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KEY DEVELOPMENTS UPDATE

AUGUST 2024

MESSAGE FROM KHAWAR QURESHI KC, HEAD OF MCNAIR INTERNATIONAL

In this update, we highlight recent decisions of the English Court of Appeal, the Privy Council, the Qatar International Court and ICSID dealing with a range of issues including the impact of sanctions upon obligations under a letter of credit, challenging an arbitral award on grounds of public policy and the consequences of a defective assignment on an investment treaty claim.

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- **ICSID tribunal dismisses substantial mining dispute against Colombia.** *Montauk Metals Inc (formerly known as Galway Gold Inc) v Colombia (ICSID Case No. ARB/18/13) (Award) (7 June 2024).* Claimant investor had never been validly assigned the rights constituting the impugned investment.

- **National Crime Agency misinterpreted important elements of UK money laundering regime in decision not to carry out a 'forced labour' investigation.** *R (World Uyghur Congress) v National Crime Agency [2024] EWCA Civ 715 (27 May 2024).* The identification of specific "*criminal property*" is not a prerequisite for commencing an investigation.

- **Court of Appeal dismisses public policy challenge based on UK's consumer rights law.** Whereas the Commercial Court found public policy grounds for refusing to enforce a Californian arbitration award involving a consumer contract in *Payward Inc v Chechetkin* [2023] EWHC 1780 (Comm), the Court of Appeal found there was no 'competing public policies' vis-à-vis the UK's consumer rights law and its "pro-enforcement" of arbitration awards policy in *Eternity Sky Investments Ltd v Zhang [2024] EWCA Civ 630 (10 June 2024).*

- **Court of Appeal gives guidance on the impact of international sanctions on obligations under letters of credit.** *Celestial Aviation Services Limited v UniCredit Bank GmbH (London Branch) [2024] EWCA Civ 628 (11 June 2024).* Making a payment under the letters of credit amounted to the provision of funds irrespective of whether the payees were connected with the Russian Federation.

- **Privy Council clarifies an arbitration agreement's impact on winding-up proceedings.** *Sian Participation Corp (in liquidation) v Halimeda International Ltd [2024] UKPC 16 (19 June 2024).* Winding-up proceedings will no longer automatically be stayed/dismissed where a debt under a contract subject to an arbitration agreement is disputed. In exercising its discretion to stay/dismiss, the court must consider whether the debt is disputed on genuine and substantial grounds.

- **Qatar International Court refuses to set aside QFC-seated award.** *B v C [2024] QIC (F) 20 (5 May 2024).* "Public order" / public policy ground for resisting enforcement given a restrictive interpretation.

ICSID TRIBUNAL DISMISSES SUBSTANTIAL MINING DISPUTE AGAINST COLOMBIA

Montauk Metals Inc (formerly known as Galway Gold Inc) v Colombia (ICSID Case No. ARB/18/13)

Introduction

On 7 June 2024, an ICSID Tribunal rejected a US$180 million claim against Columbia. Canadian mining company Montauk Metals brought a case arising out of Columbia's ban on mining within Santurbán Páramo – one of high-altitude ecosystems in the Andes. This is one of three ICISID cases started by foreign investors affected by Santurbán Páramo mining ban, the others being *Red Eagle Exploration* (ICSID Case No. ARB/18/12) and *Eco Oro Minerals* (ICSID Case No. ARB/16/41).

Background

No restrictions on mining in páramo ecosystems existed under Colombian law between 1992, when the initial license for mining exploration and exploitation in California-Vetas Mining District was granted (the location of the Vetas Gold Project which the Claimant intended to develop), and 2006, when that licence was converted into a concession. The Claimant intended to acquire exploration and exploitation rights under the concession through an option agreement with a company Reina de Oro, to which the concession was granted.

However, the Claimant was not able to exercise its rights under the option agreement due to opposition from Reina de Oro. That eventually led to a domestic arbitration between the two companies in which Galway prevailed. Following the arbitration, Reina de Oro finally agreed to assign the rights under the concession to Galway, but Colombia's National Mining Authority ("the NMA") refused to complete the registration, citing the prohibition on mining activities in the páramo area that rendered the assignment impossible.

Said prohibition was first established by 2010 Law 1382, which the Colombian Supreme Court promptly found to be unconstitutional. It was replaced by 2011 Law 1450 which also established a prohibition for mining in páramo areas, but that was limited by 2015 Law 1753 that expressly allowed pre-2010 concessions to continue. The NMA allowed mining activities to continue, but in February 2016 the Colombian Constitutional Court declared the provision of Law 1753 that allowed pre-2010 concessions to continue unconstitutional.

