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The PCA's Assistance in the Constitution of an Arbitral Tribunal: Last Breath for Investor-State OIC Arbitrations?

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On 27 March 2017, the Secretary-General of the Permanent Court of Arbitration ("**PCA**") designated an appointing authority in an OIC arbitration by applying the UNCITRAL Arbitration Rules, despite the absence of any reference to these Rules in the OIC Agreement.

This decision, which concerns a pending case, *DS. Construction v. Libya* , could mark the beginning of future changes to OIC investor-State arbitration regime, especially concerning the interpretation of the OIC Agreement's provisions regarding recourse to arbitration.

The current interpretation of the OIC Agreement following the *Al Warraq v. Indonesia* case

With a membership of 57 States, the Organisation of Islamic Cooperation ("**OIC**"), which was established in 1969 to "safeguard and protect the interests of the Muslim world in the spirit of promoting international peace and harmony", is the second largest intergovernmental organization after the United Nations. Member States of the OIC signed the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the OIC (the "**OIC Agreement**"), a copy of which may be accessed here.

The OIC Agreement was signed in 1981, entered into force in 1988 and was ratified by 28 countries.[1)] For over 25 years after its entry into force, the OIC Agreement remained unused in investor-State arbitrations until it was invoked for the first time in 2012, by a Saudi national in the famous *Al-Warraq v. Indonesia* case.

In this case, the claimant, a Saudi national, initiated an arbitration against Indonesia, the respondent, on the basis of Article 17 of the OIC Agreement, of which both Saudi Arabia and Indonesia are member-States. The claims concerned the alleged expropriation of an indirect ownership of capital in a bank.

At the jurisdictional stage, Indonesia argued that Article 17 of the OIC Agreement does not provide a forum for investor-State arbitrations, but only refers to a forum for resolution of inter-State disputes.

The Tribunal finally resolved the dispute between the parties, concluding that Article 17 contained a binding consent to participate in investor-State arbitration.

First, Article 1 of the OIC Agreement defines the "*contracting parties*" as "*[t]he Member States of the OIC signatories to the Agreement*". However, contrary to many other provisions of the OIC Agreement that refer to "*contracting parties*", Article 17 refers to "*parties to the dispute*", thus leading the Tribunal to conclude that Article 17 should be construed as encompassing not only inter-State disputes, but also investor-State disputes.

Moreover, under the OIC Agreement, the investor is also bound by some obligations regarding the respect of public order, morals and public interest.[2)] For this reason, the Tribunal considered that excluding the investor from recourse to arbitration would result in an asymmetry, such that the investor would be bound by obligations without having recourse to sanctions in the event of the State's non-compliance with these obligations.

The Tribunal also took into consideration in its reasoning the fact that the OIC Agreement contains a "fork in the road" clause which gives the investor the right to choose between national courts and an arbitral tribunal, immediately followed by Article 17, referring to arbitration. Accordingly, the Tribunal considered that Article 17 combined with Article 16 leads to the conclusion that Article 17 refers to investor-State arbitration as well.

Since this decision was rendered, requests for arbitration invoking the OIC Agreement have significantly increased. However, a problem has arisen in recent years because the OIC Agreement provides that if a party to the dispute does not appoint an arbitrator, the OIC Secretary-General will step in and make the appointment on the party's behalf. However, in previous cases (notably, in three cases against Egypt in 2014) the Secretary-General has refused to make such appointments, and as reported by some practitioners, this refusal is essentially due to political pressure from some OIC member-States.

The potential interpretation of the OIC Agreement in the aftermath of *DS Construction v. Libya*

In *DS Construction v. Libya*, a still pending case which is mentioned in the introduction above, an Emirati investor has brought a claim against Libya under the OIC Agreement concerning contracts for 19 construction projects in Libya affected by the Arab Spring in 2011. The investor alleges that the State's acts and omissions before, during and after the outbreak of the conflict led to the indirect expropriation of its investment.

In this case, the claimant appointed Stanimir Alexandrov as arbitrator, but Libya refused to appoint an arbitrator. In view of this refusal, the claimant requested the Secretary-General of the OIC to appoint an arbitrator on behalf of Libya. The Secretary-General, however, did not respond favorably to this request and did not explain the reasons for his refusal to appoint an arbitrator.

