

McNAIR CHAMBERS – QUARTERLY UPDATE – SPRING 2016

Welcome to the latest McNair Chambers quarterly round-up, in which we provide a summary of some key judicial and arbitral decisions 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.

Summary

Since our last update there have been several significant judgments handed down by the English courts concerning arbitrations touching aspects of agreements to arbitrate, bias/conflicts of interest, setting aside of arbitration awards and enforcement. In another important development concerning arbitration, the DIFC Court of Appeal confirmed the use of the DIFC as a “conduit jurisdiction” for the ultimate enforcement of international awards against assets in Dubai.

The English courts have given important judgments on aspects of state and diplomatic immunity, and the extent to which a court can conduct its own inquiry into a diplomat’s credentials. Also in the field of Public International Law, the International Court of Justice held hearings on admissibility and jurisdiction in the Marshall Islands’ cases against India, Pakistan and the United Kingdom surrounding the pursuance of nuclear disarmament.

Recent Developments

In April 2016, it was reported that the Hague District Court had set aside the US\$50 billion Energy Charter Treaty awards made in the Yukos case. A fuller update on this development will be published on the McNair Chambers website in due course.

On 17 March 2016, a hearing took place in the arbitration proceedings between Croatia v Slovenia focusing on the legal implications for the arbitration proceedings of events reported to have occurred in late-2014 and early-2015 that led Croatia to request the discontinuation of the proceedings. In response to the Tribunal’s letter of 1 December 2015 inviting both sides to make further written and oral submissions, Slovenia filed submissions and appeared at the oral hearing; however, Croatia declined to do so.

On 15 March 2016, a decision was handed down in *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30) in which an ICSID Tribunal rejected Venezuela’s fifth challenge to arbitrator L. Yves Fortier, Q.C.

On 22 January 2016, ICSID published a new issue of its online publication, the ICSID Caseload – Statistics (2016-1), showing that 52 ICSID cases were registered in 2015. Over a quarter of new cases (15) involved Spain, and 42% of the new cases related to the electric power and other energy sectors.

Arbitration

- In *Anzen Ltd v Hermes One Ltd* [2016] UKPC 1 by a decision handed down on 18 January 2016, the Privy Council allowed an appeal against decisions of the courts of the British Virgin Islands (“BVI”), holding that a party was entitled to an order staying litigation proceedings where there was an applicable arbitration clause which provided that either party “may” submit a dispute to arbitration. This was the case even where the party entitled to the stay of proceedings had not, in fact, made a reference to arbitration. The decision in *Anzen* reaffirms some basic principles of arbitration, which will be important to the development of arbitration in the BVI – where the new Arbitration Act 2013 entered into force on 1 October 2014.
- In *Gold Reserve Inc v The Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm), by a decision handed down on 2 February 2016, the English High Court declined to set aside an order for enforcement of a US\$713million ICSID arbitration award on state immunity grounds, but criticized the claimant’s counsel for “serious” failings in their duty of full and frank disclosure when seeking the order for enforcement of the award.
- In a decision handed down on 25 February 2016 in *DNB Bank ASA v Gulf Eyadah CA-007-2015*, the Dubai International Financial Centre (“DIFC”) Court of Appeal decided unanimously to reverse a first instance finding and so to confirm that the DIFC Courts can be used as a “conduit jurisdiction”. This is an important judgment highlighting a method (indeed, a potentially easier route) by which parties can attempt enforcement of a foreign court judgment against assets within Dubai’s jurisdiction, although parties seeking to do so must still bear in mind the need to consider the possible approach of the courts of Dubai. However, in April 2016, it was reported that the Dubai Court of Appeal had declared that it was not satisfied that the UK was properly a signatory to the New York Convention and, accordingly, had declined to enforce an arbitral award against a UAE energy company. If correct, this development is likely to diminish perceptions of Dubai’s attractiveness to parties as an enforcement jurisdiction.
- In February and March, two decisions were handed down by the English High Court, in which the Commercial Court was required to consider matters of alleged arbitrator bias. In *Cofely Ltd v Bingham & Anor* [2016] EWHC 240 (Comm), the English High Court found (in a rare example of such a case) that a number of grounds put forward by the applicant raised the real possibility of apparent bias, and, on the basis that the applicant had made out the requisite grounds for removal of the arbitrator under section 24(1)(a) of the Arbitration Act 1996, an order for removal would be made if the arbitrator did not resign. In contrast, in *W Ltd v M SDN BHD* [2016] EWHC 422 (Comm), despite finding that the facts leading to alleged bias fell directly within the non-waivable red list set out in the IBA Guidelines on Conflicts of Interest in International Arbitration, the learned judge dismissed a section 68 challenge and, with diffidence, concluded there were weaknesses in the IBA Guidelines.
- On 4 March 2016, the English High Court handed down its decision in *National Iranian Oil Company v Crescent Petroleum Company International Ltd & Anor* [2016] EWHC 510 (Comm) in which it rejected as “unarguable” a section 68 challenge to an arbitration award. This case once again emphasizes the high threshold which must be met for a successful section 68 challenge. It also includes useful statements on the impact of public policy on arbitration awards, particularly with reference to corruption and fraud.

