ARBITRATION WATCH
October - Issue No. 76

Laws & Treaties

Investment treaty between the EU and Angola comes into force

On 1 September 2024 the European Union-Angola Sustainable Investment Facilitation Agreement (SIFA) came into force. According to the European Commission, "this is the first-ever EU agreement on investment facilitation". The SIFA aims to stimulate foreign investments needed to achieve sustainable development goals. It focuses on improving the business environment through investment facilitation measures, such as increasing the transparency of investment regulations, promoting the use of e-government for authorisations, and enhancing stakeholder involvement. The agreement also upholds environmental and climate commitments, as well as respect for labour rights, and provides a dispute resolution regime based on State-to-State ad hoc arbitration.

European Commission disapproves Hungary's stance on intra-EU arbitrations under the ECT

An infringement procedure has been initiated against Hungary the latter's declaration claiming that the *Komstroy* judgment only applies for future intra-EU investor-State arbitrations, and that its effect will start once the Energy Charter Treaty has been amended.

The European Commission finds that Hungary's declaration undermines EU's position on the international stage with regard to the prohibition of intra-EU investor-State arbitrations related to the Energy Charter Treaty ("ECT"). It also finds that Hungary's declaration contradicts EU case law which holds that the arbitration clause of the ECT is not applicable to disputes between a Member State and an investor from another Member State concerning an investment made by the latter in the first Member State.

Arbitration Centres

SCC Arbitration Institute releases report on arbitration costs

In October 2024 the SCC Arbitration Institute in Stockholm released its report *Costs of arbitration and apportionment of costs under the SCC Rules*. Based on 221 qualifying arbitral awards, it provides data on the size of disputes, their duration and costs, as well as how Arbitral Tribunals and Arbitrators have ultimately apportioned the costs of arbitration and of legal representation.

According to the report, the mean costs of legal representation are between 13.5 and 12.85 times the costs of arbitration. In disputes determined by a sole arbitrator, 93.1% of the costs were engaged in legal representation and the remaining 6.9% in arbitration costs. In disputes determined by three arbitrators, the apportionment of costs was of 92.8% in legal representation and 7.2% in arbitration costs. The report estimates that the mean of costs for legal representation are over 10 times the costs of arbitration and encourages the parties to negotiate appropriate fee structures with their legal counsel in order to limit costs.

Changes in Gafta Contracts

The Council of the Grain and Feed Trade Association ("Gafta") has approved changes in Contracts 18, 23, 38, 39, 47, 49, 64, 79A, 82, 89, 115, 118, 119, 120, 202, 81, 78UA, 131 and 124 Sampling Rules. The contracts have been amended to remove ambiguity around "Delivery" and "Shipment", as well as to clear typos and ensure consistency with other contracts. Contracts 97, 98 and 100A are being retired from use. The changes became effective for contracts entered into on or after 1 October 2024.

Chartered Institute of Arbitrators in Hainan

The Chartered Institute of Arbitrators ("Ciarb") has signed Memorandums of Understanding

with the Hainan International Arbitration Court ("HIAC") and the Hainan Arbitration Association ("HNAA"). All three organisations will work collaboratively to promote awareness of and high standards in Alternative Dispute Resolution. HIAC and HNAA undertake to recognise Ciarb Fellowship and Chartered Arbitrator status when considering applications for entry onto their arbitrator panels and lists.

Investment Arbitration

Spain's motion to dismiss ICSID Award is denied by US District Court

On 26 September 2024 summary judgment was granted by the US District Judge for the District of Columbia giving passage to an award in favour of JGC Holdings Corporation in the ICSID Case No. ARB/15/27 ("the Award"). Delivered in 2021, the Award ordered Spain to pay 27 million US Dollars in damages to the Japanese claimant, who had invested in two solar thermal plants under a Spanish government's legislative remuneration regime.

Japan, Spain and the United States are all parties to the ICSID Convention, the Article 53(1) of which provides that any *"award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in th[e] Convention."* The US Court noted that, after the Award was issued, Spain sought annulment, which the ad hoc Committee denied, and that therefore no further remedies were available under the said Article 53(1).

Spain requested a stay on the ground of the ongoing European Commission investigation into whether Spain's regulatory regime constituted state aid prohibited under EU law. The US Court declined to stay saying that *"[w]hether the Award itself represents state aid does not bear on whether the Award is genuine and entitled to full faith and credit"*. Spain did not convince the Court with its claim that the ICSID Tribunal substantially infringed the exclusive competence of the European Commission and jurisdiction of the EU courts over matters relating to state aid. According to the Court, even if Spain could show that the Arbitral Tribunal committed an error of law or infringed on the power of EU authorities or courts, it could not show that the court did not have subject matter jurisdiction, that the award was not authentic, and that the enforcement order tracks the Award.

Spain's remaining defences based on the forum non conveniens doctrine, act of state doctrine, foreign sovereign compulsion doctrine, and broader international comity doctrine, were also dismissed.

State immunity rules do not help Spain to set aside an ICSID Award in the UK

On 22 October 2024 the Court of Appeal in England & Wales dismissed Spain's application to set aside an investment award ("the Award"). The Award had been delivered in 2018 in favour of Infrastructure Services Luxembourg Sarl and Energia Thermosolar BV in the ICSID Case ARB/13/31 under the Energy Charter Treaty ("ECT"). In the Award, Spain was ordered to pay 101 million euros in damages for changes to the tariff advantage scheme for solar energy. Spain applied to set aside the registration of the Award in England on grounds of state immunity under section 1 of the State Immunity Act 1978 (the "SIA").

