ARBITRATION WATCH
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Laws & Treaties

The UK government prioritises the Arbitration Bill

On 17 July 2024, King Charles III revealed the new Labour government's immediate agenda in the first King's Speech since Keir Starmer became prime minister. One of the revealed priorities of the recently elected Labour government is the reinstatement of the Arbitration Bill.

The Labour government has published explanatory notes and a delegated powers memorandum to accompany the bill. It has also published an impact assessment, a human rights memorandum and a factsheet setting out more detail on the bill's aims and expected impact.

The Arbitration Bill was initially proposed by Rishi Sunak's government, but along with several other proposals for new legislation, was put aside on the dissolution of parliament in May preceding the General Election of 4 July 2024.

On a separate note, on 30 July 2024 the House of Lords considered the Arbitration Bill at second reading, discussing the main topics in the bill and drawing attention to specific concerns or areas where they think changes are needed.

EU declares non-applicable the investor-state arbitration regime of the ECT

On 26 June 2024, the EU and 26 EU Member States signed the *Declaration on the legal consequences of the judgment of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings* ("the Declaration").

According to the Declaration, the regime for the resolution of disputes set forth in Article 26 of the ECT ("investor-state arbitration clause") shall not apply as a basis for intra-EU arbitration proceedings between investors and Contracting States.

The Declaration also sought to disapply Article 47 of the ECT ("sunset clause"), which provides that the withdrawal by a Contracting State takes effect upon the expiry of one year after the date of the receipt of the notification of withdrawal by the Depository of the ECT.

The Declaration is underpinned by the announcement of withdrawal from the ECT by more than 10 of the Contracting Parties, as well as by the jurisprudence of the Court of Justice of the European Union (CJEU), which found that EU law was incompatible with the ECT's investor-state arbitration clause (contained in Article 26). In *Slovak Republic v. Achmea B.V. (Achmea)*, the CJEU ruled that investor-state arbitration clauses in bilateral investment treaties (BITs) concluded between EU Member States are incompatible with EU law. Likewise, in *Republic of Moldova v. Komstroy (Komstroy)*, the CJEU stated that Article 26 of the ECT was also incompatible with EU law and therefore would not apply to intra-EU disputes.

Despite the CJEU's decisions in *Achmea and Komstroy,* more than 50 publicly known awards have affirmed the tribunals' jurisdiction in intra-EU disputes under both BITs and the ECT. In only one publicly known case (*Green Power v. Kingdom of Spain*), a tribunal followed the CJEU's jurisprudence and declined jurisdiction on intra-EU grounds.

Equatorial Guinea Ratifies the ICSID Convention

On 24 July 2024 the Republic of Equatorial Guinea deposited its Instrument of Ratification of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) with the World Bank. Equatorial Guinea becomes the 159th Contracting State to the ICSID Convention.

In accordance with its Article 68(2), the ICSID Convention will enter into force for Equatorial Guinea on 23 August 2024.

The ICSID Convention establishes the institutional and legal framework for foreign investment dispute settlement. It was created to facilitate investment amongst countries by providing an independent, depoliticized forum for arbitration, conciliation, mediation, and fact-finding.

As a Contracting State to the ICSID Convention, Equatorial Guinea will participate in the governance of ICSID through representation on its governing body, the Administrative Council. Each ICSID Member State has one representative—and one vote—on the Administrative Council. Its responsibilities include passing rules of procedure for ICSID cases, and electing the ICSID Secretary-General and Deputy Secretaries-General. ICSID Member States also have the right to name arbitrators and conciliators to the ICSID Panels.

The Arbitration Law in Latvia is reformed

Further to subsequent amendments, the Arbitration Law of the Republic of Latvia of 2015 was amended on 4 July 2024. The latest reform is underpinned by the necessity to adapt the legal framework to UNCITRAL Model Law on International Arbitration.

After the amendment, an exchange of electronic communications may suffice to prove a concluded arbitration agreement without the need of a secure electronic signature. Moreover, the parties' submission of statements of claim and defence statements acknowledging arbitral jurisdiction is, by and of itself, a valid arbitration agreement. And, pursuant to the principle of separability, an arbitration agreement in Latvia is now independent from the rest of the contract in which it is set forth.

Latvia is a Member State to both the 1958 New York Convention and to the 1961 European Convention on International Commercial Arbitration since 1992, as well as to the 1965 ICSID Convention since 1997.

Latvia's concluded intra-EU bilateral investment treaties have been denounced and terminated. The investment treaties it had with countries such as Belarus, India, the United Kingdom and Norway, have also been denounced.

Arbitration Centres

The International Chamber of Commerce (ICC) publishes the 2023 ICC Dispute Resolution Statistics

In the year 2023, the ICC Court registered a total of 890 new cases, marking the third-best year in its history. Of the 890 registered cases, 870 were held under the trusted ICC Rules of Arbitration and 20 under the ICC Appointing Authority Rules. The 2023 figures also revealed a record number of 189 new cases administered under the Expedited Procedure Provisions. Other significant statistics include the geographical diversity of parties and places of arbitration and the rising amount of female arbitrators.

The ICC Centre registered 75 new cases under the ICC Rules of Mediation, Expert Rules, and DOCDEX Rules. The cases comprised 37 mediations, 30 expertise proceedings, five requests for DOCDEX decisions and three Dispute Board proceedings.

