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INTERNATIONAL ARBITRATION UPDATE

SEPTEMBER 2020

Message from Khawar Qureshi QC, Head of Chambers

As we begin to understand and adjust to the "new normal" caused by the Covid-19 pandemic, the LCIA has been the first arbitral institution to reflect greater emphasis on virtual hearings in its rule amendments. Meanwhile, ICSID tribunals continue to grapple with the increasingly vigorous (but still mostly unsuccessful) attempts to disqualify arbitrators. In addition, the scope for emergency measures and adverse costs awards in BIT cases has been tested again recently.

All of these developments are headlined below and discussed in further detail (with links to the underlying decisions and documents).

It remains for me to offer our best wishes and hope to see as many of you as possible soon in person.

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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The following updates are covered in this newsletter:

- ***Recent Amendments to LCIA Arbitration Rules.*** *The amendments, which have effect from 1 October 2020, address the role of Tribunal Secretaries, consolidation and concurrent conduct of arbitrations, plus a renewed focus on electronic communication and virtual hearings which will be even more important in light of the Covid-19 pandemic.*

- ***Unsuccessful challenges to arbitrators in ICSID cases highlight the potential pitfalls of disqualification proposals.*** *The two decisions, handed down in July 2020, once again show how difficult it is for such challenges to succeed in all but the rarest of cases. If you require further information on such challenges, please see the full newsletter or contact us for copies of our texts*

(published by Wildys) "Conflicts of Interest in International Arbitration" and "Bilateral Investment Treaties – The Essentials".

- ***ICSID Tribunal refuses to order Sierra Leone to suspend criminal proceedings in mining dispute.*** *The high threshold that must be met for an ICSID Tribunal to intervene in a sovereign state's right to conduct its own criminal investigations was once again demonstrated in this case. While the Tribunal stopped short of ordering provisional measures, it did request the Government of Sierra Leone to take certain steps in relation to the bail conditions of certain of the claimant's employees.*

- ***Emergency measures granted in Moldovan airport dispute.*** *SCC Emergency Arbitrator issues quick award restraining Moldova from taking action to terminate a concession agreement, but refusing emergency relief in respect of "special taxes", pending constitution of a full Tribunal.*

- ***Tribunal orders Claimants to pay US$6.5 million of Panama's legal costs in investment arbitration trademark dispute.*** *While parties will often be ordered to bear their own costs in investment treaty disputes, in some circumstances a Tribunal will order payment of the other side's costs. In the Bridgestone v Panama dispute, the Tribunal awarded Panama US$6.5 million in costs owing to the Claimants' conduct of the dispute and proceedings – including almost $150,000 in an unsuccessful application to remove Panama's expert witness.*

LCIA ARBITRATION RULE UPDATE

In August 2020, the LCIA announced that it had made changes to the LCIA Arbitration Rules (with effect from 1 October 2020), with amendments including:

- Greater emphasis on virtual hearings and electronic communication;
- Explicit provisions relating to Tribunal secretaries;
- Broadening of powers to order consolidation and concurrent conduct of arbitrations;
- Express provision for early determination.

Virtual hearings

In line with the "new normal" following the Covid-19 pandemic, the LCIA Rules now make explicit reference to the conduct of hearings "virtually". This will be of particular significance in the context of international arbitrations where parties, counsel and witnesses are located in multiple jurisdictions. In addition, the emphasis is on the filing and service of arbitration documents electronically (essentially, email) with reference to other methods of service such as registered post or courier having been deleted.

Tribunal secretaries

The role of Tribunal secretaries has long been a controversial topic, with concerns that secretaries who were not appointed by the parties (albeit for whom consent is often sought from the parties) may take on an overly significant role in proceedings. A new Article 14A sets out a number of provisions relating to the role of a Tribunal secretary, including:

- Under no circumstances may a Tribunal delegate its decision-making function to a Tribunal secretary;
- Before assisting, a Tribunal secretary must provide a declaration similar to that provided by arbitrators confirming that there are no circumstances giving rise to justifiable doubts as to independence or impartiality, and that the secretary will devote sufficient time, diligence and industry to the arbitration. This is a continuing duty;
- Approval of the parties is required for the appointment of a Tribunal secretary (including to their hourly rate, if applicable).

This is a welcome change, which formalises the guidance previously issued by the LCIA on Tribunal secretaries.

