ARBITRATION WATCH
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Laws & Treaties

Proposals to update the English Arbitration Act

The Law Commission of England and Wales has unveiled new proposals to update the Arbitration Act 1996, to ensure that the UK continues to be the foremost destination for international arbitration.

The new proposals include measures to improve the efficiency of cases, give further protections to arbitrators, grant extra provisions to the courts to support cases, and refine the process for challenging an arbitrator and their decisions. Consultation proposals from the Law Commission include:

- Provisions to allow arbitrators summarily to dismiss claims that lack legal merit.
- Retaining current duties on the impartiality of arbitrators, with an additional provision on disclosing conflicts of interest.
- Strengthening the immunity of arbitrators and introducing provisions in support of equality among them.
- Extending the capacity of the courts to support arbitration proceedings.
- Refining the process for challenging the jurisdiction of an arbitrator, so that challenges in the courts take place by way of an appeal, rather than a full rehearing.
- Retaining current provisions around confidentiality and privacy in arbitration proceedings.

The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law of England and Wales under review and to recommend reform where it is needed.

Responsible private funding of litigation within the EU

The European Parliament has published a proposed Directive to regulate commercial third party funding of litigation.

Commercial third-party litigation funding (TPLF) is a growing practice whereby private investors (litigation funders) who are not a party to a dispute invest for profit in legal proceedings and pay legal and other expenses, in exchange for a share of any eventual award. Collective redress is only one type of litigation in which TPLF is currently used, with other examples being arbitration, insolvency proceedings, investment recovery, anti-trust claims and others.

The proposed Directive is intended to apply to litigation funders and their funding agreements no matter where the litigation funder is based, provided the proceedings are in the EU. It obliges Member States where third party funding activities are permitted to create a system for monitoring and authorising the activities of funders, led by an independent supervisory authority. Among other requirements, the proposed Directive put a cap on funders' recovery of 40% of the total award "absent exceptional circumstances", which are yet to be defined.

Arbitration Centres

The Scottish Arbitration Centre comes into focus

A decade after it was launched, the Scottish Arbitration Centre has declared it is ready to administer cases under inaugural arbitration rules, effective 18 September 2022.

The Centre offers an arbitral appointments service, where the selection of an arbitrator is made by its Arbitral Appointments Committee, which acts independently from the Board of the Centre. Within

the Committee, there is domestic Sub-Committee and an international Sub-Committee which appoint arbitrators for domestic and international disputes, respectively. The Centre does not maintain a list or panel of arbitrators, so the committee has complete discretion to choose a suitable arbitrator for the dispute from the leading domestic (Scottish) and international arbitrators.

The Scottish Arbitration Centre has also announced the launch of Unicorn, powered by Opus 2, following the publication of the Centre's Rules. All arbitrations administered by the Centre will use the secure, connected eFiling and Case Management system, enabling scale, consistency and convenience for parties and arbitrators.

The Centre, based in Edinburgh, was established in 2011 following the introduction of the Arbitration (Scotland) Act 2010. The Centre is a non-profit company limited by guarantee, made up of the Law Society of Scotland, the Chartered Institute of Arbitrators, the Royal Institution of Chartered Surveyors and the Scottish Ministers.

Revision of the AAA arbitration and mediation rules

A decade after it was launched, the Scottish Arbitration Centre has declared it is ready to administer cases under inaugural arbitration rules, effective 18 Sept

The American Arbitration Association (AAA) has revised its Commercial Arbitration Rules and Mediation Procedures, effective 1 September 2022. The revisions include the addition of new rules, as well as significant amendments to existing ones, on the following areas.

- Providing greater arbitrator discretion to determine the method of hearing;
- Specifying procedures for consolidation and joinder requests;
- Reinforcing the AAA's commitment to preserving the confidentiality of the arbitration process;
- Ensuring the safety and security of user and case information by recommending discussions between the parties and the arbitrator about cybersecurity, privacy and data protection; and
- Supporting the AAA's focus on efficiency and economy throughout the Rules and Expedited Procedures.

Founded in 1926 and head-quartered in New York, the AAA is a not-for-profit organization in the field of alternative dispute resolution, that provide ADR services to individuals and organizations and administers arbitration proceedings.

International Arbitration

Westmoreland Coal Company v. Government of Canada, *ICSID* Case No. UNCT/20/3

Final Award dated 31 January 2022 under NAFTA and UNCITRAL Rules.

An ICSID tribunal has rejected the standing of a US incorporated claimant concluding that it did not have jurisdiction over a NAFTA Chapter Eleven claim against Canada. The proper test to apply was, for the Tribunal, whether the claimant should have owned or controlled the investment at the time the treaty breach was committed.

On the facts, the right to claim had been purchased by first-tier lien holders in US bankruptcy proceedings and was subsequently transferred to the claimant, a company incorporated in Delaware after the claim arose. The shareholders of the said company were the same first-tier lien holders.

To endevour the test on jurisdiction rationae personae, the Tribunal drew the following principles: (i) a sham transaction will be fatal to jurisdiction, (ii) just because a transaction is bona fide does not of itself guarantee jurisdiction; and (iii) there must be beneficial ownership at all relevant times with a NAFTA investor.

