ARBITRATION WATCH

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Laws & Treaties

EU-UK Trade and Cooperation Agreement

The EU-UK Trade and Cooperation Agreement (TCA) was concluded on 24 December 2020. Since the end of the transition period on 31 December 2020, the TCA will provisionally regulate trade and investment transactions between nationals of the EU and the UK after Brexit. It contains substantive protections standards, but no investor-state enforcement mechanism. The TCA cannot be directly invoked before domestic courts, and its dispute resolution mechanism is limited to a "WTO-like" state-to-state arbitration.

Sierra Leone accedes to the New York Convention

With its accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), Sierra Leone becomes the 166th State Party to the Convention. The Convention entered into force for Sierra Leone on 26 January 2021.

The "New York" Convention is widely recognized as a foundation instrument of international arbitration and requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and to recognize and enforce awards made in other States, subject to specific limited exceptions.

Revision of Swiss International Arbitration Law

On 1 January 2021 the new Swiss international arbitration law came into force. International arbitration in Switzerland is governed by Chapter 12 of the Federal Statute on Private International Law (PILA). According to Chapter 12 of PILA, an arbitration is considered international if one of the parties to an arbitration agreement, at the time of its signature, has its domicile outside of Switzerland. Domestic arbitrations are, by contrast, subject to the Swiss Code of Civil Procedure.

The revised act clarifies that where the parties have failed to appoint an arbitrator, the appointment can also be made by the Swiss State court if the arbitration agreement merely states that arbitration will take place in *Switzerland*. Another interesting feature is that, English being the *lingua franca* in international trade and business, applications to set aside awards may now be submitted to Swiss Federal Court in English

Arbitration centres

Code of Conduct for Adjudicators in Investor-State Dispute Settlement

The Secretariats of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL) are working together on a draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (ISDS).

The said Code is intended to provide applicable principles and provisions addressing matters such as independence and impartiality of arbitrators and mediators, and the duty to conduct proceedings with integrity, fairness, efficiency and civility. It is based on a comparative review of standards found in codes of conduct in investment treaties, arbitration rules applicable to ISDS, and of international courts. As on January 14, 2021, the following States have participated: Australia, Bolivia, Canada, Chile, Colombia, Costa Rica, El Salvador, European Union and its Member States, Israel, Korea, Mexico, Singapore, Switzerland, Turkey, United Kingdom, United States, and Western Balkans (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia and Serbia).

Record number of LCIA Cases in 2020

The London Court of Arbitration (LCIA) reports an all-time high of 444 referrals in 2020, with 407 arbitration cases fully administered by the LCIA pursuant to the LCIA Rules. The remainder of referrals are cases administered pursuant to the UNCITRAL Rules, appointment only and fundholding cases or other forms of ADR. These results amount to an increase of approximately 10% compared with 2019.

SIAC Opens Office in New York

The Singapore International Arbitration Centre (SIAC) has opened a representative office in New York, USA. This is SIAC's first representative office outside of Asia (with offices in India, South Korea and China), and its creation aims to reach US parties as these are reported to be among the top foreign users of SIAC. In 2020 alone, over 500 US parties arbitrated under SIAC's Rules.

On a separate note, SIAC informs it has hit a new record in 2020, with 1005 new cases as of 30 October 2020.

New ICC Arbitration Rules in force

The new Arbitration Rules of the International Chamber of Commerce (ICC) came into force on 1 January 2021. They apply to arbitrations registered with the ICC from 1 January 2021, unless the arbitration agreement provides otherwise. The 2017 Arbitration Rules shall continue to apply to cases registered before that date.

The most remarkable changes of the 2021 Rules are the incorporation of new disclosure requirements relating to third party funding, the ICC Court's new power to select and appoint the tribunal (overriding the parties' agreement), and the powers to exclude new counsel where his/her appointment creates a conflict of interest.

The ICC also recently released an updated version of its Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, which provides guidance about conducting arbitrations under the 2021 Rules.

Recent investment awards

Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Panama, ICSID Case No. ARB/16/34

Award dated 14 August 2020 under the US-Panama Trade Promotion.

Facts: The claimants had the trademarks Firestone and Bridgestone registered in Panama. The dispute arises out of a decision of the Supreme Court of Panama, which held that the claimants motion to oppose the registration of a similar trademark (Riverstone) by another tyre-maker, Muresa, had been in bad faith, and awarded USD 5.4 million in damages to Muresa. The claimants then filed an arbitration claim for denial of justice under the FET clause of Article 10.5.1 of the US-Panama Trade Promotion Agreement (TPA).

Held: The denial of justice claim was dismissed. The Tribunal emphasized that it did not purport to exercise an appellate function on domestic decisions. Whilst it considered that the Supreme Court had given unjustified weight to certain piece of evidence, it nonetheless held that "*this was not the type of error that could possibly constitute, of itself, any indication of the lack of competence or bad faith that would have to be established before a denial of justice under international law could be made out.*" The Tribunal admitted to have identified defects in the Supreme Court's reasoning, but these were "*no more than errors of judgment*" that "*fall far short of demonstrating that the judgment was the product of incompetence or corruption*".

Case note: England & Wales

Doglemor Trade Ltd v. Caledor Consulting Ltd. [2020] EWHC 3342 (Comm)

Facts: In calculating the total value of shares, the tribunal wrongly applied the historic tax liabilities as a positive (not a negative) figure.

So, instead of deducting, the tribunal added a substantial sum, giving rise to an over-valuation of a company's shares in USD 180 million. That mistake caused an undue excess of the awarded sum, which was clearly inconsistent with the findings made by the tribunal. The tribunal was then asked to correct the award under Article 27.1 of the LCIA rules, but declined to do so, although at the same time admitting its mistake. The tribunal rejected the application because it said that if it corrected the award, that would not give effect to its intentions, as expressed in the award, of awarding substantial damages.

Held: In response to an application under section 68 of Arbitration Act 1996, the Court decided that the award should be remitted to the tribunal for reconsideration, but only on those parts of the award that were affected by the admitted mistake. In so deciding, the Court held that the tribunal's response to the application to correct the mistake was admissible as evidence of the mistake for the purpose of section 68(2)(i). However, the said response could not form part of the award or the reasons for it, had no binding status and could not be used to contradict the award. Following the dictum of Lord Sumption in a Privy Council decision, *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, the award as still binding on all those aspects not affected by the mistake, i.e. "*the reopening by the arbitrators of findings which there were no grounds for remitting and which they had already conclusively decided would therefore have been contrary to the scheme of the Arbitration Act*". She scope of remission was, therefore, limited to the mistake.

Tip of the month

☑ Is the arbitration agreement valid under the applicable law?

According to Article V of the New York Convention, the recognition and enforcement of an award may be refused if, eventually, it is proved that the arbitration agreement is not valid under the law to which the parties have subjected it.

In some jurisdictions *ultra vires* contracts are null, and the arbitration agreements that they incorporate may, for that reason, not be valid. The validity of the arbitration agreement is also in question where the said agreement is incorporated into an illegal contract, which is prohibited by statute, has a purpose that is illegal, or the performance of which would involve the commission of a crime.

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