ARBITRATION WATCH
August - 2023 Issue No. 66

Laws & Treaties

Albania passes new arbitration law

In July 2023 the Albanian parliament passed a new law "On Arbitration in the Republic of Albania". Based on the UNCITRAL Model Law, the new law regulates domestic and international arbitration disputes the place of which is based on the Republic of Albania, as well as the enforceability of foreign arbitral awards.

Albania is a member state to the International Centre for the Settlement of Investment Disputes (ICSID Convention) and is a signatory to the convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention). In addition, Albania ratified the 1961 European Convention on International Commercial Arbitration (Geneva Convention).

The UK Government signs the Singapore Convention on Mediation

After the UK Government signed the Singapore Convention on Mediation on 3 May 2023, ratification will likely take place in 2024.

To date, 56 countries have signed the Convention and 11 countries have ratified it. The Singapore Mediation Convention (the Convention) is designed to provide a consistent framework for the recognition and enforcement of mediated settlements. It opens the door for the more widespread use of mediation in different jurisdictions and is sometimes referred to as 'the New York Convention for mediation', an allusion to the 1958 agreement that underpins the enforceability of arbitral awards.

The Convention enables a party that has mediated their dispute to enforce the resulting cross-border mediated agreement in any country that is party to the convention without needing to commence an action for breach of contract.

New arbitration regime comes into force in Nigeria

On 26 May 2023, the President of the Federal Republic of Nigeria signed the Arbitration and Mediation Bill, which marked the end of the legislative process and the beginning of a new arbitration regime in Nigeria. The 2023 Arbitration and Mediation Act (the "Act") repeals the Arbitration and Conciliation Act 1988 (Laws of the Federation of Nigeria 2004 Cap A18).

The Act provides a unified legal framework for the settlement of commercial disputes by arbitration and mediation, and boosts the application of the New York Convention in Nigeria. With the objective of enhancing Nigeria's arbitration system and cementing Nigeria's status as a leading arbitration hub, the Act regulates the national courts' power to issue, recognise and enforce interim measures, and establishes a tribunal for the review of arbitral awards. It also contains provisions about third party funding in arbitration.

UNCITRAL reforms to the investor-State dispute resolution

In July 2023 more than 373 representatives of States and international organizations gathered at the Vienna International Centre to finalize the first set of investor-State dispute settlement (ISDS) reform elements during the annual session of the United Nations Commission on International Trade Law (UNCITRAL).

Four legal texts were adopted by UNCITRAL in international investment disputes: (1) the UNCITRAL Model Provisions on Mediation, (2) the UNCITRAL Guidelines on Mediation, (3) the UNCITRAL Code of Conduct for Arbitrators, and (4) the UNCITRAL Code of Conduct for Judges. It is expected that all four texts will be widely used to optimise due process, transparency and legitimacy in the resolution of international investment disputes.

Extension of mediation in civil legal claims in the UK

On 25 July 2023 the UK Government announced a major extension to the use of mediation in civil legal claims. All small claims in the County Court (generally those valued under £10,000) issued under the standard Part 7 procedure of the Civil Procedure Rules will be referred, without exception, to HM Courts and Tribunals Service's (HMCTS) Small Claims Mediation Service (SCMS) for a free one-hour telephone mediation conducted by a court-employed mediator.

The UK Government's policy response also signals an intention to extend the use of mediation to claims valued between £10,000 and £25,000. This will involve referring parties to external mediators outside the court service.

Arbitration Centres

CRCICA unveils draft new arbitration rules 2023

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) unveils its draft New CRCICA Arbitration Rules due to enter into force in 2023, after the call for comments ended on 26 July 2023.

Last updated in 2011, the new CRCICA Arbitration Rules will introduce new rules on matters such as emergency and expedited arbitration procedures, joinder of additional parties and consolidation of proceedings, the use of technology, and third party funding. The draft New CRCICA Arbitration Rules 2023 are subject to editorial corrections and adoption by CRCICA's Board of Trustees. They are available in English, Arabic and French.

The Saudi Center for Commercial Arbitration adopts new arbitration rules

The 2023 Rules take into account the best practices followed by other international arbitral institutions and have been crafted under the overarching principles of "fairness, respect and transparency", according to the Chairman of the SCCA Board of Directors. They include the establishment of the SCCA Court, expansion of the arbitral tribunal's powers, removal of references to Sharia law, the addition of new grounds for arbitrator challenges, a new mechanism for summary disposition of claims and defences, and new provisions regulating the consolidation of proceedings and cybersecurity.

Investment Arbitration

AsiaPhos Limited and Norwest Chemicals Pte Limited v. China, CSID Case No. ADM/21/1

Award dated 16 February 2023 under the China-Singapore BIT of 1985.

