LATHAM & WATKINS LLP

INTERNATIONAL ARBITRATION NEWSLETTER

October 2016 LW.com

London Will Remain a Leading Arbitral Seat Post-Brexit

London's long history as a popular seat of arbitration predates the EU, and Brexit may actually increase London's popularity.

Page 2 Click to view

NEWS IN BRIEF

London Will Remain a Leading Arbitral Seat Post-Brexit

London's long history as a popular seat of arbitration predates the EU, and Brexit may actually increase London's popularity.

By Sophie Lamb and Samuel Pape

London has long enjoyed a reputation as one of the most popular and trusted arbitral seats in the world. The use of arbitration in England is long-standing and a legislative framework recognizing and seeking to encourage the arbitral process has existed since at least the 17th Century.[1] With the advent of globalization and international trade, London has become well established as one of the world's most preferred and widely used seats. The reasons for England's success and deserved reputation as an arbitral seat have never depended on membership of the EU.

The most important features of an arbitral seat are:

- Respect for the rule of law
- Domestic arbitration legislation which is modern, comprehensive and clear, which respects the parties' choice of arbitration, provides a framework for resolving a dispute by arbitration, limits the scope for judicial intervention and mandates the recognition and enforcement of arbitral awards in accordance with international treaties
- A highly experienced, independent and efficient judiciary with an established pedigree of respecting the arbitral process and enforcing arbitral awards including those rendered overseas
- A respected, experienced and dynamic local bar governed by the highest standards of ethical conduct
- The ability of parties to be represented in arbitration by lawyers from anywhere in the world
- Safety, accessibility and infrastructure

London has all of these important qualities. None requires membership of the EU. Other leading centres for international arbitration have thrived wholly outside of the EU. Among the five most preferred and widely used seats, only London and Paris are currently members of the EU.[2] Parties have long felt comfortable having their disputes arbitrated in centres in Switzerland. The seats that users see as the most improved in recent years are Singapore and Hong Kong,[3] neither of which is a party to regional treaties or organizations equivalent to the EU.

For international arbitration, the New York Convention[4] is our most important legal infrastructure. That global treaty, which allows for the recognition and enforcement of arbitral awards in over 150 countries, does not depend on membership of the EU and indeed the United Kingdom acceded to the New York Convention well before it joined the EU. Awards rendered in London will continue to be enforceable in other New York Convention jurisdictions, including in the EU Member States, regardless of Brexit. The key European instrument on jurisdiction and enforcement issues in civil and commercial matters, the Recast Brussels Regulation,[5] does not apply to commercial arbitration.[6] Arbitration agreements concluded pre-Brexit providing for arbitration in London will, therefore, continue to be binding and enforceable. The English courts will intervene to restrain proceedings brought in breach of an arbitration agreement, even where no arbitral proceedings are contemplated (*Ust-Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35).

The English Arbitration Act, now in its 20th year, provides a tried-and-tested framework for international arbitration. Brexit will not affect that framework. The truly international arbitral community based in London will remain committed to preserving London's standing as a leading arbitral seat and to delivering world-class services that remain relevant to end users of arbitration.

Whilst the wider impact of Brexit remains to be seen, the legal consequences for London arbitration are known and they are negligible if not non-existent. Overseas parties and counsel attending hearings in London post-Brexit should see no impact on their London cases (besides, for now at least, some very favorable exchange rates).

In fact, there are reasons to believe that Brexit could well enhance the attractiveness of London as an arbitral seat and openness of the UK to international trade more generally.

First, Brexit should mean the end of Brussels' influence over the English regime for determining questions of jurisdiction. The 2001 Brussels Regulation[7] allowed for a party to commence proceedings in the court of a Member State, despite the existence of an exclusive jurisdiction agreement mandating litigation in the courts of another Member State, and required the latter to stay its proceedings until the other court had decided whether it had jurisdiction even though this stay could give rise to substantial delay and prejudice to the defendant and even if the proceedings had allegedly been commenced in bad faith to frustrate the jurisdictional agreement.[8] The "first come first served" rule has often not resulted in an appropriate allocation of jurisdiction. Brexit could allow the English Courts to regain the ability to decide on their jurisdiction in appropriate cases notwithstanding any attempts to "torpedo" the claim before EU courts.

Second, a Brexit environment may also give the English Courts greater power to stay cases that do not have an appropriate connection to the UK: this a significant public interest issue in an era of limited public resources, particularly in the Court Services.