Decision

The Tribunal found that since the assignment of rights under the 2006 concession was never completed, the Claimant never became the owner of the concession and the associated rights (however, for the purposes of jurisdiction, the majority concluded that the rights under the option agreement did constitute an investment). No assignment agreement was ever executed, and no execution of an assignment was requested as part of the enforcement of the award against Reina de Oro. Lastly, Galway never paid Reina de Oro as part of the option agreement.

The Tribunal separately found that while the claim focused on the Claimant's inability to develop the Vetas Gold Project, the Claimant had never secured additional permits, licenses or amendments to its then existing permits and licenses that would be necessary together with the Reina de Oro concession to develop Vetas Gold Project. According to the Tribunal, while the measures in question had an effect on the Claimant's rights under the option agreement, no legitimate expectations with respect to the future of the Vetas Gold Project existed and thus Colombia could not violate them. Finally, the Tribunal concluded that the contested regulations constituted a legitimate exercise of the State's police powers.

Concluding observations

The *Montauk* Tribunal followed the *Red Eagle* Tribunal which similarly found in favour of Colombia in a case which also concerned a mining project in the Vetas region hamstrung by the same regulations. But in the earlier *Eco Oro* case concerning the same measures affecting another mining project in the same páramo area the Tribunal found in favour of the investor, ruling that that the loss of Eco Oro's exploitation rights was "*capable of being considered to be a substantial deprivation, such as to amount to an indirect expropriation*".

The decision is available here.

NATIONAL CRIME AGENCY MISINTERPRETED UK MONEY LAUNDERING REGIME IN DECIDING NOT TO INVESTIGATE 'FORCED LABOUR' ALLEGATIONS

R (World Uyghur Congress) v National Crime Agency [2024] EWCA Civ 715

Introduction

By a decision handed down on 27 May 2024 in *R (World Uyghur Congress) v National Crime Agency (Spotlight on Corruption intervening)* [2024] EWCA Civ 715, the Court of Appeal reversed a decision that the National Crime Agency had not misdirected itself as to the correct approach to the exercise of its investigatory powers under the Proceeds of Crime Act 2002 vis-à-vis cotton products imported into the UK from the Xinjiang Uyghur Autonomous Region of China.

Background

The appellant was an organisation concerned with promoting the interests of the Uyghurs, and presented evidence to the National Crime Agency of forced labour and human rights abuses taking place in the Uyghur region of China. The appellant brought judicial review proceedings to challenge the National Crime Agency's decision that there was no basis to launch an investigation under Parts 5 and 7 of the Proceeds of Crime Act 2002 into imports of cotton products from the Uyghur region of China absent any specifically identified criminal property or criminal conduct. It was common ground that the proceeds from the sale of cotton products made through forced labour (and the products themselves) constituted "*criminal property*" for the purposes of a money-laundering offence and/or were "*recoverable property*" under the Proceeds of Crime Act 2002. At first instance, the court refused judicial review.

Decision

The Court of Appeal allowed the appellant's appeal.

The first instance judgment gave rise to a legitimate concern that the National Crime Agency's understanding that the existence of "*criminal conduct*" or "*criminal property*" needed to be established before an investigation under the Proceeds of Crime Act 2002 could begin was being endorsed by the courts. That understanding ran the risk of causing investigative bodies in the UK to refuse to investigate absent concrete evidence of particular crimes.

Section 329(2)(c) of the Proceeds of Crime Act 2002 allowed for an exemption from criminal liability where a person acquired or used or had possession of "*criminal property*" for "*adequate consideration*". At first instance, the judge had accepted the National Crime Agency's understanding that this exception operated to cleanse criminal property if it was acquired bona fide for fair market value. To the extent that that amounted to a finding that a market supply chain stretching thousands of miles was capable of being broken at any stage merely by the provision of "*adequate consideration*", it was wrong in law. The Section 329(2)(c) exemption had no effect on the status of the property – it was merely an exemption for the bona fide purchaser for value who would otherwise have committed a criminal offence. It did not prevent that same property amounting to "*criminal property*" when it came into the hands of another person who had the requisite knowledge or suspicion that the products in question were (in this case) derived from forced labour or other human rights abuses.

Both of the bases on which the National Crime Agency had decided not to start an investigation (namely, that specific criminal property needed to be identified before an investigation could begin, and that the provision of "*adequate consideration*" prevented property from being "*criminal property*") were mistaken in law. The decision whether to start an investigation was remitted for reconsideration to the National Crime Agency by the court.