The ICSID Convention was implemented in the United Kingdom through the Arbitration (Investment Disputes) Act 1966. It provides in Article 54 that each contracting state shall recognize an ICSID award as binding and enforceable as if it were a final judgment of its domestic courts. Further, Article 55 provides that article 54 does not derogate from a contracting state's domestic law concerning state immunity.

Turning to the English rules on immunity, the State Immunity Act 1978 ("SIA") provides in Section 2(2) that a state may submit to the jurisdiction of the English courts via a prior written agreement. And Section 9 provides that a state is not immune in respect of proceedings relating to an arbitration to which the state agreed in writing.

Against that legal backdrop, the Court of Appeal found that the express words used in Article

54 amount, on their proper construction, to an unequivocal agreement by the state to submit to the jurisdiction, even if the words "submit" and "waiver" are not used. Accordingly, Article 54 should be construed as an exception to state immunity within the meaning of section 2 of the SIA.

Case note: England & Wales

UniCredit Bank GmbH v RusChemAlliance LLC [2024] UKSC 30

Facts: RusChemAlliance LLC ("**RusChem**") is a company incorporated in Russia. UniCredit Bank GmbH ("**Unicredit**") is a German bank with assets in Russia. RusChem entered into contracts with a third party for the construction of gas processing plants in Russia. Under those contracts, the contractor was entitled to advance payments of EUR 2 billion, which RusChem made. UniCredit, in turn, issued on-demand bonds in favour of RusChem to guarantee the performance of the contract. The bonds included a clause 11 stating that: "This Bond and all non-contractual or other obligations arising out of or in connection with it shall be construed under and governed by English law". They also included a clause 12 stating that disputes are to be resolved by an International Chamber of Commerce arbitration seated in Paris, France.

The contractor subsequently wrote to RusChem to say that it could not continue to perform the contracts because of EU sanctions imposed after Russia's invasion of Ukraine. The contractor also said it could not return the advance payments. So, RusChem decided to bring proceedings against UniCredit in the Russian courts seeking recovery of EUR 448 million under the bonds. UniCredit sought and was granted an anti-injunction requiring RusChem to discontinue the Russian proceedings on the basis that these breached the arbitration agreements in the bonds. The Supreme Court had to consider whether the courts of England and Wales are the proper place for UniCredit to bring its claim for an anti-suit injunction against RusChem, or whether the claim should have been brought in France instead.

Held: In the first place, the Supreme Court had to assert which law governed the arbitration agreement. It found that clause 11 of the bonds was framed *"in particularly wide terms and covers not only the bond itself but 'all non-contractual or other obligations arising out of or in connection with it'. Even if the obligations created by the arbitration agreement were regarded as separate from the bond contract for this purpose, they are on any view 'obligations arising ... in connection with' the bond."* Yet, even if those additional words were disregarded, nothing in the wording of the bonds excepted clause 12 from the choice of English law as the governing law. Accordingly, the arbitration agreements contained in the bonds were found to be governed by English law.

The Supreme Court further held that England was the proper place for UniCredit to bring its claim in line with procedural rules on service out of the jurisdiction. As the parties had contractually agreed to arbitration, it was not necessary to show that the English courts were a more appropriate forum to grant relief. The starting point is that *"[i]t is desirable that parties should be held to their contractual bargain by any court before whom they have been or can properly be brought."* Service out of the jurisdiction should in principle be permitted, unless the court considers that the fact the arbitration has a foreign seat makes it inappropriate to exercise the court's jurisdiction. The Supreme Court also clarified that the English courts' power to grant anti-suit relief is not part of its supervisory or supporting jurisdiction where nominated as the courts of the seat of arbitration, which was not the case here. Instead, *"[I]n English law…the source of the court's power to grant anti-suit injunctions is not its jurisdiction to grant interim measures in support of current or intended arbitration proceedings but its general equitable jurisdiction under section 37 of the 1981 Act. The purpose of issuing such an injunction is to enforce the negative promise contained in the arbitration agreement not to bring court proceedings, which applies and is enforceable regardless of whether or not any arbitration proceedings are on foot or proposed which require support."*

Accordingly, the Supreme Court upheld the Court of Appeal's decision to grant the anti-suit injunction requiring RusChem to discontinue its Russian proceedings. The judgment confirms that

the English courts can issue injunctive relief in support of foreign-seated arbitration agreements where the arbitration agreement is governed by English law.

Tip of the month

☑ Is the notice of appointment of the arbitrator dispensable?

Article V(1)(b) of the 1958 New York Convention provides that parties against whom the award is invoked must have been given proper notice of the appointment of the arbitrator or of the arbitration proceedings, failing which recognition and enforcement of the award may be refused.

The burden to prove the said notice was not properly given, or was not given at all, is on the party opposing recognition and enforcement. Regarding the burden of proof, the courts of the Contracting States have generally applied high standards.

Where there was clear proof that no notice had been given, recognition and enforcement have frequently been refused. However, the courts have also looked beyond the notice itself to evaluate the parties' access to, and involvement in, the arbitration. So, if the parties are aware of the arbitration proceedings and thus able to participate in such, the courts may dispense with the need of the notice.

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 (England) Limited

25 Southampton Buildings | WC2A 1AL London | United Kingdom | Phone: +44 02071291271 | Email: aacni@aacni.com