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INTERNATIONAL ARBITRATION UPDATE

JULY 2020

As we all adjust to the new reality of social distancing, reduced travel and "Zoom fatigue", many developments have taken place which are likely to signal new norms.

Increased recourse to remote/hybrid hearings is likely (subject to essential safeguards in the form of Arbitration proceeding Protocols and Judicial Practice Directions).

We will also witness more aggressive challenges to arbitrators in BIT as well as Commercial Arbitrations – as recent cases demonstrate. The importance of continuing disclosure and avoiding "double hatting" for arbitrators cannot be overstated.

As the United Kingdom prepares to leave the EU on 1 January 2021, the English Commercial Court has confirmed its pre-eminent supporting role for London seat arbitrations, as well as the effective enforcement measures it can provide in support of arbitral awards.

On any view, the past 5 months have been challenging for most of humanity and we hope you and your families will continue to remain well.

I look forward to being able to meet with many of you in person when lockdowns ease. In the meantime, my very best wishes to you all.

Khawar Qureshi QC
Head of Chambers

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The following updates are covered in this newsletter:

INTERNATIONAL ARBITRATION AND COURT PRACTICE IN TIMES OF COVID-19

On 11 March 2020, the COVID-19 outbreak was declared a pandemic by the World Health Organisation. Since that date, steps have been taken both at an international and domestic level to ensure that disputes subject to international arbitration can continue in an expeditious and efficient manner. Nevertheless, there is no doubt that the COVID-19 pandemic has created a "new reality", not just in the field of international arbitration, but globally.

International arbitral tribunals

At the start of the outbreak, most international arbitral institutions transitioned to working remotely. On 16 April 2020, institutions worldwide (including LCIA, ICC, ICSID, HKIAC and SIAC) published a joint message in which the institutions committed to supporting "*international arbitration's ability to contribute to stability and foreseeability in a highly unstable environment, by ensuring that pending cases may continue and that parties may have their cases heard without undue delay.*"

The arbitral rules of virtually all institutions allow (either expressly or within the powers of the Tribunal) for hearings to take place either by teleconference or videoconference.

By way of example, ICSID, which handles the majority of international investment disputes, published a press release on 24 March 2020 in which it outlined its approach to virtual/remote hearings in arbitrations. ICSID noted that in 2019, around 60% of the 200 hearings and sessions organized by ICSID took place by video conference. ICSID has its own platform for such hearings, capable of supporting between a handful and hundreds of attendees, which requires nothing more than an internet connection and a webcam (or, where internet service is poor, a telephone connection). Hearings are transcribed in real-time by a virtual court stenographer, with the transcript being made available to all those present on the video conference.

The speed and flexibility with which arbitral institutions have adapted have allowed arbitrations to proceed with a minimum of delay in many cases. Indeed, arbitral institutions have demonstrated an unwillingness to allow the pandemic to lead to open-ended delays. In *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltd. v. Bolivia* (PCA Case No. 2018-39), the Respondent sought suspension of time limits for submission of its Statement of Defence, pleading force majeure as a result of COVID-19. By way of Procedural Order No. 7 (10 April 2020), the Tribunal allowed only a 30-day extension, emphasizing the importance of keeping the arbitration moving. In its Order, the Tribunal recognized "*that the COVID-19 pandemic has created a new reality…new demands have been imposed by the crisis on parties, counsel, tribunals and institutions. While there have been difficulties, practice shows that in most cases the participants in the proceedings have been able to adjust to the new reality.*"

English Commercial Court

Extensive guidance has been published by the UK Judiciary as to the operation of the judicial system during COVID-19, and is available at: https://www.judiciary.uk/coronavirus-covid-19-advice-and-guidance. This includes a Practice Direction on Video or Audio Hearings in Civil Proceedings during the Coronavirus Pandemic and Civil Court guidance on how to conduct remote hearings.

Arbitration cases which come before the English courts are handled by the Commercial Court which has continued to function and handle cases through remote/video hearings during the pandemic. Indeed, an article in the Law Society Gazette on 24 June 2020 reported that the Commercial Court had functioned so effectively during the pandemic that it had accrued virtually no backlog of cases despite the challenges presented by the situation.

