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Treaty Claims and Contract Claims Distinguished by the "Fundamental Basis of the Claim": Iskandar Safa and Akram Safa v. Hellenic Republic

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Dealing with parallel arbitrations can be very difficult, as it is caught between two conflicting constraints: on the one hand, the need to avoid any denial of justice and, on the other hand, the need to avoid two tribunals dealing with the same issue. This problem sometimes arises in treaty-based investment arbitration, particularly when the dispute involves issues relating to a contract that refers to an arbitration mechanism other than the one specified in the treaty's arbitration clause. This was the case in *Iskandar Safa and Akram Safa v. Hellenic Republic*.

After presenting the key facts of the case, this note will address the criterion of the "fundamental basis of the claim" which was used by the tribunal. This may help to identify pure treaty claims and pure contract claims whilst in some cases the distinction is too delicate to be addressed at a preliminary stage and has to be referred to the merits stage.

Background

The classification of claims as treaty-based or contractual was central to the dispute in *Iskandar Safa and Akram Safa v. Hellenic Republic*, where the two claimants were indirect shareholders in a company that owned a shipyard in Greece. The decision on jurisdiction and admissibility was issued in December 2020 (hereinafter "the Decision on Jurisdiction"), but has only recently been made public (with the decision on quantum issued in June 2023), and the developments relating to the statement of facts have been fully redacted. As a result, it is not possible to detail here the circumstances that gave rise to the dispute.

However, from the available excerpts, it can be inferred that part of the construction work was blocked by the Greek government and that the company was placed under special administration. A first arbitration was initiated – but by other claimants (Decision on Jurisdiction, para. 335) – before an ICC tribunal. Iskandar and Akram Safa then submitted their claim to ICSID. Although the submissions of the parties are also redacted, the tribunal's analysis shows that the State raised a jurisdictional objection, claiming that some of the claims submitted to the ICSID tribunal were contractual in nature – essentially the same claims that had been submitted to the ICC arbitration – and therefore outside the jurisdiction of the ICSID tribunal, which had been seized on the basis of the contract.

The “Fundamental Basis” Criterion

This case therefore gave the tribunal the opportunity to confirm the relevance of the criterion of the “essential basis” of the claim, already applied in the *Vivendi* and *Pantechniki* cases, in order to determine whether the claims brought before it were indeed contractual in nature. Applying this criterion consists in determining, for each claim, whether it is based on an alleged breach of a contract rule or of a treaty rule. This then supposes to explore the detail of each claim, which sometimes makes it necessary to almost address the merits of it.

The relevance of this criterion is easy to understand: an arbitral tribunal seized on the basis of an arbitration clause in a contract has, in principle, jurisdiction only to deal with breaches of that same contract. The key to determining its jurisdiction is therefore to determine whether the rules alleged to have been breached are included in the instrument in which the parties have consented to arbitration. Therefore, this analysis may in some respects be quite close to that on the merits, since it involves determining whether the conduct complained of can or must be analysed as a breach of the treaty or a breach of the contract.

This explains the approach taken by the *Safa* tribunal, which decided to examine the details of each of the investor’s five claims in order to determine their “essential nature”. It is very interesting to note that the tribunal reached different conclusions for (almost) each of these claims, thus demonstrating the impossibility of systematising the approach of the jurisprudence regarding the distinction between contractual and treaty claims.

Treaty Claims “by Nature”

First, a claim may be exclusively a treaty claim simply because it is not based on an allegation that could even theoretically constitute a breach of contract: this was the case here with the allegation of defamation, which was not even raised in the ICC arbitration.

However, this is a finding specific to this case, which can be explained by the terms of the contract. There is nothing *per se* to prevent a defamation claim from constituting a contractual claim in general, especially if the contract contains a good faith clause or prohibits the parties from harming each other’s reputation. It is therefore conceivable that such a claim could, in other circumstances, be based on an alleged breach of a contractual term.

Contract Claims “by Nature”

On the other hand, a claim may be clearly identified as a contract claim beyond any possible doubt. This was the case with a number of the claims presented to the ICSID tribunal here. Although there is a lack of detail about the factual background of the case, it appears that the essence of the claim was compensation for lost profits in respect of unpaid sums (allegedly due under the contract) and work proposals that were not submitted, although the claimants considered this to be an obligation of the State under the contract. It was quite easy for the tribunal to determine that these claims were purely contractual, as they were based only on rights contained in the contracts.

One interesting point, however, is worth noting: the tribunal recalls that the claimants in the ICC arbitration were not the same as the claimants in the ICSID case (Decision on Jurisdiction, para. 335). Theoretically, this fact alone could have led to a different solution, since it appears from our understanding of the case that Iskandar and Akram Safa were not direct parties to the contract (and thus to the ICC proceedings), but merely shareholders in the contracting company. It might then have been possible to consider that, in the ICSID proceedings, the claimants were simply deprived of any possibility to make any contract claim, as they had simply no contractual right. However, the tribunal decided mainly on the basis of the content of the claim, considering that the claim of Iskandar and Akram Safa was "in substance for compensation of the same loss" (Decision on Jurisdiction, para. 335) as the one already dealt with by the ICC tribunal. It was then the impossibility of distinguishing between the damage caused by the breach of contract and the breach of treaty that convinced the tribunal that the claim was essentially contractual, rather than the content of the claim itself.

Is Distinguishing Between Contract and Treaty Claims a Jurisdiction or a Merits Issue?

The tribunal's decision on special administration is also interesting because it illustrates the fact that the distinction between treaty and contract claims is almost a merits issue. The issue of special administration had not been submitted to ICC arbitration. As a result, the claims could not be declared inadmissible on that basis alone, even though their treaty nature was not automatically established.

The tribunal therefore referred the classification of the claim to the merits stage. This approach clearly confirms the difficulty of dealing with this issue at a preliminary stage. In fact, in this case, the prior ICC arbitration was of great assistance to the ICSID tribunal: if an issue has been submitted to ICC arbitration, i.e., on the basis of the contract, it is easier to find that issue inadmissible on the basis of the treaty. However, since the special administration issue had not been submitted to the ICC arbitral tribunal, the ICSID tribunal had to further analyse the substance of the claim and decided that it could only do so at the merits stage. On this point, however, the decision is somewhat disappointing, as the tribunal considers this claim to be a treaty claim, without really explaining the reasons for this characterisation (para. 766). The explanation undoubtedly lies in the wording used by the tribunal, which in the end decided not to settle the issue in absolute terms: it held that claims based on provisional administration were admissible "to the extent that they qualify as treaty claims".

This does not necessarily mean that special administration claims are, in any event, treaty claims. Rather, it means that these claims will be considered by tribunals only *if* they qualify as treaty claims, which the arbitrators said was a question of fact. However, the tribunal did not provide any further clarification but merely examined the compatibility of the placement under special administration with the treaty, finding that it was neither contrary to fair and equitable treatment nor contributed to the expropriation of the investment.

This confirms that the recourse to the "fundamental basis" is a balanced way to go beyond the question of the distinction between treaty and contract claims, in particular because it allows to take into account all the factual elements specific to each case. However, by doing so, it also shows that this question is at the exact intersection of jurisdiction, admissibility and merits. It may be relevant to take this into account when discussing the bifurcation in a case where such issue of

distinguishing between treaty claims and contract claims is raised.

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