ARBITRATION WATCH
January - 2023 Issue No. 62

Laws & Treaties

EU 9th package of sanctions against Russia

A new package of sanctions against Russia has been passed by the EU under the Council Regulation (EU) 2022/2474 of 16 December 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

Under the said Regulation, legal advice -among other services- cannot be provided, directly or indirectly, to the Government of Russia, or to legal persons, entities or bodies established in Russia. Exceptionally, the Regulation excludes from the prohibition those services which are strictly necessary to ensure access to judicial, administrative or 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, provided that such provision of services is consistent with the objectives of this Regulation and Regulation (EU) No 269/2014.

Angola ratifies the ICSID Convention

On 21 September 2022, the Republic of Angola deposited its Instrument of Ratification of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) with the World Bank. Angola becomes the 158th Contracting State to the ICSID Convention. In accordance with its Article 68(2), the ICSID Convention entered into force for Angola on October 21, 2022.

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 and fact-finding.

Revised Swiss Code of Obligations

From 1 January 2023 the Swiss Code of Obligations has been amended to allow Swiss companies to arbitrate their corporate law disputes.

Under Article 697n, Swiss companies can now settle their disputes by an arbitral tribunal seated in Switzerland. Unless the articles of association provide otherwise, the statutory arbitration clause shall bind not only the company but also the company's governing bodies, their members and the shareholders.

The possibility to arbitrate corporate law disputes is offered to Swiss Companies Limited by Shares (*sociétés anonymes*), Swiss Partnerships Limited by Shares (*sociétés en commandite par actions*) and Swiss Limited Liability Companies (*sociétés à responsabilité limitée*).

Arbitration Centres

City of London Law Society stands for arbitration

The City of London Law Society (CLLS) has established a committee devoted to arbitration in its latest move to boost London's competitive edge in the global disputes resolution marketplace.

The committee, chaired by the deputy chief executive of Hogan Lovells, Michael Davison, will provide expert advice to the government, MP and stakeholders such as the Law Society on international disputes while promoting London as an important centre for arbitration.

The City of London Law Society is one of the largest local Law Societies in the United Kingdom. There are over 30,000 solicitors practising in the Square Mile, who make up 20% of the profession in England and Wales and the CLLS represents over 16,000 of these solicitors through individual and corporate membership.

ICSID and SCC strengthen ties on International Dispute Resolution

The International Centre for Settlement of Investment Disputes (ICSID) and the SCC Arbitration Institute (SCC) have strengthened their partnership to promote the use of arbitration, conciliation, mediation, and other dispute resolution tools to resolve international investment and commercial disputes.

The agreement establishes a framework to jointly support public outreach on dispute resolution tools and methods, exchange information on new trends and technologies, and provide support for proceedings administered by either ICSID or the SCC as needed. It also encompasses collaboration on conferences, seminars, and trainings.

Swiss Arbitration Centre issues new set of rules on Swiss corporate law disputes

In response to the latest amendment of the Swiss Code of Obligations, the Swiss Arbitration Centre has issued its "Supplemental Swiss Rules for Corporate Law Disputes" ("Supplemental Rules").

The Supplemental Rules will apply to any arbitration initiated after 1 January 2023 pursuant to a statutory arbitration clause contained in the articles of association of a Swiss corporate entity, i.e. Swiss Companies limited by Shares, Swiss Partnerships Limited by Shares and Swiss Limited Liability Companies. The Supplemental Rules may also apply to other entities such as Associations or Cooperatives that choose to expressly state in their statutory arbitration clause that the Supplemental Swiss Rules will apply in case of disputes.

The Supplemental Rules are additional rules to the Swiss Arbitration Centre's arbitration rules and do not need explicit reference to apply as long as the arbitration clause refers to the "Swiss Rules of International Arbitration".