The claimant then decided to use the most favored nation clause contained in the OIC Agreement to import Libya's consent to the application of the UNCITRAL Arbitration Rules in the Austria-Libya BIT to apply Article 7(2) (b) of the 1976 UNCITRAL Rules which provides that the Secretary-General of the PCA shall designate the appointing authority if the previous designated appointing authority refuses to act or fails to appoint the arbitrator. The PCA agreed with the claimant and designated the French academic Pierre-Marie Dupuy as the appointing authority, who in turn appointed Nassib Ziadé as arbitrator. Thereafter, the two arbitrators appointed Bruno Simma as chairman.

This intervention by the PCA is significant for several reasons. In the short term, this decision would probably have positive consequences for investors, because the PCA has provided a legal precedent for investors seeking to constitute a tribunal to hear their claims under the OIC Agreement. However, in the long term, this decision may also push OIC member-States to decide on how they wish such disputes to be handled. If both the member-States and the OIC Secretary-General continue to refuse to appoint arbitrators, they will likely be placing the constitution of the tribunals in the hands of the PCA rather than the OIC, which is completely contrary to the spirit and the objectives of the OIC.

Potential establishment of the International Islamic Court of Justice

The solution for member-States would be in the establishment of the "organ" envisaged by Article 17 of the OIC Agreement:

> "Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures".

It follows that recourse to arbitration is only a temporary solution, until this "organ" is established. In other words, if this "organ" is established, resorting to arbitration will no longer be possible.

To date, no such organ has been established by the OIC but according to recent information, a process has been commenced by member-States in order to replace the mechanism provided in article 17. This process led to proposals for the creation of a permanent dispute mechanism. Then one might wonder why States would resort to the creation of a completely new organ when they have a pre-existing one. In fact, the OIC already has a judicial organ, the International Islamic Court of Justice ("IICJ").

The ambiguity of the wording of Article 17 makes it difficult to determine exactly the "organ" referred to in this article. However, the fact that the IICJ is "the principal judicial organ of the Organization"[3], whose statutes have already been drafted and adopted by the member-States[4], leads to the conclusion that it would be easier for member-States to establish such an organ. In addition, the reference to the term "established", which can be used to qualify an "institution having been in existence for a long time and therefore recognized and generally accepted"[5], suggests that the organ referred to in this article already exists.

Therefore, if the OIC finally decides to establish the IICJ as the "organ" referred to in article 17, resorting to arbitration will no longer be possible, as only the IICJ would be competent to resolve the disputes. However, if we look at the statute of the IICJ, it is mentioned in the Section "Competence of the Court" in Article 21 that: "Member States of the Organization of the Islamic Conference alone have the right to appear before the Court", which means that this possibility is clearly not offered to a private investor. Regarding this last point, the question remains open concerning the ongoing project on the establishment of a new "organ".

Conclusions

It is for the reasons highlighted above that the decisions discussed in this blog post could represent

the end of investor-State arbitration under the OIC Agreement, as recourse to arbitration on the basis of Article 17 will no longer be possible if the OIC member-States finally establish an "organ", be it the IICJ or a new judicial body.

It will be interesting to see if the OIC member-States will complete this project and take the initiative to establish such an organ in order to avoid PCA interventions and, at the same time, to evade investor-State arbitrations under the OIC Agreement. Further indications will become apparent in the near future, particularly after the issuance of the much-awaited decision of the French court concerning the set-aside proceedings introduced by Libya to contest the PCA's assistance.

In any event, the PCA's decision will undoubtedly mark the start of future changes in investor-State OIC arbitration: the question to be determined is whether these changes will be in favor of private investors, or member-States.

References

?1 The following countries have ratified the OIC Agreement: Burkina Faso, Cameroon, Egypt, Gabon, Gambia, Guinea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mali, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Syria, Tajikistan, Tunisia, Turkey, Uganda, and the United Arab Emirates.

?2 See Article 9 of the OIC Agreement.

?3 Article 14 of the Charter of the Organisation of Islamic Cooperation (OIC)

?4 New Oxford Dictionary of English, Oxford University Press 2001

?5 The statute of the International Islamic Court of Justice was adopted on the 29 January 1987

This entry was posted on Monday, April 15th, 2019 at 9:51 am and is filed under Appointment of arbitrators, Arab World, Fork in the road, Indonesia, Investor-State arbitration, Libya, MENA, Middle East, PCA, Permanent Court of Arbitration
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