Third, Brexit will provide a positive opportunity for the restoration of the English Court's power to enjoin foreign proceedings within EU Member States brought in breach of an arbitration agreement. The European Court of Justice's decision in *West Tankers*[9] curtailed the ability of the English Courts to issue anti-suit injunctions to restrain proceedings in the courts of a Member State brought in breach of an arbitration agreement. Six years later, the advocate general in *Gazprom*[10] suggested that *West Tankers* was wrongly decided. Despite this belated but welcome acknowledgement from the advocate general, in its decision in *Gazprom*, the Court of Justice of European Union chose not to comment on *West Tankers* whilst at the same time holding that an anti-suit injunction issued by an arbitral tribunal enjoining proceedings in the courts of a Member State were permissible. Brexit could mean the end of this state of affairs as far as the English Courts are concerned. Within their jurisdiction, the English Courts could again be free to issue anti-suit relief where necessary to preserve the sanctity of an arbitration agreement and thereby hold the parties to their bargain on the question on jurisdiction.

Fourth, Brexit could allow the UK to regain its treaty-making powers; including in relation to matters of foreign direct investment and international trade. The EU's exclusive competence over matters of foreign direct investment[11] (and the Commission's expansive interpretation thereof) has meant that EU-led trade discussions have been more complex and protracted than they otherwise might have been had they been UK-led. The EU's new competence has also led to controversy over the interaction between EU law and the protections afforded by intra-EU bilateral investment treaties (BITs),[12] and to the EU Commission's efforts to eradicate such treaties by initiating infringement proceedings against certain Member States and requesting them to terminate intra-EU BITs.[13]

Finally, there is a real possibility that Brexit will mean an even clearer system of English law. The pedigree of English common law reaches back more than a thousand years and its certainty and predictability is coveted around the world. To the extent that statutory inroads from EU initiatives have influenced the common law (such as EU legislation on consumer contract terms, which mandated the introduction of the notion of good faith into English consumer contract law),[14] the English Parliament and courts are now in a 'back to basics' environment. The proposal that a unified European Civil Code be developed and brought to supplant all domestic laws of private obligations (as the European Parliament requested)[15] will be put to rest as far as England is concerned.

The message from London arbitration is therefore clear: keep calm, and keep choosing London.

Ms Lamb was counsel to the Appellant before the UK Supreme Court in Ust-Kamenogorsk v AES.

NEWS IN BRIEF

Do Not Delay! The Early Bird Catches the Anti-Suit Injunction

A recent case illustrates the need for parties to act promptly and carefully when facing proceedings contrary to an arbitration agreement.

(ADM Asia-Pacific Trading PTE Ltd v PT Budi Semesta Satria[16])

By Daniel Harrison

The court refused to grant an anti-suit injunction to restrain proceedings in favor of arbitration because the claimant had actively engaged in the proceedings for over a year and delayed in making its application for relief.

The Facts

ADM Asia-Pacific Trading PTE Ltd (ADM) and PT Budi Semesta Satria (BSS) entered into a stock finance agreement (the Agreement) which contained a jurisdiction clause referring to the Indonesian courts. As contemplated by the Agreement, the parties entered into a separate contract for the sale (by ADM) and the purchase (by BSS) of soybeans containing an arbitration clause with the seat in London (the Sale Contract).

BSS refused to pay the full purchase price, complaining that the quality of goods was not in accordance with the Sale Contract, a claim which ADM refuted. On 22 May 2013, BSS commenced proceedings in the Indonesian courts relying on the jurisdiction clause in the Agreement.

The chronology of subsequent events was ultimately crucial to the English court's judgment:

- **19 June 2013:** ADM appointed an arbitrator relying on the arbitration agreement in the Sale Contract.
- **26 June 2013:** ADM became aware of the Indonesian proceedings.
- **26 May 2014:** an Indonesian court effected service of those proceedings.
- **17 June and 19 August 2014:** hearings took place in the Indonesian court and ADM indicated to the Indonesian court its intent to challenge jurisdiction.
- **2 September 2014:** ADM complied with an Indonesian court order to file its defence and challenge to jurisdiction.
- **2 December 2014:** the Indonesian court upheld ADM's challenge to jurisdiction.
- **28 January 2015:** BSS appealed the Indonesian court's decision to decline jurisdiction and lodged its memorandum of appeal on the 5 March 2015.
- **23 March 2015:** ADM became aware of BSS' appeal.
- **7 May 2015:** the arbitral tribunal issued an award deciding that the tribunal did have jurisdiction and that BSS was in breach of the Sale Contract.
- **8 July 2015:** the Indonesian appeal court allowed BSS' appeal and directed that the case be remitted to the lower court.
- **11 September 2015:** ADM applied to the English courts for an anti-suit injunction.
- **13-14 October 2015:** BSS challenged the arbitral award.

Judgment

The court noted the general principle that where foreign proceedings are brought in breach of an arbitration agreement, the court will usually grant an anti-suit injunction to restrain the foreign proceedings, unless the respondent can show strong reasons for suing in the foreign court.

