ARBITRATION WATCH

February - Issue No. 79

Laws & Treaties

The English draft Arbitration Bill receives Royal Assent

After having completed its passage through both the House of Lords and the House of Commons, the draft Arbitration Bill received Royal Assent on 24 February 2025. It is set to come into force through regulations on a day to be appointed by the Secretary of State. The new Act will apply to all arbitration proceedings commenced after the date of its entry into force. It brings the following changes to codification:

- The arbitrators' duty of to disclose any relevant circumstances which might reasonably give rise to justifiable doubts as to their impartiality in relation to the (potential) proceedings. This duty is based on what the arbitrator ought reasonably to know rather than just actual knowledge.
- The arbitrator's immunity for resignation (unless the resignation is proved to be unreasonable), as well as in respect of the costs of an application for their removal.
- The arbitrators' power to make an award on a summary basis (upon an application made by a party) if it is considered that there is no real prospect of success on the claim/defence or issue.
- New rules preventing the Court from re-hearing evidence that has already been heard by a tribunal and restricting parties' ability to raise new grounds or evidence.
- The law of the arbitration agreement shall be the law of the seat of the arbitration, unless the parties expressly agree otherwise.
- Court orders under section 44 (e.g., for the preservation of evidence) will be available against third parties.
- Peremptory orders (which can result in court-ordered compliance under section 42) and permission for applications to the Court under section 44(4) will be available in emergency arbitrations.
- The determination of a preliminary point of jurisdiction under section 32 will be available only where a tribunal has not already made a ruling on jurisdiction.

Arbitration centres

FOSFA amends its arbitration rules

The Federation of Oils, Fats & Seeds Associations Ltd. (FOSFA) has amended its Rules of Arbitration and Appeal and its Small Claims Single Tier Rules of Arbitration, which will come into effect from 1 April 2025. According to FOSFA, the amendments aim to:

- Clarify the exclusivity of FOSFA and FOSFA Arbitration in administering arbitrations.
- Remove ambiguity on the deadline for submitting claim submissions.
- Define the procedure for the use of trade representatives at oral hearings at the First Tier.
- Clarify the handling of unpaid deposits and further deposits.
- Remove ambiguity on the procedure of Cross Appeals
- Clarify and define the policy and procedure for FOSFA Awards on Jurisdiction
- Outline the procedure for managing outstanding fees and issuing Awards, including the dating of Awards.
- Provide further clarity on the application of the Defaulter Rules.

ICSID Releases 2024 Caseload Statistics

A new edition of ICSID's caseload statistics takes a deep dive into case-related trends in the 2024 calendar year, while also showcasing data on all ICSID cases going back to 1972.

According to the latest edition of ICSID's caseload statistics, the International Centre for Settlement of Investment Disputes (ICSID) registered 55 new arbitrations in 2024 under the ICSID Convention and the Additional Facility Rules, and 17 arbitrations under other non-ICSID procedural rules, such as the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

In the majority of new cases in 2024 (52%), ICSID jurisdiction was asserted on the basis of a bilateral investment treaty (BIT). When accounting for all ICSID cases, 58% have relied on BITs for jurisdiction. Multilateral treaties have accounted for a growing share of cases over time. A further 14% of new cases were brought in 2024 on the basis of contracts between a host State and investor and 5% under domestic investment laws—both of which are consistent with figures from previous years.

Investment Arbitration

***Glencore International A.G. & Ors v The Republic of Colombia*, ICSID Case No. ARB/19/22**

Award issued on 19 April 2024 under the Swiss-Colombia BIT.

The dispute revolves around a concession contract for Puerto Nuevo, a public services port for the export of coal in the municipality of Ciénaga in Colombia. The said port was constructed and operated by the claimants under a 30-year concession agreement signed with Colombia's national infrastructure agency in 2011. In 2014 Colombia required the claimants to pay tariffs for building and maintaining the infrastructure while permitting another foreign-owned company to use it without any contribution. The Tribunal found that Colombia had violated the Fair and Equitable (FET) standard contained in Article 4(2) of the Swiss-Colombia BIT, which says: "Each Party shall ensure fair and equitable treatment within its territory of the investments of investors of the other Party. This treatment shall not be less favourable than that granted by each Party to investments made within its territory by its own investors, or than that granted by each Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable."

