



Laws & Treaties

Several EU States announce exit from the ECT

Netherlands has followed Spain and Poland in announcing plans to withdraw from the Energy Charter Treaty (ECT), while other European states are reportedly considering abstaining from a vote next month on reforms to the treaty. France is the latest European country to announce it will pull out of the ECT.

Behind the announcements to exit the ECT are environmental concerns. By some, the ECT locks Member States into unsustainable climate policies while exposes them to litigation against oil and gas investors.

The ECT is a multilateral treaty for energy cooperation that entered into force in 1998 and has more than 50 Member States. One of its main objectives is to protect investors in the energy sector, in particular transnational companies operating in coal, oil and gas extraction, from the political risks involved in cross-border investment. It allows private investors to arbitrate their disputes directly against the Member States, giving rise to multimillion claims and compromising the development of national low carbon policies.

The Treaty further has a sunset clause, which holds the Member States' exposure to claim for two decades after leaving. One potential way of avoiding this clause is to leave the treaty en-masse and to enter into a new agreement that would exclude the resolution of investor-state disputes

Italian Government Passes Reform of Italian Arbitration Law

On 28 September 2022, the Italian Council of Ministers approved a series of legislative decrees aimed to reform the civil justice system. The overarching objective of the reform is to simplify

and improve the efficiency of the Italian civil proceedings and reduce their overall duration, this being one of the conditions for the access to Next Generation EU funding.

When it comes to arbitration, the said decrees address a number of changes, including a mandatory declaration of impartiality and independence by the arbitrators before taking on a case; the arbitrators' empowerment to grant interim measures; or a legal framework to ensure foreign awards can be enforced more efficiently.

Arbitration Centres

ICSID Publishes 2022 Annual Report

The International Centre for Settlement of Investment Disputes released its 2022 Annual Report, featuring an in-depth look at the Centre's activities over the past fiscal year (1 July 2021 - 30 June 2022).

According to the Report, a total of 346 ICSID cases were administered, compared to 332 cases in the previous fiscal year. This is the largest number of cases ever administered at ICSID in a single fiscal year. Overall, ICSID has administered 888 cases under the ICSID Convention and Additional Facility Rules since the first case was registered in 1972. Interestingly, 90% of the hearings were conducted remotely in the past fiscal year.

As in previous years, the majority of cases were instituted on the basis of bilateral or multilateral treaties. Thirty cases asserted ICSID jurisdiction on the basis of a bilateral investment treaty, and six were brought on the basis of the Energy Charter Treaty. In addition, cases were instituted under each of the following agreements: the Dominican Republic-Central America Free Trade Agreement; the North American Free Trade Agreement; the United States-Mexico-Canada Agreement; the Free Trade Agreement between Colombia and El Salvador, Guatemala and Honduras; and the Central America-Panama Free Trade Agreement.

For the first time, a case was brought on the basis of the ASEAN-China Investment Agreement.

Individuals of 42 nationalities were represented amongst the appointments, 45% of first-time appointees being women and 25% nationals of low- or middle-income economies.

SCC and GIAC sign a Cooperation Agreement

The Stockholm Chamber of Commerce (SCC) and the Georgian International Arbitration Centre (GIAC) entered into a Cooperation Agreement.

The purpose of the Agreement is to promote the wider use of arbitration as an independent, impartial, and efficient procedure for the settlement of commercial disputes and to facilitate trade and economic transactions between companies in Georgia, Sweden and in other countries. SCC and GIAC have agreed, for example, to inform each other on significant developments in arbitration laws in their respective countries, to organize a joint event and to assist each other, whenever necessary, in the selection of suitable arbitrators. The SCC will also offer GIAC's tribunals access to the SCC Ad Hoc Platform for their management of arbitrations.

