ARBITRATION WATCH
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Laws & Treaties

New measures on foreign-related civil litigation in China

On 1 September 2023 the Standing Committee of China's National People's Congress approved several amendments to the Civil Procedure Law regarding foreign-related civil litigation.

With effect from 1 January 2024, the said law permits Chinese courts to exercise jurisdiction over any case with a "proper connection" to China. Regarding parallel litigation, Chinese courts may exercise jurisdiction even in cases in which a dispute has already been filed abroad. And, insofar as it concerns to service on foreign defendants, the new rules allow service be made on the companies' legal representatives who are eventually travelling to China.

A new Foreign State Immunity Law, also scheduled to take effect from 2024, will permit litigation against foreign states under certain circumstance.

Changes to the Arbitration Law in UAE

In September, the UAE issued a new law amending some of the provisions of Federal Law No. 6 of 2018. The Amendment Law (Federal Law No. 15 of 2023) aims to streamline the arbitral process, facilitate cost saving mechanisms, and regulate the appointment of arbitrators.

The Amendment Law repeals and replaces Articles 10, 23, 28 and 33 of the Arbitration Law. It extends the general prohibition from acting as arbitrators to the members of administrative and executive bodies of the arbitral institutions (article 10 bis). The facilitation of remote hearings and the use of technology, including e-services like virtual hosting platforms and e-bundling services, becomes a legal obligation (Article 28). The confidentiality of the arbitration is extended to the entirety of the proceedings. And arbitral tribunals are expressly allowed to decide disputes on a document only basis, saving costs and unnecessary expenses. Arbitral tribunals are also given discretion to determine rules of evidence "provided that those rules do not prejudice the public order". Article 33 expressly provides that such discretion will apply "unless otherwise agreed by the parties" and "in the absence of rules of evidence to resolve the dispute in the applicable law" (article 33).

New Mediation Act is passed in India

On 9 October 2023 the Mediation Act 2023 came into force in India. The Mediation Act 2023 provides an exhaustive procedure for conducting mediation proceedings, and seeks to establish a statutory authority responsible to regulate and promote dispute resolution through mediation for disputes of civil and commercial nature. By virtue of the said Act, pre-litigation mediation becomes mandatory for both parties before filing any suit or proceeding in a court, whether or not there is a mediation agreement between them.

Arbitration Centres

Asian International Arbitration Centre has new Arbitration Rules

The Asian International Arbitration Centre ("AIAC") issued its Arbitration Rules 2023 ("2023 Rules"), which replace the former version of 2021 and took effect on 24 August 2023. The 2023 Rules aim to improve efficiency and cost-effectiveness.

Remarkably, the 2023 Rules segregate the 2021 UNCITRAL Rules (the procedural provisions) from the 2023 AIAC Arbitration Rules (the administrative provisions) into two separate schedules, both being applicable in their respective spheres. In case of conflict between the two, it is provided that the AIAC Rules will prevail.

To accommodate investor-state arbitrations, the 2023 Rules have now incorporated the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. For the sake of transparency, all awards shall be published after two years unless one of the parties opts out of that rule by writing to the AIAC director before the award is made.

Insofar as it concerns third-party funding, the relevant party will have to disclose details of the funding and the identity of the funder at the beginning, as well as throughout the arbitral proceedings

Investment Arbitration

ICSID award in intra-EU investment arbitration is given passage in the United Kingdom

In *Infrastructure Services Luxembourg and Energies Term solar v Spain* [2023] EWHC 1226 (Comm), the English High Court has allowed the registration of the award issued in the ICSID Case No. ARB/13/31. In that arbitration, Spain was found in breach of the Energy Charter Treaty and was ordered to pay compensation to Luxembourgish investors.

Seemingly unimpressed by the *Achmea*-line of CJEU jurisprudence, the English judge, Fraser J., found that the EU treaties did not supersede the UK's obligations under the ICSID Convention. He dismissed Spain's objections to jurisdiction of (i) the ICSID tribunal in the arbitration proceedings, and (ii) the High Court in the English registration proceedings.

In relation to the first objection, Fraser J. followed the Supreme Court's reasoning in *Micula* v *Romania*. He found that EU law did not trump UK's obligations under the ICSID Convention, which arose prior to its accession to the EU and were implemented through the Arbitration (International Investment Disputes) Act 1966. Fraser J. said: "*Where an application is made to the High Court for recognition of an award made by a tribunal under the ICSID Convention, the court is restricted to ascertaining the award's authenticity. It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal. The High Court may not refuse recognition or enforcement of an award on grounds covered by the challenge provisions in the ICSID Convention itself. Nor may it do so on grounds based on any general doctrine of ordre public.*"

Alternatively, Fraser J. reasoned that even if the UK's international obligation to enforce the award had been affected by the TFEU, as interpreted by the CJEU's judgments in *Achmea* and *Komstroy*, the obligation to enforce an ICSID award should still be given precedence under the rules on "successive treaties relating to the same subject-matter" laid down by the Vienna Convention on the Law of Treaties, the Article 30(4)(b) of which dictates that "*when the parties to the later treaty do not include all the parties to the earlier one: […] as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations*". On this point, Fraser J. concluded that, given that many state parties to the ICSID Convention, such as the UK, are not parties to the TFEU, the ICSID Convention governs the mutual rights and obligations of the UK and Spain. Accordingly, Spain could not validly rely on EU law to resist the registration of the award.

