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INTERNATIONAL ARBITRATION UPDATE

DECEMBER 2020

Message from Khawar Qureshi QC, Head of Chambers

In this update we review the UK Supreme Court decision handed down on 27 November 2020 in the Halliburton v Chubb case concerning arbitrator bias, as well as the recent ICC arbitration rule changes. The approach within the ICSID context to grants of stay of an award and costs orders have also been the subject of recent consideration.

As we approach the end of a year (which hopefully marks the gradual move away from the Covid pandemic), it remains for me to wish you all the very best for the Festive Season and the New Year.

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

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- ***Halliburton v Chubb: UK Supreme Court clarifies the legal duty of arbitrators to disclose matters that might reasonably suggest bias.*** *However, there is already significant debate as to whether the judgment is in step with the expectations of parties in international arbitration.*
- ***ICC Arbitration Rules 2021 published.*** *Amendments include a positive duty on arbitrators to ensure effective case management, increased scope for consolidation and joinder, the raising of the financial threshold for expedited arbitrations, and new disclosure requirements concerning third party funding.*
- ***Italy defeats claim based on amendments to regulatory regime governing investment in photovoltaic plants.*** *Claimants, having never effected their investment by making their plant operational, had acquired no rights under the regulatory regime.*
- ***Pakistan obtains continuation of stay of enforcement on condition of granting financial security over 25% of the award.*** *Pakistan subsequently failed to meet those conditions by the stipulated deadline.*

- ***Tribunal rejects Croatia's "intra-EU" objection where the arbitration was filed before Achmea was handed down.*** *Tribunal holds that EU Member States' January 2019 declarations concerning Achmea's consequences are not an authoritative statement of EU law.*

- ***Tribunal finds it has no power to order third party joinder in the absence of all parties' consent.*** *ICSID tribunals have no power to modify an arbitration clause without party agreement.*

- ***Nigeria defeats Interocean claim but can't recover "unreasonably high" costs.*** *Travel and accommodation expenses of US$1.2 million reflected "opulent, if not sumptuous choices".*

- ***Spain fails to have entire Tribunal disqualified for deciding to hold a virtual (rather than physical) hearing****. The Tribunal was under a "duty" to undertake an assessment of the Covid-19-related risks of a physical hearing.*

HALLIBURTON COMPANY V CHUBB BERMUDA INSURANCE LTD [2020] UKSC 48 (27 NOVEMBER 2020)

Introduction and Background

The facts concerned arbitrations that arose out of the Deepwater Horizon blowout disaster in the Gulf of Mexico in 2010. Halliburton provided cementing and well-monitoring services in relation to Deepwater Horizon. When Chubb refused to pay an insurance claim made by Halliburton under its Bermuda Form insurance policy held with Chubb, Halliburton commenced arbitration ("Arbitration 1"). Pursuant to the contractual mechanism in the parties' agreement, the English Commercial Court appointed Kenneth Rokison QC (a highly regarded and experienced arbitrator) as the chairperson of the tribunal, notwithstanding that Mr. Rokison QC had been one of the people nominated by Chubb to be the chairman, and that Halliburton had objected to his appointment.

Another arbitration was commenced between Chubb and Transocean Holdings LLC, the owner of the Deepwater Horizon rig concerning Transocean's excess liability claim under its own Bermuda Form insurance policy held with Chubb ("Arbitration 2"). Mr. Rokison QC was appointed as Chubb's party-nominated arbitrator. He did not disclose (as he explained, due to oversight) to Halliburton in Arbitration 1 his proposed appointment by Chubb in Arbitration 2.

When Halliburton discovered, in November 2016, that Mr. Rokison QC had been appointed by Chubb in Arbitration 2 (as well as having accepted a joint appointment in a third arbitration that also involved Transocean), it sought his removal under Section 24 of the Arbitration Act 1996 on grounds that there were circumstances which gave rise to justifiable concerns as to lack of impartiality.

Halliburton was unsuccessful at first instance before Popplewell J, who held that no disclosure had been necessary because there were no circumstances giving rise to justifiable concerns as to Mr. Rokison QC's impartiality.

Halliburton was also unsuccessful before the Court of Appeal, which held that, while disclosure ought to have been made, the mere non-disclosure was not sufficient (without more) to justify the inference of apparent bias for a Section 24 challenge.

Decision

The Supreme Court (Lord Hodge giving the main judgment) dismissed Halliburton's appeal.