According to the Tribunal "the test for determining whether the host state's conduct constitutes discrimination in contravention of the fair and equitable treatment standard under the Treaty draws from that for most favored nation claims; albeit, without requiring establishing discrimination on the basis of nationality (…) the test entails a three-fold analysis. "Firstly, it requires the identification of an appropriate comparator—meaning, investments of an investor in like circumstances. The Tribunal considers that investors and investments are in like circumstances when they operate within the same industry, or when they stand as direct competitors. (…) Secondly, the test requires an assessment to determine whether the host state treated the investments of the investor protected under the fair and equitable treatment standard less favorably than those of the identified comparator (…) Thirdly, when the two initial requirements are met, as in the case at hand, a third prong becomes relevant, wherein the host-state is liable unless it can demonstrate that the less favorable treatment was justified based on a non-discriminatory rational government policy." Colombia failed all three prongs of the test and was ordered to pay damages.

Case note: England & Wales

***Hulley Enterprises Ltd & Ors v The Russian Federation* [2025] EWCA Civ 108**

Facts: The former majority shareholders in OAO Yukos Oil Company ("Yukos") initiated three separate arbitrations against the Russian Federation ("Russia"). Seated in the Netherlands, the three arbitrations were pursued for Russia's breaches of the Energy Charter Treaty, which led to Yukos's bankruptcy in 2006 and affected adversely the investors' stakes. By three awards rendered in July 2014, the arbitral tribunal found that Russia had illegally expropriated the claimants'

investments and ordered Russia to pay more than USD 50 billion in total. Russia sought to set aside the awards in the Dutch courts (including the Hague Court of Appeal and the Dutch Supreme Court) on the grounds that there was no binding arbitration agreement. The argument was dismissed.

The claimants then sought to enforce the awards in England and Wales. They relied on the arbitration exception in section 9 of the State Immunity Act 1978 ("SIA"), which allows to sue a foreign State in arbitration-related proceedings if it had given written consent to the arbitration. Russia filed an objection recycling the pleadings (disposed of by the Dutch courts) based on the lack of consent. The High Court found that Russia had agreed in writing to submit the dispute to arbitration; that the exception to immunity therefore applied; that Russia was therefore not immune from the adjudicative jurisdiction of the English court; and that the Dutch court's decision created an issue estoppel which prevented Russia from re-litigating the same issues. Russia brought the matter to the Court of Appeal.

Held: Russia argued that "the principle of issue estoppel should give way to state immunity because the latter is of a higher order of importance, being concerned as it is with the United Kingdom's international obligations". So, the main question was whether the English courts should treat the Dutch courts' decision as giving rise to an issue estoppel, or if they should determine the issue independently. The Court of Appeal found that no "special circumstances" justified departing from the immunity exception and that that the Dutch courts' decision was final and conclusive. As such, it created issue estoppel and precluded Russia from rearguing the issue of estoppel before the English courts.

Lord Justice Males said: "Once it is determined, as in this case, that an issue has been finally and conclusively decided by a foreign court of competent jurisdiction, after a fair hearing in proceedings initiated by the state in which the point was fully contested, and that the judgment of the foreign court would be entitled to recognition under section 31 of the Civil Jurisdiction and Judgments Act 1982, I see no reason why effect should not be given to the issue estoppel arising from that judgment. That applies with particular force in the arbitration context when the judgment of the foreign court is given in the arbitration seat, as in this case." Russia's appeal was accordingly dismissed.

Tip of the month

☑ When is the recognition and enforcement of a foreign award contrary to public policy?

The recognition and enforcement of a foreign award may be refused if it is contrary to the public policy of the Contracting State (Article V.2.b of the 1958 New York Convention). Public policy has been defined by some courts as "the forum state's most basic notions of morality and justice", or the array of "essential and widely recognized values which form the basis of any legal order". There is no single definition, nor an exhaustive list of norms that codifies public policy in a particular jurisdiction. It may relate to substantive or procedural matters, and may root in any field or area of the law, such as procedure, insolvency, competition law or interest rates, to say a few.

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