The court refused the application because:

BSS argued that the English court should refuse the application for an anti-suit injunction because ADM had delayed in bringing the application. By contrast, ADM argued that delay alone was not a strong reason to refuse enforcing the arbitration clause. ADM argued that the delay had to prejudice BSS and be unconscionable, and that waiting for the Indonesian court to determine a jurisdictional challenge should not be regarded as an unconscionable delay.

1. ADM failed to apply promptly for the anti-suit injunction, which it should have done shortly after service of the Indonesian proceedings on 26 May 2014, and ADM provided no explanation for the delay.

2. ADM actively engaged in the Indonesian proceedings by filing a defense (and claiming the costs as damages for breach of the arbitration clause) rather than applying for an injunction.

3. ADM incurred costs in filing a substantive defense and its delay in applying for the anti-suit injunction also caused BSS to incur costs.

4. ADM could not "have the best of all worlds," and the sequence of events demonstrated that ADM was content to have the Indonesian courts deal with the matter until they made a decision against ADM's interests — at which point ADM brought the anti-suit injunction application.

5. English court intervention at this stage, when the substantive proceedings were ongoing in Indonesia, would be inappropriate.

Comment

This case confirms the general position that anti-suit injunctions may be granted where court proceedings outside the European Union are brought contrary to an arbitration agreement. However, the case highlights the necessity to act promptly and carefully when dealing with proceedings commenced instead of arbitration. Delay in applying for an injunction may lead to a denial of relief, even when the proceedings are contrary to an arbitration agreement.

Back

Looking Forward: Expedited Arbitration and Summary Procedures

The Stock Chamber of Commerce's revised rules for expedited arbitration provide welcome clarity on a hot topic.

By Philip Clifford and Robert Price

The Stockholm Chamber of Commerce (SCC) has revised both its Rules for Expedited Arbitration (Expedited Rules) and its standard Arbitration Rules, with both sets of new Rules due to come into force in January 2017. Both sets of Rules provide for a new summary procedure to deal with suitable issues of fact or law.

Key Provisions

1. Streamlining – By Articles 6 and 9 of the new Expedited Rules, the Claimant's Request for Arbitration also constitutes its Statement of Claim and the Respondent's Answer constitutes its Statement of Defense. This means that the arbitrator will have a fuller picture of the case from the start, enabling earlier case management.

2. Early Case Management – In the new Expedited Rules, the arbitrator must hold a case management conference as soon as possible and establish the timetable within seven days (Article 29). The procedure is not to include a final hearing unless a party requests and the arbitrator considers the reasons for the request compelling (Article 33).

3. Summary procedure – The new summary procedure, expressly empowering the tribunal to decide one or more suitable issues of fact or law without following all the normal procedural steps, is a feature of both sets of new Rules (Article 40 of the Expedited Rules and Article 39 of the standard Arbitration Rules). This power could be used, for example, to dispose of an unsustainable claim at an early stage.

Comment

The use of expedited rules and summary procedures are currently hot topics and the SCC's new Rules provide welcome examples of how these can be implemented in practice. Some arbitration rules (such as those of the London Centre for International Arbitration and International Chamber of Commerce) are flexible enough to allow for expedited and summary procedures but do not currently have a specific set of expedited arbitration rules or express provisions for a summary procedure. The Singapore International Arbitration Centre (SIAC) arbitration rules expressly permit parties to apply for an expedited procedure (Rule 5) but the process is not fully spelled out in a separate set of rules. The SIAC arbitration rules also make express provision (Rule 29) for the early dismissal of claims and defenses that are manifestly without merit or manifestly outside the jurisdiction of the tribunal, albeit without expressly describing this as a summary procedure.

The use of an expedited procedure is often linked to claims of low monetary value, on the basis that the cost of resolving a dispute should be proportionate to the amount at stake. Likewise, conventional wisdom holds that an expedited process would not be suitable for complex arbitrations with difficult fact patterns and/or voluminous documentation, as these need more time for proper handling. However, ultimately the question for the users of arbitration is what they want, and this may not always have a direct correlation with the monetary value of a claim. In this regard, providing users with a simple and clear choice, which does not require complex drafting in an arbitration agreement, appears to be a sensible approach.

However, whether the institutions will, over time, standardize their respective approaches to these issues remains to be seen.

Back

Court Refuses to Expand Challenges of Arbitral Procedural Orders

English courts are reluctant to interfere in arbitration, even if both parties consent to the court's jurisdiction.

(Enterprise Insurance Company Plc v U-Drive Solutions (Gibraltar) Limited[17])

By Daniel Harrison

The recent case of illustrates the reluctance of the English courts to intervene in arbitrations despite the parties agreeing otherwise. The court dismissed an attack on two procedural orders pursuant to sections 68 and 69 of the English Arbitration Act 1996 (Act) because there was no award for the purposes of the Act and the consent of both parties was not sufficient to establish the court's jurisdiction.

