



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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Award Name and Date: Ansung Housing co., Ltd. v People's Republic of China – ICSID Case No. ARB/14/25 – Award – 9 March 2017

Case report by: Diego Rafael Barrera ** Editor, Diego Luis Alonso Massa***

Summary: The Tribunal dealt with a claim made under the China-Korea BIT and the ICSID Convention concerning Ansung's investment in a golf course and condominium development project in Sheyang-Xian, China. Before the First Session, China filed "Respondent's Objection Pursuant to ICSID Arbitration Rule 41(5)", contending that Asung's claim is manifestly without legal merits given that it is time-barred. Following preliminary observations on the objection, the Tribunal decided that the start date for the three-year limitation period as set out in Article 9(7) begins with the investor's first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage. The tribunal considered that, based on Article 9(7) of the China-Korea BIT, the end date is the date on which an investor deposits its request for arbitration with ICSID, which must occur before that three years have elapsed from the date on which the investor first acquired knowledge that it had incurred loss or damage.

Therefore, the Tribunal held that the claim is time-barred and, as such, is manifestly without legal merits since the Claimant submitted its dispute before the ICSID and made its claim for purposes of Article 9(3) and (7) of the Treaty after more than three years had elapsed from the date on which the Claimant first acquired knowledge of loss or damage.

Main issues: lack of jurisdiction of the centre and its own competence - lack of legal merit - lack of temporal jurisdiction - time-barred under Article 9(7) of the China-Korea BIT - Article 3 of the China-Korea BIT ("Most-Favoured- Nation Treatment") - Article 41(5,6) of ICSID Convention.

Arbitrators: Dr. Michael Pryles (Appointed by Claimant); Prof. Albert Jan van den Berg (Appointed by Respondent); Prof. Francisco Orrego Vicuna, (President)

Claimant's Counsel: Mr. Kap-You (Kevin) Kim, Mr. Seunghyeon (Alex) Kim, Mr. David MacArthur, Mr. Junu Kim, Mr. Sejin Kim, Mr. Yenping Seng and Mr. Bhushan Satish (Bae, Kim & Lee LLC (Seoul))

Respondent's Counsel: Ms. Yongjie Li, Mr. Chenghua Jiang, Mr. Xiao Fang, Mr. Zhao Sun (Department of Treaty and Law Ministry of Commerce (Beijing)); Mr. Barton Legum, Ms. Anna Crevon, Ms. Brittany Gordon (Dentons Europe LLP (Paris)); Ms. Huawei Sun Mr. Lijun Cao (Zhong Lun Law Firm (Beijing))

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Digest:

1. Facts of the Case

The Claimant is a privately-owned company incorporated under the laws of the Republic of Korea (¶ 1). Ansung's CEO learned about possible investment opportunities to develop and operate a golf course in the Yancheng-Shi district (¶ 33). Ansung's management decided to invest in a golf resort in Sheyang-Xian by acquiring the joint venture company Sheyang Seashore International Golf Course Co. Ltd. (¶ 35). Ansung entered into an Investment Agreement with the Communist Party of the Sheyang Harbor Industrial Zone Administration Committee to build a 27-hole golf course on 3,000 *mu*. (¶ 36). The project consisted of two phases. The first phase was the development of an 18-hole golf course and the second phase was a 9-hole golf course (¶ 36).

The claimants principally dealt with different measures that were the basis of the alleged violations of the China-Korea BIT by the Respondent. Because the Respondent before the First Session, filed Respondent's Objection Pursuant to ICSID Arbitration Rule 41(5), contending that Ansung's claim is manifestly without legal merit, the actions that were the basis of the alleged violations are not relevant. (¶ 36).

2. Procedural Background

The claimant filed the request for arbitration on 7 October 2014. (¶ 6). On 15 September 2016, the Respondent filed its Rule 41(5) Objection together with Legal Authorities RLA-001 through RLA-020. On 27 September 2016, following the Parties' exchanges of correspondence, the Tribunal set the pleading schedule for the Rule 41(5) Objection (¶ 16). Parties submitted their observations on the Rule 41(5) Objections (¶ 17-19). The Tribunal held a First Session and a Rule 41(5) Hearing with the Parties on 14 December 2016 in Singapore (¶ 20). After the hearing, both parties submitted a Statement of Costs (¶ 24). The parties filed its Observations on Submission on Costs (¶ 25,26).

