ARBITRATION WATCH
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## Laws & Treaties

### 7th EU package of sanctions exempts arbitration

Following the Russian Federation's annexation of Crimea in 2014, the EU introduced successive packages of sanctions and restrictive measures against some individuals and entities in Russia and Belarus. The Regulation (EU) No 833/2014 established sectorial sanctions and the Regulation (EU) No 269/2014 upheld the freezing of funds of sanctioned individuals and entities.

More recently, on 21 July 2022 the EU adopted a 7th sanctions package (Council Regulation (EU) 2022/1269) which clarifies the scope of EU's 4th sanctions package of 15 March 2022 (Council Regulation (EU) 2022/428) in relation to transactions made with publicly controlled or owned Russian entities. The new package exempts from the ban any transaction which is strictly necessary to ensure access to arbitral proceedings in a Member State, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a Member State.

### Angola signs the ICSID Convention

On 14 July 2022 Angola's Ambassador to the United States of America signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

Angola is the 50th African State to sign the ICSID Convention. To come into force in Angola, the Convention must now be ratified.

To date, the ICSID Convention has been signed by 165 countries, of which 157 have also ratified it.

### Modernization of the Energy Charter Treaty

On 24 June 2022 the Contracting Parties reached an agreement to modernize the Energy Charter Treaty (ECT), an investment treaty that is said to protect fossil fuel investors at the expense of critical climate action.

The Contracting Parties aim to adopt a so-called "flexible approach" to fossil fuel investments, allowing individual members to exclude protection for such investments in their territories in line with their respective climate targets. The EU — now joined by the United Kingdom—intends to distinguish between existing and future fossil fuel investments, setting 15 August 2023 as the dividing line, meaning that only fossil fuel investments made after that date would no longer be protected, albeit with significant exceptions like certain investments in fossil gas, power plant conversions, and gas pipelines.

The agreement in principle will continue to allow foreign investors to use the ECT's investor-state dispute settlement mechanism to bring direct arbitration claims against host countries. The agreed text still includes provisions on fair and equitable treatment, indirect expropriation, and most-favoured nation treatment.

### Mediation proposed compulsory in the UK

Mediation may become compulsory for civil claims up to £10,000 (excluding those for personal injury or housing disrepair), under proposals being unveiled by the UK government.

Parties will be referred automatically for a free hour-long telephone session with a professional mediator provided by HM Courts & Tribunals Service before their case can progress to a hearing. During the session, they will speak separately to the mediator to see if there is any 'common ground'. If a solution is brokered, they will agree over the phone for the solution to be made legally binding through a settlement agreement.

The proposal intends to divert more disputes away from court. The Ministry of Justice believes its proposals will result in up to 20,000 extra cases a year settling away from court and free up to 7,000 judicial sitting days for more complex cases.

# Arbitration Centres

## New VanIAC international arbitration rules

On 1 July 2022 a new set of International Commercial Arbitration Rules of Procedure of The Vancouver International Arbitration Centre (VanIAC) came into force.

The new international rules incorporate innovations such as emergency arbitrator procedures and take into account changes to the UNCITRAL Model Law and Canadian arbitration legislation. They also reassure VanIAC as an arbitral institution for parties internationally, which will now benefit from the new rules' express provision for virtual hearings as well as from VanIAC's adoption of best practices competitive with those of leading arbitral institutions around the world.

VanIAC seeks to make its international rules suitable not only for parties from different countries but also where an arbitration governed by VanIAC rules is seated elsewhere in Canada than VanIAC's home province of British Columbia. Thus, under Rule 1(d) of the new international rules, in a case seated in another Canadian province or territory between parties that have agreed to arbitrate disputes under any VanIAC (or BCICAC) rules, VanIAC's new international rules, rather than its domestic rules, will apply.

VanIAC was established in Vancouver in 1986 under the name British Columbia International Commercial Arbitration Centre.

# Investment Arbitration

## *Green Power KS and SCE Solar Don Benito APS v. Kingdom of Spain*, SCC Case No. 2016/135

Award dated 16 June 2022 under the Energy Charter Treaty

The claimants were two Denmark-based corporate investors in the renewables sector in Spain. Their claims arose out of a series of energy reforms undertaken by the Spanish Government, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers. The main question was of a jurisdictional character, i.e. whether the tribunal had jurisdiction over an intra-EU investment dispute involving Denmark and Spain under the Energy Charter Treaty.

