ARBITRATION WATCH
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Laws & Treaties

Israel's Parliament approves a new arbitration law

On 12 February 2024 the Israel's Parliament passed the International Commercial Arbitration ("ICA") Law 5774-2024.

Based on the 1985 UNCITRAL Model Law (as amended on 2006), ICA law brings in modern standards to international arbitrations of a commercial nature, whereas domestic arbitrations remain subject to the former Arbitration Law 5728-1968. It adopts the approach of Section 1(3)(c) of the Model Law, according to which an arbitration is international if "the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country."

ICA law incorporates the provision on enforcement of arbitration agreements in the Model Law, which is based on Article II(3) of the New York Convention. Although the provision of Article II(3) was also included in the preceding Arbitration Law, Israeli courts have not fully embraced it and, more often than desired refused to enforce an arbitration agreement in instances that do not strictly fall into one of the exceptions stated in the article, such as public policy grounds.

ICA law will come into force as soon as it is published in the official gazette and will apply to all arbitrations initiated thereafter, regardless of the date the arbitration agreement was entered into.

New withdrawals from the ECT

On 7 March 2024 Portugal announced it is leaving the Energy Charter Treaty ("ECT"). Portugal's announcement follows those of the United Kingdom of 22 February 2024 and Slovenia of 26 February. Significantly, on 7 March 2024 the Council of the EU published the Decision on the withdrawal of the Union from the ECT. The withdrawal will now have to be confirmed by the European Parliament.

Arbitration Centres

New NAI Arbitration Rules

On 1 March 2024 the new arbitration rules of the Netherlands Arbitration Institute ("NAI") entered into force and on or after that date apply to all arbitrations filed.

The new NAI Rules, which were last revised in 2015, give passage to changes such as the establishment of a NAI Case Management Committee, a body formed by at least three members designated by the Executive Board of the NAI that administers the arbitrations. They also provide the need to hold a case management conference; require the parties' disclosure of third-party litigation funding; and envisage a procedure for challenging arbitrators, yet deterring parties from abusing their right to raise a challenge. Another change is the possibility of early determination to dismiss claims which are manifestly without merit.

Finally, the new NAI Rules provide for Amsterdam as the default place of arbitration if the parties have not agreed otherwise and allow post-award litigation in English before the Netherlands Commercial Court.

AAA-ICDR announces enhancements to Mass Arbitration Rules

On 16 April 2024 the American Arbitration Association-International Centre for Dispute Resolution ("AAA-ICDR") introduced significant updates to its Mass Arbitration Supplementary Rules and corresponding fee schedules.

The Mass Arbitration Supplementary Rules have been broadened to cover a variety of disputes, including B2B, commercial, construction and international cases, moving beyond their initial focus on consumer and employment/workplace issues.

Turning to the case threshold, mass arbitration disputes not categorized as consumer or

employment/workplace must meet a minimum threshold of 100 cases. The threshold for consumer and employment/workplace disputes remains at 25 cases.

The Tribunal Global Secretary Platform is launched

On 26 March 2024 the Tribunal Global Secretary Platform was launched. It is an online platform that helps arbitrators find external tribunal secretaries for case-by-case collaboration and offers various resources to both arbitrators and tribunal secretaries. The platform is jointly powered by the Swiss Arbitration Association (ASA) and Jus Connect, and supported by senior practitioners and professional organisations worldwide, including the Chartered Institute of Arbitrators. The use of the Global Tribunal Secretary Platform is free of charge for arbitrators and tribunal secretaries.

Investment Arbitration

Koch Industries, Inc. and Koch Supply & Trading, LP v Canada, ICSID Case No. ARB/20/52

The Claimants were US-incorporated firms. Their economic activities primarily involved purchasing publicly issued carbon emission allowances in Ontario and then transferring them to California for resale in the secondary market. Their claim arises out of an act passed in 2018 cancelling the cap-and-trade programme in the Canadian province of Ontario, and Ontario's alleged failure to compensate them for the loss of value of the allowances purchased under that programme. According to the Claimants, the emission allowances that they acquired, along with its carbon trading business in Ontario, qualified as investments, and thus met the requirements for the treaty protection under Article 1139(h) of NAFTA.

Article 1139 of NAFTA (1992) provides that: "Investment means: (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise."

The Tribunal found that the emission allowances acquired by the Claimants and its carbon trading business, considered in the context of NAFTA Article 1139(h), did not constitute protected investments. The chapeau of Article 1139(h) requires economic activity to be conducted in the territory of the host State. In the Tribunal's view, the Claimants' activity was based on cross-border trade, which several NAFTA tribunals have found not to be protected by Article 1139(h). In the Tribunal's view, the purchase of allowances in an auction, through an Ontario-specific website or a tracking system service account, does not in itself constitute an investment in Ontario in the terms of Article 1139(h). Accordingly, the Tribunal concluded that the Claimants did not conduct sufficient economic activity in the territory of Ontario to establish jurisdiction ratione materiae under NAFTA Article 1139(h).

Case note: England & Wales

Contax Partners Inc BVI v. Kuwait Finance House and Others , [2024] EWHC 436 (Comm)

Facts: The Claimant commenced an arbitration claim against against the Defendants, which were three companies in a banking group. The claim sought to enforce an arbitration award ("the Award") purportedly issued by the Kuwait Chamber of Commerce and Industry Commercial Arbitration Centre ("KCAC") and endorsed by the Kuwait Commercial Court of Appeal. The English court made an order ("the Order") giving leave

to enforce the Award under section 66 of the Arbitration Act 1996. No application to set the order aside was made within 28 days after service and, subsequently, Third Party Debt Orders ('TPDOs') were issued. At that time, the Defendants came to know about the Order and applied to court to prevent payment under the TPDOs, as well as to set aside the Order. They said the Order had not been validly served on them, but, "more than this, … there was never an arbitration at all."

Held: Butcher J. set aside the Order and the Award. He found that altogether (including the Award and the Kuwaiti judgment allegedly endorsing the Award) was a fabrication. First, substantial parts of the Award were a copy-and-paste job taken directly from Picken J's judgment in *Manoukian v Société Générale de Banque au Liban SAL* [2022] EWHC 669 (QB). Second, it was highly improbable that the Award was issued under the auspices of the KCAC. Third, the Kuwaiti judgement was not in Arabic and had not been signed by any of the actual members of the Kuwait Commercial Court of Appeal. Fourth, there was evidence that individuals named in the Award as having been involved in the arbitration were not so involved. And fifth, none of the documents referred to in the Award and the Kuwaiti judgment had been produced. Accordingly, Butcher J. concluded that there was no arbitration agreement or arbitration, and that the Award and the Kuwaiti judgment were a fabrication.

Tip of the month

☑ What is the "reciprocity reservation" to the recognition and enforcement of foreign awards?

The UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) allows the Contracting States to trigger the so-called "reciprocity reservation" in Article I(3). Pursuant to it, the Contracting States may declare that they will apply the Convention only and exclusively to the "recognition and enforcement of awards made only in the territory of another Contracting State". So, when a Contracting State makes the reciprocity reservation, their domestic courts will apply the New York Convention only to awards rendered in the territory of a State which is also a party to the Convention. For establishing reciprocity, the nationality of the parties is irrelevant; what matters is the level of reciprocity between the State where the award was rendered and the State where recognition and enforcement is sought.

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