ARBITRATION WATCH
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Laws & Treaties

Draft Bill on Arbitration in Germany

On 1 February 2024 the German Federal Ministry of Justice published a draft bill for the Modernization of Arbitration Law in Germany ("Draft Bill"). The Draft Bill aims to update the German Arbitration Law 98 in the 10th Book of the Code of Civil Procedure under the light of the UNCITRAL Model Law on International Commercial Arbitration of 2006. The Draft Bill contains new rules on freedom of form for arbitration agreements in commercial transactions, strengthens transparency and promotes the digitalization of the arbitral procedure.

UNCITRAL publishes Codes of Conduct for Adjudicators

The United Nations Commission on International Trade Law (UNCITRAL) has published the Code of Conduct for Arbitrators in International Investment Disputes (the "Arbitrators' Code"), as well as the Code of Conduct for Judges in International Investment Disputes (the "Judges' Code").

Composed by 12 articles, the Arbitrators' Code aims to preserve the reputation and legitimacy of the Investor-State Dispute Settlement system, not least after concerns have been raised about the impartiality and independence of arbitrators. With that in mind, Arbitrators' Code establishes a ban on the practice known as "double-hatting", where an arbitrator or judge, while sitting as such in one case, serves as legal counsel or as expert in another. Additionally, the Arbitrators' Code includes provisions adopting best practices on matters such as the conflict of interest disclosure, the regulation of arbitrators' fees and expenses, and the role of tribunal assistants.

The Judges' Code, in turn, contains 10 articles and applies to judges who would be members of the European Union's proposed standing Multilateral Investment Court (Standing Mechanism) should it ever materialise.

Arbitration Centres

Gafta arbitration statistics are released

The Gafta arbitration statistics for the finantial year 2022/2023 have been released. Reportedly, 337 arbitration claims were registered by Gafta, which yields an excess of 29% compared to last year. A total of 110 first tier awards were issued, 40% of which were appealed. And 23 appeal awards were issued by the Gafta Board of Appeals.

Gafta received 32 applications for correction of award or additional award under section 57 of the 1996 Arbitration Act, 24 of which were successful and 8 were fully dismissed.

New Abu Dhabi International Arbitration Centre

On 20 December 2023, the Abu Dhabi Chamber of Commerce and Industry announced that the Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC") shut down in early 2024, to be replaced with the Abu Dhabi International Arbitration Centre (branded as "arbitrateAD").

Established as an independent organization, arbitrateAD presents itself as a neutral and impartial dispute resolution forum for commercial and government entities. All pending arbitrations at the ADCCAC will continue to be administered by the ADCCAC, with new cases from 1 February 2024 to be brought to arbitrateAD under the Abu Dhabi International Arbitration Centre's Arbitration Rules (2024).

ICSID and VIAC sign agreement in support of International Investment Dispute Resolution

On 23 January 2024 the International Centre for Settlement of Investment Disputes (ICSID) and the Vienna International Arbitration Centre (VIAC) signed an agreement to jointly support

the use of arbitration, conciliation, mediation, and other dispute resolution tools to resolve international investment disputes. ICSID sources say the agreement establishes a framework to collaborate on public outreach on dispute resolution procedures, exchange information on new trends and technologies, and provide support for proceedings administered by ICSID or VIAC. Drawing on Article 63 of the ICSID Convention, the agreement also offers parties in ICSID proceedings with the option of holding hearings at VIAC's hearing centre in Vienna.

CRCICA's new Arbitration Rules 2024 come into force

The Cairo Regional Centre for International Commercial Arbitration (CRCICA) has recently announced the 2024 Arbitration Rules shall enter into force as of 15 January 2024. The new rules continue to be based on the UNCITRAL Arbitration Rules, but present novel issues like online arbitration filings, remote hearings, the law applicable to the arbitration agreement, consolidation of arbitrations, multiple contracts, third party funding, Emergency Arbitrator Rules, and Expedited Arbitration Rules. The Arbitration Rules 2024 have been released in English and Arabic.

CRCICA is an independent non-profit international organisation established in 1979 under the auspices of the Asian African Legal Consultative Organization, which at the Doha Session in 1978 projected the establishment of regional centres for international commercial arbitration in Africa and Asia, seeking to promote international commercial arbitration in the Afro-Asian area.

CIETAC Arbitration Rules 2024 come into force

On 1 January 2024, the new Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC) came into force. The 2024 Rules apply to CIETAC arbitrations commenced on or after this date. Now in their 10th edition, the new rules consist of 88 provisions and incorporate recent developments in international arbitration, such as third-party funding, multi-contracts and consolidation of disputes, to mention a few.

CIETAC's new arbitration rules also contemplate the early dismissal of a claim where, at the request of a party, the claim is found manifestly without legal merits or notoriously beyond the jurisdiction of the tribunal. Regarding jurisdiction, the Chinese Arbitration Law of 1995 do not follow the doctrine of *Kompetenz-Kompetenz*, but the new CIETAC rules allow the parties to submit a challenge of the arbitral jurisdiction to the Arbitration Commission for a decision or bring it before the people's court for an order.