New rules and new name for The SCC Arbitration Institute

The Stockholm Chamber of Commerce (SCC) has released revised versions of its arbitration and other dispute resolution rules, which came into force on 1 January 2023, replacing the former version of 2017 and increasing the administrative costs of arbitration. The Expedited Arbitration Rules and the Express Rules have also been renewed.

The SCC also changed its name from the "Arbitration Institute of the Stockholm Chamber of Commerce" to the "SCC Arbitration Institute". Changes to the SCC rules were thus made to reflect this name change.

In 2021, the SCC registered 165 new cases, out of which 103 cases were under the Arbitration Rules, 49 cases were under the Expedited Rules, 7 cases were Emergency Arbitrator proceedings, 4 were *ad hoc*, one was under the UNCITRAL Rules, and one was under the Mediation Rules. The majority of cases (113) were under Swedish law.

TheCityUK report on legal services and dispute resolution

TheCityUK has published its 2022 report on the contribution made to the British economy by legal services, including dispute resolution for international parties.

The report underlines the UK's world-leading status as a centre for international legal services and dispute resolution, with revenues generated by the sector up 12.5% year on year to £41bn in 2021/22. According to the authors, English law was estimated to have governed around £250bn of global mergers and acquisitions, and 40% of global corporate arbitrations in 2019. London is also seen as the world's preferred centre for arbitration, the number of civil disputes resolved through arbitration, mediation and adjudication in the UK being reported above 28,639 in 2021.

TheCityUK is an industry-led body representing UK-based financial and related professional services.

Amendments to the arbitration rules of the Hungarian Chamber of Commerce and Industry

The amended Rules of Proceedings of the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry entered into force on 31 December 2022 and shall apply to proceedings commenced on or after that date.

Some of the amended provisions seek to address problems and practical issues that arise in practice,

while others introduce minor changes or clarify the previously effective rules. For example, they incorporate provisions on the stay of proceedings in certain cases such as where legal succession occurs on any party's side or the arbitration is hindered for reasons beyond control. Another amendment empowers the tribunal to order the collection of evidence from third parties.

Regarding awards, the amended Rules of Proceedings allow, in consultation and agreement with the parties, delivery of the award in electronic form. A higher level of confidentiality is also emphasized with regards to dissenting opinions, which shall be placed in a closed envelope only to be disclosed by a specific permit granted by the Chairman of the tribunal.

New arbitration rules of the Mexican Arbitration Centre

On 1 December 2022, the Mexican Arbitration Centre (CAM) issued new Arbitration Rules. The new set of rules will be applicable to arbitral disputes arising from model arbitration clauses signed from 1 December 2022, as well as to those arising from an arbitration agreement providing for the application the rules in force at the beginning of a dispute.

Investment Arbitration

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

Award dated 14 September 2022 under the Energy Charter Treaty

This is yet another case about investments in photovoltaic power plants in Spain. The Claimants were German investors. Their claims arose out of a series of energy reforms undertaken by Spain between 2010 and 2014 affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers.

The claimants argued that, by reversing the incentives made available in 2007, Spain violated its obligations under the Fair and Equitable Standard (FET) of Article 10(1) of the ECT. In response, Spain relied on *Saluka* and *Philip Morris*, and argued that the legal measures had been enacted in pursuit of legitimate public policy objectives.

The tribunal recalled that legitimate expectations arise when "very specific commitments" are given by the State. It said: "*It is only firm commitments attributable to governments that can form the basis of legitimate expectations on which investors may rely. Statements about commitments that governments intend or plan to make in future cannot be relied upon in this way, although they may bear upon the understanding of measures adopted later.*" Accordingly, the tribunal found that the Royal Decrees 661/2007 and 1578/2008 enacted by Spain were intended to induce investments in the renewable energy sector by promising attractive and stable regulated tariffs and premiums, and that they constituted an invitation to potential investors to rely upon that promise. The tribunal held that, as from 25 May 2007, the Claimants' investments had been made in reliance on the specific assurances given by Spain.