The Facts

U-Drive Solutions (Gibraltar) Limited (U-Drive) commenced an arbitration against Enterprise Insurance Company Plc (Enterprise) for breach of a distribution agreement. Enterprise claimed that no agreement between the parties existed and challenged the jurisdiction of the tribunal on that basis before the tribunal and the court, which both dismissed the challenge.

The tribunal issued Procedural Order 10 ordering U-Drive to provide security for costs. When U-Drive failed to provide security, the tribunal issued a peremptory order compelling U-Drive to pay the security for costs and then directed that U-Drive must comply with the order and provide security within two weeks, failing which its claim would be dismissed. Within two weeks, counsel for U-Drive gave an undertaking to provide security, which was eventually provided seven days after the two-week limit had expired.

Enterprise applied to the tribunal for an order dismissing U-Drive's claim under section 41(6) of the Act, which provides that the tribunal may dismiss a claim if a claimant fails to comply with a peremptory order to provide security for costs. Enterprise also requested an affirmation that the claim had already been struck out because the tribunal had already given a direction that if U-Drive failed to comply with the peremptory order its claim would be dismissed (and U-Drive had failed to comply). The tribunal issued Procedural Order 14 refusing to strike out the claim.

Enterprise applied to court to challenge/appeal against: (i) Procedural Order 10 (ordering U-Drive to provide security for costs); and (ii) Procedural Order 14 (refusing to strike out the claim), both on the basis of a serious irregularity under section 68 of the Act and on the basis of an error of law under section 69 of the Act. Enterprise alleged that there had been a persistent, flagrant and systemic failure to comply with the tribunal's orders, and that U-Drive's claim had already been struck out by its failure to comply with the tribunal's directions to provide security by a certain date.

The Judgment

The court dismissed the challenges holding that it did not have jurisdiction because:

- Despite the fact that U-Drive consented to the challenge, the parties' agreement alone was not enough to grant the court jurisdiction where it otherwise would not exist.
- The procedural orders were not awards for the purpose of the Act. The court referred to a 2014 case [2][18] distinguishing an award (a "final determination of a particular issue or claim") from an order ("which addresses the procedural mechanisms to be adopted"). The procedural orders here were not awards because they were not finally determinative of a claim and were matters of discretion. The fact that Procedural Order 14 was in the form of an award did not matter (in that the order had features of an award including reasons and stating the place of the arbitration) and Procedural Order 14 constituted a decision not to dismiss and therefore did not affect Enterprise's rights as required under section 69.
- In any event, no error of law or serious irregularity occurred. The wording of Procedural Order 14 did not provide for the claim automatically to be struck out if U-Drive failed to provide security. The court considered that the wording was not expressed in the manner that, for example, a so-called unless order under the Civil Procedure Rules (CPR) would be expressed. Further the wording did not mean that if U-Drive failed to comply, the claim would be struck out without any further action. For the tribunal to accept counsel's undertaking as compliance especially where compliance did ultimately occur (late) was not an error of law. Further, there was no serious irregularity because the tribunal still had discretion over what to do given U-Drive's failure to comply and did not fail to stand by its previous orders.
- With regards to Procedural Order 10, Enterprise had argued that the tribunal erred: (i) in requiring Enterprise bear the burden of proof to establish the level above which the claim would be stifled when considering the amount for security of costs; (ii) in the alternative, in allowing the burden to be discharged without any evidence; and (iii) in failing to consider the amount of costs Enterprise would be likely to recover if successful and/or that the tribunal reached its own conclusion as to the level of security which would not stifle the claim. However, the court noted that the Act does not specifically state how the tribunal should order security for costs and so the tribunal had a broad discretion to do so. The tribunal had correctly balanced various factors in its decision to order security and so the section 69 and section 68 claims would, in any event, have failed.

Comment

This judgment highlights the reluctance of the English courts to intervene in arbitration, except as expressly provided for the in Act, even with the parties' agreement. The court did not want to expand the right to appeal, and instead supported the finality of arbitral awards. Further, the court reinforced the distinction between awards and procedural orders; the latter may not be appealed under sections 68 or 69 of the Act.

German Federal Court of Justice Rules CAS Tribunals are Proper Arbitral Tribunals

The Highest German court continues its arbitration-friendly jurisprudence.

(German Federal Court of Justice Case No. KZR 6/15 - Claudia Pechstein v International Skating Union [19]***)***

By Dr. Sebastian Seelmann-Eggebert and Dr. Felix A.R. Dörfelt

Introduction

The German Federal Court of Justice (FCJ), in a highly anticipated decision, held that the Court of Arbitration for Sports (CAS) is a proper arbitration institution within the meaning of the German Code of Civil Procedure and that CAS arbitration clauses are compatible with German competition law. The FCJ judgment reverses a much publicized decision by the Munich Court of Appeals, which had held that while arbitration clauses in general are compatible with German competition law, CAS arbitration clauses are not; due to the closed list of arbitrators and the particular appointment process.

