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KEY DEVELOPMENTS UPDATE

NOVEMBER 2023

MESSAGE FROM KHAWAR QURESHI KC, HEAD OF MCNAIR INTERNATIONAL

Protecting Foreign Investments and Resolving Disputes in Changing Times.

In early October, McNair hosted two events in Istanbul and Doha together with the leading Turkish law firm Moroğlu Arseven. ESG (Environmental Sustainability Goals) and ESC Governance (Environment, Social and Corporate Governance) have recently become very prominent, and both events examined how these impact foreign investment. In Turkey, the focus was on the way these issues have influenced Turkey's new Bilateral Investment Treaty and, in Doha, the seminar brought together a distinguished panel of experts and professionals to discuss crucial aspects of foreign investments, dispute resolution, and investment and economic cooperation between Qatar and Turkey. Recordings of the event and the accompanying PowerPoint presentation are available. Please email office@mcnairinternational.com for a copy.

On the dispute resolution front, there have been several significant decisions of both arbitral tribunals and domestic courts in recent months, revealing the ever-evolving landscape of international dispute resolution and attempts by courts when exercising their supervisory jurisdiction to consistently apply the international principles of arbitration inherent in the Vienna Convention and New York Convention of Arbitration.

Best wishes on behalf of all of us at McNair.

Should you be interested in any of the headlines below, please click here to see the newsletter in full or visit www.mcnairinternational.com/publications for a full list of our previous publications.

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The following updates are covered in this newsletter:

- **McNair International – Istanbul and Doha events in October 2023.** On 3 October 2023, a seminar titled "Protecting Foreign Investments and Resolving Disputes in Changing Times: A Global Update" took place as part of Istanbul Arbitration Week. On 5 October 2023, a seminar titled "Protecting Foreign Investments and Resolving Disputes in Changing Times: The Perspective from Turkey" took place in Doha. Both seminars focussed on key issues of investment law and arbitration and provided a comprehensive overview of the recent trends in these areas.

- **Litigation funders beware: your funding arrangement may be unenforceable under s58AA of the Courts and Legal Services Act 1990.** *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28 (26 July 2023).* This decision is of significant importance for litigation funding in England and Wales. Two trading associations pursuing class actions on behalf of their members were found to be providing "claims management services" and, thus, had to comply with the relevant regulatory regime, which required notification of the terms of the funding arrangements to each claimant in the group.

- **What are "matters" in proceedings such that they should be stayed under s.9 of the Arbitration Act 1996 and referred to arbitration?** *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) and others [2023] UKSC 32 (20 September 2023).* On 20 September 2023,

the UK Supreme Court handed down a judgment in relation to the "Tuna bond scandal" between the Republic of Mozambique and Privinvest. The decision concerned the interpretation of s.9 of the Arbitration Act 1996, which provides that if a party to an arbitration agreement is made subject to legal proceedings in respect of a matter within the scope of the arbitration agreement, they can apply to the court to stay the proceedings in favour of arbitration.

- **Can English courts grant anti-suit injunctions in support of foreign-seated arbitrations and thus restrain foreign parallel litigation?** *Deutsche Bank AG v RusChemAlliance LLC [2023] EWCA Civ 1144 (11 October 2023)*. The Court of Appeal considered whether it could grant an anti-suit injunction supporting an arbitration in Paris when a Russian company commenced parallel proceedings in Russia.

- **High Court refused enforcement of an arbitral award against a UK "crypto consumer" on public policy grounds.** *Payward Inc v Chechetkin [2023] EWHC 1780 (Comm) (14 July 2023)*. The English Commercial Court refused to enforce an arbitral award issued by a sole US arbitrator in relation to crypto trading on the basis of public policy grounds.

- **Hong Kong's reputation as a neutral seat for arbitrations involving sanctioned parties.** *Linde GMBH and Linde PLC v RusChemAlliance LLC HCCT 19/2023 [2023] HKCFI 2409 (27 September 2023)*. A series of anti-suit injunctions – granted by courts in Russia and Hong Kong – became subject of a Hong Kong judgment. RusChemAlliance sought to restrain a HKIAC arbitration against it, arguing that, for a party affected by Western sanctions, arbitrations seated in Hong Kong no longer provide independent and impartial resolution of disputes. The High Court of Hong Kong rejected its arguments and reiterated that Hong Kong remains a neutral and independent place for international parties to resolve their disputes in arbitration.

