ARBITRATION WATCH
November - Issue No. 77

Laws & Treaties

The Arbitration Bill makes its way in the UK Parliament

Arbitration Bill completed its House of Lords stages on 6 November 2024 and was presented to the House of Commons on the same date. This is known as the first reading and there was no debate on the Bill at this stage.

The Bill has been referred to a Second Reading Committee on a date to be announced. Second Readings of non-controversial Bills can be debated in a committee in the Commons, although this is rare. If a Bill passes through such a committee, its Second Reading and committal motions must still be agreed by the House in the Chamber, but may be decided there without debate.

Legislative reforms in ad hoc arbitration in China

On 4 November 2024, a draft revision of the PRC Arbitration Law was submitted to the Standing Committee of the National People's Congress (NPC) to enable ad-hoc arbitration in China. The latest draft is also released for public consultation until 7 December 2024.

The said revision pursues a reform in favour of ad hoc arbitration, which is not recognised under the current Arbitration Law. If the revision is adopted, the long-term prohibition against ad hoc arbitration will be relaxed for two types of disputes: (i) maritime disputes with international elements, and (ii) foreign-related disputes between entities registered in China's Free Trade Zones (FTZs).

Over the years, regional pilot practice of ad hoc arbitration has been carried out in Shanghai and FTZs in Guangdong, Hainan, Fujian and Tianjin. CIETAC, SHIAC, CMAC and other arbitration centres now offer services in support of ad hoc arbitration.

Indian Government proposes new Arbitration Bill

The Indian Government has proposed a reform to the Indian Arbitration and Conciliation Act 1996 ("Arbitration Act"). On 3 November 2024, it finalised a public consultation which invited comments on the draft Arbitration and Conciliation (Amendment) Bill 2024 ("2024 Draft Bill"), seeking to promote institutional arbitration, reduce court intervention and streamline arbitral proceedings.

Under the 2024 Draft Bill, Indian arbitral institutions are proposed to have enhanced powers which were otherwise exclusively vested upon domestic courts. This includes the power to extend the time-limit to issue an award, to order a reduction of arbitrators' fees where delay stems from arbitral tribunal, and to substitute arbitrators.

Costa Rica reforms its Arbitration Law

On 1 October 2024, Costa Rica enacted Law No. 10535 ("the New Law"), which will enter into force on 1 April 2025. The New Law is based on the UNCITRAL Model Law on Arbitration. It is intended to harmonize the arbitration legal framework moving away from the previously adopted dualist system that distinguished between domestic and international arbitrations, which is still the norm in other Latin American countries such as Chile, Colombia, and Argentina.

The New Law establishes a default rule for a three-person arbitral tribunal in international arbitration cases and a sole arbitrator in domestic proceedings, unless the parties agree otherwise. It also authorizes arbitral institutions to appoint arbitrators, at the request of a party, when an agreement cannot be reached. And, with regard to interim measures, it empowers arbitral tribunals to grant such measures in domestic arbitration proceedings.

In domestic arbitration cases, the New Law maintains the requirement for arbitrators to hold a law degree, have at least five years of experience, and be members of the Costa Rican Bar with authorization from the Ministry of Justice and

Peace. This requirement does not apply to domestic ex aequo et bono arbitrations or to international arbitration proceedings.

Investment Arbitration

***Vercara, LLC (formerly Security Services, LLC, formerly Neustar, Inc.) v. Colombia*, ICSID Case No. ARB/20/7.**

Award issued on 20 September 2024 under the Colombia-US Trade Promotion Agreement of 2006.

The claims arose out of the Colombian Government ministry's decision of 2020 not to renew a concession of 2009 for the operation of the ".CO" domain name and to conduct a public tender process for the signature of a new contract. Vercara LLC ("the Claimant") argues that by subjecting Neustar to different and unjustified wrongful treatment that was not applied to domestic and other foreign investors, Colombia violated Article 10.3 of the TPA (i.e. National Treatment clause) and Article 10.4 of the TPA (i.e. Most Favoured-Nation obligations clause). To determine whether there has been a violation of the MFN or NT treatment, the Tribunal considered a three-limb test must be applied: (i) the discriminatory treatment claim must be based on a comparison with other (foreign or domestic) investors or investments "in like circumstances"; (ii) Claimant must have been afforded less favourable treatment as a result of its nationality, whether de jure or de facto; and (iii) the treatment afforded must not be justified by a rational public policy objective.

