ARBITRATION WATCH
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COVID-19

Force Majeure and Hardship in the Age of Coronavirus

The COVID-19 pandemic will generate years, if not decades, of post-pandemic litigation and arbitration focusing on the application of the concepts of force majeure and hardhip. In their joint paper, Prof. Dr. Berger and Dr. Behn examine these two concepts, from their historic origins over the different paths they took in civil and common law, to modern transnational contract law as applied by international arbitral tribunals. The original title of the paper is '*Force Majeure* and Hardship in the Age of Corona: A Historical and Comparative Study.' It will be soon published at *McGill Journal of Dispute Resolution*. Since 14th April 2020, it can be downloaded from the website of SSRN.

Arbitration centres

Message from the Institutions: Arbitration and COVID-19

On 16th April 2020 the major arbitration centres (ICSID, ICC, SCC, LCIA and SIAK, among others) posted a joint announcement of mutual support and collaboration in response to COVID-19.

They encourage arbitral tribunals and parties to mitigate the effects of any impediments to the largest extent possible, while ensuring the fairness and efficiency of arbitral proceedings. In so doing, they are invited to use the full extent of their respective institutional rules and any case management techniques, so that arbitrations can make progress without undue delay.

Most of the arbitration centres remained active and fully operative during this month of April, but their offices were closed. All the users are strongly invited to proceed with filing their arbitration cases, but to do so online. Hearings are, in all cases, conducted remotely.

ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic

The COVID-19 outbreak will disrupt many pending ICC Arbitrations and generate new disputes that may themselves be more difficult to progress due to safety concerns and public health restrictions imposed to limit or slow the virus's spread.

The ICC has issued a note that provides guidance to parties, counsel and tribunals on possible measures to mitigate the adverse effects of the COVID-19 pandemic on ICC arbitrations

According to the ICC, parties, counsel and tribunals can minimise, and perhaps even avoid, such disruption by thoughtful use of case management tools that are either already available through the ICC Arbitration Rules ("Rules"), or by the additional steps the ICC International Court of Arbitration ("Court") is taking to streamline its internal processes.

Recent investment awards

Global Telecom Holding SAE v. Canada, ICSID Case No. ARB/16/16.

Award issued on 27 March 2020 under the Canada-Egypt BIT.

Facts: In 2008 Global Telecom Holding SAE (GTH), an Egyptian-incorporated company, entered the Canadian telecommunications market through an investment in a Canadian company, Globalive Wireless Management Corporation, which would later provide mobile telecommunications services in parts of Canada as "Wind Mobile". Over the investment period, Canada was alleged by GHT to have failed to create a fair, competitive and

favourable regulatory environment for new investors in this sector. GTH claimed that Canada had violated the standards of full protection and security, fair and equitable treatment, national treatment and most-favoured nation treatment. It claimed damages in the amount of US$1.8 billion.

Held: The Tribunal concluded that it did not have jurisdiction over GTH's claim that Canada violated its national treatment obligations set forth in the BIT. It took the view that the list of exceptions Canada included in its annex to Article IV of the BIT (which included both "social services" and "services in any other sector" and therefore covered the telecommunications sector) allowed it to afford GTH a treatment different than it did to Canadian nationals. Gary Born, the arbitrator appointd by GTH, issued a dissenting opinion on this point, arguing that *"the Tribunal's interpretation of Article IV(2)(d) on this issue is impossible to reconcile with either the language of the BIT or the evident object and purpose of the Treaty."* At the merits stage, the Tribunal dismissed all GTH's claims determining that GTH had failed to establish that Canada breached any of its obligations set forth in the BIT.

NextEra Global Holdings BV v. Spain, ICSID Case No. ARB/14/11.

Decision on stay on enforcement of award of 6 April 2020.

Facts: Spain filed an application for the continuation of the stay of enforcement of the ICSID award rendered on 31 May 2019. The said application was grounded on two arguments in foresight that the Award was eventually annulled: (a) that Spain would face difficulty or uncertainty in recoupment of any amounts paid to Claimants, these being described by Spain as a "*long chain of instrumental companies with no actual assets*" that can be "*dissolved at any moment*"; and (b) that Spain would be exposed to liability and possible sanctions by EU regulators for breaching EU law and regulations.