Concluding Remarks

While there is no doubt that the COVID-19 pandemic has presented significant challenges, it is equally apparent that both arbitral institutions and the courts, along with counsel and parties, have risen admirably to such challenges, allowing arbitration proceedings to continue expeditiously and successfully. While conducting proceedings remotely comes with its own set of challenges, there can be significant benefits (not least with regards to time and cost). It remains to be seen whether such systems will continue to be utilized after the pandemic.

ENGLISH COMMERCIAL COURT DECLINES TO SET ASIDE AWARD AMIDST BRIBERY CLAIMS

Alexander Brothers Ltd (Hong Kong SAR) v Alstom Transport SA [2020] EWHC 1584 (Comm) (18 June 2020)

Background

The claimant (a Hong Kong company) commenced arbitration proceedings against the first defendant (a French company) and the second defendant (an English company), which were wholly-owned subsidiaries of a group supplying railway locomotives and stock, for sums due under consultancy agreements (around to around €3 million plus default interest). The defendants' position was that the decision was taken to stop certain payments under the consultancy agreements following investigations into the Alstom group for corruption by the UK and US authorities.

The consultancy agreements were governed by Swiss law and contained an arbitration clause providing for the settlement of any disputes to be referred to ICC arbitration in Switzerland. The award handed down in the arbitration found in favour of the claimant.

At first instance, the French courts granted the claimant's application for enforcement of the award. However, upon an application by the defendants, the French Court of Appeal held that it would be contrary to public policy to enforce the award because of evidence that sums paid to the claimant by the defendants had financed the bribery of officials in China.

The claimant obtained permission to enforce the award in England. The defendants made an application to set aside this permission.

Decision

The Commercial Court (Mrs Justice Cockerill DBE) dismissed the set aside application.

The defendants' application was made on various grounds (including issue estoppel and a failure to make full and frank disclosure in the context of a without notice application for permission to enforce), the primary ground for the set aside application was the public policy exception in section 103(3) of the Arbitration Act 1996. In particular, the defendants relied on allegations of bribery and certain conduct on the part of the claimant (including that it had declined to give a cogent explanation as to how it had obtained sensitive and confidential information from the Chinese Government) and persons who dealt with the claimant (who were subsequently convicted of corruption crimes).

At the outset, it was observed that the public policy exception in section 103(3) was to interpreted restrictively; however, it was common ground between the parties that illegality and bribery could give rise to a public policy case and the conduct alleged in this case (if established) would be contrary to the Bribery Act 2010.

Where an arbitration tribunal had jurisdiction to determine the relevant issue of illegality and had determined that there was no such illegality on the facts, there was very nearly no scope for the Court to re-open the issue of illegality (save for a possibility in exceptional circumstances). This represented a balance between the public policy in favour of the finality of arbitration awards and the public policy against illegality.

In the present case, on the facts, the issue of bribery and illegality had not been decided by the Tribunal. However, the defendants' failure to run the bribery case before the Tribunal was of signifiance, and in particular, there were no overriding special circumstances in the present case which would allow the court to consider a bribery case which was deliberately not taken before the parties' chosen tribunal in ICC arbitration.

Accordingly, for the reasons set out in the judgment (including those on issue estoppel and full and frank disclosure), the application to set aside permission to enforce the arbitration award was dismissed.

Concluding Observations

This decision emphasises the importance of addressing all issues in the arbitration, including any so-called "knock out points" rather than seeking to save them for the enforcement stage in the event of an adverse arbitration award. The approach under English law is very pro-arbitration and, as is clear from this case, the English courts will enforce awards unless there are exceptional grounds to depart from such an approach.

COMMERCIAL COURT DECLINES TO SET ASIDE ARBITRATION AWARD AGAINST EGYPT

Unión Fenosa Gas SA v Egypt [2020] EWHC 1723 (Comm) (30 June 2020)

Background

UFG commenced arbitration under the ICSID framework on the basis of the Egypt-Spain bilateral investment treaty. On 31 August 2018, an ICSID Tribunal handed down an award in favour of UFG. Egypt's application to annul this award is currently pending.

The registration and enforcement of ICSID arbitration awards in English courts is governed by the Arbitration (International Investment Disputes) Act 1966 and by CPR 62.21 which applies specifically to ICSID arbitration awards. UFG made a without notice application for registration of the ICSID award pursuant to the provisions of CPR 62.21. That application was granted by Mr Justice Males on 19 December 2018 (the "Males Order").

