

McNAIR CHAMBERS – QUARTERLY UPDATE – AUTUMN 2016

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

Recent Developments

On 3 August 2016, the Iranian Minister's Cabinet approved an amended draft of the Iran Petroleum Contract (IPC) and sent it to parliament for approval. However, on 16 August 2016, the oil minister announced (following a meeting with the speaker of Parliament) that the contracts would need further amendments in light of comments from lawmakers and other advisory bodies, and would not at this stage be sent to the parliamentary assembly for final approval. Subsequently, on 17 September 2016, it was reported that Iran's parliament had given the go-ahead to the government to put a new oil contract model into effect.

On 17 October 2016, Naftogaz (a Ukrainian state-owned group of companies in the oil and gas sector) commenced arbitration proceedings against Russia, alleging that its assets in Crimea had been illegally transferred to a Russian state-owned company. These are the latest in a wide-ranging array of proceedings brought against Russia by Ukraine or Ukrainian individuals/entities arising out of Russia's annexation of Crimea in March 2014. On 15 September 2016, Ukraine announced that it had instituted arbitration proceedings against Russia under UNCLOS 1982, alleging that Russia had violated Ukraine's rights in the Black Sea, Sea of Azov and Kerch Strait, including rights to offshore natural resources. According to online media there are also numerous applications pending before the European Court of Human Rights, as well as the prospect of proceedings before the International Court of Justice, the International Criminal Court and several arbitrations under the auspices of the Permanent Court of Arbitration.

In October 2016, it was reported that Canada and the European Union had signed a free trade agreement, the Comprehensive Economic and Trade Agreement. It is expected that it will be provisionally implemented in 2017, although it will likely take years before it becomes fully effective following parliamentary approval throughout Europe. New dispute resolution provisions will apply, with a move away from the current arbitration system to a permanent and institution-based dispute settlement tribunal. Members of the tribunal will be designated in advance by the authorities of the EU and Canada, rather than being chosen by the investor and state. The three members of the tribunal dealing with a given dispute will be allocated at random to guarantee their impartiality.

International and investment treaty arbitration

- In a partial award handed down on 30 June 2016 in the ongoing proceedings between **Croatia and Slovenia**, a tribunal held that while Slovenia, by engaging in ex parte contact with the arbitrator originally appointed by it, acted in violation of provisions of its arbitration agreement with Croatia, the violations were not of such a nature as to

entitle Croatia to terminate the Arbitration Agreement, nor did they affect the Tribunal's ability, in its current composition, to render a final award independently and impartially.

- **CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8)**. In an award dated 26 July 2016, an ICSID Tribunal considered what constituted the “seat” of a company for the purposes of determining whether the company could be considered an investor and thus entitled to the protection of the bilateral investment treaty between Cyprus, and Serbia and Montenegro.
- **Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited (TANESCO) ICSID Case No. ARB/10/20**. In a decision dated 12 September 2016, an ICSID Tribunal reconsidered the decision it had made earlier in the case on the basis that the Respondent had misled the Tribunal as to material facts at the time of making the earlier award.

International Law

- In a series of three decisions handed down on 5 October 2016 (**Marshall Islands v Pakistan; Marshall Islands v United Kingdom; Marshall Islands v India**), the International Court of Justice (by a majority) upheld the objections to jurisdiction raised by Pakistan, India and the United Kingdom, based on the absence of a dispute between the parties, and found that it could not proceed to the merits of the case.

Arbitration and Litigation in the English courts

- **L R Avionics Technologies Ltd v The Federal Republic of Nigeria & Anor [2016] EWHC 1761 (Comm) (15 July 2016)**. In a decision handed down on 15 July 2016 in *L R Avionics Technologies Ltd v The Federal Republic of Nigeria & Anor* [2016] EWHC 1761 (Comm), the English High Court accepted Nigeria's argument that state immunity applied to set aside a charging order over premises owned by Nigeria.
- **Patel v Mirza [2016] UKSC 42**. By a decision handed down on 20 July 2016 in *Patel v Mirza* [2016] UKSC 42, the UK Supreme Court held that a claimant seeking compensation for unjust enrichment was not to be debarred from enforcing his claim simply because the claim sought the recovery of money paid pursuant to a contract for the commission of an illegal activity. The doctrine of illegality has been an important but much-debated area of English law and, in this decision, the Supreme Court held that the rule arising out of previous case law (*Tinsley v Milligan* [1994] 1 AC 340) was no longer to be followed.
- **Gerald Metals S.A v Timis & Ors [2016] EWHC 2327 (Comm)**. In a decision handed down on 21 September 2016, the English Commercial Court, having refused two applications for a freezing order and relief pursuant to section 44 of the Arbitration Act 1996, considered the interaction between expedited procedures/emergency arbitrator provisions in arbitral rules and applications to court for interim relief.
- **Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)**. In a decision handed down on 15 September 2016, the English Commercial Court declined to set aside an arbitration award in which an arbitrator awarded third party funder costs to the successful party in ICC proceedings.

8th November 2016