Background

The case concerns the German ice-skater, Claudia Pechstein. In 2009, at the world speed skating championship, she tested positive for heightened level of young red blood cells, an indication of doping. She was subsequently banned from competition — including the 2010 Winter Olympics. Before entering the world speed skating championship, Ms. Pechstein had signed an application form containing the standard terms of the International Skating Union (ISU). Based on an arbitration clause, which was part of these standard terms, she appealed her doping ban before an arbitral tribunal constituted under the CAS rules. The arbitral tribunal upheld the ban. Ms. Pechstein's subsequent attempt to challenge the award at the Swiss Federal Tribunal failed.

Ms. Pechstein later sued the ISU and its German counterpart (DESG) for damages resulting from the ban in the Munich District Court. The ISU invoked the arbitration agreement and argued that the Munich District Court lacked jurisdiction. The District Court only rejected Ms. Pechstein's claims on the merits, finding that the arbitration clause might be unconscionable and therefore unenforceable. However, the court denied the damages claim, holding that the decision by the arbitral tribunal regarding the doping ban was binding.

On appeal, the Munich Court of Appeals confirmed jurisdiction over the ISU, holding that the arbitration clause was unenforceable as it contravened rules of German competition law. The court reasoned that the ISU has a monopoly for world speed skating championships. According to the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) an entity with market dominance may not impose standard terms that are different from those that it most likely could impose in fair competition. Applying this test, the Munich Court of Appeal held that the arbitration clause was invalid due to particularities in the selection of arbitrators under the rules of the CAS. The court took particular offense to the fact that 12 out of the 20 members of the nominating committee, the International Council for Arbitration in Sports (ICAS), were appointed by the International Olympic Committee (IOC), the National Olympic Committees and the international sports associations. These 12 members then in turn appointed the further eight members that are supposed to represent the athletes' interests and be independent of the Olympic committees and the sports associations.

CAS Tribunals Are Proper Arbitral Tribunals

Upon appeal by the ISU Claudia Pechstein argued inter alia before the FCJ that CAS tribunals are not proper arbitral tribunals. The FCJ rejected this argument and held that CAS tribunals are proper arbitral tribunals as compared to adjudication proceedings within an association because CAS tribunals are neutral and independent. The FCJ relied in particular on the fact that the CAS is not part of any sports association and is sufficiently independent of the IOC and other sports associations that finance the CAS. The FCJ held that the method of appointing arbitrators to the closed CAS list does not cause a structural imbalance. Independence only requires that the parties are equally able to influence the composition of the specific tribunal. A closed list of arbitrators violates the parties' rights only if the appointing body is structurally biased towards one party. The FCJ could not find such a structural bias because it held that the different Olympic committees and sporting associations do not have sufficient similar interests. In addition, the CAS arbitration rules provide sufficient safeguards to guarantee the independence and neutrality of the individual arbitrators. Furthermore, the arbitral award is subject to review by the Swiss Federal Tribunal.

Arbitration Clauses in Monopoly Situations

The FCJ also confirmed that the use of arbitration clauses by a monopoly does not violate mandatory rules of German competition law if the use of the arbitration clause is justified. In the Pechstein case, the FCJ found the use of arbitration clauses justified, because: the parties had an interest in the uniform application and enforcement of the rules of the World Anti-Doping Association (WADA) and an interest in the speedy adjudication of disputes; the disputes were decided by persons with particular subject matter expertise; and the arbitral award could be internationally recognized and enforced.

Outlook

With this decision, the FCJ has continued its arbitration-friendly jurisprudence and allowed arbitration clauses even in monopoly situations, finding that arbitrations are equivalent to court proceedings. The use of arbitration clauses in monopoly situations only violates mandatory rules of German competition law if the monopoly situation is used to implement arbitration rules that favor one party over the other and if these particular arbitration rules could not be imposed in a fair market environment.

Claudia Pechstein filed an application to appeal the FCJ decision before the German Constitutional Court. However, the standards for review are very high and limited to specific violations of constitutional law, so whether or not the court will accept the case is uncertain.

Back

Second Circuit Affirmed Enforcement of ICC Arbitral Award Annulled Abroad

The US court's affirmation adds to question of enforcing a foreign arbitral award that has been set aside at the seat of arbitration.

(Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración Y Producción, No. 13-4022 (2d Cir. Aug. 2, 2016))

By Claudia T. Salomon, Lilia B. Vazova, and Iris H. Xie

On August 2, 2016, the United States Court of Appeals for the Second Circuit affirmed a 2013 decision by the US district court in the Southern District of New York, which recognized and enforced an arbitral award for a Mexican subsidiary of the US-based company KBR against a Mexican state oil and gas company, although the award had been set aside at the arbitral seat in Mexico in 2011.

