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INTERNATIONAL ARBITRATION UPDATE

APRIL 2021

Message from Khawar Qureshi QC, Head of Chambers

I am delighted to use this opportunity to introduce you to three of our new members, Rt. Hon. Tun Arifin bin Zakaria, Dr. Ali Abusedra and Professor Zachary Calo. Each brings an immense wealth of knowledge and experience of international arbitration and litigation and we very much forward to meeting and working with you in person soon.

This update summarises very recent developments, including a decision from the Privy Council on the meaning and effect of "substantial injustice" in the context of a challenge to an arbitral award, as well as a highly significant decision from the QFC Civil and Commercial Court confirming that its jurisdiction may be adopted by non-Qatari/non-QFC parties as the "Competent Court" for arbitration matters in Qatar.

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:

- ***Privy Council considers Section 68 challenge.*** *In a decision handed down on 19 April 2021, the Privy Council held that for the purposes of Section 90 of the Bahamas Arbitration Act 2009 (which is materially identical to Section 68 of the English Arbitration Act 1996) it was not a requirement that there be a separate and express allegation, consideration and finding of substantial injustice. It was sufficient that, as a matter of substance, substantial injustice be established and found.*

- ***ICSID and UNCITRAL release second draft of proposed Code of Conduct for arbitrators.*** *The revised draft, incorporating discussion and feedback on the first draft released in May 2020, includes amendments to "double hatting" and disclosure obligations.*

- ***UK House of Lords approve new disclosure obligations for receipt of income from foreign governments.*** *On 20 April 2021, the House of Lords accepted the findings of a Report of the Conduct Committee which would require members of the House of Lords to disclose payments received from foreign governments, including those relating to confidential arbitrations. The decision has received a mixed response, with some Lawyer peers raising concerns that such a disclosure obligation will harm London's status as an international arbitration centre, while others reject any such impact.*

- ***English Commercial Court orders alternative service in dispute over enforcement of arbitral award in Egypt.*** *In a judgment handed down on 19 February 2021, the English Commercial Court refused an application to set aside an order for alternative service, on the basis that the order supported the policy of "speedy finality" engaged by the Arbitration Act 1996.*

- ***QFC Court confirms "opt in" jurisdiction for arbitration proceedings.*** *In a Note on its highly significant first arbitration decision (anonymised to protect the confidentiality of the underlying arbitral proceedings), the QFC Civil and Commercial Court confirmed the ability of non-Qatari or non-QFC parties to "opt in" to the jurisdiction of the Court for the purposes of arbitration.*

PRIVY COUNCIL CONSIDERS SECTION 68 CHALLENGE

RAV Bahamas Ltd & Anor v Therapy Beach Club Incorporated (Bahamas) [2021] UKPC 8 (19 April 2021)

Introduction

In *RAV Bahamas Ltd & Anor v Therapy Beach Club Incorporated (Bahamas)*, the Privy Council held that for the purposes of Section 90 of the Bahamas Arbitration Act 2009 (which is materially identical to Section 68 of the English Arbitration Act 1996) it was not a requirement that there be a separate and express allegation, consideration and finding of substantial injustice. It was sufficient that, as a matter of substance, substantial injustice be established and found.

Background

The present proceedings arose out of an arbitration award handed down on 21 August 2017, in which the sole arbitrator awarded Therapy Beach Club ("Therapy") $9,670,000 plus interest.

On 15 September 2017, RAV applied to challenge the arbitration award in the Supreme Court of the Bahamas on the basis of, inter alia, section 90 of the 2009 Act which deals with "serious irregularity". The challenge was based on the failure of the arbitrator to deal with issues put to her, and to give RAV an opportunity to address certain matters. In a judgment dated 24 January 2018, Winder J allowed the section 90 challenge and remitted the matter to the arbitrator, in part.

Therapy appealed to the Court of Appeal of the Bahamas against that decision of Winder J. By a majority, the Court of Appeal allowed Therapy's appeal and ordered that Winder J's remittance orders be set aside and that the arbitration award be upheld. The reasoning of the majority was that Winder J's decision should be reversed because he did not expressly and separately consider and find that substantial injustice had been caused to RAV by the irregularity he had found; and similarly RAV had failed expressly and separately to plead and establish any such substantial injustice.

RAV appealed against this decision. The question for the Privy Council was whether it is not a requirement of section 90/68 that there be a separate and express allegation, consideration and finding of substantial injustice, such that an application will fail if such practice is not followed, even if, as RAV contends, as a matter of substance, substantial injustice has been established and found.