Early determination

Two new subsections have been added to Article 22 (Other Powers), giving the Tribunal the explicit power (in addition to the implicit power contained in Article 19) to (i) decide the stage of the arbitration at which any issue will be determined and in which order (Article 22.1(vii)) and (ii) determine that a claim or matter raised by a party is "is manifestly outside the jurisdiction of the Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an order or award to that effect (an "Early Determination")" (Article 22.1(viii)).

More generally, a requirement that the Tribunal hand down its decision within 3 months (building on the previous "as soon as reasonably possible" requirement) has been added.

Consolidation and concurrent conduct of arbitrations

A new Article 22A adds the power to consolidate or order concurrent conduct of arbitrations, upon the application of a party and subject to the approval of the LCIA Court. In order for consolidation to take place, the agreement of all parties must be obtained; or the arbitrations must be under the LCIA Rules and commenced under the same (or compatible) arbitration agreement, and either between the same disputing parties or arising out of the same transaction or series of related transactions, provided that no arbitral tribunal has yet been formed by the LCIA Court for such other arbitration(s) or, if already formed, that such arbitral tribunal(s) is (are) composed of the same arbitrators. Concurrent conduct of arbitrations may be ordered where the same arbitration tribunal has been appointed, and the arbitrations are either between the same disputing parties or arising out of the same transaction or series of related transactions.

Pending rule changes

The changes to the LCIA Arbitration Rules are to be welcomed, and will provide greater clarity. It remains to be seen whether other institutions will also make change to their existing rules (SIAC have already indicated their intention to do so) following what has been an unprecedented year for arbitration and more widely.

CHALLENGES TO ARBITRATORS DISMISSED IN ICSID CASES

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) (23 July 2020)

VM Solar Jerez GmbH & ors v Kingdom of Spain (ICSID Case No.ARB/19/30) (Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil, 24 July 2020)

Challenges to arbitrators continue to attract the attention of Tribunals (and the Chairman of the ICSID Administrative Council, where appropriate), although two unsuccessful challenges in July 2020 once again emphasise the importance of considering fully the merits of making such a challenge particularly given that the majority of challenges are unsuccessful.

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) (23 July 2020)

In annulment proceedings relating to an award handed down in March 2019, Venezuela sought to disqualify the entire ad hoc Committee considering its annulment application. The original Tribunal which handed down the award had also been subject to multiple disqualification challenges, with there being six attempts to disqualify arbitrator Yves Fortier (plus a decision on the reconsideration of such a request), all of which were dismissed.

The disqualification application was made on the grounds that an Order on Representation made by the ad hoc Committee demonstrated that the three members could not be relied upon to exercise independent judgment. That Order on Representation, made on 3 April 2020, rejected Venezuela's application that various members of Curtis, Mallet-Prevost, Colt & Mosle LLP who had acted for Venezuela in the arbitration proceedings be excluded from participation as they were not authorized to act for Venezuela. The dispute as to representation arose out of the disputed Venezuelan elections, discussed in our previous newsletter which is available here.

In June 2020, the Chairman of the Administrative Council who was to determine the application informed the parties of his decision to seek a recommendation on the disqualification proposal from The Rt Hon. Lord Nicholas Phillips of Worth Matravers, K.G., past President of the Supreme Court of England and Wales (although the final decision would be taken by the Chairman, as required by Article 58 of the ICSID Convention).

On 10 July 2020, Lord Phillips recommended the application for disqualification be dismissed.

The application was based on the decision of the Tribunal in the Order on Representation. Lord Phillips observed that applicant that seeks to prove from the terms of a decision alone that those who made it were not merely wrong but were, or appear to have been, manifestly lacking in the requisite independence or impartiality, has a heavy burden to discharge. In reaching his decision, he was required to consider three questions: (i) Was the decision reached by the Committee practicable without injustice to either party? (ii) Was the decision reached by the Committee one that it was proper to make? (iii) If not, does the decision demonstrate that the members of the Committee have, or appear to have, a manifest lack of independence or impartiality?

Taking each in turn:

(i) at the time that the Order on Representation was made, there was a possibility that compliance with it would prove practicable without injustice, but that this was by no means certain.

(ii) Lord Phillips proceeded on the premise, without deciding the issue, that the appropriate course that the Tribunal should have taken, when faced with the challenge to Curtis' participation in the proceedings, was to resolve who should be permitted to represent Venezuela.

(iii) an objective bystander would not conclude, from the fact of the decision reached by the Committee, that its members had demonstrated a manifest lack of independence or impartiality – nor that there was even a suspicion of lack of independence or impartiality on their part.