Held: In the first place, the Committee finds that the word "*may*" in Article 52(5) of the ICSID Convention grants wide discretion to decide whether to stay enforcement depending upon the circumstances of the case. Turning to Spain's two arguments:

(a) The Committee accepted that risk of recoupment is a relevant factor when considering the continuation of a stay of enforcement. It said: *"The fact that the ultimate owner of the Claimants, at the top of a complex corporate chain, may be a large public-listed entity on the New York Stock Exchange, while offering some level of comfort, does not sufficiently offset the risk of recoupment that Spain may face."*

(b) The Committee found that the award creditor's right to be paid is final and binding under the ICSID Convention. It said: *"While it is true that ending the stay could possibly expose Spain to the EU sanction, it does not remove the potential exposure or resolve the conflict between Spain's obligations under the ICSID Convention and its obligations to the EU. This possible exposure to penalty is at best a neutral factor and could not itself support Spain's case for a continuation of the stay of enforcement."*

The Committee noted that Spain has not yet made payment on any of the awards where stays of enforcement have been lifted. So, the risk of the uncertainty of payment of the award would certainly cause some prejudice to the Claimants. In view of all that, the Committee decided that the stay of enforcement of the Award continued on a provisional basis and under the condition that Spain provided a written undertaking to abide by the Award if, eventually, it came not to be annulled. If no such undertaking was furnished, the stay would forthwith be terminated and the Claimants should be at liberty to enforce the Award.

Case note: England & Wales

Enka Insaat ve Sanayi AS v. Chubb Ltd and Others [2020] EWCA Civ 574

Facts: The Appellant, Enka, is a major Turkish construction company. In June 2012, Enka was engaged as one of the subcontractors providing services in relation to the construction of the

Berezovskaya power plant in Russia. There was a massive fire at the plant in February 2016. Chubb, the defendant, paid (as insurer) c. $400 million to the general contractor for the loss caused by the fire. After subrogating, Chubb sought recovery and commenced proceedings in the Moscow Arbitrazh Court against 11 parties, including Enka. The contract Enka had concluded, however, contained an arbitration agreement providing that disputes would be resolved by ICC arbitration in London. So, Enka issued a claim in the Commercial Court for an anti-suit injunction restraining Chubb from pursuing proceedings in Russia.

Held: The Court of Appeal granted the anti-suit injunction in favour of Enka. Chubb was found in breach of the agreement to resolve disputes through an ICC arbitration seated in London. The two main questions were: (a) whether the English courts were the *forum conveniens* to determine Enka's claim for the anti-suit injunction, and (b) whether the arbitration agreement was governed by Russian law or English law. The Court's findings were as follows.

(a) The choice of the seat of the arbitration is an agreement by the parties to submit to the jurisdiction of the courts of that seat, and this involves the exercise of powers such as granting anti-suit jurisdictions under section 37 of the 1981 Act. *Forum conveniens* considerations, therefore, did not arise. This is actually why there is no requirement in CPR 62.5(1)(c) that England must be shown to be the '*proper place*' to obtain leave to serve an arbitration claim form out of the jurisdiction, as there is in CPR 6.37(3).

(b) As to the proper law, the Court of Appeal held that, although Russian law governed the main contract, the law of the arbitration agreement was English law. Popplewell LJ observed that the current state of the authorities '*does no credit to English commercial law' and that 'the time has come to seek to impose some order and clarity on this area of the law*'. This he proceeded to do, following a comprehensive review of the authorities and restatement of the principles that is likely to prove influential in future cases.

Our news

Daniel Behn co-authors article on force majeure in the COVID-19 era

Dr Behn and Prof. Dr Berger have jointly authored the paper "Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study". The paper will be soon published at the McGill Journal of Dispute Resolution, and is currently posted at the website of SSRN since 14th April 2020.

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Tip of the month

☑ Where is the 'agreement in writing' to arbitrate?

According to the 1958 New York Convention, the arbitration agreement must necessarily be in writing. Article 2(2) says: "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement." This requisite takes special relevance at the enforcement stage and may become decisive in giving passage to the award.

In commercial practice, the fulfillment of this requisite may encounter problems, especially where a contract is wholly or partially superseded by an addendum or by subsequent agreements of the parties. In these cases, it may become unclear whether the scope of the arbitration clause unfolds too over the disputes related to the addendum and the subsequent agreements.

To avoid pitfalls, it is recommended to ensure that the original arbitration clause is also incorporated, by repetition or by reference, into the addendum and the subsequent agreements.

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