ARBITRATION WATCH

June - Issue No. 74

Laws & Treaties

Equatorial Guinea signs the ICSID Convention

On 13 June 2024 the Republic of Equatorial Guinea signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

The ICSID Convention, which entered into force in 1966, establishes the institutional and legal framework for resolving international investment disputes. It was created to facilitate investment amongst countries by providing an independent forum for arbitration, conciliation and fact-finding.

Equatorial Guinea becomes the 166th State to sign the ICSID Convention. Once it is ratified, the ISCID Convention will come into force in the said country.

EU publishes a rapporteur's opinion on ADR

On 23 April 2024 the European Economic and Social Committee on alternative dispute resolution published the Opinion C/2024/2482. Signed by the rapporteur Wautier Robyns de Schneidauer, the document proposed a Regulation with regards to the discontinuation of the European ODR Platform, and a Directive on alternative dispute resolution for consumer disputes.

The Opinion C/2024/2482 encourages the EU to update the rules about out-of-court settlement of conflicts between providers of products and services, on the one hand, and consumers, on the other hand. The proposed framework would embrace the following actions: (1) include non-EU traders and prohibit unfair practices such as manipulative interfaces and advertising; (2) entrust designated and well-publicised bodies like the European Consumer Centres Network (ECC) with providing assistance to consumers in understanding and accessing ADR procedures; (3) give traders a 20-day deadline to accept or decline to participate in dealing with a complaint under an ADR procedure; (4) leave it to the Member States to extend the obligation for traders to join ADR schemes, while aiming to nudge traders to join such schemes where this is not obligatory under EU or national rules; (5) repeal the infrequently-used ODR procedure, to be replaced by digital interactive tools directing consumers to available redress solutions; (6) include ADR schemes offered by online marketplaces and EU trade associations; and (7) allow for collective ADR claims (for instance when a number of travellers have suffered similar inconvenience and/or damage) with a possibility for individual plaintiffs to opt out of such claims.

Arbitration Centres

A report surveys trends in compliance and enforcement of ICSID Awards

A newly published report by the ICSID Secretariat provides an in-depth look at compliance with and enforcement of awards rendered under the ICSID Convention. The report features a review of 124 publicly available domestic court decisions that relate to enforcement of awards ordering pecuniary damages as of 31 December 2021. The study finds that the vast majority of ICSID awards are satisfied, either through compliance, settlement, or enforcement.

Under the ICSID Convention, awards are final and binding on the parties. They are not subject to appeal or any other remedy except those provided for in the Convention. If a party fails to comply with an award, the other party can seek enforcement in the courts of any ICSID Member State as though it were a final judgment of that State's courts. The Convention does not provide for any grounds to refuse enforcement such as those contained in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

This enforcement regime is unique to arbitrations under the ICSID Convention.

The Permanent Court of Arbitration publishes its 2023 Annual Report

According to the 2023 Annual Report, the Permanent Court of Arbitration ("PCA") registered a record-breaking number of 82 new cases throughout the year. This marks the largest number of new registry cases ever received by the PCA in a single calendar year, surpassing the previous record of 59 cases set in 2020 and almost equalling the total from the last two years combined (90 cases in 2021 and 2022).

In the course of 2023, the PCA's International Bureau provided registry services in 246 cases, 82 of which were initiated that year. The cases administered over the course of 2023 involved parties from over 110 States. In these cases, at least one of the disputing parties came from each of the United Nations Regional Groups in the proportions shown below.

Through the cooperation agreements concluded in 2023 with the Lagos Chamber of Commerce International Arbitration Centre (LACIAC) and with the Scottish Arbitration Centre, the PCA further expanded its capacity to readily hold hearings and meetings around the globe, in keeping with its mission to be accessible "to all" and "at all times". In addition, 2023 was the first full year of operation of the PCA's new offices in Vienna (Austria) and Ha Noi (Viet Nam). The PCA now has six offices worldwide, including its headquarters in The Hague.

Investment Arbitration

Freeport-McMoRan Inc. v. Republic of Peru, ICSID Case No. ARB/20/8

Award dated 17 May 2024 under the Peru - United States Trade Promotion Agreement (2006).

Freeport-McMoRan, Inc. ("Claimant") filed claims of USD 1 billion in aggregate against the Republic of Peru in connection with the assessment of taxes and penalties for operating a copper mine. The Claimant was the shareholder of 54 per cent in Sociedad Minera Cerro Verde S.A.A. ("SMCV"). In 1998, SMCV and the Ministry of Energy and Mines entered into a 15-year stabilization agreement with respect to an investment project to expand the copper cathodes production capacity of a leaching plant ("the Leaching Project"). In 2006, SMCV completed the construction of another plant to produce cooper concentrate ("the Concentrator") in the area. Starting in 2008, the Peruvian tax authorities assessed royalties, taxes and penalties that remained unpaid with respect to products produced from the Concentrator. The Claimant alleged that, by imposing such charges, Peru violated his legitimate expectations and acted in an arbitrary and non-transparent manner, breaching the 1998 Stability Agreement and Article 10.5 (Minimum Standard of Treatment) of the Trade Promotion Agreement ("TPA") between the United States and Peru.

