McNAIR CHAMBERS – QUARTERLY UPDATE – SUMMER 2016

Welcome to the latest McNair Chambers quarterly round-up, in which we provide a summary of some key judicial and arbitral decision handed down in recent months. For a more detailed consideration of the cases listed below, please see the Publications section of the McNair Chambers website.

Summary

There have been a number of interesting decisions in international law and international arbitration in recent months, notably the decisions of a UNCLOS Tribunal in *The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* and the Tribunal in the arbitration proceedings between Croatia v Slovenia. Of further interest are the ongoing proceedings between Pakistan and India in the English courts, which recently concerned a summary judgment application.

Recent Developments

On 30 June 2016, a partial award was handed down by the tribunal in the arbitration proceedings between Croatia v Slovenia, which have been seriously disrupted by recent allegations of bias and collusion by the Slovenian-appointed arbitrator and Slovenia's representative following the leaking of private conversations between the two, which led to Croatia's withdrawal from the proceedings. The tribunal held that while Slovenia, by engaging in ex parte contacts with the arbitrator originally appointed by it, acted in violation of provisions of its arbitration agreement with Slovenia, the violations were not of such a nature as to entitle Croatia to terminate the Arbitration Agreement, nor did they affect the Tribunal's ability, in its current composition, to render a final award independently and impartially.

On 15 June 2016, the International Court of Justice ("ICJ") announced that Iran had instituted proceedings against the United States with regard to a dispute concerning frozen Iranian funds and alleged violations of the 1955 Treaty of Amity. By an Order dated 1 July 2016, the Court fixed 1 February 2017 and 1 September 2017 as the respective time-limits for the filing of a Memorial by the Islamic Republic of Iran and a Counter-Memorial by the United States of America. A full copy of the ICJ press release and Iran's application can be found on the ICJ website.

On 26 July 2016, a decision was handed down in ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30) in which two members of an ICSID tribunal (Mr. Eduardo Zuleta and Professor Andreas Bucher) dismissed a proposal for the disqualification of L. Yves Fortier QC, the sixth such challenge in the proceedings (the first having been made on 27 February 2012).

International arbitration

- In ***Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*** (ICSID Case No. ARB/09/1) (April 8, 2016), a split Tribunal handed down a decision on provisional measures, granting in part the relief sought by the claimant. The dissenting opinion in that matter focused on the arbitrator's objection to the setting out of contentious factual positions in the decision, which could be interpreted as determining issues which should be determined in the final award.
- In ***Crystallex International Corporation v. Bolivarian Republic of Venezuela***, (ICSID Case No. ARB(AF)/11/2) (April 4, 2016), an ICSID tribunal awarded the claimant almost US$1.4 billion for breach of the fair and equitable treatment standard/expropriation.
- In ***TECO Guatemala Holdings, LLC v. Republic of Guatemala*** (ICSID Case No. ARB/10/23) (April 5, 2016), the tribunal declined to grant an application for annulment of an award in full but did annul the parts of the award relating to damages on the basis that the Tribunal's reasoning was "not clear at all" such that the Committee for Annulment had "struggled to understand the Tribunal's line of reasoning."
- ***The Russian Federation v Veteran Petroleum Ltd, Yukos Universal Ltd and Hulley Enterprises Ltd*** (C/09/477160 / HA ZA 15-1, 15-2 and 15-122) - By a decision handed down on 20 April 2016, the District Court in The Hague ("the District Court") set aside six arbitral awards which had been rendered by the Tribunal in the long-running and much-publicised dispute between the former majority shareholders of Yukos and Russia. The six awards, which were handed down on 18 July 2014, amounted to the largest known damages award in the history of arbitration – ordering Russia to pay US$50 billion for its unlawful expropriation of investments in Yukos. The underlying cases had been brought pursuant to the Energy Charter Treaty ("the ECT"), which had been signed by Russia but never ratified by the Russian Duma. It was this fact that led the District Court to conclude that the Tribunal had not had jurisdiction because Russia was not bound by the offer to arbitrate in Article 26 ECT. The provisional application of Article 26 ECT would have been contrary to Russian domestic law which does not recognise disputes of an essential public law character as being capable of settlement by arbitration.

International Law

- ***The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)*** - By an award handed down on 12 July 2016, an arbitral tribunal (Judge Mensah, President; Judge Cot; Judge Pawlak; Professor Soons; Judge Wolfrum) ("the Tribunal") constituted under Annex VII to the United Nations Convention on the Law of the Sea ("UNCLOS") in proceedings instituted by the Philippines against China. The Permanent Court of Arbitration acted as Registry for the arbitration. The arbitration concerned historic rights and sources of maritime entitlements in the South China Sea, the status of certain maritime features and the entitlements that they can generate, and whether certain actions by China were contrary to UNCLOS. The Tribunal explicitly stated that it was not giving a ruling on issues of sovereignty nor was it delimiting any boundary between the Philippines and China.

Arbitration and Litigation in the English courts

- By a 75 page decision handed down on 21 June 2016 in ***High Commissioner for Pakistan in the United Kingdom v National Westminster Bank (and various interveners)*** ("the Hyderabad Funds case"), the English High Court dismissed an application by India for

summary judgment/strike out against Pakistan's claim to be beneficially entitled to the funds at the subject-matter of the dispute. The case has important historical and legal implications. Henderson J held that a claim by Pakistan to beneficial entitlement to money that was paid into an English bank account in 1948 by the former independent state of Hyderabad (known as "the Hyderabad Funds") had a real prospect of success. Further, Pakistan‟s arguments that the underlying transaction was non-justiciable or an "act of state" in respect of which the English courts were precluded from exercising jurisdiction also had a real prospect of success. In respect of Pakistan's limitation defences against other competing claims to the Hyderabad Funds from India (which had invaded and annexed Hyderabad) and from the descendants of Hyderabad's ruler these also had a good prospect of success, except as against claims based on resulting and constructive trust. Finally, Henderson J held that India's restitution claim against the bank could not be dismissed as 'unarguable'.

- On 19 May 2016, the Supreme Court handed down its decision in ***PJS v News Group Newspapers Ltd*** [2016] UKSC 26 in which it overturned the decision of the Court of Appeal and continued an injunction preventing publication of the entertainment figure at the centre of the widely publicized sex scandal.
- By a judgment handed down on 16 June 2016 in ***Harb v Aziz*** [2016] EWCA Civ 556, the English Court of Appeal allowed the appeal of a Saudi prince against a decision that he was bound by an oral contract. However, whilst the Court of Appeal agreed that the first instance judge's approach to the evidence had been unsatisfactory, an appeal on the grounds that the judge had been biased against the prince's counsel was dismissed.
- On 20 May 2016, the English High Court handed down its decision in ***Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Anor*** [2016] EWHC 1118 (Comm) in which Sir Bernard Eder ordered that an arbitration award be set aside on the basis of section 72 of the Arbitration Act 1996 (non-participation of a party).

9th August 2016