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KEY DEVELOPMENTS UPDATE OCTOBER 2024

MESSAGE FROM KHAWAR QURESHI KC, HEAD OF MCNAIR INTERNATIONAL

In this update we review recent English case law concerning State Immunity in the employment context, Arbitration Act 1996 decisions as well as the recent UK Supreme Court decision concerning the availability of anti-suit injunctions in support of arbitration. We also highlight recent ICSID annulment and investment treaty claims decisions.

The pro-arbitration, pro-enforcement policy and limited scope for challenge of arbitral awards before the English Courts is evidenced very clearly in these decisions. Likewise the very narrow focus for review of ICSID decisions by way of annulment challenges.

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- **Employment Tribunal rejects request to read down State Immunity Act 1978.** In *Muda v Malaysia (Case Number 2203623/2021*), the Employment Tribunal found a claim by an employee of the Malaysian High Commission was barred by the State Immunity Act 1978 ("SIA"). The argument that obligations under the SIA should be read down in accordance with the Human Rights Act 1998 was rejected.

- **English Commercial Court dismisses jurisdictional challenges brought by the Czech Republic under Sections 67 and 68 of the Arbitration Act 1996.** In *Czech Republic v Diag Human SE and Josef Stava* [2024] EWHC 2102 (Comm), the Commercial Court dismissed jurisdictional challenges brought by the Czech Republic under Sections 67 and 68 of the Arbitration Act 1996 in respect of an award issued in 2008.

- **ICSID tribunal rules investors are not entitled to damages despite the host state being in breach of a bilateral free trade agreement.** In *Eco Oro Minerals v Colombia*, the arbitral tribunal ruled (by majority) that the investor was not entitled to damages, despite an earlier finding that Colombia had breached the Canada-Colombia Free Trade Agreement.

- **English Commercial Court rejects the Republic of Korea's application under section 67 of the Arbitration Act 1996.** In *Korea v Elliott Associates LP* [2024] EWHC 2037 (Comm), the Commercial Court rejected Korea's application under Section 67 of the Arbitration Act 1996 to set aside an award issued in June 2023 in an arbitration between Korea and Elliott Associates LP.

- **UK Supreme Court upholds anti-suit injunction requiring the discontinuance of Russian court proceedings brought in breach of arbitration agreements.** On 18 September 2024, the UK Supreme Court in *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 gave its reasons for upholding an anti-suit injunction requiring the discontinuance of Russian court proceedings brought in breach of arbitration agreements providing for disputes to be resolved in an ICC arbitration.

- **ICSID annulment committee dismisses the state of Spain's arguments in a recent dispute concerning renewable energy subsidy regime changes.** In another setback for Spain, an ICSID annulment committee in *RENERGY S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/14/18)* dismissed the State's argument that the Tribunal manifestly exceeded its powers or failed to state reasons by refusing to give effect to the CJEU's judgments in *Achmea* and *Komstroy*.

EMPLOYMENT TRIBUNAL REJECTS CLAIM TO READ DOWN STATE IMMUNITY ACT 1978

Muda v Malaysia (Case Number 2203623/2021)

Introduction

The Employment Tribunal gave judgment on 16 July 2024 in respect of a claim brought by Mrs. Muda, an employee of the Malaysian High Commission in London since 1992, finding her claim was barred by the State Immunity Act 1978 ("SIA"). The argument that obligations under the SIA should be read down in accordance with the Human Rights Act 1998 (HRA) was also rejected.

Background

Mrs. Muda was born in Malaysia and is a national of Malaysia. She moved to the United Kingdom on 1 April 1991. She commenced employment at the High Commission of Malaysia in 1992 where she started as a clerical assistant, undertaking promotions and eventually being appointed Secretary to the High Commission in 2014.

The claimant asserted that, following her promotions to more senior positions, her employer failed to increase her remuneration accordingly. She sought by way of remedy, to be paid on the salary scale of, not her actual position (something that was in dispute), but the position she was essentially performing (that of a Social Secretary).

