ARBITRATION WATCH
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Laws & Treaties

Ecuador signs the ICSID Convention

On 21 June 2021 the Republic of Ecuador's Ambassador to the United States, Ivonne Juez Abuchacra de Baki, signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, also known as the ICSID Convention. Ecuador becomes the 164th State to sign the Convention, which has been ratified by 155 countries. Having signed the ICSID Convention, it must now be ratified before coming into force for Ecuador.

The ICSID Convention, which entered into force in 1966, establishes the institutional and legal framework for resolving international investment disputes. It was created to facilitate investment amongst countries by providing an independent, depoliticized forum for arbitration, conciliation and fact-finding.

Arbitration centres

The Swiss Arbitration Centre re-named

As of 1 June 2021 the Swiss Chambers' Arbitration Institution (SCAI) became the Swiss Arbitration Centre. It is now a company owned by the Swiss Arbitration Association and the Swiss Chambers of Commerce.

The Centre administers arbitral proceedings under the Swiss Rules of International Arbitration. Arbitration clauses referring to SCAI remain valid and binding and will be recognised and applied by the Swiss Arbitration Centre, with Notices of Arbitration to be filed at the addresses of the Secretariat in Geneva, Zurich or Lugano. The model arbitration clause has been adapted accordingly.

New Arbitration Rules of the Vienna International Arbitral Centre

The Vienna International Arbitral Centre ("VIAC") has updated its Rules of Arbitration and Mediation, and its Rules of Investment Arbitration and Mediation, with effect on 1 July 2021. Both sets of rules apply to all proceedings commenced after 30 June 2021, respectively.

New International Rules of the Arbitration Foundation of Southern Africa

The Arbitration Foundation of Southern Africa (AFSA) has published a new set of International Arbitration Rules, with effect from 1 June 2021.

The new Rules introduce a Court and a Secretariat. The members of the Court have been appointed and consist of senior international and African practitioners. Amongst other things, the Court supervises the appointment of arbitrators, deals with the challenges to appointments, and entertains issues of jurisdiction. The Secretariat will be responsible for the day-to-day administration.

Guidelines on Standards of Practice in International Arbitration

The International Council for Commercial Arbitration (ICCA) launched the Guidelines on Standards of Practice in International Arbitration, developed by ICCA's Task Force on Standards of Practice in International Arbitration. The Guidelines on Standards of Practice are intended to serve as guiding principles of civility in the field, reflecting the many cultures and situations in which international arbitration is employed. The Guidelines may be incorporated by parties in their arbitration agreement, adopted by arbitral institutions, or included by arbitral tribunals in a procedural order or in the terms of reference where appropriate.

ICCA is a NGO based in The Hague (Netherlands) devoted to promoting the use and improving the processes of arbitration, conciliation and other forms of dispute resolution.

Recent Investment Arbitration Awards

RWE Innogy v. Spain, ICSID Case No. ARB/14/34.

Award issued on 18 December 2020 under the Energy Charter Treaty (ECT).

Facts: Between 2001 and 2011, two subsidiaries of the German company RWE (jointly, RWE) acquired stakes in four hydroelectric plants and 16 wind farms in Spain. They did so under the auspices of a Royal Decree (RD) 661/2007, whereby, subject to prior registration, renewable energy generators received a premium or, alternatively, a fixed feed-in tariff (FIT) at an above-market rate for the electricity they produced. In 2012 though, the regime of incentives became unsustainable and the Spanish Government decided put an end to it. Through a law 15/2012, a 7% levy was charged on all income obtained by generators, and the FITs and premiums were all replaced by a fixed return of 7.398% before tax. In 2014, RWE started arbitration proceedings at ICSID. RWE argued that Spain had violated Article 10(1) of the ECT, breaching their legitimate expectations and failing to provide regulatory stability, FET, reasonableness, and transparency.

