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Paris Court of Appeal Addresses Constitution of Tribunal in OIC Investment Arbitration

On March 23, 2021, the Paris Court of Appeal issued a decision with important ramifications for investors pursuing arbitration under the Agreement for the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference (“**OIC Agreement**” or “**Agreement**”).¹ Such investors often confront difficulty at the outset of the arbitral proceedings in constituting a tribunal under the OIC Agreement because of a double failure: the failure of the respondent state to appoint a co-arbitrator, and the failure of the Secretary General of the OIC to exercise his authority under Article 17(2)(b) of the OIC Agreement to make the appointment in lieu of the respondent state.

To overcome this difficulty, some investors have requested that the Secretary General of the Permanent Court of Arbitration (“**PCA**”) in the Hague designate a substitute appointing authority in accordance with the UNCITRAL Arbitration Rules, justifying this request on the basis that the most favored nation (“**MFN**”) clause in the OIC Agreement can be used to “import” the respondent state’s consent to UNCITRAL arbitration from one of its other investment treaties. In *Etat de Libye c. D.S. Construction FZCO*, the Paris Court of Appeal rejected the validity of this approach, while at the same time appearing to lend support to an alternative means of constituting a tribunal in arbitrations under the OIC Agreement in the event of the respondent state’s failure to appoint a co-arbitrator.

The OIC Agreement grants various investment protections to nationals of any member state who invest in the territory of any other member state, such as protection against expropriation and the right to MFN treatment. Article 17 of the OIC Agreement entitles an investor to refer a dispute arising under the Agreement to conciliation or arbitration, until such time as the OIC establishes a permanent “organ” for the settlement of disputes. Although the OIC Agreement was signed in 1981, the OIC has yet to establish a dispute settlement organ. Accordingly, Article 17



contains a standing offer on the part of the OIC member states to arbitrate any dispute arising under the Agreement.²

Unusually for an investment treaty, Article 17(2) of the OIC Agreement provides for a *sui generis* arbitral procedure, without incorporating any established set of institutional or *ad hoc* arbitration rules (such as the ICSID Arbitration Rules or the UNCITRAL Arbitration Rules). Article 17(2)(b) lays down the procedure for constituting a three-member tribunal: the investor must appoint a co-arbitrator and name him or her in its notice of arbitration; the respondent state must appoint and name a co-arbitrator within 60 days of receiving the notice; and the two co-arbitrators must select a third arbitrator within a further 60 days. If the respondent state fails to appoint a co-arbitrator, or if the two co-arbitrators cannot agree on the appointment of the third arbitrator, Article 17(2)(b) authorizes the Secretary General of the OIC to make the appointment. Importantly, however, it does not say what happens if the Secretary General fails to exercise this authority.

Apparently bowing to political pressure from the member states, the Secretary General of the OIC has declined to appoint a co-arbitrator in lieu of the respondent state in several reported cases. This situation has led some investors to invoke the MFN clause in the OIC Agreement as a basis to import the respondent state's consent to ICSID or UNCITRAL arbitration from one of its bilateral investment treaties ("**BITs**"). The ICSID Arbitration Rules and the UNCITRAL Arbitration Rules both provide a reliable procedure for constituting a tribunal, granting appointing authority to a neutral and independent third party if the respondent fails to appoint a co-arbitrator or the two co-arbitrators cannot agree on the appointment of the third arbitrator within prescribed time limits.

This approach has now been dealt two major setbacks. In an award issued last year in *Itisaluna Iraq LLC v. Republic of Iraq*, an ICSID tribunal declined to exercise jurisdiction over a dispute arising under the OIC Agreement, rejecting the attempt by UAE and Jordanian investors in an Iraqi telecoms venture to use the MFN clause in the OIC Agreement to import Iraq's consent to ICSID arbitration from its BIT with Japan.³ The tribunal reasoned that the MFN clause "cannot properly be relied upon to incorporate into the OIC Agreement the consent to ICSID arbitration" found in the Iraq-Japan BIT because, *inter alia*, Article 17 of the OIC Agreement "establishes a clearly defined and particular dispute settlement regime with institutional elements that include an arbitration forum with bespoke characteristics" and the "necessary implication" of the omission of any reference to ICSID arbitration in the OIC Agreement "is that this omission was a matter of conscious decision".⁴

Applying similar reasoning, the Paris Court of Appeal has now rejected a UAE investor's attempt to use the MFN clause in the OIC Agreement to import Libya's consent to UNCITRAL arbitration from the Libya-Austria BIT.⁵ D.S. Construction FZCO, the UAE-registered subsidiary of an Indian construction firm, asserted claims against Libya arising under the OIC Agreement and relating to 19 construction contracts affected by the outbreak of Libya's civil war. After Libya and the Secretary General of the OIC both had failed to appoint Libya's co-arbitrator, D.S. Construction requested that the Secretary General of the PCA designate a substitute appointing authority in accordance with Article 6(4) of the UNCITRAL Arbitration Rules, which provides that "if the appointing authority [agreed on by the parties] refuses to act . . . any party may request the Secretary-General of the PCA to designate a substitute appointing authority". The Secretary General of the PCA agreed to the investor's request over Libya's objection; thereafter, the tribunal was fully constituted, fixed Paris as its seat and issued an award upholding its jurisdiction.