Investment Arbitration

***TC Energy and TransCanada v. USA*,, ICSID Case No. ARB/21/63**

Award dated 12 July 2024 under the NAFTA (1992) and USMCA (2018)

Canadian investors filed claims against the US arising out of the President Biden's decision in 2021 to revoke a 2019 permit granted under the Trump's past presidency to construct a crude oil pipeline from Alberta to Nebraska. They complained about the alleged violation of the obligations established in Article 1110 NAFTA (concerning the issuance of compulsory licenses or intellectual property rights) and article 1502(3) NAFTA (concerning the behaviour of state enterprises exercising regulatory, administrative or governmental authority). At the core of the discussion was the fact that the permit revocation occurred after NAFTA was replaced by UMSCA on

1 July 2020. The investors relied on Annex 14-C USMCA to invoke the standards of protection contained in NAFTA.

Annex 14-C provided for the continued application of certain parts of NAFTA (Chapter 11) until 30 June 2023, despite the termination of NAFTA, thus creating a limited exception to the general rule that Parties are released from obligations under a treaty after its termination. Annex 14-C USMCA reads: *"Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of NAFTA 1994 and this Annex alleging breach of an obligation under: (a) Section A of Chapter 11 (Investment) of NAFTA 1994; (b) Article 1503(2) (State Enterprises) of NAFTA 1994; and (c) Article 1502(3)(a) (Monopolies and State Enterprises) of NAFTA 1994 where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A of Chapter 11 (Investment) of NAFTA 1994".*

Prof. Schreuer, the investor's expert, framed the question as follows: *"Annex 14-C provides for the continued application of certain provisions of NAFTA to certain investments for a certain time. The core question is whether this includes NAFTA's substantive standards".*

According to the Tribunal, the ordinary meaning of Annex 14-C is that consent to arbitrate was established until 30 June 2023 for facts capable of constituting a breach of NAFTA while NAFTA was in force. Under the light of the preparatory works of the USMC, the Tribunal also found that US and Canada had no common intention, in agreeing on Annex 14-C, to extend the substantive provisions of Chapter 11 of NAFTA until June 2023. In this respect, the Tribunal said: *"Because the substantive provisions of USMCA apply to legacy investments, the resulting situation would be that the USMCA parties would be bound until 30 June 2023 by different - and potentially conflicting - sets of substantive norms on matters as sensitive as competition, intellectual property or financial services. There is no indication that such was the parties' intention."*

Accordingly, the offer to arbitrate contained in Annex 14-C of USMC only applied to events pre-dating 1 July 2020. In the circumstances, the Tribunal had no jurisdiction to determine the investors' claims under NAFTA. as these were made out of events post-dating.

Case note: England & Wales

Dassault Aviation SA v Mitsui Sumitomo Insurance Co Ltd [2024] EWCA Civ 5

Facts: Dassault Aviation SA ("Dassault") entered into a contract with Mitsui Busan Aerospace Co Ltd ("MBA"), respectively as seller and as buyer, for the construction and sale of two aircraft ("the Contract"). The Contract contained a non-assignment clause in the following terms: *"this Contract shall not be assigned or transferred in whole or in part by any Party to any third party, for any reason whatsoever, without the prior written consent of the other Party…"*

The aircraft were delivered late, giving rise to a claim against Dassault for damages for breach of the Contract. MBA had taken out an insurance policy with Mitsui Sumitomo Insurance Co Ltd ("Mitsui") which was governed by Japanese Law and covered it against consequences of the aircraft being delivered late. MBA made a claim under the insurance policy, and that claim was accepted and paid by Mitsui. As a matter of Japanese insurance law, an insurer who satisfies an insurance claim is automatically assigned such rights of recovery against third parties as the assured might have. Mitsui commenced arbitration in its own name against Dassault to recover the amount of indemnity paid to MBA. Dassault challenged jurisdiction before the tribunal on the basis that the Contract prohibited the assignment, and, as a consequence, the insurer had no title to sue.

Held: The assignment to Mitsui did not fall within the scope of the non-assignment clause of the Contract. The parties envisaged that both Dassault and MBA would take out insurances and consented to the assured satisfying their disclosure obligations to their insurers notwithstanding the confidentiality provisions of the Contract. In doing so, they voluntarily caused or agreed to the transfer of rights by operation of article 25 of the Japanese Insurance Act.

According to the Court of Appeal, the transfer was not made by MBA but by operation of law. The key words "*by any Party*" in the non-assignment clause did not catch the assignment made by MBA to Mitsui. Had the assignment been made under the terms of the insurance contract, the position might well have been different. But, as a matter of fact, the transfer occurred by operation of law, this is, by operation of article 25 of the Japanese Insurance Act.

The arbitration agreement can be *null and void* where it is affected by some invalidity, such as lack of consent due to misrepresentation, duress, fraud or undue influence. It may be *inoperative* where it has ceased to have effect because, for example, the parties missed the applicable time-bar, or have revoked the agreement. And it may be *incapable of being performed* where, for example, it is too vaguely or ambiguously worded, or it is impossible to establish the arbitral tribunal.

Tip of the month

☑ When is an arbitration agreement not effective, operative or capable of being performed?

According to the 1958 New York Convention (article II.3), the court of a Contracting State shall be prevented from referring the parties to arbitration if it finds that the arbitration agreement is "null and void, inoperative or incapable of being performed".

Our news

Ana Maria Daza-Clark, new Senior Lecturer.

Ana Maria has been recently appointed as Senior Lecturer of International Economic Law Currently at the University of Edinburgh. She lectures at the said University since (complete) and serves regularly as Of Counsel in arbitration disputes for clients of AACNI (England) Ltd.

For more information, please contact any of the following members of our Arbitration Team:


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