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The Ansung Tribunal Gives Its Views On Allocation of Costs Under ICSID Arbitration Rule 41(5)

Shiyu Wang (The George Washington University Law School) · Tuesday, May 16th, 2017

On March 9, 2017, a three-person ICSID Tribunal rendered an Award in *Ansung Housing Co., Ltd. v. People's Republic of China*. The case marks the second time where China appears as a Respondent before an ICSID tribunal. The first case was brought by a Malaysian company in May 2011, but that case was discontinued on May 16, 2013. The *Ansung* Tribunal accepted China's Rule 41(5) objection and dismissed a claim filed by a Seoul-based property developer, Ansung Housing Co. Ltd. ("**Ansung Co.**"), finding that the Korean company failed to sue within the three-year statute of limitations prescribed under the applicable investment treaty. The case raises interesting issues concerning costs.

Summary

In December 2006, Ansung Co. entered into an investment agreement with the local government of Sheyang County in China's Jiangsu Province. The agreement provided Ansung Co. with the exclusive right to build a golf course. The local government promised to provide the company 200 hectares of land in two phases to build a 27-hole golf course. In 2009, Sheyang Island Park, a Chinese-local company, started operating an 18-hole golf course in the same area and the local government took no measures to enjoin this alleged illegal operation. In November 2010, the local government refused to provide Ansung Co. the second phase of 100 hectares of land. In 2011, without the planned full course, and facing competition from Sheyang Island Park, Ansung Co. was unable to profit and had to pull back its entire investment and sell the golf course, resulting in a total loss of more than CNY100 million (USD14.5 million).

According to Article 9(7) of the China-Republic of Korea BIT, "an investor may not make a[n international arbitration] claim . . . if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage." Ansung Co. filed its claim on October 7, 2014. It argued that it first acquired knowledge of its loss or damage on December 17, 2011, after the deal to sell its entire investment in Sheyang-County was closed, so it was still within the three-year period. China argued, however, that Ansung Co. first acquired knowledge of its loss or damage as early as 2007, when Ansung observed the development of a competing golf course at Sheyang Island Park. The competing golf course went into operation in 2009, which is well before October 2011. Pursuant to Rule 41(5), China requested the Tribunal to dismiss Ansung Co.'s claim because the claim was time-barred and, thus, manifestly lacked legal merit. The Tribunal agreed.

Ansung Co. also sought to invoke the MFN clause in Article 3(3) of the China-Republic of Korea BIT to import a provision from a BIT entered into by China with Third States that did not prescribe a temporal limitation for an investor brining a claim against the host. The Tribunal disagreed, stating that Article 3(3) does not extend to MFN treatment for a State's consent to arbitrate with investors—specifically not to the temporal limitation period in Article 9(7).

*Ansung* <u>Tribunal Provides Guidance on Allocation of Costs in Rule 41(5) cases</u>

Rule 41(5) allows a Respondent-State to raise an objection that a claim is manifestly without legal merit at the preliminary stage. If the objection is sustained, the claim will be dismissed. Before *Ansung*, there were only five ICSID cases on Rule 41(5): *Trans-Global Petroleum, Inc. v. Jordan*, *Brandes Investment Partners, LP v. Venezuela*, *Global Trading v. Ukraine*, *RSM Prod. Corp. v. Grenada* and *MOL Hungarian Oil & Gas Co. Plc v. Croatia*.

By way of background, Article 61(2) of the ICSID Convention gives the tribunal discretion to allocate costs of the arbitration as it deems appropriate. Prior to the *Ansung* Award, two of the Rule 41(5) cases discussed above were dismissed. Neither case, however, provided a complete picture of the tribunals' consideration on allocation of costs. In *Global Trading*, the tribunal devoted one paragraph at the end of the decision on the matter. It briefly mentioned two factors relevant to the allocation of costs: the newness of the Rule 41(5) procedure and the reasonableness of both parties' arguments. Since the rule was introduced only four years before *Global Trading* was brought, and since the parties' arguments were both reasonable, the tribunal adopted the "pay-your-own-way" approach and ordered both parties to cover their own costs. In *RSM*, the same year when *Global Trading* was decided, the tribunal did not consider Rule 41(5)'s novelty at all and applied the "cost follow the event" principle, finding that claimant was liable for 100% of respondent's legal costs, the fees and expenses of the tribunal, and the administrative fees and expenses of the ICSID.