- **"Escape clause" for Russian parties in international arbitration becomes increasingly relevant.** In *PJSC Rosneft v BP Oil International Limited (case No. A40-197598/23-68-1448) (20 September 2023),* the Moscow Arbitrazh Court agreed to hear Rosneft's application to restrain a foreign arbitration commenced against it by BP. Concerns about fairness and impartiality of foreign tribunals are leading to "redomicilation" of disputes involving Russian parties to the jurisdiction of Russian courts.

MCNAIR INTERNATIONAL – INSTABUL-DOHA EVENTS WITH MOROGLU ARSEVEN

In October, McNair International hosted two events in Istanbul and Doha together with the leading Turkish law firm Moroğlu Arseven.

On 3 October 2023 a seminar titled "Protecting Foreign Investments and Resolving Disputes in Changing Times: A Global Update" took place as part of Istanbul Arbitration Week. The seminars covered a number of topics, including global trends in foreign investments, recent developments in approaches to dispute resolution, as well as Turkey's role in international business affairs.

Dr. E. Seyfi Moroğlu and Fulya Kurar of Moroğlu Arseven together with Anastasia Medvedskaya of McNair International delivered their presentations. Anthony Wilson chaired the event.

On 5 October a seminar titled “Protecting Foreign Investments and Resolving Disputes in Changing Times: The Perspective from Turkey” took place in Doha. The seminar addressed various provisions of Turkish law that make it an attractive destination for foreign investments, as well as

protections and dispute resolution options available to foreign investors in Turkey. Following the presentation, an engaging Q&A session took place, picking topics such as umbrella clauses and enforcement of arbitral awards against states.

Dr. E. Seyfi Moroğlu and Fulya Kurar of Moroğlu Arseven delivered their remarks, while Anastasia Medvedskaya and Sergey Ryapisov of McNair International addressed the audience’s questions, with Anthony Wilson chairing.

For those unable to attend, we have made available both the PowerPoint slides used for the Doha seminar as well as a recording of the full discussion.

We have a number of upcoming webinars and in-person seminars. Should you be interested in attending (either remotely or in person), please email office@mcnairinternational.com and we will be delighted to send you further details of events most suitable for your areas of interest and location.

LITIGATION FUNDERS BEWARE: YOUR FUNDING ARRANGEMENT MAY BE UNENFORCEABLE UNDER S.58AA OF THE COURTS AND LEGAL SERVICES ACT 1990

R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)

On 26 July 2023 the Supreme Court handed down a judgement and found that certain litigation funding agreements were in fact damages-based agreements which are unenforceable under English law.

Background

The appeal to the Supreme Court arose in the context of collective actions in the UK Competition Appeal Tribunal ("**CAT**"). The European Commission issued a decision that certain truck manufacturers had entered into unlawful agreements in breach of European competition law. UK Trucks Claim Ltd ("**UKTC**") applied to the CAT to commence opt-out collective proceedings on behalf of any person or organisation which, during the period of the cartel, purchased or leased one or more new trucks registered in the UK.

Another collective action was brought by Road Haulage Association ("**RHA**") which had also commenced proceedings in respect of new and used trucks in the UK and other European countries between 1997 and 2019. Both litigants applied for a Collective Proceedings Order. In order to satisfy its conditions, UKTC and RHA had to demonstrate that, *inter alia*, they had adequate funding arrangements in place that complied with the applicable legislation. Both UKTC and RHA entered into litigation funding agreements (**"LFAs"**) with litigation funders. The defendants challenged the lawfulness of the litigation funding arrangements on the basis that the LFAs were an unlawful damages-based agreements.

On a judicial review, the CAT was satisfied that the litigation funding in this case was not a damages-based agreement.

