TURKCELL v. THE ISLAMIC REPUBLIC OF IRAN & BILATERAL INVESTMENT TREATIES

Gist of the news

On October 16, 2014, the website of *Noodles.com* published the Turkcell company's "Announcement regarding the Arbitration Case in relation to the GSM License Tender in Iran":

Our Company had been awarded with the GSM license following the tender initiated to operate a GSM network in Islamic Republic of Iran. However, on the grounds that the license had been awarded to another company by Islamic Republic of Iran in an unlawful way, Turkcell have filed an ad hoc arbitration on January 11, 2008.

Tribunal awarded that it has no jurisdiction to entertain Turkcell's claims. Our company is assessing possible legal options against the Tribunal's award.

The website of *en.irna.ir* shared with the public a different version of the same case on October 15, 2014:

Turkcell had on January 11, 2008, relied on the arbitration specified in the Law on Encouragement and Support for Investment in Iran and Turkey, raising complaint against Iranian government that it had violated the law, thus asking for confiscation of the property gained in the second operator cellphone auction as was envisioned in the law. Turkcell company had demanded 600 million dollars compensation.

Turkcell claimed winning the bid, thus entitled to gain its contract rights; Iranian government, however, ceded the project to another operator, denying the contract rights of the company and inflicting damage on the company, the company further claimed. Under the claim, Iran's actions were in contradiction with its commitments envisaged in the agreement on supporting and encouraging Iran-Turkey investment, so Iran would have to compensate.

Iranian government defended its rights offering reliable and necessary evidences, rejected Turkcell claim of gaining its rights per the contract. Iran specially emphasized that the claimed rights of Turkcell do not fall in the context of the agreement on encouraging and supporting Iran-Turkey investment.

The file was referred to an international panel, consisting of three lawyers, and the ruling was issued after six years of investigation. Accepting Iran's defenses, the panel rejected Turkcell claim. The court mandated Turkcell to pay Iran the cost of arbitration, which is more than 1.5 million dollars.

To understand the legal repercussions of the above development, we need to look at the following matters:

1. Basic information about the case;

2. Basis of the Claim (BOC);

3. Amicable settlement of dispute;

4. Referral to court or arbitration tribunal;

5. Arbitration Rules of UNCITRAL;

6. Impossibility of referral to arbitration;

7. Enforcement of arbitral award; and

8. Other possible legal recourses.

Basic information about the case

Before entering into legal discussions, it would be useful to become familiar with the case by repeating the summarized information provided by the *americanlawyers.com*:

Amount in controversy: $600 million;
Dispute: Turkcell Iletisim Hizmetleri A.S. (Turkey) v. Islamic Republic of Iran;
Claimant's counsel: Yüksel Yüksel Karkin Küçük; DLA Piper UK;
Respondent's counsel: Eversheds; Centre of International Legal Affairs, Islamic Republic of Iran;
Arbitral Institution and site: Permanent Court of Arbitration (Ad hoc/UNCITRAL)/The Hague;
Arbitrators: Neil Kaplan; Mir Hossein Abedian Kalkhoran; Charles Brower.

Basis of the claim

As reported by Luke Eric Peterson in 2008:

In a tersely-worded filing with the Istanbul Stock Exchange, the largest cellular telecommunications company in Turkey, Turkcell, announced that it has initiated arbitration against the Islamic Republic of Iran.

Turkcell accuses Iran of violating the terms of a bilateral investment treaty between Turkey and Iran:

"This arbitration process relates to a dispute which arises by reason of acts by Islamic Republic of Iran, directly and indirectly, through entities owned and controlled by the Islamic Republic, further to the award of a license to operate a nationwide GSM network in the Islamic Republic on 18 February 2004 to a consortium that was led by our Company, as a result of which our Company has been materially deprived of its investment in that country and incurred significant losses."

Under the terms of the Turkey-Iran bilateral investment treaty, investor-state arbitration is provided for under the auspices of the ad-hoc UNCITRAL rules of arbitration – rules which do not require any mandatory registration or disclosure of information.

To understand the real basis of the claim, the next step is to analyze five paragraphs of Article 11 of the Agreement on Reciprocal Promotion and Protection of Investment between the Government of the Republic of Turkey and the Government of the Islamic Republic of Iran ("the Agreement"). These paragraphs cover (a) amicable settlement, (b) referral to court or arbitration tribunal, (c) arbitration rules of UNCITRAL, (d) impossibility of referral to arbitration, and (e) enforcement of arbitral awards.

Amicable settlement of dispute

Under Article 11(1) of the Agreement:

In the event of occurrence of a dispute between a Contracting Party in whose territory an investment is made and one or more investors of the other Contracting Party with respect to an investment, the Contracting Party in whose territory the investment is made and the investor(s) shall primarily endeavor to settle the dispute in an amicable manner through negotiation and consultation.

It is clear that before starting the arbitration process, Turkcell has gone through the process of "endeavoring to settle the dispute in an amicable manner through negotiation and consultation" but to no avail.