Concluding observations

The Court of Appeal's landmark judgment highlights the money laundering risk facing companies that have identified the potential for their supply chains to involve forced labour and/or modern slavery. The judgment's reduction of the scope of the "adequate consideration" exemption may put the National Crime Agency under increased pressure going forwards to take action in respect of allegations that forced labour and/or modern slavery used in supply chains for goods imported into the UK.

The decision is available here.

ENGLISH COURT OF APPEAL DISMISSES PUBLIC POLICY CHALLENGE BASED ON UK'S CONSUMER RIGHTS LEGISLATION

Eternity Sky Investments Ltd v Zhang (Competition and Markets Authority intervening) [2024] EWCA Civ 630

Introduction

On 10 June 2024, the English Court of Appeal handed down a judgment that considered the invocation of consumer protection legislation as a potential basis for refusing enforcement of a foreign arbitration award on public policy grounds under Section 103(3) of the Arbitration Act 1996. On the facts of the case, the Court of Appeal found the appellant was not a protected consumer and could not therefore rely on such public policy grounds to oppose enforcement of the adverse foreign arbitration award.

Background

The appellant, Mrs Zhang, signed a personal guarantee under which she guaranteed the obligations of a Hong Kong entity, Chong Sing Fin Tech Holdings Group ("Chong Sing"), to issue convertible bonds to the value of HK$500m under a subscription agreement in favour of a BVI-incorporated entity called Eternity Sky Investments Ltd ("Eternity Sky").

Chong Sing subsequently defaulted on the subscription agreement and Eternity Sky demanded payment from Mrs Zhang under her personal guarantee. Mrs Zhang contested the matter and commenced Hong Kong-seated arbitration proceedings in which she was found liable for the guaranteed amount of HK$500m plus interest and costs. Chong Sing sought to enforce the arbitration award in England, where Mrs Zhang contested enforcement on public policy grounds under Section 103(3) of the Arbitration Act 1996 by reference to the terms of the Consumer Rights Act 2015 ("CRA"). However, the English High Court found that the CRA did not apply as the personal guarantee in question lacked a "*close connection*" with the UK. Mrs Zhang appealed.

Decision

The Court of Appeal considered there to be five issues in question, namely, whether: (1) Mrs Zhang was a consumer; (2) the personal guarantee had a close connection with the UK; (3) the personal guarantee's clause 2 was transparent and prominent; (4) the personal guarantee's clause 2 was unfair; and (5) if so, should the award nevertheless be enforced?

In deciding whether Mrs Zhang was a consumer, the Court of Appeal sought to apply an objective test as to her status in relation to the relevant transaction. Notwithstanding the fact that Mrs Zhang had signed the guarantee at the behest of her late husband, the Court of Appeal found that Eternity Sky had discharged its burden of showing that Mrs Zhang acted wholly or mainly for business purposes when she entered into the personal guarantee and was not therefore a consumer for the purposes of the CRA.

The Court of Appeal further considered there to be a weak connection between the personal guarantee and the UK given such links were limited to Mrs Zhang's ordinary residence in the UK. The Court of Appeal further considered the requirement of transparency to have been satisfied given that the guarantee's clause 2 was intelligible to the relevant average consumer. Nor did the Court of Appeal consider the guarantee to be unfair noting the lack of an imbalance between the parties' respective rights and obligations.

Turning to the issue of public policy and whether the award should be enforced, the Court of Appeal acknowledged effective consumer protection as an important aspect of public policy, as well as the existence of public policy in favour of enforcing arbitration awards in accordance with the New York Convention. However, noting that Mrs Zhang had not satisfied the various criteria to engage the protections of the CRA, the Court of Appeal found there to be no tension between those two elements of public policy and Mrs Zhang's appeal was dismissed.

Concluding observations

The judgment provides helpful guidance on the interplay between the English Arbitration Act 1996 and consumer rights legislation, and a clear finding that (on the facts of this case at least) there was no competition between the UK's public policy of upholding consumer protection versus its public policy of enforcing arbitration awards.

The decision is available here.

COURT OF APPEAL GIVES GUIDANCE ON THE IMPACT OF INTERNATIONAL SANCTIONS ON OBLIGATIONS UNDER LETTERS OF CREDIT

Celestial Aviation Services Limited v UniCredit Bank GmbH (London Branch) [2024] EWCA Civ 628

Introduction

By a decision handed down on 11 June 2024 in *Celestial Aviation Services Limited v UniCredit Bank GmbH (London Branch)* [2024] EWCA Civ 628, the Court of Appeal held that Regulation 28(3) of the Russia (Sanctions) (EU Exit) Regulations 2019 ("the 2019 Regulations") operated to suspend the payment obligations under letters of credit pending the paying party's obtaining of sanctions licences. However, the paying party could not avoid payment by relying on US sanctions since it had not made reasonable efforts to obtain licences from the US authorities. The paying party's belief that its suspension of payment was in compliance with 2019 Regulations was reasonable, and thus it was exempt from civil liability under Section 44 of the Sanctions and Anti-Money Laundering Act 2018 ("SAMLA 2018") until it received the relevant licences.

