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A blast from the past... the ‘unified Arab investment treaty’ and finality of arbitration awards

Khalil Mechantaf (Baker & McKenzie) · Thursday, November 13th, 2014

In one of the very rare decisions issued by courts in the Arab world applying the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States (the “UAIAC”), the Cairo Court of Appeal has revived in its decision dated February 5, 2014, the principle of finality of arbitration awards, by which it rejected a claim for annulment of a UAIAC award, filed by the State of Libya (first claimant to annulment), the Libyan ministries of Economy and Finance (second and third claimants) and the General Authority for encouraging investments (fourth claimant), against a kuwaiti investor, Al-Kharafi & Sons Co. (case n° 39, judicial year 130/2014). The ratio decidendi of the court’s decision reads the following:

“Since the arbitral award, subject matter of this annulment, is rendered on the basis of the Unified Agreement for the Investment of Arab Capital in the Arab States, to which the Arab Republic of Egypt is a member, such award shall be considered as final immediately following its render by the arbitral tribunal, and the application for annulment shall therefore be rejected pursuant to Article 2(8) of the treaty’s Annex”.

Many of you may be aware of the arbitral proceedings between the parties that lead to a final [award](#) rendered in Cairo on March 22, 2013, and was reported on [IA Reporter](#) and [GAR](#). In summary, Al-Kharafi & Sons Co. (Claimant in arbitration), brought a claim for damages against the State of Libya on the basis of clause 29 of the contract concluded between them in 2006, which provides for a UAIAC clause, as follows:

“Any dispute arising between the parties in connection with the interpretation or enforcement of this contract shall be settled amicably, failing which the dispute shall be referred to arbitration in accordance with the Unified Agreement for the Investment of Arab Capital in the Arab States dated 26 November 1981”.

The claim was brought following the decision n° (203/2010) issued by the General People’s Committee for Industry, Economy and Trade in Libya, which terminated the investment project without awarding the Claimant an appropriate compensation. The final award rendered by a UAIAC tribunal ruled in favor of the Claimant awarding it an astonishing USD 930 Million, which left the State of Libya with no choice but to refuse honoring the award and bring an action for annulment before the Egyptian courts, being the courts of the seat of arbitration.

The Cairo Court of Appeal’s decision is beyond any doubt one of the very rare decisions, if not the

first decision, issued in respect of a UAIAC award, and confirms with it the application of one of the supranational principles of international arbitration... the finality of arbitral awards. In fact, the challenges brought against investment treaty awards has remained one of the dark little secrets of investment treaty arbitration as enforcement of international awards is becoming increasingly unpredictable and expensive, belying the efficiency and effectiveness of arbitration. That should not be anymore the case if an investor is lucky enough to have a UAIAC arbitration as the parties' agreed dispute resolution mechanism.

By way of background, the UAIAC was signed on November 26, 1980 in Amman, Jordan, during the Eleventh Arab Summit Conference. It entered into force in Egypt on July 19, 1992, and is now applicable in twenty-one Arab States. The finality of arbitration awards is provided under Article 2(8) of the treaty's Annex, which reads the following:

“Awards of an arbitral tribunal rendered in accordance with the provisions of this article shall be final and binding. Both parties must comply with and implement the award immediately upon its render unless the tribunal specifies a deferral of its implementation or of the implementation of a part thereof. No appeal may be made against arbitration awards”.

Based on the foregoing, arbitral awards are final and cannot be subject to any challenge brought before the courts of a member State, even if that challenge is on grounds of domestic public policy. The validity of the arbitration award is therefore subject only to the provisions of the UAIAC, irrespective of the grounds of annulment laid down in the law of the seat of arbitration. The principle of finality of awards was included by the drafters of the UAIAC to avoid the common pitfalls in investment treaty arbitration, which allow the courts of the host State to avoid the enforcement of an award condemning the national government's attitude towards inward foreign investments. Additionally, the UAIAC is absent of any provision in respect of the need for an execution order within the meaning of its Article 2(8). This is evidenced by the provisions of Article 11 of the UAIAC, which provides:

“Where the decision of the arbitral panel fails to be implemented within three months of its render, the matter shall be brought before the Arab Investment Court to rule on such measures for its enforcement as it deems appropriate”.

