ARBITRATION WATCH
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Laws & Treaties

New arbitration law in Papua New Guinea

Papua New Guinea has passed two new laws: the Arbitration (International) Act 2024 and the Arbitration (Domestic) Act 2024. Together, they form a dual-track legislative regime which replaces the Arbitration Act 1951 of the pre-independence era.

With the enactment of the new arbitration regime, Papua New Guinea embraces the UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments adopted in 2006, and gives full effect to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which was acceded to in 2019.

Arbitration Centres

Changes in the GAFTA Arbitration Rules

The Council of the Grain and Feed Trade association (GAFTA) has approved changes to the Arbitration Rules Nos. 125 and 126. The new Rules 24.3 and 10.3 have been added, respectively, to the Arbitration Rules No. 125 and No. 126 to prohibit a defaulter on a GAFTA award of arbitration from applying to place another party on the list of defaulters.

Administered Arbitration Rules by HKIAC

Hong Kong International Arbitration Centre (HKIAC) released the 2024 Administered Arbitration Rules (2024 Rules), with effect on 1 June 2024. The 2024 Rules replace their predecessor of 2018 and introduce new provisions to reflect advancing social norms and technological developments.

The 2024 Rules contain, among others, a new provision encouraging parties, arbitrators and HKIAC to take diversity into account when designating arbitrators. Provisions can also be found requiring that tribunals and parties consider environmental impact when adopting procedures for the conduct of the arbitration, as well as empowering tribunals to take into account any adverse environmental impact arising out of parties' conduct when allocating costs. Other provisions aim to enhance information security and prevent information security breaches. And an additional option has been included in the model clause, allowing parties to select in their contracts how the tribunal's fees will be calculated (ad valorem or at an hourly rate).

JAM adopts new Mass Arbitration Rules

JAMS has announced new Mass Arbitration Procedures and Guidelines for mass arbitrations, with effect on 1 May 2024.

The new rules aim to put barriers to abusive mass arbitrations, which occur when a claimant pool includes a large number of improper claimants, such as ones who are fictitious or duplicative, who are not even customers of or workers for the targeted business, or who were never exposed to the challenged improper conduct, and who are all necessarily asserting patently frivolous claims.

The new rules apply where the parties have a written agreement and a minimum of 75 similar demands for arbitration (or such other amount as is specified in the Parties' agreement) have been filed against the same party or related parties by individual claimants represented by either the same law firm or law firms acting in coordination.

Investment Arbitration

Glencore and Others v. Colombia, ICSID Case No. ARB/19/22

Award dated 19 April 2024 under the Colombia-Switzerland BIT (2006).

Glencore International AG, Prodeco SA and Sociedad Portuaria Puerto Nuevo SA (the Claimants) brough an ICSID arbitration claim against the Republic of Colombia. Their investment consisted in a 30-year concession contract signed with Colombia's national infrastructure agency for Puerto Nuevo, a public services port for the export of coal in the municipality of Ciénaga. After the contract was signed, Colombia refused to regulate the fair allocation of expenses related to the construction and maintenance of the port access channel among its users, resulting in the Claimants having to shoulder the entire burden of those expenses, while others remained exempt from such financial obligations and from paying tariffs for the use of access channels.

The Tribunal found that Colombia's conduct was discriminatory and, therefore, constituted a breach of the fair and equitable treatment standard under Article 4(2) of the Treaty, which reads: "Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party. This treatment shall not be less favourable than that granted by each Party to investments made within its territory by its own investors, or than that granted by each Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable."

The Tribunal found that the test for determining whether the host state's conduct constitutes discrimination in contravention of the fair and equitable treatment standard under the Treaty draws from that for most favored nation claims. The test entails a three-fold analysis which the Tribunal relied upon to bring Colombia to accountability: (1) the identification of an appropriate comparator—meaning, investments of an investor in like circumstances, which occurs when they operate within the same industry, or when they stand as direct competitors; (2) an assessment to determine whether the host state treated the investments of the investor protected under the fair and equitable treatment standard less favorably than those of the identified comparator; and (3) a demonstration that the less favorable treatment was not justified based on a non-discriminatory rational government policy.

Case note: England & Wales

Ayhan Sezer v Agroinvest SA [2024] EWHC 479 (Comm)

Facts: Ayhan Sezer purchased a cargo of rape meal and soybean meal from Agroinvest. The contract incorporated Gafta Form No. 100, which provided that damages were to be assessed by reference to the "date of default". On 27 April 2018 Ayhan Sezer requested Agroinvest not to perform the contract and sought the return of an advance payment of 20% of the price it had made at the time the contract was entered into. Whilst Ayhan Sezer acknowledged that it had renounced or repudiated the contract, it nonetheless contended that the advance payment was repayable. Agroinvest, in turn, argued that the advance payment was a non-refundable deposit and/or became due as a remedy for damages. In arbitration, the Gafta Board of Appeal concluded that Ayhan Sezer had repudiated the sale contract on 27 April 2018, but assessed damages by reference to 7 May 2018, this being the date on which the repudiation had been accepted by Agroinvest. Pursuant to Section 69 of the Arbitration Act 1996, Ayhan Sezer brought a challenge on two questions of law: (a) what the "date of default" was for the purpose of Gafta No. 100; and (b) whether the advance payment was non-refundable.

Held: HHJ Pearce found that the true date of default under the contract was the date that the Board found Ayhan Sezer to be in repudiatory breach, namely 27 April 2018, rather than the date of the acceptance of that breach. He said: "on its true construction the date of default in a Gafta default clause is the date of breach, even where that breach is anticipatory." Consequently, the matter was remitted back to Gafta to assess damages by reference to a date of default of 27 April 2018. Turning to the advance payment, the Judge held that it was repayable to Ayhan Sezer. On that question, he said: "Had the parties intended the Advance Payment not to be recoverable, they would either have called it a deposit or expressly stated this to be the case. They did not do so."

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Tip of the month

☑ Enforcement of arbitral awards: a comparison between the New York Convention and the Geneva Convention

When it comes the scope of application, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention") differs from the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 ("Geneva Convention") on two points:

First, the New York Convention applies to awards issued in any foreign State, regardless of whether that State is a Contracting State (article I.1). Unlike the Geneva Convention, it does not confine the recognition and enforcement of awards to the territory of other Contracting States; instead, it provides for an opt-in reservation based on reciprocity (article I.3).

And second, the application of the New York Convention is not contingent on the nationality or residence of the parties. Unlike the Geneva Convention, it does not require the awards be rendered in proceedings "between persons who are subject to the jurisdiction of one of the High Contracting Parties".

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