Importantly, the Supreme Court confirmed that Mr. Rokison QC had been under a legal duty to disclose the appointment in Arbitration 2 (a potentially overlapping arbitration with only one common party).

However, relying upon the explanations given by Mr. Rokison QC concerning his oversight and his correspondence with Halliburton's solicitors, the Supreme Court held that, on the facts, the fair-minded and informed observe would not infer a real possibility of unconscious bias on his part.

Concluding Remarks

The Supreme Court's judgment has been welcomed for clarifying that the arbitrator's disclosure duty is a legal duty under English law (not simply good practice). However, the overall result of the case has seen concerns raised by commentators that the judgment does not go far enough to protect international trust in the English system, which the Supreme Court itself recognised "*may not translate easily for the many parties to arbitrations who are familiar with different legal systems*".

Whilst the judgment relates primarily to English-seated arbitrations, the participation (as interveners making written submissions) of the ICC, LCIA, CIArb, LMAA and GAFTA illustrate a recognition that the case will have impacts in international arbitration as well.

For a link to McNair Chambers' webinar on *Halliburton v Chubb* featuring a panel of eminent international arbitration practitioners, please **click here**.

ICC LAUNCHES UPDATED ARBITRATION RULES TO APPLY TO CASES FILED FROM 1 JANUARY 2021

Introduction and Background

On 1 December 2020, the ICC launched its updated ICC Arbitration Rules 2021. These rules will apply to cases filed from 1 January 2021. The key changes include the following:

Article 22(2) – the new rule phrases the duty to adopt such procedural measures it considers appropriate in mandatory language ("shall adopt") rather than the former permissive language ("may adopt").

Article 10(b) – the new rule clarifies that consolidation may be ordered where "all of the claims in the arbitrations are made under the same arbitration agreement or agreements".

Article 10(c) – the new rule allows consolidation to also be ordered when "the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible".

Expedited arbitration – the ICC has had more than 146 expedited arbitrations since the procedure was introduced in 2017. Whereas previously the financial opt-out threshold was US$2 million, that threshold has now been raised to US$3 million for arbitration agreements concluded on or after 1 January 2021.

Article 12(8) – the new rule allows the Court to disregard "unconscionable arbitration agreements", in disputes involving multiple claimants or multiple respondents, where necessary to avoid "significant risk of unequal treatment and unfairness that may affect the validity of the award".

Article 36(3) – the new rule allows a party to request, within 30 days of receipt of an award, the tribunal to issue an additional award to rule on claims raised in the proceedings but not addressed in the award.

Article 11(7) – the new rule requires party to communicate promptly to the tribunal, the other parties and the ICC Secretariat, the identity of "any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration".

Article 17 – the new rule requires parties to give the tribunal, the other parties and the ICC Secretariat timely notice of any change in their legal representation. The tribunal will be empowered to decline the proposed change in representation or to limit their participation.

Article 13(6) – the new rule introduces a requirement for neutrality in ICC treaty-based arbitrations by disallowing all arbitrators on the tribunal from holding the same nationality of any of the parties (unless the parties agree otherwise).

Article 29(6)(c) – the new rule provides that the ICC emergency arbitrator provisions are unavailable for ICC treaty-based arbitrations.

Article 26 – the new rule empowers tribunals to decide (after consultation with the parties and consideration of the relevant circumstances of the particular case) between whether to conduct hearings physically or virtually.

Concluding Remarks

The 2021 revision to the ICC Rules are intended to boost "efficiency, flexibility and transparency" in ICC arbitration. The amendments reflect the exigencies of modern arbitration, including concerns raised in the specific context of investment treaty arbitration, and the realities of dispute resolution since the onset of the Covid-19 pandemic.

ESKOSOL SPA (IN LIQUIDAZIONE) V ITALY (ICSID CASE NO.ARB/15/50) (AWARD, 4 SEPTEMBER 2020)

Introduction and Background

The claimant was an insolvent Italian company that was 80% owned by a Belgian entity, Blusun SA. The claimant commenced proceedings against Italy under the Energy Charter Treaty alleging that amendments made in 2011 to Italy's regulatory regime for photovoltaic plants amounted to a breach of the Fair and Equitable Treatment ("FET") standard. Additionally, the claimant claimed that the regulatory changes were done in breach of its legitimate expectation that the regulatory or legislative regime would not be changed. Blusun SA had commenced its own proceedings against Italy (which were dismissed in 2017).