Supreme Court Decision

The crucial point for the Supreme Court to decide was whether the litigation funding agreements in question provided "*claims management services*", i.e., "*advice or other services in relation to the making of a claim*" including "*the provision of financial services or assistance*" which would then fall under s.58AA of the Courts and Legal Services Act 1990.

According to the Supreme Court (Lady Rose dissenting), the arrangement between the third-party funders, UKTC and RHA constituted damages-based agreements for the following reasons:

i) the agreements were for the provision of claims management services;
ii) the agreements provided that the claimants were to make a payment to the funders if the claimants obtained a specified financial benefit from the claim; and
iii) the agreements set the amount of the payment to the funders by reference to the amount of the financial benefit obtained.

This decision could have serious ramifications on the litigation funding market in England and Wales. For example, in a recent decision of 20 October 2023, the Commercial Court rejected the litigation funder's claim and found that such claim was brought under an unenforceable damages-based agreement pursuant to the *PACCAR* judgment (see *Therium Litigation Funding AIC v Bugsby Property LLC* [2023] EWHC 2627 (Comm)).

Judgment is available here.

WHAT ARE "MATTERS" IN PROCEEDINGS SUCH THAT THEY SHOULD BE STAYED AND REFERRED TO ARBITRATION UNDER S.9 OF THE ENGLISH ARBITRATION ACT 1996?

Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) and others [2023] UKSC 32

On 23 September 2023, the Supreme Court handed down a judgment interpreting s.9 of the Arbitration Act 1996 in a dispute between the Republic of Mozambique and Privinvest Shipbuilding SAL.

Background

The dispute between the Republic of Mozambique ("**Mozambique**") and Privinvest Shipbuilding SAL and its related companies ("**Privinvest**") stemmed from execution of supply contracts concluded between corporate vehicles wholly owned by Mozambique and Privinvest. The contracts revolved, *inter alia*, around developing fishing and gas exploration in Mozambican waters ("**Supply Contracts**").

The Supply Contracts were governed by Swiss law, and each provided for Geneva-seated arbitration. The Supply Contracts were financed through loan agreements, in respect of which, Mozambique provided sovereign guarantees. The guarantees were governed by English law and provided for dispute resolution before courts in England and Wales.

Mozambique commenced proceedings before English courts claiming to be a victim of fraud, because *inter alia* the guarantees were procured through bribes paid to employees of the financing companies and to officials of the Mozambique. A further issue was Mozambique's allegation that the Supply Contracts were shams and that no goods or services were supplied under them or they were of no value. While the substance of the Mozambique claims is still pending before the English courts, the sole question put before the Supreme Court was whether in this case there was a matter which (1) should have been referred to arbitration and (2) is therefore susceptible to triggering a stay under s.9 of the Arbitration Act 1996.

Appeal to the Supreme Court

Under s.9 of the 1996 Act a party may apply for a stay in proceedings in so far as they concern a "matter", which under the arbitration agreement is "to be referred to arbitration". Unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed, a stay in favour of the arbitration must be granted.

Key findings of the Supreme Court

The Supreme Court explained that the application of s.9 Arbitration Act 1996 required a consideration of a two-stage test: (1) the court must identify the matter or matters which the parties have raised or foreseeably will raise in the court proceedings, and (2) determine in relation to each such matter whether it falls within the scope of the arbitration agreement.

(1) What are the "matters" in respect of which legal proceedings are to be brought?

The Supreme Court recalled that English Courts follow the general international consensus on the determination of "matters" which must be referred to arbitration. A "matter" is a substantial issue that is legally relevant to a claim or a defence that is susceptible to determination by an arbitrator as a discrete dispute rather than an issue that is peripheral or tangential. In analysing the existence of the issue, the courts should have regard to (i) the substance of the dispute and foreseeable defences, (ii) the scope of the matter, (iii) the fact that a "matter" is a substantial issue that is legally relevant to a claim or a defence which is susceptible to determination by an arbitrator as a discrete dispute, rather than an issue which is peripheral or tangential, (iv) a common-sense approach, (v) the context in which the matter is brought. In this case, the Supreme Court found that Mozambique sought damages in tort resulting from the guarantees which were obtained through bribery. The validity of the Supply Contracts was an incidental matter which would only be relevant for the quantification of Mozambique losses.