3. Analysis of Legal Issues by the Tribunal

The Tribunal divided the claims into three issues.

3.1 *The legal standard for ICSID arbitration rule 41(5) and (6)*

The Tribunal stated that the test for a preliminary objection under ICSID Arbitration Rule 41(5) is whether a claim is manifestly without legal merit. The Tribunal required Respondent to establish its objection clearly and obviously, with relative ease and dispatch. (¶ 70). So, where a respondent's Rule 41(5) objection is concerned with a limitation period, as the Respondent's is, a tribunal's decision on such an objection constitutes a decision as contemplated by Rule 41(6) regarding a lack of jurisdiction of the Centre and of its own competence as well as regarding manifest lack of legal merit due to a lack of temporal jurisdiction (¶ 73).

3.2 *Article 9(7) of the China-Korea BIT – limitation period*

Article 9(7) of the China-Korea BIT stipulates that: An investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage (¶ 74). Therefore, the parties discussed on the start date (*Dies a Quo*) and the end date (*Dies ad Quem*) of the temporal limitation period.

3.2.1 *Dies a Quo*

The Respondent highlights that Article 9(7) is precise in setting the *dies a quo* as the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage (¶ 76). The Respondent alleged that the Tribunal need not decide an exact date because the first date of losses necessarily was prior to October 2011 (¶ 77). China dismisses Asung's continuing omission justification for lack of support in Asung's own allegations and the applicable jurisprudence (¶ 80).

The Claimant stated that it could ascertain its loss or damage under Article 9(7) only after its expectation and plan for the 27-hole golf course was completely frustrated, owing primarily to the government's continued inaction in providing the additional land for the second phase of the Project (¶ 93). Therefore, the *dies a quo* for purposes of Treaty Article 9(7) must be 17 December 2011 (¶ 94). Ansung claimed that the government never acted and instead simply withheld the second parcel of land, making it a continuing breach of its promise (¶ 99).

The Tribunal states that Claimant repeatedly pleaded facts setting the date at which it first acquired the knowledge that it had incurred loss or damage to be before October 2011 (¶ 107). Therefore, the Tribunal cannot accept the Claimant's attempts to characterize these pre-October 2011 dates as mere background information. The Tribunal also stated that the limitation period begins with an investor's first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage (¶ 110). Ansung's actual sale of its shares on 17 December 2011 marked the date on which it could finalize or liquidate its damage, not the first date on which it had to know it was incurring damage (¶ 110). Consequently, 17 December 2011 is when Ansung's commercial patience ran out and that could not change the date on which Ansung first knew it had incurred damage (¶ 113).

3.2.2 Dies ad Quem

Respondent argues that the end date must be 4 November 2014, the date on which ICSID registered Claimant's Request for Arbitration (¶ 86). China proposes that an investor does not make an ICSID claim or submit a dispute to ICSID arbitration until that claim is registered by the Secretary-General (¶ 88).

Claimant maintains that a claim is made when the notice of intent is submitted (¶ 99). According to Ansung, the submission of a dispute to arbitration is only a formalistic process, whereas making the claim is the more substantive step thus the prescription period applies to the substantive step, i.e. submitting the notice of intent (¶ 99).

For the applicable three-year limitation period, the Tribunal finds that, on the basis of the plain language in Article 9(7) of the China-Korea BIT, the end date is the date on which an investor deposits its request for arbitration with ICSID (¶ 115).

3.2.3 Parties and Tribunal Conclusions

Respondent submits that Claimant instituted this ICSID arbitration more than three years after the date on which it acquired knowledge that it had incurred loss or damage. Based on Ansung's own pleadings, it first learned that it incurred loss or damage related to its Sheyang-Xian golf course project at some point before October 2011. This is more than three years before November 4, 2014, when ICSID registered Ansung's case. Consequently, under the plain terms of Article 9(7) Ansung's claim is barred by the text of the consent it relies upon to invoke the jurisdiction of this Tribunal, and the lack of legal merit of its claims is manifest (¶ 92).