On March 23, 2021, the Paris Court of Appeal annulled the tribunal's award on jurisdiction, concluding that the MFN clause in the OIC Agreement could not be used to import Libya's consent to UNCITRAL arbitration from another treaty because Article 17 of the Agreement established a "specific," "autonomous," "closed" and "self-sufficient" arbitral regime for resolving disputes under the Agreement.⁶ The Court of Appeal's reasoning appears shaky, given



that D.S. Construction sought to import Libya’s consent to UNCITRAL arbitration solely to fill an obvious lacuna in Article 17 with respect to the constitution of the tribunal. By contrast, the investors in *Itisaluna Iraq LLC v. Republic of Iraq* sought to supplant the entire *sui generis* arbitral procedure established by Article 17 (including its institutional elements), replacing it with the self-contained and bespoke institutional regime established by the ICSID Convention and the ICSID Arbitration Rules. Unless the Paris Court of Appeal’s decision is reversed on appeal, however, the approach taken by D.S. Construction to constituting a tribunal under the OIC Agreement will remain fraught with risk.

At the same time, the Paris Court of Appeal’s decision appears to lend support to an alternative means of constituting a tribunal in OIC investment arbitration. In particular, the Court of Appeal seems to have endorsed Libya’s argument that D.S. Construction could and should have referred the impasse over the constitution of the tribunal to a national court.⁷ While Libya appears to have argued that a French court would have jurisdiction to appoint an arbitrator in lieu of Libya only if D.S. Construction could establish that the courts of Libya (the respondent state), the UAE (state of the investor) and Saudi Arabia (seat of the OIC) all lacked such jurisdiction, the Paris Court of Appeal left this question open.⁸ Article 1505(4) of the French Code of Civil Procedure grants the President of the Paris Judicial Court universal jurisdiction to serve as a supporting judge (“*juge d’appui*”) if one of the parties to an international arbitration (wherever seated) is “exposed to a risk of denial of justice”, and a strong argument could be made that this jurisdiction exists whenever the respondent state in an OIC investment arbitration fails to appoint a co-arbitrator, given the political pressures faced not only by the Secretary General of the OIC but also by the courts of many of its member states.

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Investors contemplating bringing claims under the OIC Agreement would be wise to approach the constitution of the tribunal deliberately and with full knowledge of the various pitfalls. While reliance on the Agreement’s MFN clause to import the respondent state’s consent to an established set of arbitration rules is fraught with risk, resort to the President of the Paris Judicial Court under Article 1505(4) of the French Code of Civil Procedure appears to offer a promising means of breaking any impasse.

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- ¹ *Etat de Libye c. D.S. Construction FZCO*, Paris Court of Appeal, March 23, 2021, available at https://www.cours-appel.justice.fr/sites/default/files/2021-04/23.03.2021%20-%20CCIP-CA%20-%20%20RG%201805756_.pdf. The OIC Agreement was approved by the 12th Islamic Conference of Foreign Ministers in 1981 and entered into force in 1988. It has been signed by 36 OIC Member States and ratified by 29.
- ² In late 2019, the OIC was reportedly working to establish a dispute settlement organ that would consist of a first instance panel and an appellate committee, both of whose members would be appointed by the OIC member states. See “Investment Dispute Settlement Body for the Organisation of Islamic Cooperation: A Dead End for Claims under the OIC Investment Agreement?”, Kluwer Arbitration Blog, December 29, 2019, available at <http://arbitrationblog.kluwerarbitration.com/2019/12/29/investment-dispute-settlement-body-of-the-organisation-of-islamic-cooperation-a-dead-end-for-claims-under-the-oic-investment-agreement/>. The current status of those efforts is unknown.
- ³ *Itisaluna Iraq LLC v. Republic of Iraq*, ICSID Case No. ARB/17/10, April 3, 2020, available at <https://www.italaw.com/sites/default/files/case-documents/italaw11410.pdf>.
- ⁴ *Id.* at ¶¶ 213, 216.
- ⁵ *Etat de Libye c. D.S. Construction FZCO*, Paris Court of Appeal, March 23, 2021.
- ⁶ *Id.* at ¶¶ 93-107.
- ⁷ *Etat de Libye c. D.S. Construction FZCO*, Paris Court of Appeal, March 23, 2021, ¶ 106.
- ⁸ *Id.* at ¶¶ 57, 106.