LCIA is licensed regarding Belarus and Russia sanctions

HM Treasury, through the Office of Financial Sanctions Implementation, has issued a General Licence for cases administered by the London Court of International Arbitration (LCIA). This General Licence is issued under Regulation 32 of the Republic of Belarus (Sanctions) (EU Exit) Regulations 2019 and under Regulation 64 of the Russia (Sanctions) (EU Exit) Regulations 2019.

The General Licence extends to all cases administered on the basis of the LCIA Rules, and covers payments to the LCIA by Designated Persons (DPs), companies owned and controlled by DPs or their legal representatives. It enables the LCIA to perform its obligations in relation to binding arbitration clauses whilst, at the same time, supports the use of sanctions in the war against Ukraine.

PCA signs a Host Country Agreement with Ecuador

The Minister of Foreign Affairs and Human Mobility of the Republic of Ecuador and the Secretary-General of the Permanent Court of Arbitration ("PCA") signed a Host Country Agreement that establishes a framework for PCA proceedings and other activities to take place in the country.

By the terms of the Host Country Agreement, Ecuador grants privileges and immunities to officials of the PCA, arbitrators, and participants in PCA-administered cases. The Agreement also establishes a framework for the PCA to request the use of facilities, as needed for PCA-administered proceedings and PCA meetings taking place in Ecuador.

Since the 1990s, the PCA has adopted a policy of concluding Host Country Agreements with its Contracting Parties with the goal of making its dispute resolution services more widely accessible throughout the world, not just at its headquarters in The Hague. Other countries with which the PCA has concluded Host Country Agreements include Argentina, Brazil, Chile, China (in respect of Hong Kong SAR), Costa Rica, Djibouti, India, Ireland, Malaysia, Mauritius, Portugal, Singapore, South Africa, Uruguay and Viet Nam.

ANEC publishes Optional Additional Standard Clauses

ANEC has published three Optional Additional Standard Clauses: 301. *Anti-boycott clause*; 302. *Trade Sanctions Clause*; and, 303. *Anti money laundering clause*. All three clauses are optional and do not form part of ANEC Standard Contracts. In case parties decide to use them, they must be referred in the business confirmation.

ANEC says: "They are not intended to be worldwide clauses. The intention is to adopt them for the contracts involving export of Brazilian products. The proposal does not collide with clauses used at destination and/or for CIF sales."

ANEC is the acronym of Associação Nacional dos Exportadores de Cereais, an association of cereal exporters of Brazil which -among other services- publishes standard contracts for the trade of grains and vegetable oils.

Investment Arbitration

Mathias Kruck and others v. Kingdom of Spain,
ICSID Case No. ARB/15/23

Decision on Jurisdiction, Liability and Principles of Quantum dated 14 September 2022 under the Energy Charter Treaty 1994.

This dispute revolves around investments in photovoltaic power plant facilities made by a group of German investors in different regions of Spain. The investors' claims arose out of a series of energy reforms undertaken by the Spanish Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers. The majority of the Tribunal found that Spain breached the investors' legitimate expectations that their investments would enjoy a stable feed-in-tariff scheme.

Spain's pleadings based on considerations of EU law were rejected by the Tribunal. Article 42(1) of ICSID identifies the law to be applied as such rules of law which may have been agreed by the parties, and in the absence of such agreement, the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

In the present case, by agreeing to arbitrate under Article 26(4) of ECT, the Parties expressly agreed that the Tribunal should decide the issues in dispute in accordance with the Treaty and the rules and principles of international law. The only question in the present case is whether, as Spain submitted "*EU Law [...] is in fact international law directly applicable to the merits of this dispute, in accordance with Article 26 ECT ...*"

According to the Tribunal, "*there is no reason to suppose that the term 'international law' in ECT Article 26(6) has a meaning different from the term 'international law' in Article 42(1) of the ICSID Convention. The Tribunal considers that the question whether EU Law 'is in fact international law' must be viewed in this context, and that the question has one answer, applicable as between*

any and all ECT Contracting Parties. Within the EU, EU Law has a privileged status by virtue of the principles of its supremacy and its direct effect. But on the international stage it is a regional legal system (...) Put in other words, in the absence of some provision in the ECT admitting that EU law can alter the scope and content of rights and duties established by the ECT, EU law cannot have such an effect."

