ARBITRATION WATCH
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Laws & Treaties

Reference to Arbitration Bill in the King's Speech

On 7 November 2023, King Charles III made his first speech in which the upcoming legislative programme of Rishi Sunak's Government was set out. One significant announcement was the Government's intention to introduce an Arbitration Bill in this Parliamentary session, which is due to end on 19 December 2023. Two weeks later, on 21 November, this much anticipated Bill was introduced into the House of Lords. Commenting on the Bill, the UK Justice Minister Lord Bellamy stated: *"These much-needed changes will modernise the role of arbitrators and further cement our position as a world leader in the field. The UK is a globally-respected hub for legal services, with English and Welsh law the bedrock for the majority of international disputes, and the Arbitration Bill will ensure businesses from around the world continue to come here to resolve their disagreements"*.

The Arbitration Bill is introduced under a special fast track procedure as it is based on the Law Commission's recommendations and thus considered uncontroversial. The main recommendations include codifying an arbitrator's duty of disclosure, introducing a new rule regarding the governing law of the arbitration agreement, and enacting the arbitrators' power of summary disposal for decisions on issues that have no real prospect of success. It is expected that a new Arbitration Act will receive Royal Assent in 2024 and come into effect shortly thereafter.

UNCTAD analyses interaction between global minimum tax and investment arbitration

In a recent publication, UNCTAD analyses the interaction between the global minimum tax nearly 140 jurisdictions have agreed to charge on the largest multinationals' profits and the investment protection rules contained in international investment agreements (IIAs). The publication bears the title *"The Global Minimum Tax and Investment Treaties: Exploring Policy Options"*.

Arbitration Centres

FOSFA Arbitration Clause is amended

The Federation of Oils, Seeds and Fats Associations ("FOSFA") has amended the Arbitration Clause in all its standard contract forms with effect from 1 April 2024.

Following extensive and ongoing discussion of the *Scott* v *Avery* provision that is included in the current FOSFA Arbitration Clause, the FOSFA Council has approved a recommendation from the FOSFA Arbitration and Appeals Committee to amend the clause so that it will allow parties to seek security while progressing substantive issues of a dispute under FOSFA Arbitration. The new clause incorporates the following addition: *"(c) Nothing contained under this Arbitration Clause shall prevent the parties from seeking to obtain security in respect of their claim or counterclaim via legal proceedings in any jurisdiction, provided such legal proceedings shall be limited to applying for and/or obtaining security for a claim or counterclaim, it being understood and agreed that the substantive merits of any dispute or claim shall be determined solely by arbitration in accordance with the FOSFA Rules of Arbitration and Appeal."*

New arbitration rules of SHIAC

The Shanghai International Arbitration Center ("SHIAC") launched new arbitration rules, coming into effect from 1 January 2024. Key changes include new provisions for emergency arbitration, single arbitration under multiple contracts,

disclosure of funding arrangements, publication of anonymised awards with party consent, and "online" arbitration using the SHIAC "E-Platform".

The new rules also regulate the arbitrators' duty of disclosure, referencing it to the IBA Guidelines on Conflicts of Interest in International Arbitration.

The new rules were launched along with sector-specific rules for aviation and data arbitrations, a guidance note on "online" arbitration (including the use of SHIAC's "E-Platform") and a guidance note on SHIAC's services for *ad hoc* arbitration.

LCIA publishes a new Schedule of Costs

A revised Schedule of Costs will come into effect on 1 December 2023 and will apply to LCIA arbitrations registered on or after that date. The 2023 Schedule of Costs introduces a range of hourly charging rates for the Arbitral Tribunal, a new Emergency Arbitrator Special Fee and new hourly charging rates for the LCIA Secretariat (although the Registration Fee will remain unchanged).

Fees of the Arbitral Tribunal may now be set by reference to hourly rates in a range from £250 to £650. The application fee for the appointment of an Emergency Arbitrator will be increased from £9,000 to £10,000, and the Emergency Arbitrator's fee from £22,000 to £25,000. In line with the approach to arbitrators, tribunal secretary hourly charging rates may now be set by reference to a range from £100 to £250 per hour. Although the Registration Fee remains the same at £1,950, the LCIA Secretariat's hourly charging rates will rise by 7%.

The LCIA has also published an updated Guidance Note for Parties and Arbitrators integrating the LCIA's previous three Guidance Notes (Notes for Parties, Notes for Arbitrators and Notes on Emergency Procedures) and which reflects the new 2023 Schedule of Costs. The new Guidance Note offers parties, authorised representatives and arbitrators user-friendly guidance on points of "best practice" on the application of the LCIA Rules 2020.

