Kluwer Arbitration Blog

Impact of Public Interest on Investor-State Arbitration in Turkey

Anil Yilmaz (Curtis, Mallet-Prevost, Colt & Mosle LLP) · Thursday, June 19th, 2014

Although Turkey has ratified the ICSID Convention as early as in 1988, it was not until the recent decade that its domestic law recognized the possibility to resort to arbitration against the State. Until 2000s, disputes arising between a public authority and a private party were to be resolved in an appeal to administrative courts established under Turkish law. Following a series of tense discussions on the traditional role and function of the State, this trend came to an end with the amendments made to Articles 47, 125 and 155 of the Constitution of the Turkish Republic. (Law No: 4446/2, O.G., 14.08.1999, No. 21786)

During the amendment process of the Constitution, questions were raised as to the capacity of arbitral tribunals to resolve public-private disputes and more generally the democratic legitimacy of arbitration as a dispute settlement mechanism. Some claimed that the disputes between public and private actors are typically in relation to public policy and arbitration as a private dispute settlement regime is structurally inadequate to deal with these types of disputes.[1)] Whereas the others maintained that it would not be necessary to 'dramatize' the peculiarities of arbitration since there are sufficient mechanisms to effect justice under the private law regimes.[2)] This cleft of opinion became heavier in favor of the former group, ultimately putting the Turkish government under pressure to take some precautionary measures for a proper transition from litigation to arbitration in the realm of investor-state disputes.

The Turkish Parliament passed the Law No. 4501 under the title of *'Law on the Principles to be followed when Resorting to Arbitration in Disputes arising from Public Services and Concession Contracts'* (Law No. 4501, O.G, 22.01.2000, No. 23941) in an underlying effort to address these suggestions and criticisms. Accordingly, the law makes a distinction between two types of agreements where the State sits as a party. First type is the agreements of a purely commercial nature that demand no special treatment and upon which the norms and rules for regular arbitration proceedings apply. Second type is the agreements with an administrative feature through which the State exercises its public authority as a reflection of its sovereign power (hereinafter referred to as 'State Contracts'). With the implementation of the Law No. 4501, the Turkish legislator set forth a number of mandatory rules and principles for the latter category. These mandatory rules, however, are limited to procedural requirements for arbitration agreements pertaining to the State Contracts. (Law No. 4501, R.G, 22.01.2000, sy. 23941, Art. 4 (2))

This begs the question of whether or not the substantive principles of administrative law may still

find room for application in State Contracts which contain an arbitration clause. Traditionally speaking, these principles, in particular the notion of public interest, provided the State with certain advantages vis-à-vis the private contractors by way of putting an emphasis on public function of the State. It has been argued by some that the lack of responsiveness of the Law No. 4501 to substantive aspects renders the principles of administrative law inoperative and thus hamper the State's public function in this respect.[3)] However, subsequent court practice has shown that from a purely domestic perspective, application of such norms and principles still exists.

At the recognition and enforcement stage or when the seat of arbitration is located in Turkey, the Turkish courts retain jurisdiction to review arbitral awards and their conformity with the public interest. In a 2012 decision, the Turkish Court of Appeals annulled an arbitral award on this basis. The Court, in that particular case, interpreted the public interest as a reflection of public policy and annulled the award accordingly. The Court's judgment stated the following:

> "Awards rendered against the fundamental principles indispensable for states, the mandatory rules aiming to protect the public policy and public interest and the laws regulating the economic structure of the society, would ultimately face public intervention."

This happens to be one of the highlight judgments so far interpreting the relation between investor-state arbitration and the notion of public interest in Turkey. The dispute was between a government agency and a telecommunications company regarding the non-applicability of certain regulatory fees to the investor as it was contemplated under the contract and the seat of arbitration was Istanbul. Although the majority of the ICC tribunal ruled in favor of the investor, the Court of Appeals has ultimately annulled the award. (YG. 13. H.D.,Trh. 17.04.2012. Es. 2012/8426, Kr. 2012/10349; ICC Award Ref. 15322/jhn/gz dated January 24, 2011)

It is, therefore, possible to argue that the Turkish courts would have little hesitation, if not any, to take necessary precautions to retain the public interest. This is no surprise to a lawyer with international practice, as public interest emerges as one of the most commonly referred concepts in limiting fundamental rights in numerous jurisdictions. Then, what is the exact threshold between public interest and fundamental rights? And more specifically, how can we assess whether or not a state conduct or a state regulation could be deemed against public interest in Turkey? To answer this question a recourse to constitutional law becomes apposite.

The concept of public interest is rather subjective and vague under the Turkish law. Judges have a great room for discretion to fill in the legal vacuum left by the ambiguity of the term itself. However, this is not to say that such discretion is without any boundaries. The ultimate body which is to determine the scope and existence of public interest is the Constitutional Court of Turkey. According to the Constitutional Court:

> "(…) the power assigned to the legislator, under no circumstances can be used to undermine or exclude (…) the public interest." (Constitutional Court, Es.1985/1, Kr.1986/4)

A negative wording of this ruling suggests that the legislator in Turkey is under constant duty of taking public interest into consideration. Therefore any rule or provision under the Turkish law which disregards the public interest would be destined to face challenges through its application. Main pillars set forth by the Constitutional Court to determine the boundaries of this concept are the doctrines of proportionality, necessity, reasonableness, fairness and aim for public purposes.[4)] Accordingly there must be a balance between the purposes of a State action and the methods used to reach thereto. Further, such actions should derive from a necessity, shall be reasonable and shall accord to the equality in the greater society.[5)]

Inasmuch as the state actions and regulations are in conformity with these standards, they could be held to offer protection to investors in Turkey. In a similar vein, the investments made in violation of these doctrines will eventually get no protection. Therefore, in their engagements, investors should always seek professional legal consultancy and bear in mind that there is an inherent risk in relation to the enforcement or annulment of terms of a concession in the absence thereof.

References

?1 S Çal, *'Uluslararas? Yat?r?m Tahkimine Yönelik Kimi Ele?tirilerin De?erlendirilmesi'*, Ankara Üniversitesi Hukuk Fakültesi Dergisi, Vol. 57, Issue 4, (2008), pp 163-6

?2 A Ulusoy; *'Yeni Anayasal Durumda Kamu Hizmeti ve Kamu Hizmetlerinin Gorulus Usulleri Kavramlari'* in Hukuk-Ekonomi Perspektifinden Uluslararasi Tahkim ve Kamu Hizmeti (2001), p 21

?3 See A Gulan; *'Kamu Hizmetinin Donusturucu Etkisi Karsisisnda Tahkimin Gelecegi'*, in Hukuk-Ekonomi Perspektifinden Uluslararasi Tahkim ve Kamu Hizmeti (2001), p 150

?4 S Simsek, *'Kamulastirmanin Anayasal Ilkeleri ve Bu ilkelerin Avrupa Insan Haklari Sozlesmesiyle Karsilastirilmasi'*, Adalet Dergisi,, Vol. 44, (2012), p 143

?5 O. O. Tekinsoy, *'?dare Hukukunda Kamu Düzeni Kavram?'*, XII Levha Yay?nc?l?k, (2011), pp. 209-13

This entry was posted on Thursday, June 19th, 2014 at 7:00 am and is filed under Investment agreements, Investment Arbitration, Investment protection, Investor, Turkey
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.