The tribunal answered in the negative, unanimously denying its rationae voluntatis jurisdiction. It found that the EU law, as interpreted by the Court of Justice of the European Union (CJEU) in the *Achmea*, *Komstroy* and *PL Holdings* judgments, precluded Spain from making a valid offer to arbitrate under Article 26 ECT. Whilst Article 26 ECT was the starting point of the tribunal's analysis, it was held to be part of an much wider international legal corpus and should therefore be interpreted in accordance with the Vienna Convention on the Law of Treaties 1969 (Articles 31 and 32) and EU law.

The tribunal found *"necessary to consider whether a unilateral offer to arbitrate under Article 26(3)(a) ECT can be validly given by an EU Member State to the investors of another EU Member State despite the existence of another agreement between these EU Member States which prevents them from making such an offer."* And, under the light of the Treaty on the Functioning of the Euopean Union and the 2020 Intra-EU BITs Termination Agreement, it concluded that *"in the context of intra-EU cases, Article 26 ECT could be interpreted as rendering [Spain's] offer to arbitrate invalid in the sense of 'to be disapplied'"*.

In contrast with more than 60 awards and decisions that have rejected the intra-EU objection before and after the CJEU's judgments in respect of bilateral investment treaties and the ECT, this is the only award that upholds the CJEU's position on the subject.

## Case note: England & Wales

### *National Investment Bank Ltd v Eland International (Thailand) Co. Ltd and another* [2022] EWHC 1168 (Comm)

*Facts*: The claimant, NIB, and the two defendants, Eland Thailand and Eland Ghana, entered into a Collateral Management Agreement in 2001 and into a further agreement in 2004, which provided: *"All parties agree to resolve any differences in a friendly manner by discussions failing which the matter may be referred to an Arbitrator under the Laws of the United Kingdom in London"*. In 2014, Eland Thailand commenced proceedings against NIB in the Accra Court of Ghana. NIB, in turn, served a defence and counterclaim in those proceedings. Yet, in 2016 the two defendants purported to commence arbitration against NIB, who decided to prosecute the court proceedings in Accra. The two defendants then applied to the Commercial Court asking for the appointment of an arbitrator under section 18 of the Arbitration Act. The defendants' application was served on NIB, but NIB did not engage with the same and Andrew Baker J made an order providing for the appointment of a sole arbitrator. NIB, which was not participating in the arbitration, sought a declaration from the High Court under section 72(1) that the sole arbitrator did not have jurisdiction.

*Held*: Foxton J. granted NIB's application. NIB's right to challenge the tribunal's jurisdiction was upheld notwithstanding the section 18 appointment of an arbitrator. Foxton J. said: *"Section 72 provides an important protection to those who do not accept the jurisdiction of the arbitral tribunal and take no part in the arbitral process."* Foxton J. noted the commencement of court proceedings in Accra was inconsistent with, and thus constituted a waiver of, the defendants' right to arbitrate the dispute. In this regard, he said: *"[A]n election is generally final in its effect, and I am unable to see how a party who has commenced proceedings and proceeded to serve their reply and defence to the defendant's counterclaim is entitled to revisit those choices (…) I am satisfied that the conduct of Eland Ghana, cumulatively and against the background of the proceedings commenced by Eland Thailand, involved acting 'in such a way as to lead [NIB] to believe [it] has completed [its] election', and was not reserving the right to take what would, from the perspective of rational businesspeople, have been the wholly uncommercial course of seeking to have claims involving Eland Thailand litigated in Ghana while identical claims involving Eland Ghana were arbitrated."*

## About us

### Daniel Behn (in memoriam)

It is with deep sadness that we inform that Daniel F. Behn passed away on 16 July 2022 in London at the far too early age of 47. Warm, generous, intellectually curious and active, he was a dearest friend, colleague, and scholarly leader to many. Daniel was of Counsel for AACNI in the United Kingdom. Rest in peace.

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


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