UFG tried to serve the Males Order (but not the arbitration claim form) on Egypt through the diplomatic route (as required by CPR 6.44). Egypt returned the documents to the UK Foreign & Commonwealth Office as having been sent to the wrong person within its Foreign Ministry.

Subsequently, UFG obtained, from Mr Justice Teare, a without notice order to dispense with service of the Males Order (the "Teare Order") and, from Mr Justice Waksman, a without notice order for alternative service on Egypt's solicitors (whose position was that they were not authorised to accept service) (the "Waksman Order").

Egypt applied to set aside the Teare Order and the Waksman Order. Egypt argued that the requirement in CPR 62.21(3) that an application to register an ICSID award be made in accordance with the CPR Part 8 procedure meant that UFG was obliged to serve the arbitation claim form properly upon it.

Decision

The Commercial Court (Mr Justice Jacobs) rejected Egypt's application.

In contrast to other parts of CPR Part 62 relating to non-ICSID Convention awards, there was no reference in CPR 62.21 to the arbitration claim form or service of it. That reflected the fact that CPR 62.21 applied a different and simplified procedure for registration of ICSID Convention awards, compared to that of other arbitration awards.

Requiring service of an arbitration claim form was inconsistent with the regime for registration in CPR Part 74 (which was incorporated via CPR 62.21(2)). CPR 74.3 expressly permitted a without notice application for registration and CPR 74.6 expressly provided that permission was not required to serve a registration order out of the jurisdiction. Those express references in the procedural rules demonstrated that the procedure on an application for registration of an ICSID award was not the full CPR Part 8 procedure (which does require the issue and service of a claim form).

CPR 6.28 permitted the court in its discretion to dispense with service on a State. It was not required that there be exceptional circumstances for that discretion to be exercised.

As both the Males Order and Teare Order had already come to the attention of Egypt, alternative service should be permitted.

Concluding Observations

This case is the latest of a series of English cases that have considered issues of service upon States, and is an important decision in terms of confirming the simplified procedural route for the enforcement of ICSID awards in the English courts.

At the time of writing, an appeal in a different case concerning service of an arbitration claim form upon a State pursuant to section 12 of the State Immunity Act 1978 (*General Dynamics UK Ltd v Libya*) is pending before the Supreme Court.

ICSID TRIBUNAL ANNULS AWARD ON BASIS OF APPEARANCE OF ARBITRATOR BIAS

Eiser Infrastructure Ltd and Energia Solar Luxembourg Sarl v Spain (ICSID Case No.ARB/13/36) (Decision on Annulment, 11 June 2020)

Background

The underlying proceedings arose out of an energy investment made by the claimants in Spain. Following the commencement of ICSID proceedings based on the Energy Charter Treaty, on 4 May 2017, the Arbitral Tribunal (Prof. John R. Crook (President), Dr. Stanimir A. Alexandrov, and Prof. Campbell McLachlan) handed down an award in which it ordered Spain to pay €128 million to the claimants.

Spain sought annulment of the award on the basis that (a) the Tribunal was not properly constituted; (b) the Tribunal manifestly exceeded its powers; (d) there was a serious departure from a fundamental rule of procedure; and (e) the Award failed to state the reasons on which it was based. Spain's position was based on the "manifest appearance of bias" of Dr. Alexandrov, due to his longstanding relationship with Mr. Lapuerta of the Brattle Group (who acted as the claimants' expert witness on damages). In particular:

- As a Sidley Austin partner, Dr. Alexandrov had been appointed as arbitrator in four cases in which the Brattle Group had been instructed as experts by the party that appointed Dr. Alexandrov. In two of those cases, Mr. Lapuerta was the testifying expert. Three of the cases proceeded at the same time as Eiser.
- In at least eight other cases, Dr. Alexandrov was counsel in cases where the client engaged the Brattle Group as expert. In three of those, Mr. Lapuerta was the testifying expert.

Decision

The annulment committee (Ricardo Ramirez Hernandez, President; Makhdoom Ali Khan; Judge Dominique Hascher) annuled the award.

