ARBITRATION WATCH
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Laws & Treaties

Outcome-related fee structures in arbitration in Hong Kong

On 25 March 2022 the Hong Kong government gazetted the *Arbitration and Legal Practitioners Legislation (Outcome Related Fee Structures for Arbitration) (Amendment) Bill 2022*, which is widely expected to become law later this year.

The new outcome-related fee structures allow lawyers to charge for arbitration work on the basis of three types of success fees, namely: conditional fee agreements, damages based agreements, and a hybrid of elements of both.

The Legislative Council Secretariat of Hong Kong has published paper providing background information to facilitate members' consideration of the Amendment Bill, and summarizing the major views and concerns of the Panel on Administration of Justice and Legal Services.

Call for Evidence response on mediation in UK

The UK Ministry of Justice has published a summary of the responses to a Call for Evidence issued last year against a backdrop of renewed interest in mandatory mediation, making it desirable and in certain circumstances compulsory.

Overall, the results demonstrate a high level of support for making greater use of mediation within the justice system, and mixed views on whether mandatory mediation is desirable. Regarding the value of mediation in providing access to redress, there appears to be widespread agreement that it can produce better outcomes and is a desirable resolution mechanism for parties. Mediation was praised for enabling a more flexible range of outcomes than more adjudicative methods, and for allowing parties to retain a sense of ownership and control over the process. It was also viewed as an option that allows for the preservation of commercial relationships (which can be vital when the parties need to maintain interactions over a long period).

Arbitration Centres

The Kyrgyz Republic ratifies the ICSID Convention

The Kyrgyz Republic deposited its Instrument of Ratification of the ICSID Convention with the World Bank on 21 April 2022, thereby completing the process of joining the institution for the resolution of international investment disputes. The Convention will enter into force for the Kyrgyz Republic on 21 May 21 2022, in accordance with the Convention's Article 68(2). Once in force, the Kyrgyz Republic will become ICSID's 157th Contracting State.

The ICSID Convention establishes the institutional and legal framework for foreign investment dispute settlement. It was created to facilitate investment amongst countries by providing an independent, depoliticized forum for arbitration, conciliation, mediation, and fact-finding.

Amendments to the ICSID Rules approved by the EU Council

On 14 March 2022 the Council Decision (EU) 2022/438 on the position to be adopted on behalf of the EU within the Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID) was published.

The said Decision is addressed to the EU Member States that are Contracting Parties to the ICSID Convention. It concerns the position to be taken on behalf of the EU within the Administrative Council of ICSID in connection with the envisaged adoption of the amended ICSID rules, which will have a legal effect on the EU's treaty practice in the field of investment dispute settlement. The

legal basis of the Decision is the first subparagraph of Article 207(4) in conjunction with 218(9) of the Treaty on the Functioning of the European Union.

The EU Council has decided that the Member States that are Contracting Parties to the ICSID Convention shall express their acceptance of the proposed amendments to the ICSID rules by approving the four draft Resolutions to amend the Regulations and Rules for ICSID Convention proceedings and for ICSID Additional Facility proceedings and to adopt Regulations and Rules for ICSID mediation proceedings and for ICSID fact-finding proceedings.

ICC and Jus Mundi make Awards freely available

The International Chamber of Commerce (ICC) and Jus Mundi have joined forces to make ICC arbitral awards freely available to the global legal community. This partnership allows Jus Mundi to provide free access to all publishable ICC Court awards and related documents made as of 1 January 2019.

Jus Mundi is a Paris-based legal tech providing smart search tools for international law and arbitration research. Jus Mundi strives to make international law and arbitration easily accessible and understandable, using artificial intelligence and machine learning to collect and structure global legal data. By combining law and technology, Jus Mundi enhances lawyers' decision-making by giving them access to critical legal information and analytics on arbitrators, judges, and WTO panellists.

Investment Arbitration

Strabag SE and Others v. Republic of Poland

Decision 48/2022 of the Cour d'Appel de Paris dated 19 April 2022.

Facts: In a partial award dated 4 March 2020, a tribunal administered under ICSID Additional Facility Rules affirmed its jurisdiction over claims brought against Poland by three Austrian companies: Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG (together, "Investors"). The arbitration was ad hoc, but it was made pursuant to the dispute resolution provisions in Article 8 of the Austria-Poland Bilateral Investment Treaty ("BIT"). The Investors' claims arose out of the Polish authorities' denial of legal titles to two hotels and related land plots in Warsaw which were held by a formerly state-owned entity the Investors had acquired during a privatization process. The seat of the arbitration was agreed by the parties to be Paris, France. The award was challenged by Poland before the French courts on the grounds that it was contrary to EU law and, in particular, to articles 267 and 344 of the TFUE.

