

McNAIR CHAMBERS – QUARTERLY UPDATE – WINTER/SPRING 2017

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, along with recent developments of interest. For a more detailed consideration of the cases listed below, please see the Publications section of the McNair Chambers website.

Recent Developments

- In February 2017, it was reported that two Iranian banks – Bank Melli and Bank Saderat – had commenced UNCITRAL arbitration proceedings against Bahrain, alleging violations of the 2002 bilateral investment treaty between Iran and Bahrain, including expropriation.
- Various cases of interest have been filed with the International Court of Justice, including:
 - *Ukraine v Russian Federation*. On 16 January 2017, Ukraine instituted proceedings against the Russian Federation with regard to alleged violations of the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999 and the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965. Ukraine also filed a request for a number of provisional measures, relating to both Conventions, and public hearings are to be held between 6-9 March 2017.
 - *Malaysia/Singapore*. In this case, Malaysia requests a revision of the Judgment of 23 May 2008, in which the Court found, inter alia, that sovereignty over the island of Pedra Branca/Pulau Batu Puteh belongs to Singapore.

- Press reports indicated that Bosnia would, before the end of February 2017 (when the ten year limitation period for any application for revision would expire), file an application with the ICJ seeking revision of the 2007 ICJ judgment in *Bosnia and Herzegovina v. Serbia and Montenegro*. The 2007 judgment held that while genocide had taken place in Srebrenica, it did not say that such genocide had happened in other parts of Bosnia. In addition, while the ICJ found that while Serbia had failed to prevent genocide, it held that it was not directly responsible for killings, rape and ethnic cleansing during the break up of Yugoslavia in the 1990s.

Brexit

- *R (Miller & Dos Santos) v Secretary of State for Exiting the European Union* [2017] UKSC 5 - By a decision handed down on 24 January 2017, an 11-member UK Supreme Court dismissed an appeal by the British Government against a decision of a 3-member Divisional Court (comprising the Lord Chief Justice, the Master of the Rolls and Lord Justice Sales) that ministers of the British Government cannot rely on prerogative powers to serve pursuant to Article 50 of the Treaty on the European Union a notice of an intention to withdraw from the European Union but, instead, according to the constitutional requirements of the United Kingdom, can only do so after prior authorisation by an Act of Parliament. The Supreme Court also decided that it was not a requirement for the British Government to consult and/or obtain the consent of the devolved legislatures prior to serving such a notice.

Investment treaty arbitration

- *Micula & Ors v Romania & Anor* [2017] EWHC 31 - On 20 January 2017, the English High Court handed down its decision in *Micula & Ors v Romania & Anor* [2017] EWHC 31 in which it stayed enforcement of an ICSID award pending resolution of the proceedings in the European court.

International Law

- *Belhaj v Straw; Rahmatullah v Ministry of Defence* [2017] UKSC 3 - By a decision handed down on 17 January 2017, the UK Supreme Court rejected the British Government's attempts to invoke the doctrines of "state immunity" and "foreign act of state" to bar the English courts from adjudicating claims that the British Government had been complicit in serious tortious wrongdoing that was allegedly committed by other States and their agents in overseas jurisdictions. The allegations included

unlawful detention and rendition, assault and torture or other cruel and inhumane treatment.

Fraud and corruption

- *Serious Fraud Office v (1) Rolls-Royce plc; (2) Rolls-Royce Energy Systems Inc, Case No: U20170036* - By a decision handed down on 17 January 2017, Sir Brian Leveson (President of the Queen's Bench Division of the English High Court) approved a Deferred Prosecution Agreement concluded between the Serious Fraud Office and two entities within the Rolls-Royce group of companies in settlement of an investigation into bribery, corruption and fraud.

Arbitration and Litigation in the English courts

- *Bunge SA v Huaya Maritime Corporation of the Marshall Islands & Anor [2017] EWHC 90 (Comm)* - On 27 January 2017, the Commercial Court ordered the defendant to be imprisoned for 18 months for failure to comply with disclosure orders despite the disclosure orders not having been personally served on the defendant, nor having contained the required penal notice.
- *Excalibur Ventures LLC v Texas Keystone Inc & Ors [2016] EWCA Civ 1144* - On 18 November 2016, the Court of Appeal dismissed an appeal against the first instance Judge's finding that litigation funders were to be liable for their contributions to the funding in addition to their contributions provided for security for costs.
- *Pulis v Crystal Palace Football Club [2016] EWHC 2999 (Comm)* - By a decision handed down on 18 November 2016, the English Commercial Court rejected a football manager's challenge, brought pursuant to Section 68 of the Arbitration Act 1996, to an arbitral award that had been made against that manager concerning early receipt of a bonus by deceit.
- *Bestfort Development LLP & Ors v Ras Al Khaimah Investment Authority & Ors [2016] EWCA Civ 1099* - In a decision handed down on 8 November 2016, the Court of Appeal considered the appropriate test for the granting of an order for security of costs, and the impact of Article 14 of the European Convention on Human Rights.