(2) Conclusions of the Supreme Court in relation to matters falling within the scope of the arbitration agreement

S.9 of the 1996 Act must be applied with common sense. In ascertaining the scope of an arbitration agreement, the court must have regard to what rational businesspeople would contemplate. It was unlikely rational business people would subject the factual issue of the quantification of Mozambique's losses alone to arbitration.

Judgment is available here.

CAN ENGLISH COURTS GRANT ANTI-SUIT INJUNCTIONS IN SUPPORT OF FOREIGN-SEATED ARBITRATIONS AND THUS RESTRAIN FOREIGN PARALLEL LITIGATIONS?

Deutsche Bank AG v RusChemAlliance LLC [2023] EWCA Civ 1144 (11 October 2023)

On 11 October 2023, the Court of Appeal ruled that English courts can grant anti-suit injunctions ("**ASI**") in aid of foreign-seated arbitrations in circumstances where the court of the seat cannot grant such an injunction itself.

Background

The case revolved around a dispute arising from a guarantee issued by Deutsche Bank AG ("**DB**") in favour of RusChemAlliance LLC ("**RCA**") – a subsidiary of Gazprom. The guarantee was governed by English law and provided for an arbitration seated in Paris.

The dispute arose in relation to the failure by DB and two other guarantors, Commerzbank and UniCredit, to pay out on guarantees issued with respect to the work carried out by German contractor Linde on a gas processing plant project in Russia. RCA initiated legal proceedings in Russia against the banks despite the valid arbitration clause in the respective guarantees.

Initial Court Application

Once RCA filed its claim in Russia, DB unsuccessfully petitioned the Commercial Court to grant an ASI against RCA to halt the Russian proceedings.

English Position on Anti-Suit Injunctions

Giving the main judgment, Lord Justice Nugee held that the first instance judge had been hampered by the limited French law evidence available to him. Upon considering fresh experts evidence, Lord Justice Nugee concluded that "*although a French court does not have the ability to grant an ASI as part of its domestic toolkit, it will recognise the grant of an ASI by a court which does have that as part of its own toolkit, provided that in doing so it does not cut across international public policy*".

The Court recognised that "*where the seat of the arbitration is in England, the practice of the English court in readily granting ASIs is part of the "supervisory" or "supporting" jurisdiction of the English court*". A natural extension of that approach would be a position that "*the proper place in which to bring any claim for an ASI would be the courts of the seat of the arbitration*". However, Lord Justice Nugee stated that there is an established position on the "proper place" in English law already: it is a "*forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice*" (*Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada)* [1987] AC 460, 475-484).

The Court confirmed that it is the policy of English law to enforce a rule that "*parties to an arbitration agreement, who have thereby impliedly agreed not to litigate elsewhere, should not do so*". After analysing the authorities on ASIs in English law, the Court granted an ASI in favour of DB. The choice was not between two competing jurisdictions. The choice was between the claim being brought or not being brought at all. The English court here was faced with a contract govern by English law with one party threatening to do something it had contractually promised not to do. The English courts would readily enforce that promise by way of an injunction.

Judgment available here.

THE HIGH COURT REFUSES TO ENFORCE AN ARBITRAL AWARD AGAINST A UK "CRYPTO CONSUMER" ON PUBLIC POLICY GROUNDS

Payward Inc v Chechetkin [2023] EWHC 1780 (Comm).

On 14 July 2023, the Commercial Court declined the enforcement of a foreign arbitral award on public policy grounds because the arbitrator had not considered or applied English consumer rights and financial services laws.

Background

Mr. Chechetkin, a lawyer, purchased several crypto assets on a cryptocurrency exchange platform operated by Payward's subsidiary based in the United Kingdom. The standard terms and conditions mandated that disputes be resolved through Judicial Arbitration and Mediation Services ("**JAMS**") arbitration, seated in San Francisco.