The Tribunal dealt with Colombia's preliminary argument that the Claimant's claims do not qualify under Articles 10.3 and 10.4 of the TPA altogether and should be dismissed on this basis alone. In this respect, the Tribunal accepted that the term "treatment" under Articles 10.3 and 10.4 should be understood broadly and applied on that basis. This includes "*the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory*". The Tribunal found that Colombia's actions did not come within this definition of treatment for the following reasons. First, the decision not to renew the 2009 Contract was not contrary to the express terms of the contract. The renewal of the contract was a mere possibility; it was subject to the will of both parties and further discussion and agreement between them. Thus, the Government was under no obligation to renew the contract and ".Co" Internet and Neustar had no entitlement to a renewed contract. Second, the tender process was held in accordance with the legal and administrative requirements under Colombian law. Neustar was also invited to comment on the draft Terms of the 2020 Tender and to attend the launch of the Tender; both of which it did. And third, the term of Neustar's contract was terminated after and not before the completion date. For the above reasons, the Tribunal found that Colombia's actions and conduct of which the Claimant has complained do not constitute "treatment" within the meaning of Articles 10.3 and 10.4.

Case note: England & Wales

***O v C* [2024] EWHC 2838 (Comm): 8 November 2024**

Facts: A cargo of naphtha was loaded on board the vessel by the Charterers ("C") at Singapore on 9 February 2023. The said cargo remained on the vessel for over 20 months because, shortly after it was loaded, the US Office of Foreign Assets Control ("OFAC") added the Charterers to its List of Specially Designated Nationals and Blocked Persons (the "SDN List"). In consequence, the Owners ("O") of the vessel decided to terminate the charterparty and refused to discharge the cargo. The Charterers commenced arbitration proceedings seeking damages for conversion. The Owners argued that that they were entitled to terminate the charterparty in reliance on para (D) of the BIMCO Sanctions Clause and/or para (h) of the Compliance Clause, which were terms of the charterparty.

Pursuant to section 44 of the Arbitration Act 1996, the Owners sought an order from the court that the cargo may be sold and that the proceeds be paid into a blocked account with a US financial institution. The Charterers did not oppose the sale but requested that the proceeds should be paid into the court. The Owners, in turn, opposed that payment into court would risk breaching US sanctions. The importance of the order was that it

was to be made in support of the arbitration and, in particular, to enable effect to be given to whatever the arbitral tribunal decided..

Held: Sitting as a Judge of the High Court, Sir Nigel Teare had to consider whether, in case that the payment into court of the sale proceeds were a breach of US sanctions, the risk of a prosecution of the Owners (or of the US citizens in New York who control the Owners) was real or fanciful. He first noted that the Owners appeared to have done all that they could to avoid any breach of US sanctions. Second, he acknowledged that the Owners would not have acted "wilfully or recklessly" but in compliance with an order of the English court. Further, he believed that payment of the proceeds into court would not damage the objectives of US sanctions. That is because the Charterers would not be able to access those proceeds if, after a careful review of US sanctions law, the arbitral tribunal considered that the Owners were within the reach of US sanctions and were obliged to 'block' the cargo. So, on the material before the court, the judge said that *"it was certainly much more likely than not that there would be no criminal prosecution (…) the importance of the order for payment into court outweighs the very low risk of prosecution."* That being so and applying the principles set out above, Teare J. ordered that the proceeds of sale be paid into court.

Tip of the month

☑ Is the New York Convention applicable only in the Contracting States?

The New York Convention of 1958 applies to awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought", according to article I (1). Further, article I (3) provides that "any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State." So, unless a State has made a reciprocity reservation pursuant to article I (3), the Convention applies to awards made in any State, whether or not a Contracting State.

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

AACNI (England) Ltd. is a Private Limited Company with number 14021820 and registered office address in Palladia, Central Court, 25 Southampton Buildings, London WC2A 1AL, United Kingdom. It is recognised by the Solicitors Regulation Authority and its SRA no. is 8000602. AACNI is a trademark registered in the EU.

This publication does not constitute legal advice.