ARBITRATION WATCH
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Laws & Treaties

Civil Justice System Reforms in Italy

A structural reform of the Italian civil justice system recently adopted by Legislative Decree No 149/2022 incorporates significant changes to arbitration practice in Italy with effect from 28 February 2023. After that date, all arbitration proceedings in Italy will reflect those changes.

As a consequence, the arbitral tribunals based in Italy are now vested with the power to grant interim measures and provisional relief, which was previously a matter for the Courts. It imposes a duty of disclosure upon the arbitrators prior to their appointment. And it allows the enforcement of foreign awards in Italy upon issuance of an ex parte recognition decree by the president of the competent court of appeal.

Timor-Leste accedes to the New York Convention

With its accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), Timor-Leste becomes the 172nd State Party to the Convention. The Convention will enter into force for Timor-Leste on 17 April 2023.

A Code of Conduct for ISDS Adjudicators

The 44th session of UNCITRAL Working Group III completed the proposed Code of Conduct for Adjudicators. This is the first official work product produced by the Group since taking up the subject of Investor State Dispute Settlement (ISDS) Reform in 2017. Initially drafted by the UNCITRAL Secretariat in 2019, the Code has since undergone many revisions.

The final version of the Code is expected to contain 11 articles and be separated into two versions: one for arbitrators, which could be applied immediately within the current ISDS system; and one for judges who might one day sit as part of the European Union's proposed standing multi-lateral investment court.

In an effort to salvage the reputation and legitimacy of the ISDS system, the Code put the focus on the impartiality and independence of the arbitrators. With that in mind, it sets forth a ban on double hatting on arbitrators. This amounts to a prohibition on arbitrators in disputes involving states from acting in any other capacity in arbitration while sitting in as arbitrators. This issue, together with the Code itself, will continue being the subject of further debate in the next sessions of the UNCITRAL Working Group III.

Arbitration Centres

CEPANI's arbitration rules take diversity and inclusion aboard

CEPANI, the Belgian Centre for Arbitration and Mediation, has published new arbitration and

mediation Rules, entering into force on 1 January 2023. The new rules replace the previous version in force since July 2020.

Beyond considerations of gender imbalance, the 2023 rules require taking into account other factors such as religion, sexual orientation, disability, or socioeconomic status. Together with the Scottish Arbitration Centre, CEPANI becomes one of the first arbitration centres to require the parties, their counsel, any nominated arbitrator and the Centre itself to take diversity and inclusion into account when nominating arbitrators.

Review of the Gafta No 124 Sampling Rules

After a comprehensive review over a period of over 12 months, Gafta (Grain and Feed Trade Association) has published the new version of Gafta No 124 Sampling Rules, which will be effective for contracts dated from 1 June 2023.

Whilst the fundamentals of the procedures of drawing and preparing contractual samples are unchanged, many changes have been made to modernise the language and understanding, and to improve consistency with other Gafta Codes of Practice and the Gafta Standards. Like its predecessor, the 2023 version includes a set of rules for making up sets of contractual samples which, when it comes to arbitral disputes, shall be examined by the tribunal and they constitute evidence of the quality and condition of the goods.

Amendments to Fosfa Contracts of Sale

Fosfa (Federation of Oils, Seeds and Fats) has been amended its Contracts for Oilseeds to introduce a three-month retention period for samples. Other contracts, the American/Canadian Contracts, have replaced the "Strikes, etc." clause with the Fosfa standard "Force Majeure" clause. According to Fosfa, this amendment will provide more clarity and certainty as to what events are considered as "Force Majeure" and will also help to align these Contracts to more standard and proven terms.

ICSID Releases 2022 Caseload Statistics

ICSID, the International Centre for Settlement of Investment Disputes between international investors and States, has released its 2022 Caseload statistics. According to ICSID, 30 different States were named as respondents in 41 cases registered in 2022 under ICSID's procedural rules for resolving international investment disputes. Arbitrations under the ICSID Convention accounted for 34 of those cases, followed by 7 arbitrations applying the ICSID Additional Facility Rules.