Decision

The judgment (delivered by Lord Hamblen and Lord Burrows) allowed the appeal.

Given the similarity of the Bahamas 2009 Act and the English 1996 Act, it was appropriate to have regard to the English law authorities when interpreting the relevant provisions. The high threshold applicable to Section 90/68 challenges was reiterated.

On the substance of the appeal itself:

- While it was good practice and should be encouraged, it was not a mandatory requirement of section 90 of the 2009 Act that there be a separate and express allegation, consideration and finding of substantial injustice.
- Substance was more important than form and undue formalism should not be required.
- It was sufficient that, as a matter of substance, substantial injustice be established and found.
- The fact that there was no express and separate allegation of substantial injustice was not fatal to an application under section 90. It was implicit in any section 90 application that substantial injustice was being alleged

In the present case, as a matter of substance, substantial injustice had been both established and found. On a fair reading of his judgment, Winder J did consider and find that there was substantial injustice, even if he did not use those words.

Accordingly, the matter would be remitted back to the Tribunal to the extent set out by the Privy Council.

The decision is available here.

ICSID AND UNCITRAL RELEASE VERSION TWO OF THE DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INTERNATIONAL INVESTMENT DISPUTES

Introduction

On 19 April 2021, ICSID and UNCITRAL released a second draft of the proposed Draft Code of Conduct for Adjudicators in International Investment Disputes.

The first draft was published in May 2020, and was the subject of extensive discussion and feedback.

Amendments

As a starting point, the provisions contained in the second draft have been reordered and streamlined, following recommendations from State representatives and other stakeholders.

Substantive changes to the draft Code include:

- The first draft included proposals relating to "double hatting", where the impartiality and independence of an arbitrator could be questioned if they were involved in other investment treaty cases in other roles – specifically whether the arbitrator should reframe from acting or alternatively disclose that they were acting as counsel, expert witness, judge, agent or in any other relevant role at the same time (or within a certain time period). The second draft reflects the suggestion that double-hatting could be acceptable with informed consent of the disputing parties. Furthermore, this would be limited to concurrent proceedings, and does not include a prohibition or limitation for a period before or after, unlike in the previous draft. The draft includes language allowing for a full prohibition, or only where the matter involves the same factual background and at least one of the same parties or their subsidiary, affiliate or parent entity.
- The duty of diligence (which includes obligations relating to availability), now set out at Article 5, had previously proposed a limit on the number of cases an adjudicator could hear simultaneously. That proposal has now been removed.
- The previous disclosure obligation had contained an obligation to disclose a list of all publications by the adjudicator or candidate (and potentially their relevant public speeches). This has now been deleted, although no explanation is given. In addition, Annex I now provides the form of disclosure to be made by adjudicators (as required by Article 10(3)). It is specifically stated at Article 10(5) that the fact of disclosure by an Adjudicator does not establish a breach of the Code; rather, Article 10(1) requires disclosure of matters that may give rise to doubts "in the eyes of the parties".

As to implementation of the Code, the first draft suggested that the most likely options would be (i) to incorporate the code into investment treaties and other instruments of consent; (ii) to have disputing parties agree to its application at the inception of each case; (iii) to append it to the disclosure declaration that adjudicators must file upon acceptance of nomination; or (iv) to incorporate the code into applicable procedural rules. The code could also be made part of a multilateral instrument on ISDS reform. The second draft merely says that a paper addressing possible methods of implementation is under preparation and will be issued separately.

It is also proposed that a Commentary be prepared, which will supplement the Code of Conduct. Examples of matters that may be included in the Commentary include suggestions of conduct/circumstances which would breach the requirement of impartiality and independence, when concurrent cases would be considered to address the same factual context or the same party, ability to circulate a draft ruling for comment to the parties if permitted by the relevant rules or treaty or with party consent, and the impact of repeat appointments on impartiality and independence.

The revised draft is available here.

NEW DISCLOSURE RULES FOR LAWYER PEERS

On 20 April 2021, the House of Lords accepted the findings of a Report of the Conduct Committee which would require members of the House of Lords to disclose payments received from foreign governments, including those relating to confidential arbitrations.

The decision has received a mixed response, with some lawyer peers raising concern that such a disclosure obligation will harm London's status as an international arbitration centre, while others reject any such impact.