Under the SIA, foreign states enjoy general immunity from jurisdiction of the UK courts, pursuant to Section 1(1). This general immunity is subject to a range of exceptions set out in Sections 2-11 of the SIA.

Decision

The tribunal was required to assess firstly, whether the claimant's employment constituted an exercise of sovereign authority.

Secondly, the tribunal was required to assess whether it was required, under Section 3 of the HRA 1998, to "read down" Section 4(2) of the SIA in order to comply with Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial – as incorporated via Section 1 of the HRA 1998.

The tribunal went on to explore the nature of the claimant's relationship with the state of Malaysia, drawing heavily from the judgement of Lord Sumption in *Benkharbouche* (see below), concluding her functions were *not* a manifestation of Malaysia's sovereign authority. The tribunal also found that pay under an embassy employment contract was of a private nature – not concerning sovereign acts.

Despite the clearly private law dynamics of the relationship, Malaysia retained immunity by virtue of Section 4(2) of the SIA. This provision of the SIA allows for special rules to apply where the individual who brings a claim is a national of the State concerned (such as Mrs. Muda was).

The argument to read down Section 4(2) failed as to do so would have required the tribunal to "*carve out an exception*" to the SIA that "*does not go with the grain of the legislation*". The tribunal could therefore not accept any reading down despite the "*breadth*" and "*power*" of the provision.

Concluding observations

This is the latest in a long line of cases involving the alleged abuse of worker's rights in the context of employment within a diplomatic mission – other cases include: *Reyes v Al-Malki* [2017] UKSC 61 and *Benkharbouche v Foreign Secretary* [2018] IRLR 123. It signifies the strength of a State's right to immunity from the courts, even in the face of important international treaties such as the ECHR.

The decision is available here.

ENGLISH HIGH COURT DISMISSES JURISDICTIONAL CHALLENGES BROUGHT BY THE CZECH REPUBLIC UNDER SECTIONS 67 AND 68 OF THE ARBITRATION ACT 1996

Czech Republic v Diag Human SE and Josef Stava [2024] EWHC 2102 (Comm)

Introduction

On 9 August 2024, Mr Justice Foxton handed down the Commercial Court's judgement in *Czech Republic v Diag Human SE and Josef Stava* [2024] EWHC 2102 (Comm). The court has dismissed the jurisdictional challenges brought by the Czech Republic under Sections 67 and 68 of the Arbitration Act 1996 ("1996 Act") in respect of an award issued in 2008.

This case provides insightful guidance on how the courts approach and consider jurisdictional challenges advanced under Sections 67 and 68, particularly in investor-state claims.

Background

Conneco, which later became Diag Human SE ("Diag"), was founded in the early 1990s by Swiss-Czech entrepreneur, Joseph Stava. The company entered into cooperation agreements to supply blood plasma directly to hospitals in then Czechoslovakia. In March 1992, the Czechoslovakian Minister of Health issued a letter (the "Bojar Letter") cancelling all of Diag's agreements.

In 1996, Diag commenced commercial arbitration against the Czech Republic in respect of losses it had incurred as a result of the Bojar Letter. The tribunal rendered its award in 2008 in favour of Diag (the "2008 Award"). The Ministry of Health commenced a further arbitration in 2008 to seek a review of the 2008 Award, however, these proceedings were discontinued in July 2014 by way of resolution. During this time Diag had sought to enforce the 2008 Award in various jurisdictions, but courts in these jurisdictions refused to enforce it pending ongoing challenges to the award. Being unable to enforce the 2008 Award, Diag commenced arbitration proceedings in 2017 under a bilateral investment treaty (the "**BIT**").