Background

The respondent Irish aircraft leasing companies demanded payment under letters of credit (governed by English law and denominated in US dollars) they were the beneficiaries of after their leases to certain Russian airlines were terminated for default in March 2022. The appellant bank resisted the demands in reliance on sanctions. The appellant applied for US, UK and EU sanctions licences and settled the principal amounts due. When the matter came on for trial, the parties' dispute was limited to interest and costs.

The Commercial Court held, *inter alia*, that (1) Regulation 28(3) of the 2019 Regulations, which prohibited provision of financial services or funds "*in connection with*" an arrangement to supply aircraft for use in Russia, was not engaged, and (2) the appellant could not rely on Section 44 SAMLA 2018 because its belief that it was in compliance with the 2019 Regulations was not objectively reasonable.

Decision

The Court of Appeal partially allowed the appellant's appeal.

The phrase "*in connection with*" in Regulation 28(3) of the 2019 Regulations was broadly drafted and was concerned with factual connection, not legal interdependence. Making a payment under the letters of credit amounted to the provision of "*funds*", and would be "*in connection with*" the leases, given that the letters of credit provided security for performance of the lessees' obligations under them – providing the sufficient factual connection. The Commercial Court had failed properly to engage with the wording of Regulation 28(3) and had erred in assessing its purpose. The payment obligation was suspended pending completion of the UK licence process.

Contrary to the respondent's submission, the appellant's real reason for not paying was not because of its cashflow concerns, but because of its objectively reasonable belief (on which it had been required to form a view at short notice) that the payment would breach Regulation 28(3) of 2019 Regulations. Pending receipt of the relevant sanctions licences, the appellant was entitled to rely on exemption from civil liability under Section 44 SAMLA 2018. However, it was not clear that that defence applied to protect a debtor from action to recover a lawfully-due debt that had not been paid in the reasonable belief that its payment would be a sanctions breach.

Concluding observations

As the English courts continue to grapple with the expansion of sanctions concerning the Russian Federation, this decision provides helpful guidance on the interpretation of several crucial aspects of the sanctions regime, including the civil liability exemption contained in Section 44 of SAMLA 2018, the breadth of the phrase "*in connection with*", and the circumstances in which a belief that an action will contravene sanctions will be considered to be held "*reasonably*".

The decision is available here.

PRIVY COUNCIL CLARIFIES AN ARBITRATION AGREEMENT'S IMPACT ON WINDING-UP PROCEEDINGS

Sian Participation Corp (in liquidation) v Halimeda International Ltd [2024] UKPC 16

Introduction

By a judgment handed down on 19 June 2024 in *Sian Participation Corp (in liquidation) v Halimeda International Ltd* [2024] UKPC 16, the Privy Council held that the Court of Appeal's judgment in *Salford Estates (No.2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575 was incorrect and should not be followed going forwards. As a result, an arbitration agreement (or exclusive jurisdiction clause) will no longer as a matter of course cause the stay or dismissal of a creditor's winding-up petition in respect of a disputed debt (unless the debt was genuinely disputed on substantial grounds).

Background

The appellant and respondent were parties to a loan agreement with a broadly drafted arbitration clause. The respondent sought repayment after the appellant defaulted. The appellant disputed the debt, and the respondent applied to appoint liquidators. The BVI courts found the appellant had no genuine and substantial grounds to dispute the debt, and exercised its discretion to appoint liquidators under Section 162(1)(a) of the BVI's Insolvency Act 2003.

On appeal to the Privy Council, the appellant contended that the BVI courts should have followed *Salford Estates (No.2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575) and consequently either dismissed the respondent's application or stayed it until the establishment of the debt through arbitration.

Decision

The Privy Council dismissed the appeal.