Held: In relation to the issue of jurisdiction, the tribunal noted that Germany and Spain were EU member states at the time of ratification of the ECT. However, it concluded that, under Article 59 of the Vienna Convention on the Law of Treaties, the EU treaties did not prevail over the ECT amongst the two States, nor amounted to a suspension or a termination of the ECT as between them. The *Achmea* judgment was distinguished and therefore irrelevant insofar as, unlike the present case, *Achmea* concerned a BIT to which the EU was not a party. In relation to the alleged failure to provide a stable legal regime, the tribunal found that Spain did not give any specific commitment to maintain the incentives that would have been otherwise sufficient to create legitimate expectations. It also found that the new legal regime was transparent and reasonable. However, it found that Spain had nevertheless breached the FET standard by acting disproportionately. It held that, in some of RWE's plants, the internal rate of return proved to be substantially less than the "reasonable rate" imposed by Spain.

Case note: England & Wales

Republic of Sierra Leone v. SL Mining Ltd [2021] EWHC 286 (Comm)

Facts: The Claimant, the Republic of Sierra Leone, challenged an Award on Jurisdiction under section 67 of the Arbitration Act 1996. By the Award, the Tribunal concluded that it had jurisdiction in respect of the Defendant's claims in an arbitration concerning the suspension and subsequent cancellation by the Claimant of a large-scale mining licence and a license agreement (MLA). The MLA contained a clause requiring the parties to "*a good faith endeavour to reach an amicable settlement… within a period of 3 (three) months from a written notice by one party to the other specifying the nature of the dispute and seeking an amicable settlement*". The Notice of Dispute was served by the Defendant on 14 July 2019, and the Request for Arbitration was served on 30 August 2019. The Claimant's challenge (rejected by the Arbitrators after written submissions and a hearing) was that no arbitration proceedings could be commenced before 14 October 2019 (three months from the Notice of Dispute) and so the Tribunal was without jurisdiction.

Held: Section 67 of the Act permits an application to the Court to challenge any Award as to its "substantive jurisdiction", and this term is defined by Sections 82 (1) and 30(1) as referring to any of the following matters: *"(a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement."* The Court agreed with the conclusions of the Arbitrators in the Award that *" if reaching the end of the settlement period is to be viewed as a condition precedent at all, therefore, it could therefore only be a matter of procedure, that is, a question of admissibility of the claim, and not a matter of jurisdiction"*. The Court was thus satisfied that sections 30(1)(c) and 67 were not engaged in respect of a challenge that the

claim was made prematurely to the arbitrators. It further noted that international authorities (Born, Paulsson, Mills, and Merkin and Flannery) and other jurisdictions (US, Singapore, Uncitral…) *"are plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction"*.

developed by the University of Edinburgh (UoE), has invited Ms Cecilia Llamosas (University of Sussex and UNA) to share the findings of some of her research on these topics in the context of the revision of Annex C of the Itaipu Treaty. Her work was discussed on 9 July 2021 by various speakers, with Dr Ana Maria Daza-Clark as chair.

Our news

Annex C of the Itaipu Treaty: A discussion through the lens of sovereignty and energy justice

In 2023 the High Contracting Parties of the Itaipu Treaty will revise the financial basis for the energy tariffs of the world's largest renewable energy producing dam. Fifty years after the original negotiation - in 1973 - the prospects of what exactly a beneficial outcome would translate into for Paraguay and Brazil have kept politicians, stakeholders and academics equally busy. Most recently, some 'big' international law and relations concepts such as sovereignty, (energy) justice, power asymmetry and social and economic rights have been invoked. The Itaipu Project,

Tip of the month

☑ Was the appointment of the arbitrator(s) properly communicated?

The New York Convention of 1958, in article V(1)(b) provides that the recognition and enforcement of an award may be refused where *"the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings"*. This requirement is of special relevance in cases of insolvency or closure de facto, in which service of the notices of arbitration and appointment can be severally compromised. To avoid pitfalls, consideration should be given to the possibility of making service through a judicial order.

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