ARBITRATION WATCH
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Laws & Treaties

Suriname accedes to the New York Convention

Suriname has just become the 171st State Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('the New York Convention').

The New York Convention was accessed to by Suriname on 10 November 2022 and will enter into force in that State on 8 February 2023.

European Parliament resolution on the modernisation of the Energy Charter Treaty

The European Parliament has published its Resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty ('ECT'). It acknowledges that the current ECT is an outdated instrument, which no longer serves the interest of the European Union, especially with regard to the objective to become climate neutral by 2050.

The Resolution recalls the Parliament's position that the EU and its Member States should not sign or ratify investment protection treaties that include the ISDS mechanism, and regrets the fact that the modernised ECT maintained this outdated dispute settlement mechanism, stressing that investment arbitrators often disregard the states' public policy objectives, especially when it comes to phasing out fossil fuels or the protection of the environment;

It also calls on the Commission to expressly support including within the UNCITRAL process and outputs a mechanism by which states can efficiently withdraw consent for ISDS from their treaties, or terminate their investment treaties.

Arbitration Centres

New release of anonymized SCC Awards

The SCC Arbitration Institute, in collaboration with the International Council for Commercial Arbitration and Kluwer Arbitration, will publish anonymized SCC awards in the Kluwer Arbitration database. A new upload of materials from the 2022 volume of the Yearbook Commercial Arbitration is now available in the Kluwer Arbitration database. The materials include ten unpublished awards rendered under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce between March 2019 and February 2022.

Aiming to increase access to awards of general interest rendered in SCC arbitrations, a joint ICCA-SCC initiative was launched in 2020. Under this initiative, entitled ICCA Focus on Sweden, a selection of anonymized SCC awards is annually published alongside Swedish court decisions and arbitration-related secondary sources.

Arbitrating Small Value Claims in Investment Arbitration

The Investment Arbitration Subcommittee of the International Bar Association ('IBA') has published the report called "Arbitrating Small Value Claims in Investment Arbitration". The Report examines the mechanisms and strategies available to the parties to calibrate the time, effort, and financial resources mobilised and invested to arbitrate small value investment claims in a manner that is commensurate with the sums at stake.

Small value claims in investment arbitration exist and represent a sizeable percentage of investment cases –across arbitral institutions, industry sectors, and geographic regions. Underlying this premise is the definition of a small value claim, which for purposes of the Report, is a case in which the amount claimed is no greater than US$50m or €50m.

New Arbitration Rules of the Bahrain Chamber for Dispute Resolution

On 1 October 2022, the new Rules of Arbitration of the Bahrain Chamber for Dispute Resolution ('BCDR') came into effect. The 2022 set of rules override its predecessor of 2017, and will be applied in all arbitrations commenced on or after 1 October 2022.

The 2022 BCDR rules require disclosure of any third-party funding arrangement that may have been entered into at any time before or during the arbitration. This requirement allows the arbitrators to fully assess the existence of any conflict of interest that may arise from the involvement of a third-party funder, as well the impact of third-party funding on costs.

Other key features include the arbitrators' power to order security for costs, the adoption of electronic communications (including hearings, orders and awards), and the termination of proceedings where no steps have been taken in the arbitration for at least six months and the parties raise no justifiable objections to termination.

BCLP Arbitration Survey 2022: The reform of the Arbitration Act 1996

Bryan Cave Leighton Paisner LLP ('BCLP') has published its findings from the "BCLP Arbitration Survey 2022: The reform of the Arbitration Act 1996". It canvased views on the Arbitration Act 1996 ('the Act'), identified potential areas of reform, and shared the results with the Law Commission as part of its ongoing consultation process. The key findings of the survey included:

- 74% of respondents gave the Act a rating of or higher on a scale of 1 to 10.
- 83% of respondents favoured either full codification of the duty of confidentiality or the embedding of a general principle of confidentiality in the Act.
- 77% of respondents thought that the Act should include an express provision of summary determination or disposal.
- 67% thought the right of appeal on a point of law should be retained.

Investment Arbitration

LSG Building Solutions GmbH and others v. Romania, ICSID Case No. ARB/18/19.

Decision on Jurisdiction, Liability and Principles of Reparation dated 11 July 2022 under the ECT and the ICSID Convention.

This is a dispute brought against Romania by investors from Austria, Cyprus, Germany and the Netherlands with interest in a photovoltaic power plant in Romania's Giurgiu region. The claim arises out of the changes brought about by Romania between 2013 and 2018 on the incentive scheme it had in place to attract investors in the renewable energy sector.

Romania challenged the jurisdiction of the Tribunal. It contended that, pursuant to Art. 41 of the Vienna Convention on the Law of Treaties 1969, the Treaty of Lisbon 2007 -which amended the Treaty on the European Union 1992 (TEU) and the Treaty of Rome with the Treaty for the Functioning of the European Union (TFEU)- modifies and conflicts with the ECT, having the effect of displaying the arbitration clause in Art. 26 of the ECT as between EU Member States. Romania signed and ratified the Accession Treaty in 2005, and officially acceded to the EU on 1 January 2007.