Italy raised objections based on lack of jurisdiction and/or inadmissibility.

Italy contended that the Tribunal did not have jurisdiction because, at the time the arbitration proceedings were registered, the claimant, by virtue of having been placed under the control of an Italian receiver appointed and supervised by the Italian courts, was not "foreign controlled" and therefore was not a foreign investor but rather had Italian nationality by virtue of the fact that it was controlled by its Italian trustee in bankruptcy, rather than its Belgian shareholder.

Additionally, Italy contended that the fact that Blusun SA had previously brought arbitration claims rendered the claimant's proceedings inadmissible under Article 41(5) of the ICSID Arbitration Rules.

Decision

The Tribunal (Jean Kalicki, President; Guido Tawil; Brigitte Stern) dismissed Italy's objections but rejected the substantive claims.

The Tribunal applied Section IV of the Final Act of the European Energy Charter Conference reflecting the Understanding that was reached between the members of the Energy Charter Treaty on the meaning of "control". It was noted that there was no temporal clarification concerning the point at which "foreign control" was to be assessed in Article 26(7) of the Energy Charter Treaty, nor in Article 25(2)(b) of the ICSID Convention. Nevertheless, the Tribunal held that, at all of the points in time that were potentially relevant to that assessment, the claimant was controlled 80% by Blusun SA. The fact that the claimant's Italian trustee-in-bankruptcy and/or the Italian court supervising the liquidation exercised significant influence of the management of the company's assets did not lead to the conclusion that the claimant was "Italian controlled" rather than "foreign controlled". In particular, Blusun SA still retained the ability to exercise control, for instance, by an injection of funds.

The Tribunal rejected Italy's objection as to admissibility. The instant proceedings and Blusun SA's previous proceedings were based on different provisions of the Energy Charter Treaty. Additionally, the claimant was not wholly owned by Blusun SA and, even though it might obtain some portion of the damages by way of shareholder distribution, that was no reason to deprive the claimant of its independent right to arbitration.

However, having dismissed Italy's jurisdictional/admissibility objections, the Tribunal rejected the substantive claims on the merits.

The two 2011 decrees that the claimant argued had caused it financial loss had been general enactments that intended to apply to the whole industry. They were adjustments to the core elements of the incentive scheme concerning photovoltaic plants, including an adjustment on how many new plants could qualify for incentives, the time periods for doing so, and the level of subsidised tariffs). These were changes that were not irrational and were consistent with the original objectives to stimulate industry growth.

The claimant had failed to demonstrate any specific commitment that was made to it in particular, or the broader industry, that could give rise to a legitimate expectation that the regulatory regime would not change. A general statement that a specific regulatory regime would not be "cavalierly altered" was insufficient in this regard. Even if that statement was capable of giving rise to legitimate expectations, it would only do so for a class of beneficiaries that had rights under the terms of that regulatory regime. The claimant had no such rights because it had never complied with the essential preconditions of the legislation – its photovoltaic plant had never become operational (a crucial qualifying event).

Concluding Remarks

The decision provides a valuable illustration of the principles concerning the admissibility of parallel investment treaty claims advanced by related parties, as well as the assessment of the requirement of “foreign control” in ECT arbitrations.

TETHYAN COPPER COMPANY PTY LTD V ISLAMIC REPUBLIC OF PAKISTAN (ICSID CASE NO. ARB/12/1 – ANNULMENT PROCEEDINGS) (DECISION ON STAY OF PROCEEDINGS, 17 SEPTEMBER 2020)

Introduction and Background

In July 2019, an ICSID Tribunal (Klaus Sachs, President; Lord Hoffmann; Stanimir Alexandrov) handed down an award in favour of the claimant investor for US$5.9 billion against Pakistan in a dispute arising out the claimant's interest in the Reko Diq mine.

In November 2019, Pakistan commenced annulment proceedings and requested a provisional stay of enforcement.

In February 2020, the claimants applied for the termination of the stay of enforcement.

Decision

The Annulment Committee (Joongi Kim, President; Judge Bernardo Sepulveda-Amor; Carita Wallgren-Lindholm) continued the stay of enforcement, subject to conditions.

The Annulment Committee upheld the position that there is no presumption either for or against the maintenance of a stay of enforcement in ICSID annulment proceedings. The burden is on the party that seeks to maintain the stay to demonstrate that there are circumstances that justify its maintenance. The following factors were identified as material to that assessment: whether the request for stay had been made in good faith; the balance of the potential prejudice to each side; and the risk of non-recoupment and of non-compliance.