Manifest appearance of bias

The relationship was such that an independent observer, on an objective assessment of all the facts, would conclude that there was a manifest appearance of bias on the part of Dr. Alexandrov.

The annulment committee drew a distinction on the facts between the present case, and previous cases in which a party had sought to disqualify Dr. Alexandrov on the basis of his relationship with the Brattle Group and Mr Lapuerta. The *Tethyan* case could be distinguished as the other arbitrators were aware of the relationship (which was not the case here), while the *SolEs* challenge was distinguished on the basis that, in *SolEs*, Dr. Alexandrov was not simultaneously acting (as counsel) with Mr. Lapuerta (as damages expert) while Dr. Alexandrov was sitting as an arbitrator.

Although it was inevitable that there would be some interaction between arbitrators, lawyers and experts in the investment treaty sphere, the more "connections" between them across cases and in different roles, the more chance there was that these would lead to conflict.

Obligation to disclose the relationship

The relationship between Dr. Alexandrov and Mr. Lapuerta should have been disclosed. While Mr. Lapuerta was not the main testifying expert in this case, he had an important role. It was critical that the other arbitrators had no knowledge of the relationship between Dr. Alexandrov and Mr. Lapuerta – had the other arbitrators been aware, it may have affected the deliberations and the outcome. Dr. Alexandrov's relationship with the Brattle Group had been challenged in two other arbitrations that were ongoing at the time of Eiser and thus Dr. Alexandrov should have been alerted to the need to disclose the relationship in Eiser.

Concluding Observations

This decision emphasises the difficulties that can arise where individuals wear both their arbitrator and counsel "hats", either at different times or simultaneously in different arbitrations.

UNCTAD UPDATE ON 2019 INVESTMENT ARBITRATIONS

The UNCTAD Investment Policy Hub publishes annual Fact Sheet on Investor-State Dispute Settlement Cases, the most recent being published in July 2020 which covered cases and outcomes in 2019.

The Fact Sheet addresses not only those cases brought under BITs, but also multilateral treaties such as NAFTA, CAFTA and the Energy Charter Treaty (with the most recent Fact Sheet noting that around 20% of the 1023 known cases have invoked either the Energy Charter Treaty (128 cases) or the North American Free Trade agreement (NAFTA) (67 cases)).

Of particular interest in the most recent Fact Sheet:

(i) At least 55 treaty-based investor–State dispute settlement cases were initiated in 2019, all under old-generation treaties signed before 2012. Of those cases, Colombia, Mexico, Peru and Spain were the most frequent respondents. Three economies – the EU, Nepal and Sierra Leone – faced their first known ISDS claim.

(ii) The new ISDS cases in 2019 were initiated against 36 countries and one economic grouping (the EU). As in previous years, the majority of new cases were brought against developing countries and transition economies. Developed-country investors brought most of the 55 known cases.

(iii) Investors in 2019 most frequently challenged the following types of State conduct:

a) Alleged takeover, seizure or nationalization of investments (at least 9 cases)

b) Alleged breach, non-fulfilment or interference, or termination, non-renewal or alleged interference, with contracts or concessions (at least 13 cases)

c) Revocation or denial of licences or permits (at least 4 cases)

d) Legislative reforms in the renewable energy sector (at least three cases)

e) Forced liquidation or closure (at least two cases).

(iv) Where information regarding the amounts sought by investors has been disclosed (in about half of the new cases), the reported amounts claimed range from $10 million to $3.5 billion.

(v) By the end of 2019, some 674 ISDS proceedings had been concluded. About 37% of all concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about 29% were decided in favour of the investor, with monetary compensation awarded. If only those cases decided on the merits are considered, then about 60% were decided in favour of the investor and the remainder in favour of the State.

Unlike in previous editions, the Fact Sheet published in July 2020 did not contain a section on arbitrators. The 2018 Fact Sheet (published in May 2019) noted that 537 people have been appointed as arbitrators in the (then known) 942 ISDS cases (original proceedings). About half have served on more than one known case, and 14 have been appointed to more than 30 cases each. The most frequently appointed arbitrator (French) is noted as receiving over 100 known appointments, followed by a Swiss arbitrator (56 appointments) and a Canadian arbitrator (53 appointments).

The full Fact Sheet is available here.