In May 2022, the tribunal held that the Czech Republic breached its obligations of fair and equitable treatment under Article 4(2) of the BIT and upheld the damages awarded in the 2008 Award. In June 2022, the Czech Republic applied to set aside the 2008 Award based Section 67 (substantive jurisdiction) and Section 68 (serious irregularity) of the 1996 Act. The Commercial Court heard, in the first instance, the issues on a series of jurisdictional objections, which Foxton J dismissed in March 2024. A further hearing took place in June 2024 to consider the remaining jurisdictional matters under Section 67 and 68 of the 1996 Act

Decision

In August 2024, Foxton J in his judgement addressed the remaining Section 67 jurisdictional challenges (the "no investment obligation", the "Ratione Temporis" objection and the objection that Diag is not a protected investor) as well as Diag's application to advance an argument of estoppel and a residual issue of one of the Section 68 challenges.

The Court rejected all three of the Czech Republic's arguments and held that:

- The investments did qualify for protection under the Treaty;
- The tribunal did have jurisdiction to determine the dispute and that the Bojar Letter dispute: "*(1) had a different subject matter to any disputes concerning the 1990 and 1991 tenders, (2) had a different "real cause" and rested on essentially different facts (the sending of the Bojar Letter, (3) was capable of being resolved independently of any disputes regarding the 1990 and 1991 tenders; and (4) targeted different conduct to any dispute about the 1990 and 1991 tenders*"; and
- Diag did qualify as a "protected investor" for the purposes of Article 1(1)(c) of the BIT.

The Czech Republic also claimed substantial injustice under Section 68(2) of the 1996 Act. However, the Court held that no substantial injustice has been suffered by the Czech Republic.

Concluding observations

Foxton J's two judgments on the Czech Republic's Section 67 and 68 challenges demonstrate the robust approach taken by the English courts to challenges to awards, including investment-treaty awards.

The decision is available here.

ICSID TRIBUNAL RULES INVESTORS ARE NOT ENTITLED TO DAMAGES DESPITE HOST STATE BEING IN BREACH OF A BILATERAL FREE TRADE AGREEMENT

Eco Oro Minerals Corp v Republic of Colombia (ICSID Case No. ARB/16/41)

Introduction

In *Eco Oro Minerals v Colombia*, the arbitral tribunal, chaired by Juliet Blanch with Philippe Sands KC (appointed by the Respondent) and Horacio A. Grigera Naón (appointed by the Claimant), ruled by majority that the investor was not entitled to damages, despite an earlier finding that Colombia had breached the Canada-Colombia Free Trade Agreement ("FTA"). Horacio A. Grigera Naón dissented, and Philippe Sands KC issued a declaration on costs.

Background

Eco Oro, a Canadian mining company, acquired mining rights in Colombia's Angostura gold and silver deposit in 1994 and planned an open-pit mine. However, after Colombia enacted a 2010 law banning mining in high-altitude wetland zones (Páramos), the Ministry of the Environment rejected Eco Oro's environmental impact assessment, citing the project's overlap with the environmental objectives. Despite seeking to shift to an underground mine and receiving government support, Eco Oro's project was severely impacted by subsequent legal developments, including a 2016 Constitutional Court ruling that eliminated exceptions to the mining ban in Páramo regions. Following the delimitation disputes and legal setbacks, Eco Oro ultimately renounced its concession rights in 2019 and filed for arbitration.

In an earlier decision on jurisdiction and liability the tribunal found (by majority of Ms. Blanch and Mr. Grigera Naón) Columbia liable for a breach of the FTA's minimum standard of treatment and rejected the claim for expropriation.

Decision

In the quantum phase, the majority found that, as no expropriation occurred, Eco Oro could not be compensated for the loss of value of its mining concession; the only compensable loss was its inability to apply for an environmental licence for the exploitable part of its concession. Moreover, Eco Oro failed to provide sufficient evidence to value the loss. Furthermore, the majority found it impossible to determine if the remainder of the concession was exploitable, as Colombia had not yet defined the ban's exact boundaries. The tribunal also denied compensation for remediation costs, concluding they would have been incurred regardless.