In the instant case, the request had not been made in bad faith. As regards prejudice to Pakistan if the stay was lifted, the Annulment Committee recognised the potential economic hardship to Pakistan, but did not consider that such hardship was either as severe or immediate as Pakistan had suggested. Any prospect of enforcement was immediate but would take 12-18 months to take execution proceedings through national courts. Additionally, Pakistan's creditworthiness and ability to maintain and receive support from the IMF should not have changed, as the IMF would have been aware of Pakistan's potential multi-billion dollar liability since the ICSID proceedings had been commenced as long ago as 2011. Pakistan would not suffer a risk of non-recoupment in light of offers by the claimant to put monies received in escrow. Conversely, the claimant had not shown a sufficient risk of non-compliance by Pakistan if the award were not annulled.

The stay was continued but made subject to conditions. The Annulment Committee considered that a pledge by Pakistan to give security for 25% of the award (approximately US$1.5 billion with interest) would be an adequate balancing measure in terms of easing the burden on Pakistan and providing some comfort for the claimant. The Reko Diq mine itself (valued at US$270 billion) would serve as collateral.

The Annulment Committee, noting that Pakistan had twice failed to provide security as ordered by previous tribunals, also required Pakistan to provide an undertaking to pay the amount under the award within 120 days if it was not annulled.

The claimant was ordered to provide a guarantee to cover Pakistan's costs of providing the security if the award was annulled, in addition to an undertaking that it would pay any amounts that Pakistan could not cover from the escrow account holding assets obtained from enforcement.

In the event that Pakistan failed to provide security within 30 days, the stay would be lifted.

Concluding Remarks

The Annulment Committee's decision illustrates the complex arrangements that can be reached in an attempt to balance the interests of award debtors and creditors in ICSID annulment proceedings.

Postscript

It was subsequently reported in November 2020 that the stay had been partially lifted as a result of Pakistan's failure to meet the security conditions laid out by the Annulment Committee.

RAIFFEISEN BANK INTERNATIONAL AG & ANOR V REPUBLIC OF CROATIA (ICSID CASE NO. ARB/17/34) (DECISION ON THE RESPONDENT'S JURISDICTIONAL OBJECTIONS, 30 SEPTEMBER 2020)

Introduction and Background

In September 2017, the claimants commenced ICSID arbitration proceedings alleging that Croatia had breached the Fair and Equitable Treatment (FET) standard in the Austria-Croatia BIT arising out of 2015 legislation that converted Swiss franc-denominated loans issued by the claimants to consumers/business customers in 2004 into Euro-denominated loans.

Article 11(2) of the Austria-Croatia BIT provided that "the Contracting Parties are not bound by the present Agreement insofar as it is incompatible with the legal acquis of the European Union (EU) in force at any given time".

On 6 March 2018, the Court of Justice of the European Union held in *Achmea (C-284/16)* that Articles 267 and 344 of the Treaty on the Functioning of the European Union precluded investor-state dispute settlement provisions in intra-EU BITs.

On 15 and 16 January 2019, the Member States of the EU issued declarations recognising the consequences of *Achmea*.

Accordingly, Croatia raised a jurisdictional objection that Article 9 of the BIT (containing the arbitration clause) was invalid following the decision in *Achmea* and the terms of Article 11(2) of the BIT.

The European Commission intervened as a non-disputing party and filed submissions arguing that *Achmea* deprived the tribunal of jurisdiction.

Decision

The Tribunal (Lucy Reed, President; Stanimir Alexandrov; Lazar Tomov) dismissed Croatia's jurisdictional objection.

The Tribunal noted that the incompatibility with EU law of a BIT was to be assessed against the EU law "in force at any given time". The relevant point in time for determining jurisdiction for the purposes of the ICSID proceedings was the date when the claim was registered (15 September 2017).

A majority of the tribunal held that it was not required to interpret or apply EU law in the proceedings, but rather was required to take it into account as "as a necessary component of the comparative analysis mandated in Article 11(2) of the BIT".

The majority held that, although *Achmea* had formed part of the EU *acquis* since it was handed down on 6 March 2018, it had not formed part of EU law at the date that the ICSID proceedings were registered.

