McNAIR CHAMBERS - QUARTERLY UPDATE – SUMMER 2015

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

- Recent Developments
- Iran Sanctions
- English decisions on arbitral procedure
- English civil procedure
- Renewable energy disputes

Summary

A number of decisions in both the English and European courts have considered the imposition and effect of sanctions on Iranian entities, with the General Court of the European Union lifting sanctions on a number of entities. In the English courts, Bank Mellat continues to pursue its damages claim against the Treasury as a result of the losses it suffered through financial restrictions imposed pursuant to sanctions against Iranian entities.

The English courts have continued to deliver judgments emphasizing the importance of bringing claims in an appropriate manner and reducing costs, with recent decisions focusing on the jurisdiction clauses and the drafting of statements of case. Decisions of the English courts have focused on a number of aspects of the arbitral process, including the importance of choosing appropriate arbitrators, choice of applicable law, the setting aside of an arbitral award, and the impact of state immunity.

Finally, there have been a number of interesting developments in the international arbitration sphere in recent months. While full details have not been made publically available for all of these developments, a note on those of particular interest are set out below.

Recent Developments

- On 11 June 2015, A Qatari businessman, Ali Alyafei, commenced ICSID proceedings against The Hashemite Kingdom of Jordan on the basis of a Most Favoured Nation clause in a treaty comprising an investment agreement between the Arab League states (ICSID Case No. ARB/15/24). The claim relates to an alleged failure to sell a stake in a bank.
- In May 2015, it was announced that a 26-year arbitration between the National Iranian Oil Company and a company owned by Israel relating to payments for oil shipments has ended with a US$1.1 billion award in favour of NIOC. In response, Israel has said that it will not pay the debt to the Iranians. Finance Ministry statement: "Without referring to the matter at hand, we'll note that according to the Trading with the Enemy Act it is forbidden to transfer money to the enemy, including the Iranian national oil company."
- In Maud v The Libyan Investment Authority [2015] EWHC 1625 (Ch) (08 June 2015), the English High Court set aside a statutory demand made in relation to a debt owed by a UK

property tycoon to the Libyan Investment Authority on the grounds that if the debtor was compelled to make the payment it would leave him vulnerable to criminal penalties for acting in breach of sanctions against Libya.

- The English Court of Appeal has ruled that the claim of a former wife of King Fahd of Saudi Arabia against his estate is not barred by head of state immunity, and that compensation can be sought (HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz v Harb [2015] EWCA Civ 481 (13 May 2015)).

Iran Sanctions

In ***Bank Tejarat v Council (T-176/12)*** (22 January 2015), the General Court of the European Union lifted the asset freeze and other restrictions on Bank Tejarat on the basis that, amongst other factors, the Council's arguments did not demonstrate that Bank Tejarat had provided support for nuclear proliferation or aided others to breach or avoid the sanctions. Having been given two months to respond to the decision, on 8 April 2015 the Council reimposed sanctions on Bank Tejarat on new grounds, including that Bank Tejarat "provides significant support to the Government of Iran by offering financial resources and financing services for oil and gas development projects".

In ***Central Bank of Iran v Council (T-563/12)*** (25 March 2015), the General Court dismissed Central Bank of Iran's application for the lifting of sanctions imposed upon it. The General Court considered to what extent the criterion of support to Iranian Government may be distinguished from the criterion of support for nuclear proliferation. The General Court held that the Council was obliged to specify the resources which it alleged the Central Bank provided to the government, but was not obliged to give reasons for the contested acts in relation to the possible use of those resources and facilities by the Iranian Government for pursuing nuclear proliferation.

In ***National Iranian Tanker Company & Ors v Secretary of State for Foreign and Commonwealth Affairs*** **[2015] EWHC 282 (Admin)**, the English High Court gave reasons for its refusal to grant interim relief sought by the National Iranian Tanker Company and Gholam Golparvar to compel the Foreign Secretary to veto their re-listing. Green J focused on the balance of convenience and public interest, which presented "insuperable problems" for the applicants. The applicants could always use the orthodox route of challenge – an annulment application to the General Court. The decision to relist the applicants was one of an acutely political nature with international consequences, and this provided powerful reasons to refuse interim relief sought.