Unlike *Global Trading* and *RSM*, the *Ansung* Tribunal provided a detailed analysis on allocations of costs in Rule 41(5) cases.

First, novelty is not within a Tribunal's consideration for costs anymore. *Global Trading*, was decided in 2010 and now in 2017, according to the *Ansung* Tribunal, the Rule 41(5) procedure can no longer be considered new. Even if accepting that "MFN applies to temporal limitation" as a novel legal question, such novelty would not be considered by the Tribunal in its allocation of costs.

Second, neither Claimant's unfortunate position nor its efficiency in the Rule 41(5) procedure provide a good reason to allocate costs in its favor. Ansung Co. submitted that it is a small investor that had already suffered substantial loss because of China's action. Ansung Co. also asserted that it had pursued its claim in good faith, on sound substantive grounds, and "in the most procedurally efficient and economical manner." The Tribunal, however, found that none of these points were relevant to the allocation of costs following a successful Rule 41(5) objection.

Third, the Tribunal focused it analysis on the reasonableness of the Respondent's costs claim. Ansung Co. cited to a non-Rule 41(5) case—*Romak v. Uzbekistan*—and submitted that there is a general practice in investment arbitration disfavoring the shifting of arbitration costs against the losing party. China disputed this and cited *RSM* where the tribunal applied the "costs follow the event" principle. The Tribunal made clear that it did not need to venture into a discussion on either the "costs follow the event" or "pay-your-own-way" approaches. Instead, the only question left was the reasonableness of Respondent's costs claim.

The Tribunal ultimately found Respondent's costs claim to be disproportionate to its Rule 41(5) objection submission and excessive given the one-day hearing. As a result, the Tribunal decided to award China its share of the direct costs of the arbitration proceedings plus 75% of its legal fees and expenses.

Implications

According to its timeline, *Ansung* was registered by the ICSID on November 4, 2014, and the Award was rendered on March 9, 2017 – about two years and four months later. Considering the usual lifespan of ICSID cases, *Ansung* is likely to encourage future respondent-States to utilize Rule 41(5) objections effectively. Under English common law, a similar preliminary procedural mechanism is generally known as "motion to dismiss". In the United States, under Rule 11 of the Federal Rules of Civil Procedure, if a motion to dismiss is granted due to lack of support for pleadings, a court may impose sanctions against the violating attorneys and litigants. In March 2017, the U.S. House of Representatives passed H.R. 720 to make Rule 11 sanctions mandatory.

While there are only six Rule 41(5) tested cases, based on the analysis in *Ansung*, after finding meritless claims, it is likely that tribunals would focus mainly on the "reasonableness" of the costs claimed, and no longer consider the "novelty" of the rule in allocating the costs. But should future parties also worry about the risk of being sanctioned for bringing manifestly unmeritorious claims before tribunals?

On one hand, although sanctions are uncommon in arbitration, there are institutional rules such as

Article 18.6 of LCIA Arbitration Rules (2014) which allow the tribunals to order sanctions against counsels who has violated the general guidelines of the rules. Also, in ICSID arbitration proceedings, the discretion to allocate costs does give tribunals some form of a weapon to use to sanction parties. For example, in *Kim v. Uzbekistan*, the tribunal held the respondent responsible for claimants' entire expert cost (£259,519.76) because respondent's counsel, in violation of "attorney's eyes only" procedural order, copied a high-ranking government official on an email that contained confidential information.

On the other hand, given the preliminary nature of Rule 41(5), the dismissal of claims and the obligation to pay most, if not all, of the arbitration costs already function as "sanctions" against losing parties. Rule 41(5) should be utilized to strike a balance between the need to save time and costs and the guarantee of due process in arbitration proceedings. An actual sanction in addition to a dismissal would probably tip the balance by deterring claimants from bringing their claims.

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