process of the judging legality in the international investment arbitration shall be sorted out from the macro and dynamic level, aiming at inducing the legal standards and refining superior award.

**Definition of Superior Award in International Investment Arbitration**

**Connotation of Superior Award in International Investment Arbitration**

Under the same type of substantial or procedural issues, all awards do not have a substantial impact on the international investment arbitration field without exception. In the substantial or procedural range of the same established award, only the internally high-quality established award made by the judge with occupational prestige is enough to maximize the effectiveness, which is called the “superior award” by the author.

The superiority of superior award refers to that the award of the arbitral tribunal should comply with four requirements: first, rendering an award according to the applicable law of the treaty recognized by the parties; second, rendering an award in accordance with the applicable law of arbitration rules determined by the parties; third, arriving at a reasoning process of the final conclusion by reasonably detailing the award; fourth, appropriately citing established awards. Among them, the more important is the reasonable law reasoning and appropriate invoking of established awards.

The superior award has two characteristics: first, the arbitral tribunal must detail the reasoning arguments while reasonably exercising the discretion. The explanation of the arbitral tribunal can effectively fill the gap in the national obligation regulations related to the investment treaty. The established award with detailed arguments provides a valuable reference to the trial of international investment arbitration cases. Only when the high-quality award without objection emerges constantly, the international investment legal system can be expected to improve. Second, the established award can be invoked appropriately. On the basis of rational argument, the subsequent award made by the arbitral tribunal through invoking established awards is more convincing, and can be widely recognized. So based on this path, when the arbitral tribunal makes an award in the subsequent cases, it should take the initiative to bring into correspondence with superior award, which facilitates the parties to understand and accept the decision, and promote the improvement of international investment arbitration mechanism.

**Beneficial Impacts of Superior Awards in International Investment Arbitration on Risk Control**

Superior awards effectively ensure the public’s reasonable expectations of the fairness and credibility of the arbitration process, so that the parties will consciously obey the conclusion of the arbitral tribunal, helping the parties, especially the host country to execute the award. Meanwhile, the superior award has a pivotal leading role in the subsequent cases.

Only by invoking superior awards, the host country is enough to ensure the effective implementation of the award, and it is especially true when the decision is unfavorable to the host country. This is because the implementation of the award matters the public benefits of the nationals of the host country, and the inferior award may cause the host country failing in or hindering the implementation. In the relationship between the host country and investors, the investors are in protected status, and reserve the right to terminate the business activities in the host country. In contrast, the rights and obligations determined by the host country and the home country of investors through the conclusion of a treaty are long lasting and stable. During the conclusion of international investment treaty, the permanent commitment made by the host country must use the superior award rendered by the arbitral tribunal as an effective guarantee.
It is possible that the parties may apply for annulling the superior award. Even the award annulment mechanism is launched, the inherent superior features in the award (the arbitral tribunal appropriately invoked the established award, and made detailed and reasonable explanation of the reasoning process of the case) are sufficient to effectively promote the ad hoc committee to arrive at high-quality evaluation of the award on this basis. For example, in the Glamis Gold v. United States case in 2009, the NAFTA arbitral tribunal thoroughly discussed the leading role of superior awards of international investment arbitration in subsequent cases, and pointed out that “the superior award with reasonable and detailed reasoning effectively ensures the credibility of the arbitration mechanism.”

**The Demonstration Effect of Superior Awards concerning the Risk Management**

On a macro level, under the same substantive or procedural issue, those awards with clear demonstration, rich arguments and appropriate references to the established awards should be seen as “superior awards”; at micro level, those parts with precise arguing and rigorous reasoning in the given award belong to the “superior part” of the awards. This paper would take the demonstration concerning the applying of “fair and equitable treatment” by the tribunal of LG&E v. Argentina case for example. Generally, the demonstration and internal logic of this section is evident from the tribunal's presentation of the factual findings, clear analytical framework, and application of the framework to the facts of the dispute.

To begin with, the tribunal established factual findings regarding the guarantees to investors set forth in the Gas Law of the host state and its implementing regulations that had been violated. The violations of the Gas Law and its implementing regulation, ultimately provided the factual grounding for the tribunal's conclusion. After stating the factual underpinnings of the present dispute, the tribunal cogently presented the analytical framework and standard for interpretation required of fair and equitable treatment pursuant to the BIT. As the BIT does not expressly define that treatment, the tribunal first examined the BIT’s preamble and then the decisions of prior ICSID tribunals, in accordance with Article 31 of the Vienna Convention on the Law of Treaties. From this BIT language, the tribunal derived the following broad standard of fair and equitable treatment, which including “the stability of the legal and business framework.” Thus far, the tribunal has established a broad standard of fair and equitable treatment from the language of the BIT.

Then the tribunal reviewed prior ICSID and NAFTA tribunal decisions in order to present two more specific components of fair and equitable treatment that have evolved as internationally recognized standards: investor expectations and transparency. According to the tribunal, this interpretation is supported by the BIT and in the decisions of the aforementioned tribunals. The tribunal established the specific components of the broad framework of fair and equitable treatment by first considering the BIT provisions and subsequently adding more specific meaning through the evolution of *jurisprudence constante*. Furthermore, the tribunal applies the framework of fair and equitable treatment it has established to the particular facts of the dispute. These expectations are successfully met in the tribunal’s conclusion that Argentina violated the BIT provisions of fair and equitable treatment. Therefore, the reasoning and conclusion in this part are sound and credible.

**Conclusion**

To sum up, the “superior awards” could be emphasized and invoked by subsequent arbitral tribunal via comparison and analysis on the method of categorization, thus the model effect of superior awards or superior parts could be enhanced. In this way, aiming to the risk management of the large-scale appearance of inferior awards, the subsequent arbitral tribunals could clarify arguments and invoke accurately in awards as much as possible to get support and recognition from both parties and public.

**Acknowledgement**

This research was financially supported by the Youth Research Program of China University of Political Science and Law.
References

