ARBITRATION WATCH
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Laws & Treaties

ICSID explores the possibility of Appeal Awards

The International Centre for Settlement of Investment Disputes ("the Centre") has published a Note on a Potential Inter Se Modification of the ICSID Convention. The said note is shared with the UNCITRAL Working Group III in the context of the discussions on the Draft Statute of the Standing Mechanism for the Resolution of International Investment Disputes.

The Centre explores the possibility of submitting ICSID Awards for appeal before an Appeals Tribunal. The appeal model would allow the parties to submit ICSID Awards for appeal and in so doing would replace the current annulment model.

If the proposal catches light, an amendment of the ICSID Convention would be required by unanimous ratification of the Contracting States.

Arbitration centres

Proposed Guideline on Third-Party Funding in arbitration

The Chartered Institute of Arbitrators ("Ciarb") makes a public call for comments to its Proposed Guideline on Third-Party Funding. Being aware of the rapid development of third-party funding in arbitration, Ciarb's Proposed Guideline on Third-Party Funding is a comprehensive tool for ADR practitioners that provides much needed transparency over the third-party funding process. The deadline for submissions is 17 June 2025.

Investment Arbitration

Rockhopper v. Italy, *ICSID Case No. ARB/17/14.*

Award issued on 23 August 2022 under the ECT and the ICSID Convention

In 2015 the Italian Parliament re-introduced a ban on oil and gas exploration within 12 miles of the Italian coastline. The ban had previously been introduced in 2010 but revoked in 2012. In 2017, UK company Rockhopper Exploration Plc, along with its Italian subsidiary, filed a claim for compensation alleging violations of the investor protection provisions of the Energy Charter Treaty. An ICSID tribunal found Italy unlawfully expropriated Rockhopper's investment and awarded damages of €184 million plus interest, based on Rockhopper's pre-acquisition discounted cash flow evaluation of the field. Italy later attempted to annul the award, but the attempt failed, leading to a monetisation agreement with a specialist fund.

The Tribunal found that the Respondent unlawfully expropriated the investment when in 2016 it denied the application for a production concession. The Claimants' right to be granted the production concession came to an end due to two specific matters, namely, the Respondent passing a law published in 2015 and then sending a letter in2016 (based on that law) denying the actual grant of the production concession. As of that moment, the Claimants' right to be granted a production concession was taken away from it. Thereafter the Claimants had neither the right to be granted the production concession, much less the production concession itself. The Claimants went, in one fell swoop, from a position where they had rights to a valuable production concession which would actually lead, under Italian law, to such production concession, to essentially nothing at all. The Tribunal said: "*No lengthy elaboration is required to arrive at this conclusion. There was, factually speaking, an immediate and complete deprivation of the Claimants' investment. There were no indirect actions, whether described as creeping or otherwise, cumulatively leading to*

such deprivation, but rather a specific act on the part of the Respondent which brought about this circumstance on 29 January 2016.".

Case note: England & Wales

Czech Republic v Diag Human SE & Anor [2025] EWCA Civ 5

Facts: The Czech Republic ("CZR") challenged an award issued in favour of Diag Human SE under the Swiss-Czech Republic Bilateral Investment Treaty ("the BIT"). The challenge raised jurisdictional objections and claims of procedural irregularity.

Held: According to section 31(1) of the 966 Arbitration Act ("the Act"), "A*n objection that the arbitral tribunal lacks substantive jurisdiction at the outset of the proceedings must be raised by a party not later than the time he takes the first step in the proceedings to contest the merits of any matter in relation to which he challenges the tribunal's jurisdiction.*" So, jurisdictional challenges must be raised promptly during the arbitration proceedings. That said, a party that did not raise an objection within the time specified in section 31 of the Act was not precluded from relying on the point if it established that it did not know and could not with reasonable diligence have discovered the grounds for the objection until some time later. Hence, the Court found that CZR's jurisdictional objections were made in the arbitration within the time allowed by the tribunal within the meaning of section 31(3) of the Act if it considers the delay justified. That was not, however, the case here. The Court of Appeal then dismissed the appeal relating to the Commercial Court's finding that one of CZR's challenges was not jurisdictional in nature.

Another issue for the Court of Appeal related to claims of procedural irregularity, this is, Diag's status as an "investor" for the purposes of the BIT. The definition of "investor" in Article 1(1) of the BIT included (c) "legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party." Diag was a Liechtenstein company and could only qualify as an "investor" if it came under subsection (c). CZR argued that, after placing of their shares in a trust in 2011, Diag, ceased to be controlled by Mr Stava, a Swiss national, with the consequence that it no longer fell within the definition of "investor" of subsection (c). The Court clarified that, to qualify as an investor under the BIT, a legal entity from a third state must be de jure (rather than de facto) controlled by a qualifying national or entity. According to the Court, *"The fact that the shares were transferred into a discretionary trust in which the potential beneficiaries, who included Mr Stava, had no legal rights of ownership or control, was not a matter of form. It was a matter of substance and was critical. The trust was valid and effective under Liechtenstein law to achieve these purposes, but only because of the transfer of legal rights.".*

Tip of the month

☑ Can states rely on immunity to resist the jurisdiction of an arbitral tribunal?

The privilege of immunity aims to protect sovereign entities and individuals from legal action, either in litigation or in arbitration. Exceptionally, the privilege can be waived by an agreement to arbitrate or by voluntary submission to a particular court or tribunal.

In arbitral disputes determined in accordance with the ICSID Convention, the privilege of immunity is entirely waived. The Contracting States cannot avail themselves with immunity because, when they signed the Convention, they gave their irrevocable consent to arbitrate and adopted the rule of abstention as provided in articles 25.1, 26 and 64.

For more information, please contact any of the following members of our Arbitration Team:

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