

ICSID TRIBUNALS CONSIDER “MOST FAVOURED NATION” PROVISIONS

Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan (ICSID Case No. ARB/10/1)

Garanti Koza LLP v. Turkmenistan (ICSID Case No. ARB/11/20)

Introduction

In two recent decisions in *Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan* (ICSID Case No. ARB/10/1) and *Garanti Koza LLP v Turkmenistan* (ICSID Case No. ARB/11/20), the International Centre for the Settlement of Disputes (ICSID) considered whether the most favoured nation clause in a bilateral investment treaty (BIT) applied to the treaty’s dispute resolution provisions, reaching contrary conclusions.

Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan (ICSID Case No. ARB/10/1)

Background

Kilic, a Turkish construction company, brought a claim against Turkmenistan under the Turkmenistan-Turkey BIT.

In a decision released by the ICSID on 25 May 2012, the Tribunal found that the Turkey-Turkmenistan BIT required the dispute to be submitted to the national courts before commencement of arbitration proceedings. While Turkmenistan requested the Tribunal to decline jurisdiction on the basis that Kilic had failed to do so, the Tribunal refused this request and noted that it was yet to decide on the effect of non-compliance with this condition.

Following that decision, Kilic argued that the “most favoured nation” (MFN) clause in the BIT overrode the mandatory provisions which required disputes to be submitted to the national courts. Turkmenistan asserted that Kilic’s failure to comply with the dispute resolution processes deprived the Tribunal of jurisdiction and the mandatory requirements were not overridden by virtue of the MFN clause.

Decision

In a decision dispatched to the parties on 2 July 2013, the Tribunal held that the MFN clause did not encompass or apply to the Turkey-Turkmenistan BIT’s dispute resolution provisions so as to permit Kilic to rely on the dispute resolution provisions of the Switzerland-Turkmenistan BIT.

Accordingly, the Tribunal found that it did not have jurisdiction over this arbitration, unless Kilic was excused from mandatory prior recourse to Turkmenistan's courts by on grounds that such recourse would be obviously futile.

In a separate opinion, appended to the award, one of the arbitrators considered that Kilic's failure to comply with the Turkey-Turkmenistan BIT's dispute resolution provisions went not to the Tribunal's jurisdiction, but only to the admissibility of Claimant's claims.

Garanti Koza LLP v Turkmenistan (ICSID Case No. ARB/11/20)

Background

Garanti Koza LLP, incorporated in the UK, brought a claim against Turkmenistan under the Turkmenistan-UK BIT. The dispute arose out of a contract entered into between State Concern Turkmenautoyollari as the owner and Garanti Koza LLP as the contractor for the execution of the projection, construction, and installation works of 28 highway bridges and overpasses.

Turkmenistan challenged the Tribunal's jurisdiction on the grounds that (i) Turkmenistan had not consented to jurisdiction under the UK-Turkmenistan BIT; and (ii) most of the claims brought by the claimant were contractual in nature and therefore not within the jurisdiction of the Tribunal. In particular, Turkmenistan alleged that Garanti Koza LLP could not use the MFN clause to avoid the specific requirement contained in the BIT that in order for a dispute to be submitted to ICSID, an agreement to ICSID arbitration between the investor and the BIT's Contracting Party must exist given the requirement in the BIT that the parties must choose between UNCITRAL, ICC or ICSID arbitration.

Decision

In a decision dated 3 July 2013, the Tribunal rejected the challenge to its jurisdiction, and held that in this case the MFN clause did apply to the dispute resolution provisions.

In relation to the MFN clause, Turkmenistan had argued that, while an MFN clause may possibly be used to overcome a qualifying condition, such as a waiting period, in the dispute resolution clause of a BIT (as was the case in *Maffezini v. Spain*) it may not be used to "import" the State's "consent to a different arbitration system" from one treaty into another as Garanti Koza LLP was attempting to do in this case. The Tribunal disagreed with this interpretation, and held that the Article 3(3) of the BIT expressly provided that the MFN treatment applied to the dispute resolution provisions of the BIT.

In a Dissenting Opinion, Arbitrator Laurence Boisson de Chazournes asserted that finding in favour of Garanti Koza LLP "would involve a forum shopping attitude," "running against the fundamental principles of international adjudication," to bypass the consent requirement. The arbitrator held that for the MFN clause to apply to the dispute resolution provisions, the parties must first be in a dispute resolution relationship – and in this case, the parties were not.

Observations

The scope and impact of the MFN clauses have been a source of much debate in recent years, with over 20 arbitral tribunals handing down conflicting decisions on the question of whether such a clause can be used to take advantage of more favourable dispute resolution provisions, accompanied by a significant amount of academic discussion and commentary. It is clear from the latest two decisions that no consensus has yet been reached in what the tribunal in *Garanti Koza LLP v. Turkmenistan* described as "*a fiercely contested no-man's land in international law*".

ICSID Caseload Statistics

On 31 July 2013, ICSID released its latest biannual summary of its caseload statistics. For historic ICSID caseload statistics, please see our previous [alert](#).

- 50 new cases were accepted by ICSID in 2012 (14 cases have been accepted this year as at 30 June 2013).
- 65% of ICSID cases are based on bilateral investment treaties for jurisdiction
- 29% of cases concern South American state parties and 24% concern Eastern Europe/Central Asia state parties
- 25% of cases are in the oil, gas and mining sector, with 12% and 11% in the electrical power & energy and transportation sectors respectively
- 63% of cases lead to an award (37% of proceedings are discontinued).
- 76% of cases lead to an award on the merits. 23% of awards decline ICSID jurisdiction
- 68% of arbitrators in ICSID cases are from North America and Western Europe
- The top 3 nationalities for ICSID arbitrator appointments are US -162; French-139; and British-128.

(Statistics taken from The ICSID Caseload – Statistics (Issue 2013-2) available at <http://icsid.worldbank.org/>)

27th August 2013