The BVI's insolvency jurisdiction was inherited from the UK, whose law did not permit a company's winding-up based on a debt that was genuinely disputed on substantial grounds, and would dismiss or stay a winding-up petition until the debt's establishment. Faced with an arbitration agreement covering the debt, the English courts followed the practice described in *Salford Estates* of treating any non-admitted debt as being "*disputed*", even if the grounds of dispute were not genuine and substantial. There the BVI courts differed because they required the debt to be genuinely disputed on substantial grounds before staying an application to appoint liquidators in the face of an arbitration agreement. The Privy Council held that *Salford Estates* was wrongly decided. Winding-up petitions and liquidation applications did not trigger the mandatory stay provision in Section 9 of the Arbitration Act 1996 (or its equivalent in Section 18 of the BVI's Arbitration Act 2013) as they were not concerned to resolve the debt's existence or amount. If the mandatory stay provisions were inapplicable, so was the public policy underlying them. To require a creditor to go through the arbitration first would only add delay and expense. The correct test was the one the BVI courts had applied – was the debt disputed on genuine and substantial grounds?

Not only did the Privy Council find *Salford Estates* was wrongly decided, it directed that that case should no longer be followed by the English courts and that the English courts' practice of staying or dismissing (in the face of an arbitration clause or exclusive jurisdiction clause) a creditors' winding up petition over a debt disputed on non-genuine and non-substantial grounds should cease. However, "*different considerations*" would arise if the arbitration clause drafted so that it applied to a creditor's winding up petition.

Concluding observations

The Privy Council's decision provides for a fundamental change of English Law at the confluence of arbitration and insolvency law. According to many commentators, it is likely to have knock-on effects in other jurisdictions that have followed *Salford Estates* historically.

The judgment is available here.

QATAR INTERNATIONAL COURT REFUSES TO SET ASIDE QFC-SEATED AWARD

B v C [2024] QIC (F) 20

Introduction

On 5 May 2024, the Qatar International Court's Court of First Instance ("the Court") dismissed an application to set aside a Qatar Financial Centre ("QFC") seated arbitration award.

Background

Parties B and C were business partners in a joint venture company set up in late 2013 to secure major road construction projects in Qatar. Further to a dispute arising out of the parties' Shareholders' Agreement, in April 2020 Party C commenced QFC-seated ICC arbitration proceedings against Party B. The resulting arbitration award ("the Award") was rendered in April 2023, *inter alia*, ordering Party B to pay approximately QAR24.5 million plus interest to Party C.

Subsequently, Party B applied to the Court to have the Award set aside on four grounds, arguing that it was not in the interest of the QFC and/or was contrary to the public order of the QFC and/or Qatar, and the arbitration was not conducted in accordance with the Parties' agreement. In turn, Party C contended that Party B's set aside application was made too late, outside the three-month period specified by Article 41(3) of the QFC Arbitration Regulations.

Decision

On the matter of the timeliness of Party B's set aside application, the Court found that the reference date for assessing whether or not the application notice was filed in time is the date of filing rather than service. On that basis, the Court found that the set aside application was made within the prescribed three-month deadline.

In deciding the set aside application, the Court referred to Article 41 of the QFC Arbitration Regulations and recalled the language of Article 41(2)(B)(ii) in stating that "*An Award may be set aside by the [Court] only if: […] the [Court] finds that: […] the Award is not in the interest of the QFC.*" The Court considered the language of "*interest of the QFC*" to be equivalent to a reference to public policy. The Court did not consider the reference to the QFC as opposed to mainland Qatar to have any practical effect as their respective interests are aligned. The Court also emphasised that it observed a policy of minimal curial intervention regarding the challenging of arbitral awards and that even where a legitimate ground for set aside was established, the Court would not exercise its discretion to set aside an award where the matter complained of was "*inconsequential or minor or does not cause serious prejudice to the party seeking to challenge the award*".

On the four grounds Party B raised to argue that the Award should be set aside:

- On Ground 1, which concerned Party C's lost profits claim as being contrary to Qatari Companies Law, the Court deemed it to be an improper challenge to question the Tribunal's findings on the law and the facts. Further, the Court did not consider such grounds to fall within the purview of the "*interest of the QFC*" as a matter of public order.
- On Grounds 2 and 4, which both queried the Tribunal's lack of reasoning for preferring the witness testimony of Party's C primary fact witness, the Court explained that it would not interfere with findings of fact and the assessment of evidence by the Tribunal. Nor did the Court consider such challenges to involve questions of violation of public policy.
- On Ground 3, which was based on the argument that the Tribunal's awarding of pre- and post-award interest was contrary to Qatari law, the Court found that there was ample Qatari law authority and precedents that pre- and post-award interest may be awarded. As such, the Court did not consider this ground to be a legitimate public policy challenge.

Concluding observations

The judgment is significant for being the first one on a set aside application before the Qatar International Court. It sends a message of "pro-enforcement" / "pro-arbitration" policy and provides a clear signal that the public policy ground for resisting enforcement of arbitration awards is likely to be given a restrictive interpretation going forwards (in keeping with many other jurisdictions worldwide).

The decision is available here.