As regards the declarations made by the EU Member States on the interpretation of *Achmea*, the Tribunal held that these did not form part of the EU *acquis* at all. They were not a binding interpretation of EU law, which could only be given by the Court of Justice of the European Union.

Concluding Remarks

The Tribunal followed previous decisions concerning the validity of the Austria-Croatia BIT since Achmea and provides a further illustration that the "intra-EU objection" or Achmea objection is not 'taking hold' in international investment arbitration decisions.

AYAT NIZAR RAJA SUMRAIN & ORS V STATE OF KUWAIT (ICSID CASE NO. ARB/19/20) (DECISION ON THE JOINDER APPLICATION, 5 OCTOBER 2020)

Introduction and Background

The claimant investors commenced ICSID proceedings under the Egypt-Kuwait BIT relating to their alleged investment in a real estate development project in Kuwait.

More than 1 year after the claimants registered the proceedings with ICSID, the claimants applied for a third party to be joined to the proceedings. The third party was a person who held an indirect shareholding in the company that had entered into the BOT contract with Kuwait's Ministry of Finance. This agreement was "at the heart" of the arbitration. In addition, the third party was presented as the main creditor and financier of that company by virtue of her having financed a performance bond pursuant to the BOT contract.

Decision

The Tribunal (Zachary Douglas QC, President; Fernando Pierola Castro; Samuel Wordsworth QC) rejected the application for joinder.

The tribunal considered whether or not it had a procedural power or discretion to join a third party.

The applicable ICSID Convention and the ICSID Arbitration Rules contained no provisions concerning joinder. ICSID Arbitration Rule 44 provides ISCID tribunals with powers to resolve procedural issues that are not expressly governed by any of the ICSID Convention, the ICSID Arbitration Rules or the relevant arbitration agreement. However, the Tribunal considered that this was an insufficient basis for the proposed power to join a third party.

The Tribunal considered that, in the absence of consent from Kuwait to the joinder (which was not forthcoming), it had no power to order joinder.

The Tribunal also considered arguments that the third party would itself have qualified as an "investor" with a qualifying "investment" under the Egypt-Kuwait BIT. However, the Tribunal held that this was not a relevant factor, since it did nothing to alter the fact that the third party was not a party to the arbitration agreement.

Whilst an ICSID Tribunal had the power to interpret and apply arbitration agreements, there was no power to modify an arbitration agreement in the absence of the consent of all parties.

Concluding Remarks

Given the private, contract-based nature of arbitration, issues of joinder of third parties (and also consolidation of related arbitrations) have been considered carefully by most arbitral institutions in the course of drafting their procedural rules. Whilst such issues have perhaps arisen less often in investor-state arbitration, as compared to regular commercial arbitration, this decision provides an important statement of the relevant principles on joinder.

INTEROCEAN OIL DEVELOPMENT COMPANY & ANOR V NIGERIA (ICSID CASE NO. ARB/13/20) (AWARD, 6 OCTOBER 2020)

Introduction and Background

The claimant US investors commenced ICSID arbitration against Nigeria alleging breaches of Nigeria's Investment Promotion Commission Act and/or customary international law, including the indirect expropriation by diluting the claimants' interest in a joint venture that held a 40% interest in an oil mining licence.

Nigeria advanced jurisdictional objections, including that claims of indirect expropriation and breach of customary international law were excluded from the scope of the protections provided by Nigeria's Investment Promotion Commission Act.

Decision

The Tribunal (William Park, President, Julian Lew QC; Justice Edward Torgbor) dismissed both the jurisdictional objections and the substantive claims.

As regards jurisdiction, the Tribunal rejected the argument that indirect expropriation and customary international law were outside the scope of the Nigerian legislation. Interestingly, the Tribunal held that customary international law formed part of the English common law, which was directly incorporated into Nigerian law through Section 32 of Nigeria's Interpretation Act.

As regards the substantive claims advanced by the claimants, the Tribunal held, inter alia, that the unlawful dilution and the seizure of the claimants' shareholding in the underlying JV were not acts that were properly attributable to Nigeria. They did not form part of an alleged concerted effort by Nigerian state authorities to expropriate the claimants' investment.

The Tribunal, when considering costs, decided that the "costs follow the event" principle was applicable. However, despite the fact that Nigeria successfully defended itself on the merits, the Tribunal held that it was unable to recover certain of its costs, including travel and accommodation costs. Since Nigeria had been represented *pro bono*, these constituted some of Nigeria's main costs.