While trading on Payward's platform, Mr. Chechetkin lost over £600,000. He filed a claim in England arguing that Payward's operations were unauthorised in the United Kingdom under the Financial Services and Markets Act 2000 ("**FSMA**"). Payward launched a JAMS arbitration. The sole arbitrator found that Payward bore no liability towards Mr. Chechetkin. Further, the arbitrator prohibited Mr. Chechetkin from pursuing his pending FSMA claim in the English courts.

The Commercial Court decision

Bright J considered two key points in this case.

First: Was Mr. Chechetkin a "consumer" under the Consumers' Rights Act 2015 ("**CRA**")? Under s.2(3) of the CRA, a consumer is understood to be "acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession". To the extent that Mr. Chechetkin (i) was a lawyer and (ii) Payward had assessed him to be a customer, acting for non-commercial purposes, the Commercial Court affirmed that he met the criteria set forth in the CRA.

Second: Did the JAMS award violate UK public policy? The Commercial Court affirmed that both the CRA and FSMA formed part of English public policy. Mr. Chechetkin was trading in the United Kingdom, thus even where the parties had chosen a different law governing their arbitration agreement and the sole arbitrator refused to consider English law issues, the matter still fell under the umbrella of financial regulations applicable in the United Kingdom.

To the extent that the issues at dispute were directly connected with matters falling under public policy in the United Kingdom, the sole arbitrator could not have properly addressed them given the lack of knowledge of English law: "*the appointment of a US arbitrator, in the context of a US arbitration system, meant that (through no fault of her own) this arbitrator was not an appropriate tribunal for the issues raised by Mr. Chechetkin's case. She had no experience of English law; let alone the English regulation of financial services markets and she was not receptive to submissions that focussed on this area.*"

The Court thus refused to recognise or enforce the award.

Judgment is available here.

DOES HONG KONG CONTINUE TO MAINTAIN ITS REPUTATION AS A NEUTRAL SEAT FOR ARBITRATIONS INVOLVING SANCTIONED PARTIES?

Linde GMBH and Linde PLC v RusChemAlliance LLC HCCT 19/2023 [2023] HKCFI 2409

On 27 September 2023 the High Court of Hong Kong confirmed that Hong Kong remains a neutral arbitration seat that does not create obstacles in access to justice and in obtaining a fair trial to parties affected by international sanctions.

Background

Following the imposition of sanctions on Russian companies in early 2022, the claimants, Linde, issued a Sanctions Notice to the defendant RusChemAlliance (the same RCA in the *Deutsche Bank* case) notifying it of the complete suspension of works in respect of the gas processing plant project. RCA maintained that Linde's actions were not justified as it suspended all works on the project, including those not affected by the sanctions. RCA considered that a material breach of the contract, and eventually, RCA issued a termination notice in September 2022.

Russian litigation and HKIAC Arbitration

In 2022 RCA applied to a Russian court seeking a freezing order on Linde's assets, ostensibly in aid of an HKIAC arbitration that it said it would shortly commence. Later, RCA amended its application and commenced the Russian litigation to recover the advance payments from Linde instead. In June, the Russian court ruled that wide-ranging sanctions against Russian parties made it harder for them to protect their rights and economic interests and obtain access to fair and impartial resolution of their disputes abroad, including in Hong Kong-seated arbitration by virtue of close ties between Hong Kong and English legal systems.

Hong Kong's stance on the effect of sanctions and Russian parties

On 17 March 2023, Linde obtained an ASI restraining the Russian proceedings. Chan J considered a challenge in which RCA asked the Hong Kong court to discharge that injunction because the Russian defendant would not get a fair and impartial trial in a Hong Kong-seated HKIAC arbitration.

In considering RCA's challenge Chan J said that "*claims of its inability to gain access to justice and to obtain a fair trial by arbitration in Hong Kong are grossly exaggerated, if not totally based on false premises. First and foremost, the Sanctions have no legal effect in Hong Kong. Secondly, it is patently clear that the Defendant was able to have access to lawyers in Hong Kong, who have represented them from the time of the initial* ex parte *application for the HK Injunction until now. Thirdly, as the Plaintiffs have sought to highlight, our former Chief Justice, Geoffrey Ma, has been successfully appointed to the Tribunal upon the Defendant's nomination in the Arbitration. There is no suggestion, and no basis for any complaint, that the Defendant has encountered any difficulties with the HKIAC in connection with the Arbitration, or with its representation in or conduct of the Arbitration*".