The award was rendered in an International Chamber of Commerce arbitration arising out of a contract to build oil platforms in the Gulf of Mexico between Corporacion Mexicana De Mantenimiento Integral, S. De R.L. De C.V. (COMMISA), a subsidiary of the US company KBR, and Pemex-Exploracion Y Produccion (PEP), a subsidiary of PEMEX, a Mexican state oil and gas company. The US district court in the Southern District of New York confirmed the award in 2010. However, a Mexican court subsequently annulled the award in 2011, based in large part on a new Mexican law — enacted while the arbitration was pending — that renders administrative rescission of contracts non-arbitrable. Following the annulment, the Second Circuit granted PEP's motion to vacate and remand to the district court to consider the implication of the annulment in the arbitral seat Mexico.

On remand, the Southern District again confirmed the award, finding that the annulment in Mexico "violated basic notions of justice," where a retroactive application of the Mexican law would leave COMMISA without any forum to litigate its contractual claims.

Concluding that the district court properly exercised its discretion in confirming the award, the Second Circuit held that giving effect to the nullification in Mexico "would run counter to United States public policy" and would "be repugnant to fundamental notions of what is decent and just in this country." In an analysis of Article V of the Panama Convention, the Second Circuit held that a district court may exercise discretion to enforce an arbitral award annulled at the arbitral seat, consistent with the Convention's "pro-enforcement aim." However, the exercise of such discretion "is constrained by the prudential concern of international comity" and is appropriate only to "vindicate fundamental notions of what is decent and just in the United States."

The Second Circuit's affirmation of the district court decision in COMMISA joins an ever-growing body of jurisprudence from courts around the world grappling with the issue of whether a national court of a signatory state to the New York Convention should recognize and enforce a foreign arbitral award that has been set aside at the seat of arbitration.

A Gold Standard for Damages? ICSID Tribunal Awards Rusoro Mining US$1.2 Billion in Damages

Arbitral tribunal adopts a novel method for determining the fair market value of expropriated gold mining interests.

(Rusoro Mining Ltd. v. Venezuela, International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB(AF)/12/5)

By Catriona E. Paterson

An arbitral tribunal has ordered Venezuela to pay the claimant, Rusoro Mining Limited, US$1.2 million in compensation for losses suffered as a result of restrictions placed on gold exports from 2009, and the ultimate taking in 2011 of the claimant's gold mining interests.

The tribunal's award is notable not only for the amount of awarded to the claimant, but also for the way in which the tribunal calculated the fair market value of the claimant's gold mining interests.

The Facts

Between 2006 and 2008, the claimant acquired controlling interests in a number of Venezuelan enterprises, which held in aggregate 58 gold mining concessions and other contracts for the exploration, development and exploitation of gold deposits in Venezuela.

From the early 2000s onwards, the State began to increase regulation of the gold mining industry, including by imposing restrictions on the sale and export of gold, as part of a State-policy to ultimately assume control over the gold mining industry. Gold producers and exporters were also affected at that time by currency and exchange controls intended to guarantee the stability of the Venezuelan bolivar. The situation came to a head in 2011, when President Chavez decreed the nationalization of the gold mining industry. As a result, the State extinguished miners' contractual rights and, at least in the claimant's case, took physical possession of mining assets.

Compensation for Expropriation

In an award issued on 22 August 2016, an arbitral tribunal determined that Venezuela had breached its obligations under the Canada-Venezuela bilateral investment treaty (BIT) — including by expropriating the claimant's investment without payment of compensation — and awarded the claimant US$1.2 billion in damages. One of the more interesting aspects of the tribunal's award is its determination of the compensation payable to the claimant for the 2011 nationalization of the claimant's gold mining interests.

That the BIT required the State to pay the claimant the fair market value (FMV) of the gold mining interests was uncontroversial between the parties. However, the tribunal rejected the parties' principal valuations of that FMV and instead proceeded on a "stand-alone" method that took into account the strengths and weaknesses of three valuation methodologies and weighted them accordingly.

The tribunal's approach was influenced, inter alia, by what it considered to be factors unique to the gold industry and the investment landscape in Venezuela during the Chavez regime. In its view:

- Gold is "intimately linked to the financial sovereignty of nations."
- The price of gold is highly volatile.
- The value of gold companies is affected by the intensity of the regulatory measures adopted by host States.
- The Venezuelan gold industry had been subject to increasing regulatory pressure, making it "impossible to predict, with any certainty, how future cash flows would be affected."

Accordingly, the tribunal determined the FMV of the claimant's gold mining interest in Venezuela based on the:

1. **Maximum price obtained for the claimant's equity on the Toronto Stock Exchange (TSX), less net debt.** This valuation was entirely objective and eliminated the effects of the State's expropriatory measures on the value of the claimant's investment, as the BIT required. However, as this price was only achieved for a short period of time, three years before the date of the expropriation, the tribunal gave it a weighting of 25%.