Claimant submits that it meets the three-year limitation period in Article 9(7) of the China-Korea BIT because Ansung came to know, or should have come to know, of its loss or damage around 17 December 2011 and it made a claim with its Notice of Intent on 19 May 2014, approximately two-and-a-half years later. Alternatively, Claimant submits that it made a claim with the filing of its Request for Arbitration on 7 October 2014, which also meets the three-year limitation period in Article 9(7) of the China-Korea BIT. Consequently, Ansung's claim cannot be considered manifestly meritless on grounds that it is time-barred (¶ 104).

Consequently, the Tribunal considered that Ansung submitted its dispute to ICSID and made its claim for purposes of Article 9(3) and (7) of the Treaty after more than three years had elapsed from the date on which Ansung first acquired knowledge of loss or damage. Therefore, the claim is time-barred and, as such, is manifestly without legal merit (¶ 115).

3.3 Article 3 of the China-Korea BIT – MFN treatment

The Claimant argues in the alternative that the Tribunal finds that the claim is made after the three-year limitation period, the MFN Clause in Article 3(3) of the China-Korea BIT operates to save the claim from being time-barred (¶ 124). Since MFN clauses operate to allow investors to import substantive rights from other treaties, the Claimant argues that the principle of extinctive prescription is considered a substantive rather than a procedural right both in international law and in many civil law countries, including Korea and China (¶ 125). Because the three-year limitation period in Article 9(7) of the China-Korea BIT is less favorable to foreign investors than those investors protected by BITs, which do not contain

such a prescription period, Ansung claims the protection of other Chinese treaties lacking prescription periods (¶ 125). Ansung held that the MFN clauses should be interpreted broadly and be extended to the important procedural protection of arbitration provisions (¶ 126).

The Respondent states that Article 3(3) does not apply either in general to Investor-State dispute settlement provisions or in particular to China's temporal condition to consent to arbitration in Article 9(7) (¶ 130). China also argues that Ansung's invocation of the MFN Clause in Article 3(3) fails as a matter of treaty interpretation. The text of Article 3(3) limits MFN treatment to the host State's territory and covers only investment and business activities and the Treaty context confirms that Article 3(3) does not cover dispute settlement (¶ 131). The Respondent contends that Ansung errs in categorizing either equitable prescription or Article 9(7) as a substantive obligation. While in customary international law prescription is a question of admissibility rather than merits, Article 9(7) is explicitly framed as a condition to consent to arbitration and therefore presents a question of jurisdiction (¶ 134). Lastly, Respondent stresses that Claimant has failed to specify a treaty with more favorable treatment as a matter of time limitation, and so has failed to demonstrate more favorable treatment than Article 9(7) of the China-Korea BIT (¶ 135).

The Tribunal does not consider that Article 3(3) of the China-Korea BIT assists Claimant in preventing its claim from being manifestly time-barred under Article 9(7) of the Treaty (¶ 141). The Tribunal finds that the wording of the MFN Clause in Article 3(3) of the Treaty is clear, so it is not necessary to consider additional arguments or previous arbitral decisions on the interpretation of other MFN clauses or treaty practice. The plain reading of Article 3(3) and its interpretation leave no doubt that China has established its Rule 41(5) Objection with regard to the MFN Clause clearly and obviously, with relative ease and dispatch (¶ 140).

4. Decision

The tribunal held Ansung's claim to be time-barred under Article 9(7) of the China-Korea BIT and not protected by operation of the MFN Clause in Article 3(3) of the Treaty. The Tribunal finds the claim hence to be manifestly without legal merit under ICSID Arbitration Rule 41(5). The Tribunal dismisses with prejudice all claims made by Claimant in its Request for Arbitration, pursuant to ICSID Arbitration Rule 41(5).