The Tribunal found in favour of Peru. The 1998 Stability Agreement did not apply to the entire mining units of concessions of the Claimant, but to the Leaching Project alone. So, the Claimant was not entitled to extend to the Concentrator the same threshold of protection Peru owed in relation to the Leaching Project. Regarding the standard of protection under Article 10.5 of the TPA, the Claimant failed to prove that Peru created legitimate expectations that SMCV relied on at the time the investment was made, and that those were frustrated. The Claimant also failed to prove that Peru's actions were arbitrary. According to the Tribunal, "*a government action is arbitrary 'if, among other factors, it is taken not based on legal standards but on excess of discretion, prejudice or personal preference´*" Applying the ELSI standard, arbitrariness is *"something opposed to the rule of law"* and *requires "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."* The Claimant also contended that Peru's conduct had been "based on political calculations" on the factual premise that Peru would have changed its interpretation of the 1998 Stability Agreement because of political pressure, after having assured SMCV that the stability guarantees applied to the Concentrator, and that such conduct constituted arbitrary action. The Tribunal found the Claimant's argument according to which conduct "based on political

calculations" constitutes arbitrary action to be unsupported. It said: *"Policy decisions of States are, by essence, based on political considerations or 'calculations', and these do not per se taint State conduct with arbitrariness."*

Case note: England & Wales

Sharp Corp Ltd v Viterra BV (previously known as Glencore Agriculture BV) [2024] UKSC 14

Facts: This is an appeal on a question of law under section 69 of the Arbitration Act 1996. The question arose out two awards ("the Awards") issued by a GAFTA Board of Appeal in relation to two cargoes of lentils and peas ("the Goods") shipped in Vancouver, Canada. The Goods had been sold C&F free out Mundra, India, by Viterra BV ("Sellers") to Sharp Corp Ltd ("Buyers"). The carrying vessel arrived in Mundra in June 2017. By that time, the Buyers had not paid for the Goods, so both parties agreed to discharge, customs clear and store the Goods in a warehouse ashore, subject to a contractual undertaking from the Buyers that they would not take them out of without the Sellers' written consent. The parties decided to vary the contracts and signed two Addenda to provide that the Buyers would pay for the Goods in instalments. Shortly after the Goods cleared customs, the Indian Government imposed import tariffs of 50% on peas and 30.9% on lentils with immediate effect, which eventually increased the Goods' value in the domestic market. Eventually, the Buyers failed to pay the instalments and were put in default on 9 November 2017. On 2 February 2018, the Buyers eventually agreed to release the cargo to the Sellers, and filed a consent order provided for the Sellers to obtain possession of the Goods. The case was brought to arbitration in London, where a GAFTA Appeal Board found the Buyers liable for damages to be assessed under the Default Clause of the GAFTA Form No 24, paragraph (c) of which provides that, where no substitute sale is made, damages should be assessed based on "the actual or estimated value of the goods" on the date of default in that market.

The question of law was whether, under paragraph (c) of the Default Clause, damages should be assessed by reference to: A. the market value of Goods at the discharge port of Mundra, where they were located on the date of default; or B. the notional cost on the date of default of buying the Goods in position FOB Vancouver, plus the market freight rate for transporting them to Mundra. In addressing the said question, the Court relied substantially on the dicta of Lord Sumption in Bunge SA v Nidera BV, [2015] 3 All E.R.

The Court of Appeal found that the contracts had been varied for they were no longer on C&FFO Mundra terms and instead became ex warehouse Mundra. Accordingly, it held that damages should be assessed on the basis of the new pricing terms. The Sellers appealed to the Supreme Court on grounds that the Court of Appeal had exceeded its jurisdiction under section 69 of the Act. The Buyers cross-appealed on grounds that, if the Sellers' appeal succeeded, damages should be assessed "as is, where is", i.e. on the basis of the price obtainable for the goods in the Indian internal market at the time.

Held: Since there was no evidence of an available market for a substitute transaction on C&FFO Mundra terms, the issue which then arose is by reference to what market the estimated value of the goods should then be established. The Sellers contended that it should be the FOB Vancouver market with appropriate adjustments being made to arrive at a C&FFO Mundra price, as the GAFTA Appeal Board accepted. The Buyers contended that it should be the ex warehouse Mundra market. The proper approach is to be guided by the principle of mitigation and to consider the market in which it would be reasonable for the Sellers to sell the goods. On the date of default the Sellers were left with goods, which were landed, customs cleared and stored in a warehouse. The goods had also significantly increased in value because of the imposition of customs tariffs. In such circumstances, the obvious market in which to sell the goods, and in which it would clearly be reasonable to do so, was the ex warehouse Mundra market on 2 February 2018. Accordingly, the Board of Appeal erred -among other questions of law- in its assessment of damages.

Tip of the month

☑ Do arbitral awards have *res judicata* effect?

Article III of the 1958 New York Convention provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon". Whilst the said provision does not explicitly provide that arbitral awards have res judicata effect, a number of national courts have ruled they do have such in practice. So, it can be said that until and unless an arbitral award is successfully challenged, it presumptively establishes the rights and liabilities of the parties to the arbitration.

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