The Chairman of the Administrative Council, having reviewed the parties' and arbitrators' positions, and Lord Phillips' recommendation, dismissed the application for disqualification.

The decision and recommendation are available here.

VM Solar Jerez GmbH & ors v Kingdom of Spain (ICSID Case No.ARB/19/30) (Decision on the Proposal to Disqualify Prof. Dr. Guido Santiago Tawil, 24 July 2020)

In an arbitration commenced under the Energy Charter Treaty, Spain sought to disqualify Dr Guido Santiago Tawil. Having received the submissions of the parties, the Unchallenged Arbitrators (Mr. Michael Collins (Presiding Arbitrator) and Dr. Ioana Knoll-Tudor) notified the Secretary-General that they were equally divided with respect to the Disqualification Proposal and accordingly ICSID informed the Parties that the Proposal would be decided by the Chair of the Administrative Council (pursuant to Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4)).

The Respondent's Proposal was based on two grounds: (i) Prof. Tawil had three previous appointments by investors in arbitration cases against Spain that allegedly share multiple common factual and legal issues with the present case, and (ii) Prof. Tawil prejudged core issues arising in the present case, as evidenced by his dissenting opinions rendered in the SCC cases of *Charanne* and *Isolux*.

The Chairman of the Administrative Council rejected the Disqualification Proposal.

At the outset, the Chairman observed that the Respondent had requested that the Proposal be submitted to a third party for an independent recommendation given the Unchallenged Arbitrators were equally divided. The Chairman said that external referrals were requested on rare occasions and on the basis of the specific facts of the case. The Chairman asserted that the present case did not warrant such a referral, although no detailed reasons were given as to why this was the case.

As to the merits of the Disqualification Proposal, the Chairman held:

- Repeat appointments. The existence of multiple appointments does not establish by itself a manifest lack of independence and impartiality. There were multiple and relevant differences between the other cases against Spain in which Prof. Tawil was appointed with the present case. On the basis of the evidence provided, these cases involved different (i) investors; (ii) law firms representing the Claimants; (iii) dates of the alleged investment and (iv) measures. Thus, the mere existence of these multiple appointments did not rise to the level that would merit questioning the independence and impartiality of an arbitrator, and in the circumstances there was no objective basis to suggest that Prof. Tawil would not evaluate the present case with an open mind or that his independence and impartiality would be affected by his appointments in other cases against Spain.
- Alleged prejudgment of issues. The fact that an arbitrator has expressed views on issues of law or fact common to two or more arbitrations in which that arbitrator is involved is not — without more — evidence of bias or the appearance thereof. The *Charanne* and *Isolux* cases involved investments in Spain by unrelated companies represented by different law firms, made at different times, and allegedly affected by different measures. Such distinctions were relevant in the context of renewable energy cases – even in cases where the issues could be similar, the arguments, and the manner in which they are presented by different parties, could differ depending on the particularities of each case. Accordingly, a third party undertaking a reasonable evaluation of the facts would not conclude that Prof. Tawil manifestly appeared to lack the required impartiality and independence to decide this case.

Accordingly, the Proposal for Disqualification would be dismissed.

The decision is available here.

Concluding Observations

Successful challenges to arbitrators are rare in investment arbitration. If you are interested in further information and discussion on challenges to arbitrators, then please contact us for copies of our texts (published by Wildys) "*Conflicts of Interest in International Arbitration*" and "*Bilateral Investment Treaties: The Essentials*".

ICSID TRIBUNAL REFUSES TO ORDER SIERRA LEONE TO SUSPEND CRIMINAL PROCEEDINGS IN MINING DISPUTE

Gerald International Limited v. Republic of Sierra Leone (ICSID Case No. ARB/19/31) (28 July 2020)

Background

The underlying dispute arose out of the Claimant's investment in SL Mining Limited ("SL Mining"), a Sierra Leone company allegedly owned by the Claimant, and its iron ore project at the Marampa mine in Sierra Leone. The Claimant alleged that Sierra Leone took a series of unlawful measures to coerce SL Mining into renegotiating the mining license agreement concluded between SL Mining and the Government of Sierra Leone for the operation of the Maramp Project, which escalated after the Claimant and SL Mining served a Notice of Dispute under the Bilateral Investment Treaty between the United Kingdom and Sierra Leone ("UK/SL BIT").