The Tribunal upheld jurisdiction under Art. 26 of the ECT and declared that Romania breached the standards of protection of Art. 10(1) of the ECT. It took the view that there is no conflict between Art. 26 of the ECT and Arts. 267 and 344 of the TFEU. The ECT and EU law can co-exist. It said: *"Assuming for the sake of the argument that the ECT and the TFEU can be considered 'successive treaties' (with the earlier treaty being the ECT and the later treaty being the TFEU), the Tribunal is unconvinced that the ECT and the TFEU concern the same subject-matter."*

The Tribunal also found that the CJEU's Judgment in Komstroy is irrelevant to the Tribunal's determination on jurisdiction. *"Assuming ad arguendum that the CJEU has the monopoly of interpretation of the EU Treaties, this does*

not mean that the CJEU has the monopoly of interpretation over the ECT. The ECT is a multilateral treaty, to which the EU is a party, but it is not an 'EU Treaty' in the meaning of either Art. 19 of the TEU or Art. 267 of the TFEU."

As regards the potential to enforce the award within the *EU, the Tribunal cited the Vattenfall award and said that the "unenforceability of this decision is a separate matter which does not impinge upon the Tribunal's jurisdiction".*

Case note: England & Wales

Royal & Sun Alliance Insurance Ltd and others v Tughans [2022] EWHC 2589 (Comm).

Facts: This case deals with a "triple crown" challenge brought by Royal & Sun Alliance Insurance Ltd. ('RSA') to a Final Arbitration Award ('the Award') in which RSA was obliged to indemnify a law firm named Tughans in respect of certain losses and liabilities. Tughans' notice of arbitration expressly disavowed claims in respect of its liability to return a success fee it had received from another firm. In the midst of the arbitration, Tughans eventually introduced a qualification to the claim it had formerly disavowed, and sought declaratory relief in respect of whether such liability was covered by the policy. RSA objected on the basis that the said claim had been expressly disavowed, but the arbitrator held that RSA was liable to indemnify Tughans.

RSA filed three challenges under the 1996 Arbitration Act as follows: (i) the arbitrator acted in excess of jurisdiction for the purposes of section 67; (ii) the arbitrator's decision involved a serious irregularity under section 68(2) which caused RSA substantial injustice; and (iii) the arbitrator's decision involved an error of law, which is challenged under section 69.

Held:

(i) Section 67 challenge failed. Foxton J. observed that the notice of arbitration had expressly disclaimed a claim for an indemnity in respect of liability for the success fee. *"If a claimant having once abandoned one part of his claim subsequently sought to reinstate it, he could do so only by consent of the opposing party or, without such consent, by permission from the arbitrator. In the latter case, considerations of justice and fairness to the opposite party might well arise."* So, the content of the notice had the effect that either RSA's consent or the arbitrator's permission was required to permit Tughans to seek relief of the disclaimed kind from the arbitrator (with the attendant possibility that "considerations of justice and fairness" might lead the arbitrator to refuse that permission).

(ii) Section 68 challenge succeeded. Foxton J. accepted there was a serious irregularity in that RSA was not allowed a reasonable opportunity to present its case and/or deal with Tughans', and a failure to conduct the proceedings in accordance with the procedure agreed by the parties. This caused a substantial injustice which justified a remission to the arbitrator for the purpose of determining whether, and if so on what terms, it should be open to Tughans to pursue their indemnity claim in relation to the success fee on an unqualified basis.

(iii) Section 69 challenge failed. According to RSA, the arbitrator's decision declaring that Tughan was entitled to a full indemnity in relation to the success fee (including not only those sums retained as profit costs but also income tax and VAT thereon) was wrong in law and raises a point of general public importance as to the limits of indemnities that may be claimed under a policy of professional indemnity insurance. Foxton J. rejected that argument. As he put it, *"if the solicitor has done what is necessary as a matter of contract to accrue a right to the fee, an award of damages in the amount of the fee payable will ordinarily constitute a loss for the purposes of a professional indemnity policy".*

Tip of the month

☑ What is the standard of review of an arbitration agreement?

In all matters in respect of which the parties have made an arbitration agreement, Article II(3) of the New York Convention requires the national courts of the Contracting States to refer the parties to arbitration unless they find that the said agreement is "null and void, inoperative or incapable of being performed."

The standard of review of the validity of the arbitration agreement varies from one jurisdiction to another. The courts of some countries, like Italy and Germany, endorse an in-depth review. Others, such as those of France, Canada, Switzerland or India, adopt a prima facie standard of review, referring the parties to arbitration unless the arbitration agreement is manifestly null and void.

In England and Wales, the courts have applied the principle that it is right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute. Commonly known as the Fiona Trust rule, this approach does not preclude the courts, prior to staying judicial proceedings and referring the parties to arbitration, from being satisfied that (i) there existed a valid arbitration agreement and (ii) the dispute fell within its scope.

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