ARBITRATION WATCH
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Laws & Treaties

English Arbitration Bill makes its way in the UK Parliament

The Arbitration Bill [HL] 2024-25 had its second reading on 29 January 2025. After having been introduced in the House of Lords on 18 July 2024, the bill completed its Lords' stages on 6 November 2024 and was then sent to the House of Commons.

The bill will amend the Arbitration Act 1996 in accordance with recommendations made by the Law Commission. It is aimed to achieve the government's policy objective of promoting the UK as one of the world's premier seats of arbitration, against a backdrop of recent legislative updates in competing jurisdictions. The bill will extend to England and Wales and Northern Ireland.

Statutory changes on ADR in Spain

On 3 January 2025 a law was passed adopting measures addressed to improve the efficiency of the Public Justice Service in Spain. The said law incorporates structural changes in the judiciary and makes the use of Alternative Dispute Resolution a mandatory requisite prior to commencing judicial proceedings of any kind.

When it comes to arbitration, the said law requires Counsel to have a special power of attorney to redirect a court case to an arbitral tribunal. The rules around the duty of confidentiality become narrower and more stringent on all the parties involved in arbitration proceedings, including factual and expert witnesses. And arbitration disputes related to estate property will be eligible for posting in the public registries.

Restriction of intra-EU investment disputes in the ECT

On 3 December 2024 the Contracting Parties to the Energy Charter Treaty (ECT) adopted a modernization of the text of the ECT. The modernization significantly curtails investment protections overall, but it will not apply to investor-State arbitrations commenced before the changes take provisional effect on 3 September 2025.

The main changes to the ECT are summarised as follows:

- The ECT will no longer apply to most new hydrocarbon investments made after 3 September 2025, and will unleash protection to the existing ones after a ten-year period
- Intra-EU investor-State disputes—i.e., disputes between a company from one EU member state and another EU member State- could no longer benefit from the dispute resolution provisions of the ECT.
- The ECT will publish detailed guidelines for the application of key investment protections and for the conduct of investor-State arbitration. These guidelines may, in some cases, expand the scope of protection but, in many other cases, will restrict or reduce it.
- Concerns about the States' freedom to adopt climate change mitigation and adaptation measures will be reflected in the ECT and provisions will be added upholding their sovereign right to regulate and setting forth exceptions to the treaty for certain necessary environmental.

The modernization of the ECT will impact many European energy businesses, but is also relevant to non-European businesses, the subsidiaries of which currently enjoy ECT protection over their operations and investments in Europe or surrounding areas.

Arbitration centres

SIAC launches new arbitration rule

On 1 January 2025, the 7th Edition of the Arbitration Rules of the Singapore International

Arbitration Centre (SIAC) took effect. The changes and novelties to the SIAC Rules are aimed at enhancing user experience and raising the bar on efficiency, speed, and cost-effectiveness.

The highlights of the new rules include: (a) the introduction of a new streamlined procedure for low value disputes, (b) revised requirements for emergency arbitration, (c) a broader application of the expedited procedure, (d) new rules on coordinating related proceedings, (e) revised rules regarding the appointment of arbitrators, (f) a new requirement for parties to disclose certain third-party funding agreements, (g) new rules for preliminary determination, and (h) streamlined administrative procedures, including a new online case management system.

LCIA releases updated "Costs and Duration" analysis

The London Court of International Arbitration (LCIA) has undertaken a third costs and duration analysis, as part of its ongoing commitment to transparency and assisting users to make more informed choices. This analysis covers all cases which reached a final award between 1 January 2017 and 12 May 2024. This is the longest time period studied by the LCIA, and the longest time period covered by an analysis of costs and duration conducted by any institution to date, allowing for a more detailed analysis, including a comprehensive comparative analysis with previous reports.

The median LCIA arbitration costs USD 117,653, a modest increase from USD 97,000 reported in the previous report published. It is noted that numbers have not been adjusted for inflation and the real increase is therefore even smaller.

The median LCIA arbitration lasts a total of 20 months and of this, tribunals take four months to produce awards. Cases with claims under USD 1 million are decided very expeditiously, namely in 12 months.

According to the said analysis, LCIA arbitration costs are lower than the estimated costs of the compared institutions across almost all amounts in dispute. This difference is especially notable for larger cases, with cases ranging from USD 100 million-USD 1 billion and cases above USD 1 billion being significantly more expensive at all other institutions studied than at the LCIA.

QICCA publishes new arbitration rules

The Qatar International Center for Conciliation and Arbitration (QICCA) has released new arbitration rules, effective from 1 January 2025.

The 2024 Rules introduce optional expedited arbitration procedures, which apply to claims valued at less than QAR 1 million (approximately USD 275,000) and require the tribunal to issue a final award within 90 days. The 2024 Rules also introduce emergency arbitrator provisions, which provide that the decision of the emergency arbitrator must be issued within 15 days. The 2024 Rules also introduce express joinder and consolidation provisions to address multi-party/ multi-contract disputes. Article 9 of the 2024 Rules requires the disclosure of the identity of, and the nature of the arrangement with, a third-party funder to the QICCA or the tribunal.

