ARBITRATION WATCH
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Laws & Treaties

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.

Situated 550 km north of Australia, Timor-Leste is the smallest and more eastern island of the Malay Archipelago. It is the only Portuguese speaking country independent nation in Asia.

Plans to reform arbitration law unveiled in Germany

On 18 April 2023, the German Federal Ministry of Justice announced a reform of the German arbitration law. The said reform pursues the modernisation of the 10th Book of the Code of Civil Procedure, the last version of which dates back to 1998. The reform will take into account a number of developments in the field of arbitration, like the UNCITRAL Model Law of 2006, the legal reforms adopted by the neighbouring countries (France, Austria and Switzerland) and the progressive digitalization of legal proceedings, to say a few.

The German Federal Ministry of Justice has released a paper that sets the basis for a reform bill. The said paper identifies 12 key points that may benefit from the revision. The list includes points such as the validity of oral arbitration agreements in B2B transactions (as foreseen in Option II of Article 7 of the UNCITRAL Model Law, 2006), or the possibility to publish the arbitral award subject to the parties' consent.

Arbitration Centres

The Commercial Court Annual Report is released

The Judiciary of England and Wales has published the Commercial Court Report for the year 2021-2022 (the Annual Report). The Commercial Court deals with both international and domestic business disputes, including claims related to arbitration.

According to the Annual Report, matters arising from arbitration make up a significant proportion of the claims issued in the Commercial Court (around 25%). Those matters include a range of applications made in support of the arbitral process, such as applications for injunctions in connection with arbitrations, for the enforcement of arbitration awards, and other matters such as applications to the Court for the appointment of an arbitrator.

The bulk of the arbitration claims issued are:

- Challenges to awards on grounds of jurisdiction under section 67 of the Arbitration Act 1996 (27 applications compared to 17 the previous year);
- Challenges alleging irregularity under section 68 (40 applications compared to 26 the previous year);
- Appeals on a point of law under section 69 (40 applications compared to 37 the previous year); and
- Applications for injunctions under section 44 (15 applications compared to 27 such the previous year).

Investment Arbitration

The PV Investors v. Spain (PCA Case No. 2012-14)

Final Award dated 28 February 2020 under the Energy Charter Treaty.

In an Order dated 29 March 2023 the US District Court for the District of Columbia has declined to enforce the UNCITRAL award in the PCA Case No. 2012-14 against Spain. The said award had been rendered on 28 February 2020 in a dispute administered by the Permanent Court of Arbitration with the seat in Switzerland. The US District Court judge found that under the EU law, which both Spain and the investors are subject to and which applied to the dispute by the terms of the ECT itself, no valid agreement to arbitrate exists. The US court found that Spain lacked the legal capacity to enter into a valid arbitration agreement when the request for arbitration was filed, meaning that no valid arbitration agreement had been formed. The US court concluded that, since no valid agreement to arbitrate exists, as defined by the ECT itself, the arbitral tribunal lacked authority to decide the dispute, and the award was, by definition, ultra vires. Accordingly, the US court found that it lacks the subject matter jurisdiction necessary to recognise and enforce the award.

Case note: England & Wales

BPY v MXV [2023] EWHC 82 (Comm)

Facts: A sole arbitrator decided a dispute over three sale and purchase agreements ("SPAs"). The dispute was conducted in London in accordance with LCIA rules. During a six-day evidentiary hearing, 30 witnesses were called to cross-examination. Prior to the hearing, the arbitrator issued a direction that: "I do not expect all points of witness evidence to be expressly challenged in cross-examination. It will remain for me to decide what weight to accord to the evidence before me, regardless of whether it has been expressly dealt with in cross-examination." No further clarification was sought as to what evidence the arbitrator could give weight to without cross-examination. The hearing proceeded on the basis of that indication and an award was rendered dismissing BPY's claim with costs.

BPY made an application under section 68 of the Arbitration Act 1996 challenging the award based on four grounds of serious irregularities in the way the arbitrator reached her conclusions, causing substantial injustice to BPY. The grounds of complaint was that the arbitrator had determined that there had been dishonesty in the making of the SPAs, when such a case had not been properly put to the witnesses who were accused of fabricating the sham SPAs.

Held: The Court dismissed BPY's challenge. Butcher J acknowledged that Browne v Dunn, a House of Lords judgment, established the rule that in cross-examination, a party must challenge the witness evidence of an opposing party if it intends to argue that the evidence is not to be believed. Generally, under the Browne v Dunn rule, the failure to cross-examine a witness on a material element of evidence, or at all, may be treated as an acceptance of the truth of that evidence. However, he also recalled more recent authorities have made exceptions to that rule in certain circumstances (for example, if there is a time-limit to cross-examination and a lengthy witness statement treated as evidence-in-chief).

Butcher J found that there was no unfairness in the arbitrator proceeding in accordance with the direction she had given, which was not questioned by the parties. He said: "*(1) The fundamental issue is one of fairness to witnesses and to the parties. (2) Usually fairness will require that when a witness gives evidence as to a specific factual matter and the court will be asked to disbelieve him or her, he or she should be challenged on it so as to have an opportunity of affirming or commenting on the challenge. (3) But this is not an inflexible rule. There may be cases in which there will be no unfairness because, looked at more generally, the procedures adopted in the litigation mean that a party and the relevant witness(es) have had ample opportunity to comment on the other side's case. It may also be the case that a particular matter does not have to be specifically put to the witness because it is obvious from other evidence which*

he or she has given as to what his or her response will be. Furthermore, the extent to which there needs to be cross-examination may depend on the procedures which have been adopted by the court (for example in setting time limits for cross-examination).”

Tip of the month

☑ Who bears the burden of proving that an award is final?

Under the New York Convention, the applicant of the recognition and enforcement of a foreign award needs not provide proof of finality of the award. The applicant is relieved from proving negative facts like that the award has not been challenged before the court in the country where it was rendered. The burden of proof is shifted onto the opponent, who must otherwise prove that the award was not final in the country of the seat.

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