ARBITRATION WATCH
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Laws & Treaties

Commercial rent debts in England & Wales to be settled in arbitration by law

On 25 March 2022 the 'Commercial Rent (Coronavirus) Act 2022' came into effect in England & Wales to prevent tenant insolvencies and resolve remaining commercial rent debts because of the pandemic. Up until that date, landlords have been prevented from enforcing recovery of rent arrears during the general moratorium on forfeiture and other landlord remedies.

A legally binding arbitration process will now be available for eligible commercial landlords and tenants who have not already reached an agreement. This will resolve disputes about certain pandemic-related rent debt and help the market return to normal as quickly as possible.

UK consultation on Singapore Mediation Convention

The UK Government launched a public consultation on whether the UK should become party to the Singapore Convention on Mediation 2018 and implement it in UK domestic law. The consultation closes on 1 April 2022.

The Singapore Mediation Convention was negotiated and drafted through the UN Commission for International Trade Law (UNCITRAL), and is designed to provide a consistent framework for the recognition and enforceability of mediated settlements. It came into force on 12 September 2020, and currently has 55 signatories and 9 ratifications.

Arbitration centres

New ICSID Rules are approved

On 21 March 2022 the Member States of the International Centre for Settlement of Investment Disputes (ICSID) approved a comprehensive set of amendments to ICSID's rules for resolving disputes between foreign investors and their host States. The 2022 ICSID Regulations and Rules will come into effect on 1 July 2022.

According to David Malpass, President of the World Bank Group and Chair of the ICSID Administrative Council, "*The amended rules streamline procedures to enable greater access and speed, increase transparency, and enhance disclosures, with the ultimate goal of facilitating foreign investment for economic growth.*"

Established in 1966, ICSID is the only multilateral institution with a specific mandate to facilitate the resolution of international investment disputes under treaties, contracts, and investment laws

LMAA publishes caseload statistics for 2021

The London Maritime Arbitration Association (LMAA) reported 2,777 new appointments under the LMAA Terms and Procedures in an estimated 1,657 references during 2021. The numbers are slightly but not significantly lower than in 2020, perhaps reflecting readjustments which occurred in shipping markets after the turmoil of that year. There was an increase in the number of appointments under the Intermediate Claims Procedure (54 up from 43 in 2020), which is designed to deal with claims between US$100,000 and US$400,000.

An estimated 531 awards were published, the highest number since 2016. The majority of LMAA arbitrations are conducted on documents and written submissions only, but the pandemic did not prevent progress with hearings (in-person, virtual and hybrid) after some interruptions in 2020.

The 2021 statistics show that London-seated arbitration under LMAA Terms and Procedures remains one of the world's leading choices

of arbitration for the resolution of maritime disputes (including shipping, offshore energy and international trade).

Changes in the GAFTA Arbitration Rules

The Council of the Grain and Feed Trade Association (GAFTA) approved changes to the Arbitration Rules No. 125 and the Expedited Arbitration Procedure Rules No. 126. The changes will become effective for contracts entered into on or after 1 March 2022.

The Notices clause in the two sets of rules was amended to reflect the changes made to the Notice Clause in Gafta contracts from 1 January 2022, embracing email and "other mutually recognised electronic method of rapid communication". For the purposes of time limits, the date of despatch shall, unless otherwise stated, be deemed to be the date of service. Service on the brokers or agents named in the contract shall be deemed proper service to the counterparty.

New DIAC Arbitration Rules come into effect

The Dubai International Arbitration Centre (DIAC) issued new arbitration rules. The new rules will apply to all arbitrations referred to DIAC after the rules came into effect on 21 March 2022. The 2022 DIAC Rules embrace modern features of arbitration and, for the first time, include provisions on consolidation of multiple arbitration proceedings, joinder of third parties, expedited proceedings, and emergency arbitration.