Investment Arbitration

Mihaljevic v. Croatia, ICSID Case No. ARB/19/35.

Award dated 19 May 2023 under the Croatia-Germany BIT of 28 September 2000.

This case originates from the invalidation of a purchase of land made by the Claimant's father in Zagreb, Croatia. The Croatian State Privatization Fund declared the seller had no title to sell the property, and the Croatian Courts declared that the purchase illegal without compensating the Claimant's father. The Claimant alleged he had been expropriated and invoked the standards of the Germany-Croatia BIT on the basis of his German nationality.

The Tribunal found that the Claimant was not a "national of another Contracting State" within the meaning of Articles 25(1) and 25(2)(a) of the ICSID Convention, and dismissed the case for lack of jurisdiction rationae personae.

Whilst the Claimant was a German citizen since 1995, he nonetheless kept the Croatian nationality on the date on which his request of arbitration was registered. The Claimant did not discharge his burden to prove that he had relinquished his Croatian citizenship at any time prior to 18 May 2020, and therefore the Tribunal found that he remained a dual national of Croatia and Germany on the date the Request for Arbitration was registered (31 December 2019), and this precluded ICSID jurisdiction pursuant to Article 25(2)(a) of the ICSID Convention.

In this regard, the Tribunal said: *"The 'negative' test in Article 25 of the ICSID Convention is that the natural person must not have the nationality of the Contracting State party with which it has a dispute on two dates: the date on which the parties consented to submit such dispute to arbitration and the date on which the request was registered."*

Case note: England & Wales

Renaissance Securities (Cyprus) Ltd v Chlodwig Enterprises Ltd & Others [2023] EWHC 2816 (Comm).

Facts: The Defendants were firms incorporated in Russia and Cyprus owned or controlled by sanctioned persons. Each of the Defendants was a client of RenSec and a party to an Investment Services Agreement ("ISA") pursuant to which the claimant, Renaissance Securities (Cyprus) Ltd. ("RenSec"), would arrange and execute various investments for the relevant Defendant. The ISAs were governed by English law and contained a dispute resolution provision with a remittance to the rules of the London Court of International Arbitration.

After the Defendants were sanctioned, RenSec took the decision to block the Defendants' accounts and to freeze their assets. The Defendants requested that its assets were transferred to bank accounts in Russia, and commenced proceedings in the courts of Kaliningrad and Moscow seeking damages in the amount of its blocked assets. According to an expert witness, Russian law gives jurisdiction to the Russian courts where, regardless of any contrary arbitration or jurisdiction clause, the parties are unable to arbitrate or litigate outside Russia due to "restrictive measures" such as sanctions. RenSec had not been served with any of the Russian proceedings and had not even commenced LCIA arbitration, but it sought an anti-suit injunction ("ASI") and an anti-anti-suit injunction ("AASI") from the English courts. RenSec's application was made on an urgent, without notice basis and heard in private.

Held: The English judge, Dias DBE, found that if the Russian proceedings were permitted to proceed, it would potentially allow the Defendants to bypass the sanctions regime altogether by obtaining judgment in Russia and then enforcing against RenSec's assets there which are currently frozen. He also found that, given the expert's evidence, the Russian courts were unlikely to consider foreign sanctions a legitimate excuse for RenSec's failure to comply with the Defendants' instructions. These considerations alone made it "just and convenient" to grant the injunction. According to the English judge, "*an ASI may be granted even in advance of the commencement of foreign proceedings, provided there is a sufficient threat that they will be commenced and that they will be such as to justify the injunction.*" He added: "*Where no arbitration proceedings are in existence and where, for the reasons just given, it would be unjust to require RenSec to commence arbitration, the question of obtaining anti-suit relief from the tribunal as an alternative to a court injunction plainly does not arise. In any event as a matter of principle it cannot on its own be a good reason for refusing an ASI otherwise it would never be possible to obtain such relief in support of an arbitration.*" On similar grounds, the AASI was granted as well to pre-empt any attempt by the Defendants to obtain ASIs of their own in Russia.

Tip of the month

☑ What is the "reciprocity reservation"? When does it apply?

The recognition and enforcement of a foreign award is generally made on the basis of reciprocity between States. The New York Convention of 1958 contains a reciprocity reservation, which excludes from its scope any award made in a non-Contracting State. In this respect, article I.3 of the Convention provides that any State may "declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." For the purposes of establishing reciprocity, the nationality of the parties is irrelevant. What is relevant is that reciprocity exists between the State where the award was rendered and the State where recognition and enforcement is sought.

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