Mr. Grigera Naón's Dissenting Opinion:

The dissent contends that the 2090 Resolution's delimitation of the Santurbán Páramo was not a lawful exercise of Colombia's police powers, leading to uncertainty and harming Eco Oro's investment. It argues that the negative effects of the Resolution, unaddressed by subsequent actions, directly caused damages that Eco Oro should be compensated for. The dissent also criticised the tribunal's denial of compensation based on causation and valuation methods, arguing that Colombia's actions disrupted the investment's value and that Eco Oro deserved full reparation under international law.

Mr. Sands' Declaration on Costs:

The statement concurs with the tribunal's decision on damages, suggesting both parties share costs equally due to partial successes in jurisdiction and liability. While the Respondent's costs were reasonable, the Claimant's expenses of $33.3 million were excessive for a case with limited prospects, including $2.9 million paid to Compass Lexecon, whose work did not assist the tribunal. It also criticised the Claimant's third-party funding, which facilitated speculative gains for unrelated funders, calling for stricter regulation and transparency to maintain the integrity of investor-State arbitration.

Concluding observations

The tribunal's majority decision demonstrates the robust approach taken by investment-treaty tribunals to damages claims that appear speculative, unevidenced and/or inflated.

The decision is available here.

ENGLISH COMMERCIAL COURT REJECTS KOREA'S APPLICATION UNDER SECTION 67 OF THE ARBITRATION ACT 1996

Korea v Elliott Associates LP [2024] EWHC 2037 (Comm)

Introduction

On 1 August 2024, the Commercial Court rejected the Republic of Korea's ("Korea") application under Section 67 of the Arbitration Act 1996 ("the Act") to set aside an award issued in June 2023 ("the Award") in an arbitration between Korea and Elliott Associates, LP ("EALP"). Section 67 of the Act permits the challenging of an award of a tribunal seated in England and Wales "*as to its substantive jurisdiction*", or to seek an order declaring that an award on the merits is of no effect "*in whole or in part because the tribunal did not have substantive jurisdiction*".

Background

The Award was rendered in an arbitration commenced by EALP (a US investment fund) against Korea under Chapter 11 of the USA-Korea Free Trade Agreement ("the Treaty"). EALP was a minority shareholder in Samsung C&T Corporation ("SC&T"). EALP claimed that the Korean government interfered in the merger of SC&T and Cheil Industries Inc (which EALP opposed) by ensuring that the National Pension Service (another minority shareholder in SC&T) voted in favour of the merger. EALP alleged that this was a breach of the minimum standard of treatment and national treatment standards of the Treaty. Article 11.1(1) of Chapter 11 of the Treaty applied to "*measures*" "*adopted or maintained*" by Korea "*relating to*" EALP. The tribunal ruled that the Korean government's conduct satisfied these requirements and awarded EALP almost $50 million in damages. Korea disagreed that the Korean government's conduct constituted "*measures*" and challenged the award in the English courts under section 67 of the Act. This raised a question regarding the tribunal's "*substantive jurisdiction*" under Chapter 11 of the Treaty.

Decision

The court noted that jurisdictional objections usually fall into three categories, whether the: (i) claimant satisfies the nationality requirements; (ii) subject matter of the claim falls within the scope of the offer to arbitrate; and (iii) claim satisfies any temporal limitations to the offer to arbitrate. In determining whether Korea's challenge raised issues which are jurisdictional for the purposes of section 67, the court considered applicable English case law having regard to the facts of the dispute and the wording of Article 11 under Chapter 11 of the Treaty. The court determined that the requirements in Article 11.1.1 did not constitute a limitation to the offer to arbitrate in Article 11.16 and that the issues Korea sought to raise were not jurisdictional for the purposes of section 67. Amongst its reasoning the court stated that: Article 11.1(1) appeared in Section A of the Treaty, which dealt with substantive content of the obligations owed to investors, not issues of dispute resolution which were addressed in Section B; Section B (which contained Article 11.16) included subject matter limitations on the offer to arbitrate but did not refer to Article 11.1(1) as such a limitation; and the issues raised by Article 11 were very fact sensitive and were integrated into the merits of the dispute.