Accordingly, an award debtor has three months to voluntarily enforce an arbitration award. Failing to do so will result in a compulsory enforcement process that can be brought before the Arab Investment Court (AIC). Interestingly, Article 11 limited the powers of the AIC to only review applications for enforcement, instead of annulment of awards, which thus confirms the finality and binding effect thereof. The Cairo Court of Appeal took a formalistic approach in applying such provisions and emphasized the need to respect its international commitments, as follows:

“Any international treaty signed and ratified by the Arab Republic of Egypt becomes an integral part of Egyptian law. If such a treaty includes special rules with regard to arbitration, those rules shall override any other rules laid down in the Egyptian arbitration law n°27/1994”.

As a result, awards rendered under the context of UAIAC do not need to fit in internationalist or nationalist-positivist views and can operate outside the constraints of national legal systems in the Arab world. The court reviewing any claim for annulment in that regard would only be allowed to reject the claim, even when it includes a challenge on the application *ratione materiae* and *ratione personae* of the UAIAC, or even a challenge on public policy.

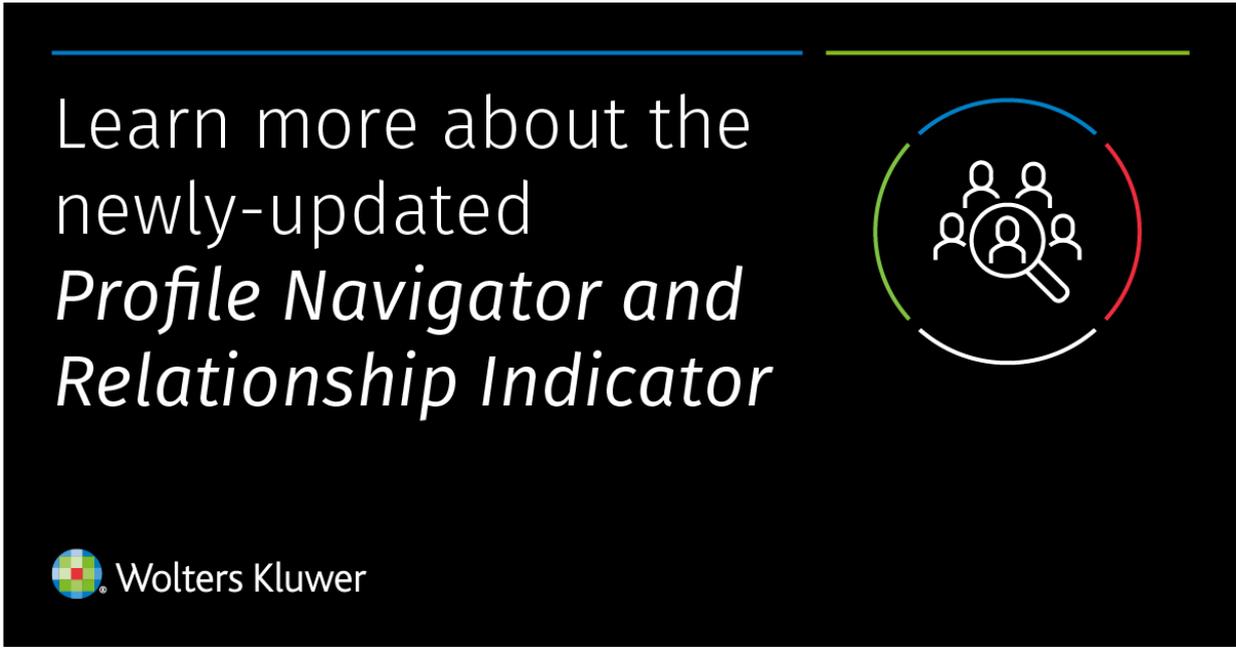
It is expected that the surge of investment claims under the UAIAC as a result of the Arab uprising will trigger further court decisions issued by other member States, which should provide further clarity on the application of Article 2(8) and determine, if any, the limits of application of the principle of finality.

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