2. **Net book value of the claimant's assets as stated in its audited balance sheet for 2011.** The tribunal considered this both a conservative valuation, and one that was reliable in light of the rigorous accounting and disclosure obligations imposed on listed companies. On the other hand, the book value did not reflect any increases in the price of gold as between the date of investment and the date of expropriation, nor any increase in value resulting from investments the claimant made to develop its gold mining properties. For these reasons, the tribunal gave it a weighting of 25%.

3. **Amounts invested by the claimant in Venezuela —- being the initial consideration paid for the shares in the Venezuelan enterprises plus further investments in property, plant and equipment.** Because the claimant had made its investment when gold prices were low, and the State had expropriated the gold mining interests when gold prices were at a peak, the figure was adjusted upwards to reflect the movement in gold prices as between the date of the investment and the date of the expropriation. The tribunal viewed the resulting adjusted figure as the "minimum which fairness requires an expropriating state to compensate for the expropriation of a gold producing enterprise," and gave it a weighting of 50%.

Comment

The tribunal's approach to calculating damages was evidently influenced by what it saw as the unique nature of gold and the circumstances existing in Venezuela at the relevant time. However, it serves also as a broader reminder to disputing parties that arbitral tribunals are increasingly willing to engage with quantum issues and test whether the expert reports presented properly account for any particular characteristics of the investment being valued.

Back

ICSID Tribunal Declines Jurisdiction Under Most-Favored-Nation Treatment Clause in the General Agreement on Trade in Services

ICSID tribunal confirms that Senegal could not be compelled to arbitrate where it had not consented to jurisdiction.

(Menzies Middle East and Africa S.A. et Aviation Handling Services International Ltd. c. République du Sénégal)

By Laila Hamzi

On 5 August 2016, an ICSID tribunal rendered its French-language decision in *Menzies Middle East and Africa S.A. et Aviation Handling Services International Ltd. c. République du Sénégal*. The tribunal declined jurisdiction to hear the dispute and ordered costs against the claimants.

Summary of Facts

The claimants, Menzies Middle East and Africa (Menzies) and Aviation Handling Services International Ltd (AHSI) were the parent companies of a Senegalese subsidiary that operated aircraft ground-handling services. In 2013, Senegalese authorities placed AHS (the subsidiary) under temporary administration pursuant to an unjust enrichment investigation against a former Senegalese aviation minister who was thought to be the indirect economic beneficiary of AHS.

Subsequently, the claimants filed for arbitration against Senegal alleging that the temporary administration of their subsidiary was in fact a disguised expropriation. The respondent objected to the tribunal's jurisdiction and the tribunal determined to bifurcate the proceedings.

The Parties' Arguments

Menzies is a company registered in Luxembourg which has no BIT with Senegal. Accordingly, Menzies sought to establish the tribunal's jurisdiction in reliance on the Most Favoured-Nation Treatment Clause (MFN Clause) in the General Agreement on Trade in Services (GATS). Menzies argued that the GATS MFN Clause gave it access to the dispute resolution process under Article 10 of the Senegal-Netherlands BIT, or under Article 8 of the Senegal-UK BIT. Menzies argued that it was a service supplier within the meaning of the GATS MFN Clause. In turn, as Senegal refused to grant a Luxembourg national consent to arbitrate, as it had done for Dutch and British service suppliers, Senegal was in violation of the MFN Clause.

AHSI, registered in the British Virgin Islands, invoked Article 8 of the Senegal-UK BIT and the Senegalese Investment Law to establish the tribunals' jurisdiction. AHSI argued that while it was not a UK national within the meaning of the BIT, it was a UK national under international law.

Senegal disputed Menzies' MFN Clause argument on several grounds. Notably, Senegal argued that GATS provisions could only be invoked by States and not by individuals. Moreover, Senegal observed that accepting Menzies' argument would infringe the exclusive competence of the WTO Dispute Settlement Body to find a violation of GATS.

Senegal also argued that the GATS MFN Clause did not require it to grant investors of different nationalities identical treatment. The GATS only required treatment that was "no less favorable." In any event, Senegal asserted that consent to arbitrate did not amount to "treatment" under the GATS MFN Clause, which operates differently from MFN Clauses in BITs. Senegal also argued that under international law, a State's consent to jurisdiction must be clear and unequivocal. By contrast, Senegal had never intended to extend the application of the GATS MFN Clause to disputes with investors. To accept the interpretation Menzies forwarded would be to manufacture consent to ICSID arbitration that was manifestly lacking.

In relation to AHSI, Senegal argued that the tribunal lacked personal jurisdiction because AHSI was not a foreign investor for the purposes of the Senegal Investment Law. Senegal also argued that AHSI was not a national of the UK according to the definition included in the Senegal-UK BIT.