Concluding observations

This judgement illustrates the approach the English courts will take when determining what issues constitute matters of "*substantive jurisdiction*" for the purpose of a s.67 challenge. The court placed emphasis on the particular facts of the case and the wording of the relevant Treaty provisions. The court noted that a challenge under s.67 of the Act required a full hearing rather than simply a review of the tribunal's decision. Korea was granted leave to appeal the judgement indicating that this may not be the last of this matter.

The decision is available here.

UK SUPREME COURT UPHOLDS ANTI-SUIT INJUNCTION REQUIRING THE DISCONTINUANCE OF RUSSIAN COURT PROCEEDINGS BROUGHT IN BREACH OF ARBITRATION AGREEMENTS

UniCredit Bank GmbH v RusChemAlliance LLC [2024] UKSC 30

Introduction

By a decision handed down on 18 September 2024 in *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30, the UK Supreme Court upheld an anti-suit injunction requiring the discontinuance of Russian court proceedings brought in breach of arbitration agreements providing for disputes to be resolved in French-seated ICC arbitration.

Background

The parties entered two engineering procurement and construction contracts for facilities in Russia, secured by on-demand bonds issued by the German bank UniCredit, governed by English Law and subject to ICC arbitration in Paris. Following Russia's invasion of Ukraine, the contracts were terminated due to the contractor's non-performance, citing EU sanctions. The Russian company, RusChemAlliance LLC ("RCA"), sought payment from the Arbitrazh Court of St. Petersburg under the bonds, arguing the arbitration agreement was unenforceable under Russian Law. The court examined whether the English court had jurisdiction to issue an anti-suit injunction against RCA's Russian proceedings. The Commercial Court ruled it lacked jurisdiction, stating that the arbitration agreement was governed by French Law and that the English court was not the appropriate forum since UniCredit could achieve substantial justice in France. UniCredit appealed, and the Court of Appeal held the English court did have jurisdiction and ordered RCA to cease Russian proceedings.

Decision

The core issue was whether the English court had jurisdiction over UniCredit's claim, which hinged on two questions: (i) whether the arbitration agreements were governed by English Law; and (ii) whether the English courts were the proper forum.

RCA contended that: (i) the choice of English law in the contracts did not extend to the arbitration agreement; and (ii) the arbitration agreement was governed by French law, relying on exceptions noted in *Enka v Chubb* [2020] UKSC 38. In *Enka*, it was established that a governing law clause typically applies to arbitration agreements, even if the seat of arbitration has a different legal system. An exception exists where the law of the seat indicates that the arbitration agreement is governed by that law.

Applying these principles, the bonds' governing law clause encompassed all obligations, including the arbitration clause. Even if viewed as separate, the obligations under the arbitration agreement were still connected to the bond. Thus, the arbitration agreements were interpreted as governed by English Law. A rule assigning arbitration agreements to the law of the seat would complicate matters unnecessarily.

Absent a specified choice of law for the arbitration agreements, the law of the seat applies. The governing law clause indicated English Law applied to all provisions, including the arbitration clauses. The Court of Appeal found that UniCredit's claim fell within the contractual gateway for service of proceedings.

Regarding whether the English courts were the proper forum, the starting point is the parties' contractual agreements. There was a substantial connection to England, given that the rights UniCredit sought to enforce were under English law. CPR 6.37(3) supports the presumption that England was the appropriate venue for an anti-suit injunction unless the foreign seat makes it inappropriate.

The English courts could enforce RCA's compliance with the arbitration agreement through an anti-suit injunction. Since French courts would lack jurisdiction over a claim by UniCredit to enforce the arbitration agreements, there was no reason for the English court to refuse the injunction.