While the tribunal read the new regulatory regime of 2010-2014 as a reasonable response to the energy crisis, it found "unreasonable" to impose restrictive measures "*upon investors who had already committed the large up-front capital expenditures necessary to construct and commission [photovoltaic] plants and had done so in reliance upon the commitment by Spain to offer fixed, predetermined Feed-In Tariffs for the whole of their electricity production over a period of 25 years (with 80% of that tariff payable thereafter)*."Accordingly, the majority of the tribunal concluded that the denial of the legitimate expectations amounted to a breach of the FET standard, giving rise to compensation for the financial losses they suffered therefrom.

Case note: England & Wales

EGF v HVF and Others [2022] EWHC 2470 (Comm)

Facts: A tribunal formed by two arbitrators and a chair made a Partial Award pursuant to Article 34 of the UNCITRAL Rules whereby EGF should pay

HVF the sum of US$250 million by way of an Interim Payment Order. EGF filed a challenge arguing that: (i) the said Partial Award was "tainted with serious procedural irregularity" and caused substantial justice because the arbitrators' impartiality had been called into question due to their decision to admit two late witness statements without allowing cross-examination; and (ii) the arbitrators exceeded their powers on the basis that Articles 26 and 34 of the UNCITRAL Rules did not empower them to order a provisional payment or make an award for an interim remedy. Relying on Sections 67 and 68(2)(b) of the Arbitration Act, EGF applied to the Court seeking the removal and replacement of the arbitrators for bias, as well as an order setting aside the Interim Payment Order.

Held:

(i) Bias. The admission of late witness statements did not constitute bias or raise any justifiable doubt as to the arbitrators' impartiality. The tribunal's decision with regards to the witness statement "was a rational and reasonable response to that procedural circumstance within the range of case management solutions that an impartial tribunal might consider would provide the claimant a fair opportunity to pursue that new allegation and the defendants a fair opportunity to respond to it." According to Baker J., "nothing was predetermined" by the tribunal's ruling on the witness statement.

(ii) Arbitral powers: A challenge pursuant to Section 67 "is only a challenge as to the arbitrators' substantive jurisdiction if the challenge being well founded would mean that there had not been a binding agreement between the parties for the challenged decision to be made by the arbitrators who had purported to make it. In this case, the arbitrators were duly appointed so as to be a properly constituted arbitration tribunal pursuant to valid agreements to arbitrate, and by the interim payment order they dealt with a matter that had been submitted to them."

Turning to the Section 68(2)(b) challenge, Baker J. observed that Article 26 of the UNCITRAL Rules does confer power on the arbitrators to order by way of interim remedy a provisional payment on account of money claims referred to them for determination in the arbitration. However, he nonetheless admitted that, by reason of Article 34 of the UNCITRAL Rules, any such remedy ought only to have been granted by way of order of the arbitrators and not by way of award. After all, Article 34 provides that 'All awards shall…be final", and an Interim Payment Order is by no means final in nature. Although by that reason the Tribunal had exceeded its powers, Baker J. held that the challenge could not be successful under Section 68(2)(b) of the Arbitration Act because such irregularity did not cause substantial injustice to the claimant.

About us

We are now AACNI England Ltd. The Solicitors Regulation Authority has authorized AACNI (England) Limited as a recognised body with No. 8000602. You may find us, as usual, in Central Court, 25 Southampton Buildings, London

Tip of the month

☑ When is an arbitration agreement deemed to be "null and void"?

Article II (3) of the New York Convention 1958 requires domestic courts to refer the parties to arbitration "unless [they find] that the said agreement is null and void, inoperative or incapable of being performed."

The invalidity of the contract does not necessarily entail the invalidity of the arbitration agreement. Applying the severability doctrine, the validity of the arbitration agreement should be ascertained separately and independently from the validity of the main contract, even if both are contained in the same document. The severability doctrine has been endorsed by most countries, arbitral institutions and UNCITRAL.

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

AACNI (England) Limited

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