SL Mining initiated an emergency arbitrator proceeding under the mining licence agreement, with the ICC-appointed Emergency Arbitrator issuing various interim orders. The Claimant states that Sierra Leone refused to comply with the orders and instead cancelled SL Mining's licence, following which an ICC Tribunal was constituted and confirmed the orders of the Emergency Arbitrator.

On 18 October 2019, the Claimant filed a Request for Arbitration with ICSID against Sierra Leone pursuant to the UK/SL BIT, alleging breaches of Article 2 (fair and equitable treatment), Article 3 (national treatment and most-favored-nation), and Article 5 (expropriation).

On 19 May 2020, the Claimant filed a Request for Provsional Measures in which it sought to obtain the immediate release from detention of five employees of SL Mining, to allow the employees to return to SL Mining's operation site in Sierra Leone, to suspend the criminal investigation launched against the employees, and to obtain the release of SL Mining documents that were seized by Sierra Leone authorities.

Decision

The Tribunal (Prof. Dr. August Reinisch, President; Ms. Olufunke Adekoya, SAN; Prof. Dr. Guido Santiago Tawil) dismissed the Request for Provisional Measures. However, the Tribunal did urge Sierra Leone to convey to the authorities competent to decide on the bail conditions the Tribunal's views in order to consider adapting the current bail conditions so as to allow the Claimant's employees to return to the Marampa mine site, and requested that Sierra Leone detail the documents seized, make a full copy of them, to preserve the originals and make the copies available to the Claimant and the Tribunal by 15 August 2020.

In applications such as the present Request for Provisional Measures, the starting point was that provisional measures that concern the sovereign right to conduct criminal proceedings must be issued with caution. However, the Tribunal considered that such measures could be ordered in exceptional circumstances, such as where they were not instituted or conducted in good faith. In addition, an order for provisional measures would also require a showing of necessity and urgency, and must satisfy a proportionality test. The burden of proof was on the Claimant to show why the requested measures should be recommended.

As to the criminal investigation and arrests, while the Tribunal was concerned by aspects of the criminal investigation (including coincidence of the investigations and the ICSID proceedings, and unclear connection with riots), there was no evidence at this time that the investigations were initiated in bad faith or by way of retaliation and it was relevant that the SL Mining employees had not sought to challenge the arrests or investigation. Accordingly, no order would be made. However, the specific bail conditions imposed on certain employees did impact on the investment for the purposes of the ICSID proceeding and accordingly, the Tribunal requested that these be considered again.

The Tribunal's view was that legal remedies in regard to criminal investigations and bail conditions were primarily to be sought in the domestic legal order – albeit that this did not absolve the parties from their duty to act in good faith and to refrain from taking any measures that could affect the integrity of this arbitration or aggravate the dispute. The decision is available here.

EMERGENCY INTERIM MEASURES GRANTED IN MOLDOVAN INVESTMENT DISPUTE

Komaksavia Airport Invest Ltd. v. Republic of Moldova (SCC EA 2020/130) (Emergency Award on Interim Measures, 2 August 2020)

Background

In 2016, the claimant spent approximately €3.6 million to acquire a 95% interest in a Moldovan company that was the sole legal operator of a concession to Chisinau International Airport. The claimant invested at least €30 million in the airport.

On 23 August 2019, the Moldovan authorities made an official statement that it would take a decision to terminate the concession agreement for either a breach or failure to meet investment obligations. On 12 September 2019, the President of Moldova confirmed that the concession agreement would be terminated. On 1 April 2020, the Moldovan authorities introduced a new "*special airport tax*" on the claimant's Moldovan subsidiary pursuant to which 50% of the monthly accumulated recoverable fees for airport modernisation would be transferred to the National Social Assistance Agency. The Moldovan authorities took further action against the claimant through criminal investigations, accusations of money laundering, obstructing the claimant's efforts to obtain a performance guarantee, and the formal issuance of notice to terminate the concession agreement.

The claimant commenced emergency arbitration proceedings under the auspices of the Stockholm Chamber of Commerce (SCC) on 24 July 2020. The SCC served the application on Moldova, determined that Stockholm was the seat of the arbitration, and appointed an Emergency Arbitrator (Bernardo Cremades) – all on 27 July 2020. The Emergency Arbitrator set a tight procedural timetable to enable compliance with his duty to issue an emergency arbitral award within 5 days of the application. Notwithstanding that Moldova filed its response to the application a whole day late, the Emergency Arbitrator nevertheless took it into account.

