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Welcome Certainty For Investors From 27 OIC Member States

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Until recently, investors in the 27 states that ratified the Agreement on Promotion, Protection and Guarantee of Investments of the Organisation of Islamic Cooperation (the "OIC agreement") have only had theoretical access to the guarantees of investment protection set out in that agreement. With one exception, investors have found themselves unable, in practical terms, to enforce those protections.

The exception was the case of Hesham Al-Warraq v. the Republic of Indonesia, in which jurisdiction was established under the OIC agreement to allow investors to take host states to arbitration.[1] Al-Warraq's claim related to the nationalization of his stake in the Indonesian Bank, PT Bank Century TBK, following its bailout in 2008. In this case, Indonesia argued that the OIC agreement only provided for state-to-state arbitration. The tribunal, however, concluded that Article 17 of the OIC agreement contains an offer by each OIC member state to arbitrate disputes with investors of other OIC member states, permitting Al-Warraq to continue with his claim.

Subsequent cases brought under the OIC agreement have foundered after respondent states refused to appoint arbitrators (a tactic that the Republic of Indonesia did not employ in the Al-Warraq case) and the OIC secretary-general then failed to make a default appointment on behalf of the respondent state, leaving claimants without a constituted tribunal.

However, on March 27, 2017, the secretary-general of the Permanent Court of Arbitration (the "PCA") stepped in to appoint an arbitrator on behalf of Libya in a case brought by a UAE-based company, DS Construction, under the terms of the OIC agreement, clearing the way for a tribunal chair to be appointed. This development has very significant implications for the enforceability of investment-protection rights by investors from the 27 states in question, and effectively breathes new life into the OIC agreement.

The OIC Agreement

The Organisation of Islamic Cooperation (the "OIC", formerly the Organization of the Islamic Conference) is an intergovernmental organization with a membership of 57 states spread over four

continents, describing itself as “the collective voice of the Muslim world.”[2]

In 1981, the OIC agreement was approved by member states of the OIC and opened for signature.[3] It has been ratified by 27 states, including Egypt, Indonesia, Iran, Jordan, Morocco, Pakistan, Saudi Arabia, Turkey and the United Arab Emirates.[4]

The provisions of the OIC agreement provide broadly similar protections for foreign investors as are found in the global network of bilateral and multilateral investment treaties. These protections offer valuable assurances and incentives for cross-border investment, often facilitating investments that would otherwise be commercially impossible. However, investors have historically been unable to access the dispute resolution provisions of the OIC agreement, rendering the protections largely illusory.

The OIC agreement explicitly provides for arbitration of investment disputes “until an Organ for the settlement of disputes arising under the Agreement is established,” but in Al-Warraq, the Republic of Indonesia argued that the arbitration provision only applied to state-to-state arbitration, and extended no offer to arbitrate to private investors. This argument was dismissed by the Al-Warraq tribunal, including the arbitrator appointed by the Republic of Indonesia.

Appointment of Arbitrators under the OIC Agreement

A stalemate has arisen in recent years because the OIC agreement envisages that, if the respondent state does not appoint an arbitrator, the OIC secretary-general will step in and make the appointment on the state’s behalf. In previous cases, the secretary-general has refused to make the appointment, halting the arbitration process and incentivizing respondent states to refuse to appoint arbitrators, as a means of stalling claims made against them.

According to press reports, on March 27, 2017, the secretary-general of the PCA appointed an arbitrator to the case of D.S. Construction FZCO v. Libya, following Libya’s and the OIC secretary-general’s failure to do so.

The claimant apparently argued that the most-favored nation clause in the OIC agreement entitled the claimant to use the more favorable UNCITRAL Arbitration Rules contained in a different investment treaty entered into by Libya. The 1976 UNCITRAL Rules provide that the PCA secretary-general may designate a new appointing authority in circumstances where an existing appointing authority refuses to act.

The claim relates to 19 construction project contracts in Libya that were affected by the outbreak of the civil war in February 2011. DS Construction was reported to have suffered losses estimated at US$525 million, which it argues are as a result of the Libyan state’s acts and omissions before, during and after the time of the February 2011 uprisings in Libya, which ultimately led to the indirect expropriation of DS Construction’s investments in the country.

Consequences for Investors

This decision is of great interest to investors from OIC member states who choose to invest in another member state; for example, Turkish, Saudi or Emirati companies investing or working in Egypt, Pakistan or Indonesia. The PCA has opened up an avenue for investors to constitute a tribunal to hear their claims under the OIC agreement, providing greater legal certainty and encouraging greater investment by foreign investors.

The decision may also push OIC member states to decide on how they wish such disputes to be handled. If both member states and the OIC secretary-general continue to refuse to appoint arbitrators, they will likely be placing the constitution of arbitral tribunals in the hands of the PCA rather than the OIC.

Furthermore, as noted above, the OIC agreement provides for a dispute settlement organ to be established (it is only until that happens that arbitration is envisaged). To date, no such organ has been established by the OIC, although a number of the required statutes are in place for it to happen. If the OIC is not content for investment disputes under the OIC agreement to be arbitrated, then the PCA's decision may hasten the establishment of this dispute settlement organ. How that organ would be established and operate is unclear, but in the current climate of political and public debate around investor-state dispute settlement, it will be interesting to see whether the OIC takes the initiative to establish a different system.

In any event, the PCA's decision marks a welcome development in creating certainty where there had been doubt.

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[1] Award on Jurisdiction available at: http://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf Final Award available at: http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf

[2] http://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en

[3] http://ww1.oic-oci.org/english/convenion/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf

[4] For a full list of the States that have ratified the OIC Agreement, see: http://www.oic-oci.org/upload/pages/conventions/en/accords_oct_30_en.pdf

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