Upon these premises, the tribunal's construction of Articles 1101(1), 1116(1) and 1117(1) of NAFTA is

that "*only the party which owned the investment at the time of the alleged treaty breach has jurisdiction ratione temporis to bring a claim*". So, ownership or control at the time the challenged measures were adopted or maintained is of critical importance. The correct construction of the said articles is that the challenged measures alleged to be in breach of "Section A Investment" must relate to the investor of the party that is filing the claim under "Section B Settlement of Disputes between a Party and an Investor of Another Party". In considering the nature of this relationship, the tribunal *"accepts Canada's submission that the challenged measure must 'directly address, target, implicate, or affect the claimant' or have a 'direct and immediate effect on the claimant.' The tribunal does not accept that the effect of this is to impose any constraint on the ability of an investor to seek protection under Chapter Eleven but merely acknowledges the fact that to be entitled to Chapter Eleven protection, an investor must have accepted risk."*

Case note: England & Wales

Sea Master Special Maritime Enterprise & another v. Arab Bank (Switzerland) Ltd [2022] EWHC 1953 (Comm)

Facts: Sea Master Special chartered a ship to Agribusiness United DMCC for a carriage of grain. Arab Bank provided finance to Agribusiness for the purchase of the cargo. The cargo was initially carried under a Bill of Lading, but due to successive changes of destination two Switch Bills of Lading were issued consecutively, the last of which contained a clause reading: "*any dispute arising out of or in connection with this Contract shall be referred to arbitration in London in accordance with the Arbitration Act 1996.*" The original sale fell through and the cargo remained on board for longer than anticipated, being finally delivered without production of the Switch Bill. As holder and pledgee of the Switch Bills of Lading, Arab Bank claimed in arbitration damages for misdelivery. Sea Master, in turn, counterclaimed -among others- a reasonable remuneration and quantum meruit damages. The Tribunal declared it had no jurisdiction and said: "*Even if the claims had any merit, it is difficult to see why they should be covered by the additional bills and the arbitration clause…they are ex-contractual and so we have no jurisdiction to determine them in this arbitration.*" Sea Master challenged the Award as to its substantive jurisdiction pursuant to section 67 of the 1996 Arbitration Act.

Held: Sea Master's challenge failed. As starters, Picken J. said that while section 67 challenge is a rehearing, the Court is, nonetheless, still entitled to have regard to the decision which the arbitrators have made on the jurisdictional issue. With that premise in kind, he went on to interpreting the Award.

He noted that the Tribunal did not decide or raise an entirely new point on the construction and scope of the arbitration agreement. That was never reflected in the Award nor submitted by the parties. The only issue in play was whether Arab Bank was bound by the arbitration agreement (i.e. the "Party point"), not whether Sea Master's claims fell within the scope of the arbitration agreement.

The Tribunal's decision needs to be read only in response of Sea Master's submission that "*the claims for reasonable remuneration fell within the scope of the arbitration clause, but were not liabilities under the contracts of carriage evidenced by the Switch Bills*. So, it was thus clear that the Tribunal's focus was on the "Party point" rather than on the ambit of the arbitration agreement. In the same vein, the "*ex-contractual*" reference to the claims in the Award should not be understood as a reference to the ambit of the arbitration agreement, but as a reference to Sea Master's contention that "*any transfer of the bills did not have the effect of divesting Arab Bank of their liabilities for those claims or of the obligation to comply with the arbitration clause*".

Accordingly, Picken J. concluded that the Tribunal did not decide that the non-arbitrability of Sea Master's claims was due to a limited scope of the arbitration agreement.

About us

Parliamentary briefing session on the Electronic Trade Documents Bill

Albert Badia was invited to a Parliamentary briefing session hosted by Lord Holmes at the House of Lords in Westminster, London, about the Electronic Trade Documents Bill entering Parliament in the coming weeks. Hosted by the International Chamber of Commerce, the event was limited to 30 participants and counted with a wide range of speakers who brought different perspectives regarding the importance of the Bill and the impact it will have on trade for the UK.

The Electronic Trade Documents Bill is the flagship English legislation for trade this year. The bill is critical to operationalising the FTA's, coming at a crucial time with the benefit of making trade cheaper, faster, more secure and more sustainable for businesses.

Tip of the month

☑ Enforcement of arbitral awards: the New York Convention v the Geneva Convention

When it comes the scope of application, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) differs from the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (Geneva Convention) on two points:

First, the New York Convention applies to awards issued in any foreign State, irrespective of whether that State is a Contracting State (article I.1). Unlike the Geneva Convention, it does not confine the recognition and enforcement of awards to the territory of other Contracting States; instead, it provides for an opt-in reservation based on reciprocity (article I.3).

And second, the application of the New York Convention is not contingent on the nationality or residence of the parties. Unlike the Geneva Convention, it does not require the awards be rendered in proceedings "*between persons who are subject to the jurisdiction of one of the High Contracting Parties*".

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

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