ARBITRATION WATCH
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Laws & Treaties

Norway terminates BITs with the European Economic Area members

The Government of Norway announced the termination of its bilateral investment treaties (BITs) with members of the European Economic Area, which gathers all EU and European Free Trade Association members.

Since 1 June 2023 Norway initiated negotiations on termination agreements with the countries in question, and the negotiations are at various stages. The termination agreements with Estonia, Latvia, Lithuania, Romania, and Hungary have now entered into force. This means, among other things, that the bilateral investment protection agreements with these countries can no longer be used as a basis for investor-state dispute settlement, according to the Norwegian Ministry of Trade, Industry and Fisheries.

Altogether this is presumably a consequence of the agreement for the termination of intra-EU BITs the 23 EU Member States signed on 5 May 2020, and the recent European Court of Justice case law (Achmea, etc. case) whereby the investor-State arbitration clauses in intra-EU BITs were held to be incompatible with the EU Treaties.

Review of the English Arbitration Act 1996

The UK Law Commission has published its final report with recommendations to reform the Arbitration Act 1996. The final report includes draft legislation.

Delivered on 6 September 2023, the said report includes draft legislation and recommends the following major initiatives:

1. Codification of the statutory duty of disclosure
2. Strengthening of arbitrator immunity around resignation and applications for removal
3. Introduction of a power to make an arbitral award on a summary basis
4. An improved framework for challenges to awards under section 67 on the basis that the tribunal lacked jurisdiction
5. A new rule on the governing law of an arbitration agreement
6. Clarification of court powers in support of arbitral proceedings, and in support of emergency arbitrators.

Arbitration Centres

Changes to Gafta Arbitration Rules effective 1 September 2023

The Gafta Council has approved changes to the Arbitration Rules No. 125 and the Expedited Arbitration Procedure Rules No. 126 Rules with effect for contracts entered into on or after 1 September 2023. Minor changes and correction of clerical errors aside, the main changes are as follows:

- The preamble in both sets of Rules has been amended to say *"Gafta is the only body which has the authority to administer an arbitration arising from or out of its Rules."*
- In the Arbitration Rules No. 125, Rule 3.2(a) has been amended to remove the option for Claimants to request Gafta to appoint an arbitrator on the their behalf; further, Rule 8.1(b) has been amended to spell out that the dismissal of jurisdiction will be notified *"by way of an Award"* and not merely by an order; and Rule 12.1 were amended so that an oral hearing will be the default option.

- In the Expedited Arbitration Procedure Rules No. 126, Rule 4.2 now reads as follows: *"Not later than 7 business days from receipt of the deposit, the Claimants shall submit a clear and concise statement of their case and supporting documents to Gafta and to the Respondents."*

- Ultimately, for all appeals lodged under any of the above rules after 1 September 2023, the appeal deposit have been increased from £17,000.00 to £20,000.00.

Investment Arbitration

US court denies enforcement of an award against Spain applying EU law

In the case *Blasket Renewable Investments, LLC v. Kingdom of Spain, Civil Case 21-3249 (RJL)* the US District Court for the District of Columbia granted Spain's motion to dismiss the enforcement of the award. The judge, R. J. León, found that the court lacked subject-matter jurisdiction under the Foreign Sovereign Immunities Act. He based this decision on the fact that Spain's standing offer to arbitrate in the Energy Charter Treaty (ECT) was void in light of the decisions of the Court of Justice of the European Union (CJEU) in the Achmea line of cases. According to the judge, Spain lacked the legal capacity to extend and offer to arbitrate any dispute under EU law. He said: *"As such, no agreement to arbitrate ever existed. Absent such an agreement, this Court cannot establish jurisdiction under any exception to the Foreign Sovereign Immunities Act."*

The *Blasket* decision came a little more than a month after D.C. District Judge Tanya Chutkan's decision in *NextEra Energy Global Holdings v. Kingdom of Spain*, which rejected Spain's motion to dismiss a petition to enforce another ECT award.

Case note: England & Wales

Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Ors [2023] UKSC 32

Facts: This case concerns the "Tuna Bond" scandal in Mozambique. Three corporate vehicles wholly owned by Mozambique (the "SPVs") entered into supply contracts (the "Contracts") with the respondents (the "Privinvest companies") for the development of Mozambique's exclusive economic zone. The Contracts were all governed by Swiss law and contained arbitration agreements. The SPVs borrowed the purchase funds from various banks, for which borrowing Mozambique granted sovereign guarantees (the "Guarantees"). The Guarantees were governed by English law and provided for dispute resolution in the courts of England and Wales. Mozambique accuses the Privinvest companies and various others of paying significant bribes to Mozambique's corrupt officials, exposing it to a potential liability of approximately US $2bn under the Guarantees, and decided to bring court proceedings in England and Wales. Mozambique was not a signatory to the Contracts, but Privinvest contended that as a matter of Swiss law Mozambique was party to them and bound by the arbitration agreement within them. On that basis, Privinvest sought a stay of all Mozambique's claims pursuant to Section 9 of the Arbitration Act 1996. As a preliminary question, the issue arose as to whether Mozambique's claims were "matters" which fell within the scope of the arbitration agreements under Section 9. At first instance, the High Court held the claims were not. The Court of Appeal disagreed on appeal and the case was brought to the Supreme Court.

Held: Section 9 of the Arbitration Act 1996 mandates the court to stay proceedings (upon a duly made application) brought by claim or counterclaim "*in respect of a matter which…is to be referred to arbitration*". Within that context, the term "*matter*" should be construed as *"a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined*

by an arbitrator as a discrete dispute". As such, the "*substantial issue*" of the controversy was whether the transactions, including the Contracts and the Guarantees, were obtained through bribery, and whether Privinvest had knowledge at the relevant time of the alleged illegality of the Guarantees. So, as the validity and commerciality of the Contracts were not essential to any relevant defence, the Supreme Court held that these were not "matters" under section 9 of the 1996 Act in relation to the question of Privinvest's liability. Accordingly, the Supreme Court concluded that the Court of Appeal *"erred in stating that the validity and genuineness of the supply contracts are substantial matters on which Privinvest is bound to rely without going on to consider whether those were matters essential to a relevant defence to the Republic's surviving claims."*

Tip of the month

☑ Can we spot the "incapacity" to agree to arbitrate a dispute?

Pursuant to article V(1)(a) of the New York Convention 1958, the recognition and enforcement of a foreign award may be denied if -among other reasons- the parties to the arbitration agreement were, under the law applicable to them, under "some incapacity". Capacity is generally the legal ability of a person to act and enter into an agreement in its own name. So, incapacity refers to the legal restriction preventing a party from acting in such manner. In the case of individuals, mental disorder or an inability to communicate may constitute forms of incapacity. In the case of companies, the incapacity defence may extend to situations where they act ultra vires their constitutional documents, or where the representative power is alleged to be invalid.

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