Case note: England & Wales

Soleymani v Nifty Gateway LLC [2022]
EWCA Civ 1297.

Facts: Mr Soleymani, an individual resident in Liverpool, took part in an online auction held on a platform of Nifty Gateway LLC, a corporation registered in the State of Delaware with business premises in New York. In the said auction, Mr Soleymani placed a bid for non-fungible tokens (NFTs) associated with an artwork. His highest bid was for USD 650,000, which placed him in the third place. Pursuant to the "ranked auction" terms, his third position assigned him an undesired third edition of the said artwork. Mr Soleymani said he was unaware of such terms and denied liability for his bid. Nifty Gateway LLC sought payment of the bid and initiated arbitration in New York pursuant to a clause contained in its online terms. Shortly afterwards, Mr Soleymani commenced a claim before the English Court. He sought declaratory relief that the arbitration clause was unfair and not binding as contrary to the Consumer Rights Act 2015. The High Court denied jurisdiction and granted a stay of the proceedings in favour of the New York arbitration pursuant to section 9 of the Arbitration Act 1996.

Held: On appeal, the Judge's decision was overturned. The Judge erred in staying the proceedings without determining whether the arbitration clause was fair (and therefore enforceable) under the Consumer Rights Act 2015. According to the Court of Appeal, Mr Soleymani should be allowed to proceed to a full trial in the English Courts to determine whether or not Nifty Gateway LLC is entitled to rely on the arbitration clause.

According to Lord Justice Birss, the vindication of consumer’s rights in the context of online transactions “directed to or targeted at this country” is best decided by a domestic court. He said: *“the domestic court is better placed to undertake the fairness assessment under domestic law than a foreign arbitrator would be applying that law.”*

In a case in which a consumer is relying on his or her rights under domestic law to contend that the arbitration clause is null and void, it is more appropriate for the court to decide the issue than leaving it in the first instance to the arbitral tribunal. Birss LJ added: *“if the arbitrability issue is likely to come before the court in any event under enforcement, then that is a powerful factor in favour of the court deciding the issue rather than leaving it to the arbitration despite the arbitration agreement giving Kompetenz-Kompetenz to the arbitrator.”*

Birss LJ also observed that, *“transposed into a consumer context, the privacy of arbitration is not such an advantage from a public policy standpoint”*. Due to their precedential value, all decisions on consumer rights should be made in public as they are not only for the benefit of the individual consumer in the instant case but for the benefit of the consumers as a class. *“This publicity feature - Birss LJ concluded- is a further reason*

why the principle articulated in the previous paragraphs should apply in the consumer context. Decisions about consumers’ rights should normally be made in public, in a court.”

Tip of the month

☑ Are all disputes *arbitrable* ?

The New York Arbitration Convention 1958 requires that all arbitrable disputes must concern “a subject matter capable of settlement by arbitration” (Article II.1). This requirement has been construed differently by the national courts of the Contracting States.

Some courts, like those of Switzerland and Austria, have determined the arbitrability of a dispute according to the law applicable to the arbitration agreement, or to the law of the country where the award was or shall be made, i.e. seat of arbitration (Article V(1)(a)). Other courts, like those of Italy, Belgium and the United States, have determined the issue pursuant to their own system of law, i.e. lex fori (Article V(2)(a)).

In every case, the arbitrability of the dispute is ultimately based on considerations of public policy which may be enshrined in legislation, common law, or both.

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



Albert Badia



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

AACNI (UK) Ltd. is a limited liability company with VAT no. 996434860 and registered in Thorntons, Whitehall, 33 Yeaman Shore, Dundee DD1 4BJ, United Kingdom, under no. SC354717. AACNI is a trademark registered in the EU with no. 7.516.776. The contents of this publication express the views of the editors only. They do not provide or supplement legal advice.