Consequently, the appeal was dismissed, affirming the Court of Appeal's order mandating RCA to discontinue its Russian proceedings.

Concluding observations

The UK Supreme Court's judgement is of significance not only in explaining the application of the principles in *Enka* but also in its approach to the question of whether the English Court was the proper forum and its affirming its jurisdiction on the granting of anti-suit injunctions in support of foreign-seated arbitrations.

The decision is available here.

ICSID ANNULMENT COMMITTEE DISMISSES SPAIN'S CHALLENGE TO AWARD IN RENEWABLE ENERGY SUBSIDY REGIME DISPUTE

RENERGY S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/14/18)

Introduction

In another setback for Spain an ICSID annulment committee (the "Committee") dismissed the State's argument that the Tribunal manifestly exceeded its powers or failed to state reasons by refusing to give effect to *Achmea* and *Komstroy* judgements of the CJEU.

Background

The case arises from cuts to the State's renewable energy subsidy regime that led to numerous other investment arbitrations against Spain. The State argued that the Tribunal lacked jurisdiction due to the effect of *Achmea* and *Komstroy*. Particularly in *Komstroy*, the CJEU ruled that intra-EU investment arbitrations under the Energy Charter Treaty ("ECT") are incompatible with EU law.

Spain further argued that the Tribunal failed to apply EU law as international law under Article 42 of the ICSID Convention. According to Spain, EU Law had to be applied to the merits of the case, "*in order to analyse the Claimant's legitimate expectations regarding both the nature of renewable energy incentives as State Aid […] and the possibility of obtaining such incentives for electricity produced by such means*".

Spain separately argued that the Tribunal's treatment of the above issues of EU law and its analysis of the ECT amounted to a failure to state reasons for the purposes of annulment.

Decision

The Committee began by reiterating the starting point of ICSID annulment process: it is distinguished from appeals and does not involve a review of the merits of the award.

Manifest Excess of Power:

The Committee first noted the Tribunal's analysis that the relevant legal instruments from which Spain's consent to arbitrate can be derived from are the ECT and the ICSID Convention. The Tribunal found that it had jurisdiction by virtue of Article 26 ECT and Article 25 of the ICSID Convention and thus there was no need to resort to EU law to determine the jurisdiction.

The Tribunal separately noted that even from an internal EU law perspective, it was doubtful that the effect of *Achmea* and *Komstroy* judgments could be that the obligations of EU Member States under the ECT are void, invalidated, or could not have been validly entered into. The Committee concluded that the Tribunal addressed Spain's jurisdictional objection based on the relevance of EU law, rejected that objection in a reasoned decision and did so based on an "*entirely tenable*" reasoning.

Turning to the merits dimension of the manifest excess of power argument, the Committee noted that per the Tribunal "*the Respondent invokes the EU State Aid Rules precisely for the very purpose of preventing the Claimant from enjoying protection under Part III of the ECT*". As a result, the Tribunal concluded that pursuant to Article 16(2) ECT, EU State Aid Rules could not be applied to the case. Since there were no other rules of EU law whose application would appear to have/were suggested to have, any relevance to the outcome of the case on the merits, the Tribunal decided that it did not need to rule on the general applicability of EU law pursuant to Article 26(6) ECT. The Committee found that the Tribunal did not manifestly exceed its powers in making such a decision.

Failure to State Reasons:

The Committee found that the Tribunal's reasoning was not only internally coherent, but also consistent with its own earlier assertion that it was not bound to resort to EU law to determine its own jurisdiction. Per the Committee, "*the Award simply cannot be said to omit sufficient reasons in respect of its determinations on the merits of the dispute, nor to be based upon contradictory reasons in this respect*".

Concluding observations

The Committee's decision provides the latest example of Spain's near-universal failure to overturn decisions refusing Spain's jurisdictional objections based on the effects of the *Achmea* and *Komstroy* decisions.

The judgement is available here.