Aligned with the English legal standpoint, Hong Kong sees "*foreign proceedings in breach of an arbitration agreement are a breach of contract which will ordinarily be restrained by the grant of an injunction restraining the party in breach from conducting such proceedings, unless there are strong reasons to the contrary shown*". Importantly, a foreign court's ruling in favour of its jurisdiction does not inherently preclude an ASI from an Hong Kong court.

Judgment available here.

"ESCAPE CLAUSE" FOR RUSSIAN PARTIES IN INTERNATIONAL ARBITRATIONS BECOMES INCREASINGLY RELEVANT

PJSC Rosneft v BP Oil International Limited (case No. A40-197598/23-68-1448)

On 20 September 2023, the Moscow Arbitrazh Court agreed to hear Rosneft's application to restrain BP from pursuing an unknown international arbitration against it.

While the particulars of the case remain undisclosed, the initial hearing is scheduled for the end of November. This case exemplifies an emerging trend where Russian parties are increasingly opting to bring their disputes before Russian courts rather than resolve them in arbitration. The legal basis for this shift was introduced in the Russian Arbitrazh Procedure Code ("**APC**") in 2020. Articles 248.1 and 248.2 of the APC provide that the cases involving parties subject to foreign restrictive measures (sanctions) are under the exclusive jurisdiction of Russian courts. Even if there is an arbitration clause in the parties' contract, it can be disregarded if the restrictive measures pose barriers to a Russian party's access to justice.

Initially, Russian courts exhibited caution in interpreting these provisions. In several instances, decisions were rendered finding that applicants did not genuinely encounter impediments in accessing justice while participating in foreign arbitrations. The trend was reversed by the Russian Supreme Court in *JSC Uraltransmash v PESA* (cases No. A60-62910/2018 and A60-36897/2020) where it decided that the very fact of imposition of restrictive measures is sufficient to give an applicant access to the regime provided for by Arts. 248.1 and 248.2 of the APC.

Since then, reliance on these articles has increased, reflecting growing concerns on the part of some Russian parties whether they will be treated fairly and impartially by foreign arbitrators. For example, earlier this year a Russian court restrained an SCC arbitration against Rosneft's subsidiary Tyumenneftegaz (case No. A70-26488/2022), despite the final award in the arbitration against Tyumenneftegaz being rendered in late 2022.

Gazprom Export appears to be pursuing the same course of action against Polish EuRoPol GAZ (case no. A56-96787/2023), seeking to restrain an SCC arbitration against itself. In the arbitration, EuRoPol claims nearly USD 1.5 billion from Gazprom Export over gas delivery delays caused by international sanctions as well as Gazprom's request to pay for gas in roubles.

On 18 October 2023, the Russian Supreme Court refused to hear Siemens' appeal (case no. 305-ЭС23-19401) of an April decision by the Moscow Arbitrazh Court restraining it from continuing a VIAC-administered arbitration against Russian Railways

Another recent example – involving domestic litigation rather than arbitration – includes an application by Mr. Alexey Kutyavin, a former member of the board of Latvian PNB Banka. He sought to restrain the bank from pursuing a lawsuit against him in the Latvian courts (case No. A28-2754/2023). The Russian court agreed with the applicant that the mere fact that Latvia essentially entirely ceased issuing visas for Russian nationals – thereby preventing the applicant from travelling to Lavia to participate in the proceedings in person – was sufficient to grant his request.

Concluding remarks

All the cases discussed above show that the ability of Russian parties to seek "safe haven" in domestic courts has now become a significant factor in international disputes, consequently leading to a rise in anti-suit injunctions applications by foreign counterparties seeking to pre-empt applications in Russia. This trend requires careful consideration by anyone contemplating a dispute with a Russian counterparty.

The Moscow Arbitrazh Court decision accepting the application is available here.