The Tribunal's Findings

The tribunal declined jurisdiction because it considered that under international law, a State could not be subject to the jurisdiction of an international court or tribunal without express and unequivocal consent. In relation to Menzies' claim, it found that Senegal had not provided such consent to arbitrate to Luxembourg nationals.

The tribunal noted several difficulties with the claimants' arguments. First, Article II of the GATS makes no mention of arbitration, nor dispute resolution more generally. Secondly, the claimants' arguments required complicated and controversial analysis of Article II of the GATS, and such analysis would be insufficient to establish jurisdiction. Thirdly, the BITs which the claimants invoked clearly did not extend to Luxembourg nationals. Rather, the tribunal was being asked to craft consent by piecing together distinct treaties.

The tribunal then observed that even if Article II of GATS extended to investment arbitration, it would not amount to present consent to arbitrate. Rather, Article II might impose a future obligation on signatory States to offer consent to arbitrate. In turn, were Senegal not to comply with this obligation, the sole consequence would be to find Senegal in violation of the GATS. In other words, a State could always choose to disregard its international obligations but could not be compelled to arbitrate where it had not consented to jurisdiction.

Finally, the tribunal reviewed the GATS negotiating history and found that States had been divided on whether or not to include investment arbitration rights and obligations in the GATS. The tribunal observed that the fact that the question remained open was certainly not evidence of unequivocal consent to arbitrate pursuant to the GATS. The tribunal noted that international investment law and international trade law have evolved separately and that States have increasingly concluded BITs, precisely because they do not intend to offer service providers access to investment arbitration through the GATS.

The tribunal also declined jurisdiction in respect of AHSI because the company was registered in the British Virgin Islands, and was therefore, not a British national as defined in the Senegal-UK BIT. The tribunal concluded that to find otherwise would be to contradict the intentions of treaty parties who chose not to extend the application of the BIT to the British Virgin Islands.

Conclusion

The tribunal's decision, in respect of both claimants, reemphasizes the importance of States' express and unequivocal consent to arbitration. Notably, while the tribunal recognized the complexity and novelty of Menzies' argument, the tribunal was clearly reluctant to craft consent through creative and controversial applications of the law.

***

Endnotes

1 For a history of arbitration in England, see Lord Mustill, 'Arbitration – History and Background', Journal of International Arbitration, 1989. Lord Mustill traces the history of the English Parliament seeking to create a framework that would assist private parties in resolving disputes through arbitration rather than through the courts back to 1698.

2 See the School of International Arbitration at Queen Mary University of London, 2015 Survey 'Improvements and Innovations in International Arbitration', which finds that the five most preferred and widely used seats are London, Paris, Hong Kong, Singapore and Geneva.

3 *Ibid*. Respondents to the survey expressed the view that the most improved arbitral seat (taken over the past five years before the study) is Singapore, followed by Hong Kong.

4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

5 Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

6 The Recast Brussels Regulation expressly provides that it does not affect the application of the New York Convention. See Article 73(2) Recast Brussels Regulation.

7 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

8 See *Erich Gasser GmbH v MISAT Srl* (Case C-116/02) [2005] QB 1.

9 *Allianz SpA v West Tankers Inc* (Case C-185/07) [2009] EUECJ.

10 Case C-536/13 *('Gazprom OAO')*.

11 Articles 3(1)(e) and 207 of the TFEU.

12 See *e.g.* the issues arising in *Micula v. Romania* (ICSID Case No. ARB/05/20).

13 See the Commission's Press Release of 18 June 2015, available at: http://europa.eu/rapid/press-release_IP-15-5198_en.htm.

14 See the Unfair Terms in Consumer Contracts Regulations 1999.

15 Official Journal of the European Communities, 1989, N. C 158/400.

16 [2016] EWHC 1427 (Comm).

17 [2016] EWHC 1301.

18 Brake v Patley Wood Farm LLP [2014] EWHC 4192 (Ch).

19 German Federal Court of Justice, Case No. KZR 6/15, Judgment of 7 June 2016.

INTERNATIONAL ARBITRATION NEWSLETTER

About Latham & Watkins International Arbitration Team
Latham & Watkins International Arbitration team is comprised of approximately 70 lawyers based across Latham's global network advising clients on multi-jurisdictional disputes, international commercial arbitration, investment treaty arbitration and public international law. For more information about the practice, please visit: http://www.lw.com/practices/InternationalArbitration.

About the Publication
Latham & Watkins International Arbitration Newsletter is a regular publication produced by the firm's global International Arbitration team designed to highlight important news, legal issues and developments in a practical and informative way.

If you have any questions about this publication please contact a lawyer on the editorial team, Sebastian Seelmann-Eggebert, Philip Clifford, Catriona E. Paterson and Jan Erik Spangenberg.

LW.com