Referral to court or arbitration tribunal

Article 11(2) of the Agreement states that:

In the event that the Contracting Party in whose territory an investment is made and the investor(s) are unable to agree within six months from the notification of the claim by one party to the other, the dispute upon the request of the investor, be referred to

(a) the competent courts of the Contracting Party in whose territory the investment is made, or with due regard of their own laws and regulations to :

(b) the ad hoc arbitral tribunal of three members established in the following manner:

The Party to the dispute that desires to refer the dispute to the arbitration shall appoint an arbitrator through a written notice sent to the other Party. The other party shall appoint an arbitrator within sixty days from the date of receipt of the said notice and the appointed arbitrators shall within the sixty days from the date of the last appointment, appoint the umpire. In the event that each of the parties fails to appoint its arbitrator within the mentioned period or that the appointed arbitrators fail to agree on the umpire, each of the parties may request the President of the International Arbitral Tribunal of the International Chamber of Commerce to appoint the failing party's arbitrator or the umpire, as the case may be. In any event the umpire shall be appointed amongst nationals of a country having diplomatic relations with both Contracting Parties.

The parties to the Agreement opted for the *ad hoc* arbitral tribunal of three members. According to *iareporter.com*:

> Since that time, an IAReporter investigation reveals that a tribunal has been constituted to hear the case. The panel consists of Judge Charles N. Brower (claimant's nominee), Mr Hossein Abedian Kalkhoran (Iran's nominee), and Mr. Neil Kaplan (chair).

The interesting event reported by the IAReporter was that at the beginning of the arbitration procedure, the government of Iran questioned the independence and impartiality of Judge Brower on account of his past service on the Iran-US Claims Tribunal. Further, the law firm of Judge Brower was involved in a particular legal matter involving Iranian parties. The challenge handed to the International Court of Arbitration of the ICC was ultimately dismissed.

Arbitration rules of UNCITRAL

Under Article 11(3) of the Agreement:

> The arbitration shall be conducted according to the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

The UNCITRAL Arbitration Rules include the following steps:

1. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay (Article 32(2)).

2. The award may be made public only with the consent of both parties (Article 32(5)).

3. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case (Article 40(1)).

Impossibility of referral to arbitration

Article 11(4) of the Agreement adds that:

> A dispute primarily referred to the competent courts of the Contracting Party in whose territory the investment is made, as long as it is pending, cannot be referred to arbitration save with the parties agreement; and in the event that a final judgment is rendered it cannot be referred to arbitration.

We know that in the above case, the matter was never referred to the competent courts of either Iran or Turkey but it is interesting to know that in case of such a referral, it would be impossible to refer the case to arbitration if a final judgment was rendered on the issue.

Enforcement of arbitral award

Finally under Article 11(5) of the Agreement:

National courts shall not have jurisdiction over any dispute referred to arbitration. However, the provisions of this paragraph do not bar the winning party to seek for the enforcement of the arbitral award before national courts.

The government of Iran, therefore, can seek enforcement of the arbitral award issued in its favor before the courts of Turkey under the *Act on Private International and Procedural Law* (Act No. 5718). Article 61 of the Act clarifies the matter:

(1) A party requesting enforcement of a foreign award shall attach the copies of the following documents depending on the number of the other parties:
a) The original or duly certified copy of the arbitration agreement or arbitration clause,
b) The original or duly certified copy of the final and executable or binding upon the parties arbitral award,
c) Translations and duly certified copies of the documents listed in (a) and (b) above.

(2) The court shall apply Articles 55, 56 and 57 of this Chapter by analogy with regard to the recognition of arbitral awards.

Other possible legal recourses

Telecompaper.com reported on October 17, 2014 that:

Turkish operator Turkcell is assessing possible legal options against an Iranian tribunal's decision that it has no jurisdiction to approve Turkcell's claims that the license it had won in Iran was awarded to another company by the Islamic Republic of Iran in an unlawful way. Turkcell had filed an *ad hoc* arbitration on 11 January 2008. Turkcell was awarded the GSM license following the tender initiated to operate a GSM network in Iran.

Separately, MTN Group said the tribunal held that it had no jurisdiction to hear the claims brought under the Turkey-Iran bilateral investment treaty, on the basis that no qualifying investment was made within the meaning of the treaty. In a statement, MTN said this failed litigation is the latest in a series of unsuccessful claims that Turkcell has brought in respect of the award of the Iranian license. MTN said it will continue to defend its rights in any jurisdiction wherever the lawsuit is filed.

MTN said Turkcell's claim for damages regarding the awarding of the second GSM license in Iran has no legal merit and MTN will accordingly continue to vigorously oppose it. MTN maintained it did not cause Turkcell to lose its Iran license bid, as claimed by Turkcell. The Turkcell consortium was never awarded the license in Iran, said MTN.

Conclusion

Bilateral Investment Treaties (BITs) are cornerstone of the foreign investment law system. They regulate the investment relationship between the investor and the investee. The provisions included in the BITs need to be revised and reviewed based on the feedback that both sides of the BITs receive in practice. As far as dispute settlement is concerned, the best way to test the relevant provisions of the BITs is to look at the investment-related litigation and arbitration cases. In this report, we tried to analyze a recent case to open the way for more in-depth study of these cases in our future News & Analysis reports. A comparative study of the BITs signed by the government of Iran during the last 60 years may result in interesting discoveries.