Investment Arbitration

JSC DTEK Krymenergo v Russia, PCA Case No. 2018-41, Award dated 1 November 2023 under the 1998 Russia-Ukraine BIT

DTEK Krymenergo, a company incorporated in Ukraine, owned an electric power distribution business in the Crimean Peninsula. After the accession of Crimea by Russia, the claimant relocated its corporate seat from Crimea to Kyiv, establishing a branch office in Crimea. In January 2015 the Russian-backed Crimean authorities (i.e. the State Council of the Republic of Crimea) ordered the seizure without compensation of the company's Crimean assets, which were subsequently transferred to a Russian state-owned entity. In response, DTEK Krymenergo initiated international arbitration against the Russian Federation under the 1998 Russia-Ukraine BIT. The arbitral tribunal issued an award pursuant to the 1976 UNCITRAL Rules finding Russia liable for -among other violations of the treaty- committing an unlawful expropriation by confiscating all the claimant's assets without any compensation. Consequently, Russia was ordered to pay approximately $267 million in damages, together with interest and costs.

Throughout the arbitration, Russia challenged the jurisdiction of the tribunal on the objection -among others- that DTEK Krymenergo's investment was not located within the "territory" of Russia. The

term "territory" was defined in Article 1(4) of the BIT as "the territory of […] the Russian Federation, as well as their respective exclusive economic zone and continental shelf, as determined in conformity with international law." The tribunal dismissed Russia's objection on jurisdiction. It found that the BIT did not bind the notion of "territory" to sovereignty (as argued by Russia), but rather to the effective jurisdictional control exercised by a state over a certain area. Accordingly, the tribunal found that the claimant's investment was well within the Russian territory because since 2014 the Crimean Peninsula had been placed under Russian effective control.

Relying on the Article 31(1) of the Vienna Convention on the Law of Treaties, the tribunal pointed out that the interpretation of the said Article 1(4) of the BIT should be made "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The ordinary meaning of "territory" was, according to the tribunal, "the entire area within a State's possession or control, over which a government exercises de facto jurisdictional powers—irrespective of the question of sovereignty". Turning to the language of the BIT, the tribunal observed that the notion of "territory" included the respective exclusive economic zones and continental shelf, over which no state exercises full sovereign rights, which inferred the BIT parties' intention to not link the term "territory" with sovereignty. Ultimately, the tribunal also noted that the Russian Federation has actively affirmed since 2014 that Crimea constitutes a part of its territory.

Case note: England & Wales

Palmat NV v Bluequest Resources AG [2023] EWHC 2940 (Comm)

Facts: In an LCIA arbitration, Bluequest Resources AG ("Bluequest") sought payment of a quantity of liquid caustic soda due to it from Palmat NV ("Palmat") pursuant to an agreement entitled "Sales Contract". On the same date as that of the said contract, the parties had entered into another agreement entitled "Purchase Agreement" whereby Palmat would deliver a quantity of aluminium to Bluequest. The price agreed for the liquid caustic soda was USD 590 per dry metric ton, and the payment terms were "100% against aluminium metal delivery" under the Purchase Agreement. Through the conclusion of the two contracts, the parties were basically exchanging liquid caustic soda for aluminium.

Liquid caustic soda was shipped pursuant to the Sales Contract, but no aluminium was shipped within the period agreed in the Purchase Agreement. In the first place, the tribunal found that the two agreements were independent to each other and could not be read together as a single barter agreement. Having asserted that Palmat had neither delivered aluminium nor paid by cash for the liquid caustic soda it received, the tribunal gave Bluequest damages. It also awarded interest on arbitration and legal costs despite Bluequest not having claimed such. Pursuant to section 68 of the 1996 Arbitration Act, Palmat sought to challenge the award alleging multiple procedural irregularities, all of which were dismissed save for that in respect to interest on arbitration and legal costs.

Held: The Court found the tribunal was right to conclude that the cash price of the liquid caustic soda became payable where the shipment of aluminium had not taken place. Insofar as it concerns interest on arbitration and legal costs, the award was set aside. The Court found that interest had been awarded on arbitration and legal costs when Bluequest had not sought interest on either. According to the Court "it was…common ground that interest on arbitration and legal costs was not in play in the relevant sense at the final hearing."

Turning to the rationale of the decision, the Court cited Popplewell J in Terna Bahrain Holding Company WLL v Al Shamsi [2012] EWHC 3283 (Comm), who said: "In order to make out a case for the court's intervention under section 68(2)(a), the applicant must show: (a) a breach of section 33 of the Act; ie that the tribunal has failed to act fairly and impartially between the parties, giving each a reasonable opportunity of putting his case

and dealing with that of his opponent, adopting procedures so as to provide a fair means for the resolution of the matters falling to be determined; (b) amounting to a serious irregularity; (c) giving rise to substantial injustice." With those principles in mind, the Court said that "[r]elief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could be reasonably be expected from the arbitral process, that justice calls out for it to be corrected." Thus, he added "there will generally be a breach of section 33 where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with." Further on this point, the Court cited Carr J in Obrascon Huarte Lain SA v Qatar Foundation for Education, Science and Community Development [2019] 2 Lloyd's Rep. 559 saying: "It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated…".

Tip of the month

☑ What is a "duly authenticated original award"?

The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), in its Article IV, provides that any application for the recognition and enforcement of a foreign award must be accompanied by "the duly authenticated original award or a duly certified copy thereof". But what do these words mean in practice? The courts of the Contracting States have interpreted them in different ways, but it is widely accepted that an "authenticated original award" is a certification that the award is genuine by a Public Notary of the jurisdiction in which the award was issued, together with the recognition by the Government of that country that the certification is a public document within the terms recognised in The Hague Convention of 5 October 1961..

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