As of December 31, 2022, ICSID had registered a total of 910 cases under the ICSID Convention and Additional Facility Rules since the first case in 1972. The majority of ICSID cases have been arbitrations under the ICSID Convention (821), followed by Additional Facility arbitration cases (76), ICSID Convention conciliation cases (11), and Additional Facility conciliation cases (2).

ICSID also administers cases under other 'non-ICSID' procedural rules. In 2022, ICSID administered 21 such cases, with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) being the most common (accounting for 15 cases).

Investment Arbitration

Watkins Holdings S.à r.l. and others v. Spain, ICSID Case No. ARB/15/44

Decision on Annulment dated 21 February 2023

An ICSID Annulment Committee has dismissed Spain's application to annul the award dated 21 January 2020 under the Energy Charter Treaty ("the Award"). The Decision deals with a procedural question interesting enough to be referred here.

Spain alleged that the Tribunal's refusal to admit two awards into the record amounted to a failure to give it a right to be heard, which in itself is a fundamental rule of procedure and a due process right the parties are entitled to.

The Committee upheld the validity of the Award. It noted that Spain's request to admit the two awards came after the Parties filed closing submissions, and that, in refusing such request, the Tribunal stated that those awards were *"not necessary for the Tribunal to deliver its decision." Citing the Decision on Annulment in Tulip v Turkey, the Committee recalled that "[t]he right to be heard refers to the opportunity given to the parties to present their position. It does not relate to the manner in which tribunals deal with the arguments and evidence presented to them."* Therefore, a refusal to allow in new evidence does not of itself amount to a refusal to hear a party. According to the Committee, *"[a]n ICSID tribunal's task is to provide a party with a reasonable opportunity to be heard; there is no right to an unlimited opportunity to be heard."*

Case note: England & Wales

ADM International SARL v Grain House International SA [2023] EWHC 135 (Comm)

Facts: Grain House International SA (GHI) was ordered to pay US$3.5m to ADM International SARL (ADM) in a Gafta arbitration award. Pursuant to section 66 of the Arbitration Act 1996, the award was enforced in the United Kingdom as if it was a court's order or judgment. Accordingly, a Claim

Form was served on GHI's offices in Morocco. In a number of hearings, the Court granted orders to ADM requiring GHI to disclose and freeze assets worldwide. The hearings and orders were unattended by GHI, and ADM entered an application to commit GHI's directors for contempt of court.

Held: All allegations of contempt, both civil and criminal, must be proved to the criminal standard. This standard, frequently cited as being "*beyond a reasonable doubt*", applies even where the applicant seeks only a non-custodial penalty. In order to establish that someone is factually in contempt of an order, it is necessary to show to the criminal standard that: (i) They knew of the terms of the order; (ii) They acted (or failed to act) in a manner which involved a breach of the order; and (iii) They knew of the facts which made their conduct a breach. According to Cockerill J., "*it was not seriously in issue*" that GHI knew all of the terms of the asset disclosure and freezing orders, and that it may have dissipated assets.

The courts have indicated that in the case of deliberate serious breaches of disclosure obligations linked to a freezing order, in particular, the court should consider imposing a long sentence, possibly even the maximum of two years, in order to encourage future co-operation by the contemnor. In this respect, Cockerill J. said: *"While I consider the breaches as serious I do not see them as being at the very top of the culpability/harm matrix. They were deliberate, but there was basic disclosure which enabled the position to be clarified - this is not a case of a failure to provide even any basic disclosure." On this basis, he imposed a custodial sentence of 18 months to the President and General Manager of GHI, being "the person who must logically have known of the facts which amount to breaches of the orders and is thus responsible for them."*

Tip of the month

☑ When is an arbitration agreement "incapable of being performed"?

According to Article II.3 of the New York Convention, the court of a Contracting State may not refer the parties to arbitration when it finds that the arbitration agreement is "incapable of being performed".

An arbitration agreement has been held "incapable of being performed" in two main cases: (i) when is vague, ambiguous and gives no clue as to how the arbitration should proceed, and (ii) when designates a non-existent arbitral institution.

Some courts have adopted a stringent approach to this definition, but others have taken a pro-arbitration stance upholding such agreements on the assumption that the parties' intention to have their dispute resolved by arbitration should prevail.

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