Bank Mellat continues to pursue its damages claim against the Treasury as a result of the losses it suffered through financial restrictions imposed pursuant to sanctions against Iranian entities. In ***Bank Mellat v Her Majesty's Treasury*** **[2015] EWHC 1258 (Comm)**, the English High Court determined important preliminary issues against the Treasury. Importantly, the Treasury was no longer allowed to assert that it had not acted unlawfully in its imposition of financial restrictions against Bank Mellat because a majority of the UK Supreme Court had previously reached the opposite conclusion. Furthermore, Bank Mellat would be allowed to pursue its claim for all losses that were caused by the Treasury's unlawful interference with Bank Mellat's 'possessions' under Article 1 of Protocol No.1 to the European Convention on Human Rights ("A1P1").

Arbitration

In ***PCL & Ors v The Y Regional Government of X*** **[2015] EWHC 68 (Comm)**, the English Commercial Court set aside two without notice peremptory orders granted by an LCIA tribunal. Service of the arbitration claim form and other documents on the defendant territory had not complied with State Immunity Act 1978 s12, which requires transmission through the UK Foreign & Commonwealth Office to the Ministry of Foreign Affairs of the defendant state and a minimum two month period for the defendant state to file an Acknowledgment of Service. The failure to disclose to the court that these requirements applied in the instant case led to the orders being set aside.

In ***Secretary of State for the Home Department v Raytheon Systems Ltd*** **[2014] EWHC 4375 (TCC) and [2015] EWHC 311 (TCC)**, the English Technology & Construction Court found that an arbitral tribunal had failed to deal with all the issues put before it – including fundamental issues of both liability and quantum. The irregularity was so serious that the dispute was referred to a freshly constituted arbitral tribunal. The judge made no express criticism against the arbitrators (who were not named). Nevertheless, Raytheon serves as an example of the consequences of choosing arbitrators who are perhaps not adequately equipped to handle complex and technical disputes.

In ***Shagang South-Asia (Hong Kong) Trading Co Ltd v Daewoo Logistics*** **[2015] EWHC 194 (Comm)**, the English Commercial Court upheld challenges to an arbitral tribunal's jurisdiction under Arbitration Act 1996 s67. There had been confusion as to the choice of different applicable laws to govern: (i) the substantive issues; and (ii) the arbitral proceedings themselves. The Court held that an agreement for arbitration "to be held in Hong Kong" was an implied choice of Hong Kong as the seat of the arbitration and therefore the law governing the arbitral proceedings. The result was that the tribunal was invalidly constituted and therefore the tribunal had had no jurisdiction.

In ***Malicorp Ltd v Government of the Arab Republic of Egypt & Ors*** **[2015] EWHC 361 (Comm)**, the English Commercial Court refused enforcement of an arbitration award rendered in Cairo where the award had already been set aside by a court of competent jurisdiction (the Cairo Court of Appeal). Further, the arbitral tribunal had left the Defendant unable to present its case in a manner so grave as to justify refusal to enforce the award.

English Law and Procedure

In ***Tchenquiz (Vincent) & Ors v Grant Thornton UK LLP & Ors*** **[2015] EWHC 405 (Comm)**, the English Commercial Court struck out statements of case that were drafted in a manner which flouted the principles of the Commercial Court Guide, and disallowed the costs related to drafting them.

In ***Hashwani v Jivraj*** **[2015] EWHC 998 (Comm)**, the English Commercial Court held that it was an abuse of process for a party to contend that an arbitral award had been made and by a valid arbitrator where, in earlier litigation, that same party had adopted the position that the relevant person had not been an arbitrator at all. To bring a claim in an incomplete state to the English courts leaves litigants vulnerable to a strike out application. The Court also decided not to refer the case to the Court of Justice of the European Union – a decision in respect of which a complaint to the European Commission is pending.

In ***Trust Risk Group SpA v AmTrust Europe Ltd*** **[2015] EWCA Civ 437**, the English Court of Appeal considered the English law principle of "one stop, one jurisdiction" whereby rational businesspeople are presumed to intend that disputes arising out of their relationship will be tried by the same tribunal. The Court held that the principle was not to be treated as a presumption where the parties' overall contractual arrangements contained multiple differently express jurisdiction/governing law clauses in respect of different agreements.

Renewable Energy Disputes

In ***Department of Energy and Climate Change ("DECC") v Breyer Group plc & Ors*** **[2015] EWCA Civ 408**, the English Court of Appeal dismissed both the appeal of the Department of Energy and Climate Change and the cross appeal in a dispute relating to losses suffered as a result of a proposal by the DECC which caused the claimants to lose out on incentives they would otherwise have been entitled to under the DECC's Feed-in-Tariffs scheme. The Court held that, even though the DECC's action was only a proposal rather than a final decision, it nevertheless was capable of constituting an unlawful interference with the claimants' possessions for the purposes of Article 1, Protocol 1.

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