The reason why Nigeria was prevented from recovering these costs was because they were claims for "unreasonably high" figures that reflected Nigeria's "opulent, if not sumptuous choices". The round figures claimed for certain witness costs and disbursements (which were described as "obviously odd" and "highly unlikely") were rejected as artificial.

Additionally, Nigeria's claim to recover US$30,000 in costs for the "Hyperlink of processes and documents" was rejected in circumstances where none of Nigeria's submissions or supporting documents had been hyperlinked at all.

Concluding Remarks

The decision provides an important illustration of the need for parties (including States) to maintain accurate records of costs incurred during arbitration proceedings, as well as the need for all parties to be mindful of the need (if there is to be a prospect of recovering costs) for expenses to be incurred reasonably and proportionately.

LANDESBANK BADEN-WÜRTTEMBERG ET AL V SPAIN (ICSID CASE NO. ARB/15/45) (DECISION ON THE SECOND PROPOSAL TO DISQUALIFY ALL MEMBERS OF THE TRIBUNAL, 15 DECEMBER 2020)

Introduction and Background

The underlying proceedings concerned a claim commenced by German banks against Spain pursuant to the Energy Charter Treaty.

On 28 July 2020, the Tribunal members (Sir Christopher Greenwood QC; Charles Poncet; Rodrigo Oreamuno) issued a procedural order to the effect that a hearing that had been scheduled for 27 August–5 September 2020, originally intended to be held in-person, was instead to be held virtually. The Tribunal had been asked by Spain to reconsider its order but had declined to do so.

One of the reasons for the change (from physical to virtual) was because of Mr. Oreamuno's inability to travel to The Hague from Costa Rica because Costa Rica had closed its borders. Furthermore, Mr. Oreamuno had a surgery scheduled to take place on 4 August 2020 and he had been advised (for Covid-19 reasons) to undertake a 2-week quarantine post-surgery and not to travel for a further 2 weeks thereafter.

On 12 August 2020, Spain applied for the entire tribunal to be disqualified for having taken "*partial and unfair decisions*" and having demonstrated that they "*lacked high moral character*". Spain noted that the Costa Rican Government had stated that its borders would reopen on 1 August 2020 – thus permitting travel.

In addition, Spain alleged that Sir Christopher Greenwood and Dr. Poncet should be removed because of their involvement in events surrounding the Frankfurst Investment Arbitration Moot that were organized by the claimants' counsel, which they "*deliberately and in breach of all the ethical and conflict rules did not disclose those invitations and the acceptance thereof*".

Spain alleged that the conduct of the Tribunal was in breach of the IBA Guidelines on Conflicts of Interest and the World Bank's Code of Conduct. In addition, Spain alleged that the Tribunal's conduct amounted to a breach of the draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (recently published jointly by UNCITRAL and ICSID).

Decision

The Chair of the ICSID Administrative Council rejected Spain's application for the disqualification of the Tribunal.

The Chair confirmed that, although the IBA Guidelines, the World Bank's Code of Conduct and the ICSID/UNCITRAL draft Code of Conduct were useful reference material, the decision fell to be determined only by the standards stipulated under Articles 57-58 of the ICSID Convention.

The Chair held that the Tribunal's procedural order indicated that it had conducted a risk assessment in light of "*the extraordinary circumstances and the multiple uncertainties created by the COVID-19 pandemic*". Whilst the result of that risk assessment may have been disappointing to Spain, it could not be said that the risk assessment evidenced a "*lack of high moral character*" on the part of the Tribunal. A third party undertaking a reasonable evaluation of the facts would not conclude that the Tribunal lacked the qualities of independence and impartiality as required.

As regards the additional ground raised against Sir Christopher Greenwood and Dr. Poncet, the Chair held that that ground had not been raised promptly (having been raised more than 3 years after the relevant facts). Furthermore, both arbitrators had confirmed they had received no remuneration or contribution for having participated in the events. Even if the IBA Guidelines were relied on, these matters would have fallen within the Green List and objectively gave rise to no actual conflict of interest.

Concluding Remarks

The decision provides an illustration of the practical impact of Covid-19 upon international arbitrations and (in the context of disqualification applications) the wide margin of appreciation likely to be afforded to Tribunals in navigating those difficulties. The Chair held that the risk assessment which the Tribunal was challenged for undertaking was, in fact, one that it had a "*duty*" to undertake.