The claimant, AsiaPhos Ltd., was a company incorporated in Singapore. It owned (through locally incorporated subsidiaries) three phosphate mines in the Sichuan province of China. The mines were located in and around the Jiudingshan Natural Reserve. After 15 years of granting consecutive license renewals and extensions, the Sichuan Province Government adopted a new policy and prohibited mining in the area, leading to the shutdown, sealing and mandatory "exit" of all three mines. The claimant raised –among others- a claim that China adopted unlawful measures having an effect equivalent to expropriation in violation of the China-Singapore BIT.

After bifurcating the arbitral proceedings, the tribunal issued an award dismissing the claim for want of jurisdiction. As a starting point, the tribunal recalled that jurisdiction could be upheld only if, and to the extent that, the parties consented thereto in a clear and unequivocal manner. With that fundamental approach in mind, the tribunal went on making a literal interpretation of the Treaty. It found that the arbitration clause in Article 13(3) should be read as being limited to disputes involving the amount of compensation to be awarded resulting from expropriatory

measures, excluding those other disputes, like the one at hand, that concerned with the occurrence and legality of an expropriation, which could only be brought before the domestic courts.

The tribunal further decided that the MFN clause in Article 4 could not expand the scope of the arbitration clause and import consent from a different treaty the State was also a party to. Concurring with the view expressed in *Plama v. Bulgaria*, the tribunal held that *"the expansion of an arbitration clause by virtue of an MFN clause requires the clear and unambiguous intention of both parties to have this effect."* According to the tribunal, no such intention could be inferred from the MFN clause of this particular Treaty, not least because the *words "no treatment less favourable"*, which refers literally to the "investments" protected by the Treaty, *"cannot be considered to unambiguously apply to procedural provisions such as the dispute settlement clause in Article 13 of the Treaty."*

Case note: England & Wales

Global Aerospares Limited v Airest AS [2023] EWHC 1430 (Comm)

Facts: The Claimant (Global Aerospace Ltd.) and the Defendant (Airest AS) concluded an agreement, which contained an arbitration clause with no procedure for the appointment of an arbitrator. The arbitration clause simply said: *"This Agreement is subject to English jurisdiction. If a dispute cannot be settled by negotiation it shall be settled by arbitration in London."* A dispute arose out of the agreement and the Claimant served a request to appoint an arbitrator within 21 days thereafter. The Defendant did not reply to the request. The Claimant then filed an application pursuant to section 18 of the Arbitration Act 1996 ("the Act"), which provides for the Court to give directions where there is a failure of the procedure for the appointment of the arbitral tribunal.

The Defendant opposed the application and contested the Court's jurisdiction to try the claim on the basis that the Court's power under section 18 of the Act was not engaged. According to the Defendant, there had been no failure of the procedure for the appointment of the arbitral tribunal. It argued that the Claimant's request to appoint an arbitrator was not a valid request within the meaning of section 16(3) of the Act, which provides that, if the tribunal is to consist of a sole arbitrator, the parties shall jointly appoint the arbitrator not later than 28 days after service of the request. In light of that provision, the Claimant's request of arbitration was clearly defective for it stood for 21 days only.

Held: The judge (His Honour Worster) found that the request to arbitrate had not been properly served, and that the process for the appointment of an arbitrator had for that reason not been validly begun. Consequently, it could not be said that there had been a failure of a process that had not even been commenced. In circumstances where, because of a defective request to arbitrate, there has been no failure of the procedure for the appointment of an arbitrator, the court has no power to make an order under section 18 of the Act. Thus, in the The "*Lapad*") [2004] 2 Lloyd's Rep. 109, Moore-Bick J. said: *"It is clear that the court's jurisdiction to exercise its powers under section 18 depends on two things: a failure of the contractual procedure for the appointment of the tribunal and the absence of agreement between the parties as to the steps to be taken as a result."* Relying on that case, the Judge concluded that *"[i]f there has been no failure in the appointment procedure an application for directions under section 18 will fail."* The Claimant's application was accordingly dismissed.

About us

Ana Maria Daza, speaking on International Investment Agreements and Climate Change

Ana Maria Daza, of counsel in AACNI (England) Ltd., served as panellist in a workshop entitled "International Investment Agreements and Climate

Change: what is the role of International Investment Agreements in the Transition to a Green Economy?" This was a capacity building event funded by Asia Pacific Economic Cooperation Meeting that took place in Seattle, on the 5th of August 2023. The event concerned foreign direct investment, clean energy projects and sustainability. In the transition to clean energy infrastructures, Ana-Maria's paper identifies a typology of potential risks linked to environmental pollution, market failure, social conflict and changing political landscapes.

Tip of the month

☑ What is a "duly authenticated original award or a duly certified copy thereof"?

Article IV of the New York Convention of 1958 does not say what "authenticated" and "certified" mean within the context of enforcement of foreign arbitral awards. Generally speaking, authentication amounts to confirmation that the signatures in the award are of the arbitrators, and certification amounts to confirmation that the document provided is a true copy of the original award. This entails a two-tier process of, first, notarization, and, second, certification by the State through the "The Hague apostille" (for all the State members to the 1961 Hague Convention). The authorities competent to perform this process will ultimately be decided by the law of the State in which the award is to be enforced.

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