Held: The Cour d'Appel de Paris recalled that, in *Slovak Republic v. Achmea BV* (Case C-284/16), the Court of Justice of the European Union ("CJEU") held that the dispute resolution provisions in intra-EU BITs were incompatible with EU law. In *Poland Republic v. PL Holdings* (Case C-109/20), the same rationale was applied in relation to arbitration agreements made ad hoc. With these two cases in mind, the Cour d'Appel found that Article 8 of the Austria-Poland BIT was contrary to EU law and that the arbitration, albeit being ad hoc, effectively resulted from the said Article 8.

The Cour d'Appel noted that, whilst the BIT in Achmea provided for the application of the laws of the host State, the Austria-Poland BIT contained no indication as to the applicable law. It was also noted that, by a Procedural Order the parties to the arbitration had agreed, *"the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable and such rules of international law and treaties as the Arbitral Tribunal considers applicable."* Yet, according to the Cour d'Appel, the said agreement did not allow the Tribunal to exclude, or otherwise contradict, the rules and principles of EU law.

The fact on 5 May 2020 Austria had not signed the Agreement for the termination of intra-EU bilateral investment treaties made no difference to the precedence of EU law in this case. After all, on 23 November 2016 Austria had been required by the EU Commission to terminate all its intra-EU BITs. So, despite Austria having not signed the said Agreement, it would be bound to give EU law preference over its national laws and BITs.

Case note: England & Wales

Ducat Maritime Ltd v Lavender Shipmanagement Incorporated [2022] EWHC 766 (Comm)

Facts: In an arbitration conducted under the LMAA Small Claims Procedure, Lavender Shipmanagement Inc. ('Owners') were awarded damages notoriously in excess of their claim.

The facts were as follows. Out of the charter of a vessel, the Owners claimed US$37,831 by way of unpaid hire. Ducat Maritime Limited ('Charterers') admitted that bank charges and additional war premiums were due, but sought to deduct US$15,070 for the vessel's underperformance by way of set off and counterclaim.

The arbitrator found that Owners' claim succeeded, save that one item, US$9,553 for damages for inadequate hull cleaning, was not due and owing.

He found that Charterers' underperformance counterclaim failed. It was common ground that the arbitrator should have awarded Owners US$28,277.91, which represented the claimed sum (US$37,831.83) less the unsuccessful hull cleaning claim (US$9,553.92). Instead, he added the Charterers' unsuccessful counterclaim of US$15,070 for underperformance to the Owners' total claim.

The result was that he found Owners' total claim was actually worth US$53,692.66, which was more than the US$37,831.83 that Owners had, in fact, claimed.

The Charterers made an application to the arbitrator under section 57(3) of the Arbitration Act 1996, seeking the correction of the award on the basis that there had been a clerical mistake or error arising from an accidental slip or omission.

Owners opposed the application and the arbitrator declined to correct the Award. Charterers sought to set aside part of the Award on the grounds of serious irregularity which caused substantial injustice, as per section 68(2) of the Arbitration Act 1996.

Held: Butcher J. found that the arbitrator, after making an obvious accounting mistake, declined to make a correction under the slip rule. There was indeed an irregularity, constituted by the arbitrator's failing to adhere to the common ground between the parties, in deciding how much was owed on a basis that had not been argued by either party, without giving them the opportunity to comment on it. This represented a failure to act fairly and impartially. Butcher J. said: *"It appears to me, however, that a gross and obvious accounting mistake, or an arithmetical mistake of the 2 + 2 = 5 variety made in the award, may well represent a failure to conduct the proceedings fairly, not because it represents an extreme illogicality but because it constitutes a departure from the cases put by both sides, without the parties having had an opportunity of addressing it."*

Such irregularity was causative of substantial injustice since it was held to be unjust that Charterers should, by reason of an error such as that made by the arbitrator, be ordered to pay about 33% more than was due by way of principal, and be ordered to pay interest on its own unsuccessful counterclaim.

Tip of the month

☑ Do States have immunity from execution of a foreign award?

Sovereignty and independence of States prevent one of them from pursuing another in its own courts.

This is known as the doctrine of sovereign immunity. It may prevent the execution in a State of judgements obtained against foreign States or against the State in which execution is sought.

The very same principles apply to the execution of arbitration awards, and no treaty or convention (New York, ICSID, etc.) may derogate the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution of awards.

For more information, please contact any of the following members of our Arbitration Team:

Albert Badia

Daniel Behn

Ana Maria Daza

Erman Ozgur

An International Law Firm

AACNI (UK) LTD.

25 Southampton Buildings | WC2A 1AL London | United Kingdom Phone: +44 02071291271 | Email: aacni@aacni.com