Investment Arbitration

***Gabriel Resources Ltd. and Other v. Romania*, ICSID Case No. ARB/15/31..**

Award dated 8 March 2024 pursuant to the UK-Romania and Canada-Romania Bilateral Investment Treaties

The investor was a company incorporated in Canada which was wholly owned by a company incorporated in Jersey, one of the Channel Islands. The dispute concerns Romania's treatment of the investor's project in mining deposits of gold, copper and silver in Romania. The investor alleged that Romania had violated the Fair and Equitable Treated (FET), full protection and security (FPS), unreasonable or discriminatory measure, expropriation, and umbrella clauses of the UK-Romania and Canada-Romania BITs. Of note is the Tribunal's analysis on jurisdiction. In this regard, Romania stated that the claimant incorporated in Jersey should not be able to resort to the UK-Romania BIT's arbitration clause since it was incompatible with the Achmea judgment. The state argued that (i) Jersey courts'

previous referrals to the CJEU, (ii) Article 355(5)(c) of the TFEU, and (iii) Protocol No. 3 of the UK 1972 Accession Treaty, show altogether that the Bailiwick of Jersey could be equated to an EU member state for the purposes of the application and interpretation of EU law.

The Tribunal noted that the Bailiwick of Jersey, as a British Crown Dependency, "is not part of the UK but instead a self-governing dependency that has its own elected legislature and court system as well as independent administrative, fiscal and legal systems. The Bailiwick of Jersey had a limited relationship with the EU, which was set forth in Article 355(5)(c) of the TFEU, which reads: '[T]his Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements of those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.'" The Tribunal took the view that the ruling in the Achmea judgment "is limited to the situation where an offer to arbitrate under an intra-EU investment treaty is made by a Member State and accepted by the investor of another Member State (…) The extension of the CJEU's ruling to a situation where the investor is from a non-Member State that applies EU law in a limited manner would require a separate and independent justification. It certainly does not follow logically from the CJEU's reasoning in Achmea. It was thus concluded that the Tribunal's jurisdiction over the dispute submitted to arbitration by the Jersey-incorporated claimant "is not affected by the Achmea Judgment as Gabriel Jersey is a company incorporated in the Bailiwick of Jersey, which has never been a Member State of the EU."

Case note: England & Wales

Aiteo Eastern E & P Company Limited v Shell Western Supply and Trading Limited and others **[2024] EWHC 1993 (Comm)**

Facts: Four partial awards in a consolidated dispute were rendered by a tribunal appointed under the rules of the International Chamber of Commerce. The claimant in these proceedings, Aiteo, applied to set aside the awards pursuant to section 68 of the Arbitration Act 1996 ("the Act"). He argued that there was a serious irregularity within the meaning of section 68(2)(a) of the 1996 Act, which was apparent (not actual) bias on the part of one of the members of the Tribunal, the Rt. Hon Dame Elizabeth Gloster DBE ("DEG"). An important and unusual feature of the present case is that a successful challenge to DEG was made to the ICC Court. When the challenge was upheld, however, the tribunal had already rendered the 4 partial awards.

The allegation of apparent bias is based upon professional connections between DEG and the solicitors firm representing the parties that nominated DEG as arbitrator, Freshfields Bruckhaus Deringer LLP ("Freshfields"), coupled with the fact that timely disclosure of some of these connections was not made. Aiteo contended that in the period 2018-2023, DEG had received a total of 7 prior arbitral nominations/appointments and expert instructions, in which Freshfields were acting. Aiteo contends that in total there were 8 relevant "relational contacts", including two expert instructions and one arbitral appointment during the currency of the arbitral proceedings.

Held: The Court addressed two critical questions to resolve the set-aside application: (1) Would the fair-minded and informed observer consider that there was a real possibility that DEG was biased? (2) If so, did Aiteo establish that the serious irregularity relied upon (i.e. apparent bias on the part of DEG) caused or would cause substantial injustice to Aiteo?

(1) Mr Justice Jacobs considered that the ICC Court's ruling did not bind the English court insofar as it concerned the necessary ingredients for a successful challenge under section 68 of the Act. He also found that Aiteo had not lost the right to challenge the partial awards pursuant to section 73(1) of the Act by continuing to take part in the arbitrations when it was aware of some, but not all, of the facts that ultimately formed the basis of its allegation of apparent bias. The proper test he followed to assess apparent bias was established in the UK Supreme Court's decision in *Halliburton Co. v. Chubb Bermuda Insurance Ltd* [2020] UKSC 48, i.e. whether the fair-minded and informed observer,

having considered the facts, would have considered there was a real possibility of unconscious bias in the present case. After a thorough application of the test, Jacobs J. concluded that in the present case "the observer would consider that there was a real possibility of unconscious bias."

(2) Whereas a finding of apparent bias amounts to a serious irregularity for the purposes of section 68 of the Act, does not in itself amount to a finding of substantial injustice. So, the question of substantial injustice must still be addressed separately. However, in a case of apparent bias, substantial injustice will normally be inferred or anticipated. In a case of apparent bias that affects only one member of the tribunal (as was the present case), it is still inherently likely there has been substantial injustice. In the present case, Jacobs J. found that "substantial injustice would indeed normally be inferred as being 'inherently likely' or 'likely in the very nature of things', and that it should be inferred here unless there are circumstances which rebut it." He concluded that a set of exceptional facts rebutted that inference in respect of three of the four partial awards, but the fourth partial award was ordered to be remitted for reconsideration.

Tip of the month

☑ Is a suspended or a set aside award enforceable?

Article V (1)(e) of the New York Convention of 1958 allows national courts to refuse recognition or enforcement if the award has been set aside or has been suspended by the courts of the country in which, or under the law of which, the award was made.

In those cases, the recognition and enforcement of the award "may" (but not necessarily should) be refused. This explains why a number of courts has accepted to enforce awards suspended or set aside at the seat of the arbitration, either on the basis of the use of the term "may" in article V (1), or on the basis of a more favourable provision in the domestic law than article V (1)(e) in accordance with article VII (1).

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