Public International Law

- On 7-11, 14 and 16 March 2016, the International Court of Justice (ICJ) heard arguments on jurisdiction and admissibility in the cases brought by the Marshall Islands against India, Pakistan and the United Kingdom. This is the first time the ICJ has been asked to address issues relating to nuclear weapons since its 1996 advisory opinion, in which it unanimously concluded that there "exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.
- Important PIL issues concerning immunity have also been raised recently in the English domestic courts. In *Estrada v Al-Juffali* [2016] EWHC 213 (Fam), Hayden J rejected an attempt to use diplomatic immunity to defeat financial relief proceedings brought by the ex-wife of a senior Saudi businessman who purported to serve as a diplomatic representative of St Lucia to the International Maritime Organisation. The Judge did so on the grounds that the person concerned was only entitled to immunity while exercising official functions. Aspects of this decision were subsequently reversed by the Court of Appeal but the lack of immunity due to permanent residence in the UK was confirmed (an appeal to the Supreme Court is being sought).
- By contrast in *Fawaz Al-Attiya v Al Thani* [2016] EWHC 212 (QB), Blake J held that, in the face of a certificate from the Foreign & Commonwealth Office concerning the Defendant's status as a diplomat, the Court was not permitted to look behind that certificate which "was conclusive as to the facts stated therein". This was so despite there being cogent evidence that he had not performed any such functions since his arrival.
- In *Ogelebanwei v The President of Nigeria and others* [2016] EWHC 8 (QB), the Court declined to grant leave to enforce a Nigerian court judgment against the President and the Attorney General of Nigeria in respect of an unlawful military action in Nigeria against particular communities, on the basis that they benefitted from State Immunity. The Judge held that the exclusion from immunity in respect of personal injury in Section 5 of the State Immunity Act 1978 was justifiable in being limited to "damage caused by an act or omission in the United Kingdom". The Judge concluded that Major-General Bello, the military commander of the relevant operation, was not capable of invoking immunity and thus leave was granted to enforce the Judgment against him.

Contract law

- In *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, by a decision handed down on 2 December 2015, the Supreme Court (Lords Neuberger, Clarke, Sumption, Carnwath and Hodge) held that it had been wrong to imply into a contract a term to the effect that a tenant was entitled to a rent refund for rent paid in advance on a quarterly basis if the tenant exercised a contractual break clause. Such a term could only be implied where such an intention was demonstrated in a very clear case. The Supreme Court's decision contains useful guidance on the processes adopted by the English courts to both the implication of terms into a contract and the interpretation of contractual terms.

Iran Sanctions

- On 16 January 2015, it was announced that the IAEA has verified that Iran had complied with its responsibilities under the Joint Comprehensive Plan of Action and accordingly, international sanctions on Iran would be lifted in accordance with that agreement. On 17 January 2016, a day after sanctions were lifted, it was reported in the international press

that Iran intended to buy 114 civil aircraft from Airbus, which could be worth \$10 billion. It was announced on the same day that the US had imposed new sanctions in respect of a recent ballistic missile test.

- The UK Government has issued updated guidance on doing business with Iran, including an announcement that UK Export Finance (UKEF) is ready to provide assistance to entities wishing to trade with Iran. The guidance is available [here](#). Guidance has also been issued by the US Office of Foreign Assets Control [see here](#). In addition, a joint statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif was released on 16 January 2016 [see here](#). This remains a complicated area, and any business considering doing business in or with Iran is advised to take legal advice.

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