The 2022 DIAC Rules have been launched following the Decree No. 34 of 2021, in accordance with which DIAC will accept the filing of new arbitration cases subject to a DIFC-LCIA arbitration agreement. Such cases shall be administered by DIAC under the new 2022 DIAC Rules. On-going cases under the DIFC-LCIA Rules will continue to be administered under the DIFC-LCIA Rules, with procedural adjustments available to allow an award to be issued as an LCIA award (with DIAC remaining responsible for financial aspects of case administration).

Recent Investment Arbitration Cases

Sevilla Beheer V. and others v. Spain, ICSID Case No. ARB/16/27.

Decision dated 11 February 2022 under the Energy Charter Treaty (ECT).

In another renewables dispute against Spain (details obviated), the Tribunal affirmed its competence to decide all claims except whether a 7% tax enacted by Spain on the value of the production of electricity breached Spain's obligations under the ECT. On this particular point, the Tribunal found that the validity of the said tax did not fall within its jurisdiction for it was within the meaning of Article 21(7) of the ECT, and it was thus covered both by the Taxation Carve-Out under Article 21(1) as well as the Tax Claw-Back under Article 21(5).

Rejecting Spain's intra-EU objection, the Tribunal established that: (1) the jurisdictional requirements of Article 26(1)-(3) of the ECT and Article 25 of the ICSID Convention were satisfied; (2) the ECT does not exclude, either expressly or by implication, intra-EU investor-State disputes from the application of its Article 26(3); (3) the Treaty for the Foundation of the EU does not explicitly prohibit to refer investor-State disputes to arbitration under an investment treaty; and (4) even if there was a conflict between EU law and the ECT, EU law could not displace the terms of Article 26 of the ECT (under which the Tribunal was constituted) either by virtue of Article 30 or Article 41 of the Vienna Convention of the Law of Treaties.

As regards liability, the Tribunal found that Spain breached Article 10(1) of the ECT to extent that it applied a new legal regime retroactively to the remuneration already received by the Claimants under Royal Decrees 661/2007 and 1578/2008; and (ii) the said regime did not provide a reasonable return to the Claimants at the promised rate of 7% after taxes.

Case note: England & Wales

DHL Project & Chartering Ltd v Gemini Ocean Shipping Co. Ltd [2022] EWHC 181 (Comm)

Facts: DHL Project & Chartering Ltd ("Charterers") and Gemini Ocean Shipping Co. Ltd ("Owners") negotiated the fixture of a vessel for a carriage of coal. A fixture recap was issued preceded by the words "*subject shippers/receivers approval*". A few days later, the Charterers rejected the vessel on the grounds that she had not been approved by the shippers. The Owners subsequently sought damages for wrongful rejection. A sole arbitrator in London issued an Award finding that the Charterers repudiated the fixture on the basis that the vessel's approval had been unreasonably withheld.

Held: The Charterers successfully challenged the Award pursuant to section 67 of the Arbitration Act. The Court set aside the Award on the basis that the arbitrator had no jurisdiction. Following the decision in *The Leonidas* [2020] EWHC 1986 (Comm), it was found that the "*subjects*" provision was a pre-condition to the effectiveness of both the contract and the arbitration agreement contained within it. Jacobs J. said: "*The placement of this provision at the start, and the use of bold text, reflected the importance of this provision. It indicated, in my view, that it qualified everything which followed. That naturally includes the arbitration clause itself.*" *So, as "shipper/receiver's approval"* was not in fact obtained, the "*subjects*" provision was not satisfied, and so neither the contract nor the arbitration agreement became binding on the parties.

Tip of the month

☑ Can you enforce an award involving a sanctioned person?

The enforcement of a foreign award may be refused where it is contrary to the public policy of the country in which the enforcement is sought. If the award involves a sanctioned person, it is likely that the courts of that country reconsider the enforcement under the light of the applicable sanctions. This may give rise to exceptional measures like, for example, freezing the funds due to the sanctioned person under the award. That said, such measures could be at odds with the standards of protection commonly found in most investment treaties signed between the country of the enforcement and the country of the sanctioned person.

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