

## CLIENTTOPICS

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### International Investor-State Arbitration

*Bilateral Investment Treaty Developments*

#### **Breach of Contract Claims Allowed Under Certain Bilateral Investment Treaties**

A little noticed important feature of certain bilateral investment treaties (BITs) is the claim of breach of contract that aggrieved investors may bring against a host government or state.

For example, in addition to permitting claims for breaches or violations of the common BIT protections of “fair and equitable treatment,” non-discriminatory treatment, and “full protection and security,” the UK/Malaysia Bilateral Investment Treaty, allows for the arbitration of any legal dispute or claim arising out of an investment, including a claim for breach of contract. The UK/Malaysia BIT provides that “Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party” and for the arbitration of “any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State.” Similarly, the new China/Germany BIT permits the arbitration of “any dispute concerning investments between a contracting party and an investor of the other contracting party.”

Under the UK/Malaysia BIT and the China/Germany BIT, mere contractual claims are elevated to the level of justiciable international or BIT claims. Clauses in BITs which extend arbitration to breaches of any obligation, including contract obligations, are generally referred to as “umbrella clauses.” In BITs without “umbrella clauses,” contract claims cannot be arbitrated at the international level and must usually be settled as the parties have provided for under the investment contract in question, which may include arbitration or court litigation in the country in which the investment is made, where the judge or the judicial system may not always be independent of the accused government.

BITs with “umbrella clauses” that also provide for the arbitration of disputes in neutral fora such as the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID) provide investors with an added measure of legal protection and mitigate the risk of international investments, especially in instances where the contract counterparty or respondent is a host government or state. Additionally, in certain cases, proving a breach of contract claim may be a lot easier than proving a more traditional BIT claim such as denial of “fair and equitable treatment.”

For more information on The Eren Law Firm and its international arbitration and litigation practice or to learn how The Eren Law Firm may be of assistance to you in protecting your international investment before or after the fact, please contact:

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