The claimant sought provisional measures in respect of the special airport tax, the obstruction of the performance guarantee and the termination of the concession agreement.

Decision

By a decision handed down on 2 August 2020, the Emergency Arbitrator upheld some of the claims for provisional measures, but rejected others.

The Emergency Arbitrator noted that it was not proper to analyse the requested relief in the same manner that a constituted tribunal would do in due course.

The Emergency Arbitrator noted that there was a high bar to an arbitral tribunal's interference with a State's fundamental sovereign right to exercise its taxation powers. The relief requested in respect of the special airport tax was rejected on the grounds of insufficient urgency to justify emergency remedies. Any financial harm caused was capable of being remedied at the substantive stage.

By contrast there was sufficient urgency in respect of the relief sought concerning the actions taken to terminate the concession agreement and the obstruction of the performance guarantee. The Emergency Arbitrator held that it was proportionate to restrain Moldova from terminating the concession agreement as "*the threat faced by Claimant far outweighs any harm that might be caused to the Respondent by the granting of the interim measures. In fact, the Respondent will suffer no harm at all*".

The Emergency Award is available here.

CLAIMANT ORDERED TO PAY COSTS OF US$6.5 MILLION IN UNSUCCESSFUL ICSID CASE

Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v Republic of Panama ICSID Case No. ARB/16/34 (Award, 14 August 2020)

Background

The underlying dispute concerned the investments consisting of the FIRESTONE trademark, and the licences to use the FIRESTONE and BRIDGESTONE trademarks in Panama, which were the subject of court proceedings in Panama culminating in a judgment of the Supreme Court of Panama against the Claimants. The Tribunal described the ICSID proceedings as putting "*in issue the competence and the integrity of the Supreme Court of the Republic of Panama*."

The Claimants filed a Request for Arbitration puruant to the United States-Panama Trade Promotion Agreement, alleging violations of Article 10.3 (National Treatment), Article 10.5 (Minimum Standard of Treatment) and Article 10.7 (Expropriation). Ultimately, the Claimants only pursued the claims for breach of Article 10.5.

Decision

The Tribunal (Lord Nicholas Phillips Baron of Worth Matravers, President; Mr. Horacio A. Grigera Naón; Mr. J. Christopher Thomas, QC) dismissed the claims. They also ordered the Claimants' to pay US$6.5 million to the Respondents towards their legal fees and costs of the arbitration.

A treaty will typically include provisions giving the Tribunal the discretion to decide which party is to bear the costs of the proceedings before it. While parties will often be ordered to bear their own costs, including legal and expert fees, in some cases a Tribunal may feel it appropriate that one party bears all or a substantial part of the other side's costs.

In the present case, the legal costs claimed by both parties were substantial, with the Claimants' costs and disbursements (excluding advances to ICSID) exceeding US$6.4 million and the Respondent's costs (excluding advances to ICSID) exceeding US$8 million.

In seeking its costs, Panama submitted that the ICSID Convention authorised a tribunal to award costs against "abusive or unsuccessful claimants", and accused the Claimants of engaging in "a variety of abusive tactics," including, inter alia, (i) channelling funds through a shell subsidiary for purposes of manufacturing a TPA claim; (ii) "approach[ing] representatives of Panama's Executive Branch in hopes of getting the Executive Branch to interfere with the independent judiciary"; (iii) distorting key aspects of the local litigation that led to the Supreme Court Judgment; (iv) asserting a "speculative and remote" claim related to investments outside of Panama dismissed for lack of jurisdiction; and (v) attempting to transform a courtesy meeting with the Panamanian Ambassador to the United States into a wild allegation of corruption and a binding admission by a sovereign State.

Panama also alleged that the claims against it had been "frivolous", relying on the dropping of the majority of the treaty claims by the Claimant, the continuation of a "hopeless" denial of justice claim, the assertion of loss where their financial statements showed none, and the contempt shown throughout the proceedings towards Panama, its institutions and its senior officials.

In reaching its decision on costs, the Tribunal observed that there was "a degree of hyperbole in Panama's submissions, but a degree of truth as well." The Claimants had overreacted to their loss before the Supreme Court, and faced with allegations of judicial corruption and incompetence of their highest court, Panama was justified in deploying lawyers and experts of high standing to meet the case made against it.

Justice would be served by ordering the Claimants to reimburse the Respondent the expended portion of the advances paid by the Respondent to ICSID, and to pay US$6.5 million towards Panama's legal costs and expenses.

The decision is available here.