Turning to the second objection posited by Spain, Fraser J. affirmed the jurisdiction of the English High Court to register the award in the UK. Whilst states are generally cloaked with immunity and cannot be subject to the jurisdiction of other states' courts, in this case Spain waived and lost immunity within the terms of Section 9(1) of the State Immunity Act 1978, which reads: "*Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the UK which relate to the arbitration.*" This is precisely what occurred here through Spain's ratification of (i) the ICSID Convention, the Article 54 of which compels Spain to recognize and enforce ICSID awards, and (ii) the Energy Charter Treaty, the Article 26 of which provides the jurisdictional basis for the award against Spain.

Case note: England & Wales

Deutsche Bank AG v RusChemAlliance LLC [2023] EWCA Civ 1144

Facts: RusChemAlliance LLC, a company based in Russia, entered into a contract with a German construction company for the engineering, procurement and construction of an LNG plant in the Leningrad Region of Russia. In respect of a number of advance payments agreed under the contract, Deutsche Bank AG issued an advance payment guarantee ("the Guarantee") to RusChemAlliance LLC. The Guarantee was governed by English law and referred all disputes arising therefrom to arbitration in Paris under the Rules of Arbitration of the International Chamber of Commerce (ICC). Following the Russian invasion of Ukraine and the adoption of sanctions by the EU, works were suspended and the contract was terminated. RusChemAlliance LLC made a demand on Deutsche Bank AG under the Guarantee, but the later declined to pay on the grounds that it was prohibited by sanctions from doing so. RusChemAlliance LLC then commenced arbitral proceedings against Deutsche Bank AG in the Arbitrazh Court of Saint Petersburg and Leningrad Region. A few weeks after receiving notification of those proceedings, Deutsche Bank AG commenced arbitration in Paris under the ICC Rules. Nearly at the same time, Deutsche Bank AG applied to the English Commercial Court for an interim anti-suit injunction (ASI) restraining RusChemAlliance LLC from pursuing the Russian proceedings, as well as for an anti-enforcement injunction (AEI) restraining it from enforcing any award obtained in the Russian proceedings, together with permission to serve out of the jurisdiction. After being dismissed by the Commercial Court, the application was allowed in the appeal.

Held: The Court observed, in the first place, that a French court does not have the ability to grant an ASI as part of its domestic toolkit, but it will recognise the grant of an ASI by a court which does have that as part of its own toolkit, provided that in doing so it does not cut across international public policy. The question was whether England is "*the proper place in which to bring the claim*" (as required by Civil Practice Rule 6.37(3)) where England is not the seat of arbitration.

Goff LJ in The Spiliada [1987] AC 460, 475-484 affirmed that "*the proper place in which to bring the claim*" should be regarded as "*the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice*". So, in a case such as this one, the Court found no difficulty in identifying what English law regards as required by "the ends of justice". In words of Nugee LJ, "*It is the policy of English law that parties to contracts should adhere to them, and in particular that parties to an arbitration agreement, who have thereby impliedly agreed not to litigate elsewhere, should not do so. The English court, faced with an English law governed contract containing a promise by a party not to do something and a threat by that party to do the very thing he has promised not to do, will readily and usually enforce that promise by injunction.*" In those circumstances it seemed to the Court of Appeal that the forum in which the claim for an interim ASI can be suitably tried for the interests of all the parties and for the ends of justice is the English court, on the simple basis that such a claim cannot be given effect to in France." Accordingly, the ASI and the AEI were both granted.

Tip of the month

☑ Where do predated arbitration agreements go?

The 1958 New York Convention provides that the arbitration agreement must necessarily be in written form. Article 2(2) says: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement." In commercial practice, this requisite may not be as easy to be fulfilled as it seems. Problems may arise where a contract is wholly or partially superseded by an addendum or a subsequent agreement. In those cases, the arbitration clause of the original contract is frequently lost or forgotten in the successive versions. Where that occurs, the choice of arbitration is simpy given away. To avoid an undesired outcome, the original arbitration clause must be expressly written into the addendum or the subsequent agreement, either verbatim or by reference.

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