On 2 December 2020, the House of Lords agreed to the Conduct Committee's Report on "Registration of members' foreign interests" (7th Report, Session 2019–21, HL Paper 182), which proposed that Members of the House of Lords be required to register earnings from, amongst others, "governments of foreign states (including departments and agencies)". These proposals arose in part out of a recommendation from the Intelligence and Security Committee of Parliament on Russia's influence in the United Kingdom's democracy.

Subsequently a consultation was held which asked for views on whether there should be any exemption if Members felt that they were bound by an established duty of confidentiality. Responses were received from the Bar Standards Board, the Solicitors Regulation Authority and the Faculty of Advocates, and from members who practise or formerly practised as barristers, solicitors, arbitrators and judges.

Following the consultation, the Conduct Committee issued its report in which it recommended that there should be no exemptions to the scheme for registering certain foreign interests. In recognition of the sensitivity of some legal proceedings the Committee proposed that lawyers should be required to disclose the identity of clients only once the relationship has entered the public domain or they have been paid (wholly or in part) for the work, whichever comes first. As with any interest, they would need to make the disclosure within one month of it becoming registrable, but they would have longer to register their fees. The scheme should also apply to arbitrators with respect to registrable parties.

In a debate on the House of Lords, concerns were raised as to the impact on commercial arbitration. Some lawyer peers suggested that the obligation to make such disclosures would have severe ramifications for the confidentiality of arbitrations, and that the position was different in respect of arbitrations (compared to lawyers) on the grounds that while arbitrators received fees from the arbitrating parties, they did not owe duties in the same manner as a lawyer would. Concerns were also raised that the duty to disclose would affect London's status as a world class centre for international arbitration. Baroness Deech rejected the contention that London would lose its attraction as an arbitration centre, considering that, with respect, such a contention regarded too highly the contribution made by the handful of lawyers in the House of Lords who would be affected by the rule. Importantly, Lord Thomas of Cwmgiedd, the former Chief Justice of England & Wales and now President of the Qatar International Court and Dispute Resolution Centre, agreed with Baroness Deech that the recommendations of the Report would not damage London, on the basis that the strength of London is that there are sufficient persons of great skill and eminence who can provide these services.

Following the debate, the House of Lords agreed to accept the recommendations of the Conduct Committee in its report. A grace period will apply, which will exempt Members from having to make disclosures in respect of arbitrations currently ongoing (although should these arbitrations last longer than the grace period, and that period is not extended, then disclosure may subsequently be required).

Some commentators have welcomed this development, on the basis that there is a perception (rightly or wrongly) that some lawyer peers were being instructed as "hired guns", with material regard to their status as members of the House of Lords.

COURT ORDERS ALTERNATIVE SERVICE IN EGYPT ENFORCEMENT CASE

M v N [2021] EWHC 360 (Comm)

Introduction

In a judgment handed down on 19 February 2021, the English Commercial Court refused an application to set aside an order for alternative service, on the basis that the order supported the policy of "speedy finality" engaged by the Arbitration Act 1996.

Background

The present proceedings arose out of an arbitration award dated 29 January 2019, in which the GAFTA Board of Appeal awarded M €3,275,036.90. No challenge to the award was filed within the time stipulated in the Arbitration Act 1996, and two years later the award remained unpaid.

M applied for the s.66(1) and section 37(1) relief in an arbitration claim form issued on 1 December 2020. Cockerill J gave permission for both the s.66(1) order and the arbitration claim form to be served on N out of the jurisdiction, and also gave permission for alternative service, by email on N's vice chairman and by recorded delivery to N's address, rather than pursuant to the provisions of the Hague Service Convention ("HSC").

By an application issued on 18 January 2021, N sought to set aside the order for alternative service.

Decision

Foxton J dismissed N's application.

The Court considered the circumstances in which it is appropriate to make an order for alternative service on a defendant who would otherwise have to be served abroad under the HSC or another service convention.

In the present case, Egypt was a signatory to the HSC and had objected to Articles 8.2 and 10(a)-(c) of the Convention, such that service of foreign process could only be validly effected through the Central Authority. Pre-pandemic, this could take 9 months – in present circumstances, there was evidence that this had been worsened by the current situation, such that it was taking at least 12 months.

On the facts of the case, the order for alternative service made by Cockerill J was amply justified, particularly taking into account:

i) This was an application brought to assist in the enforcement of an arbitration award of a tribunal sitting under the auspices of the 1996 Act, which engages the policy of speedy finality full square.

ii) N fully engaged in the proceedings which culminated in the Award, through English lawyers (solicitors and counsel) – this is very far from a case in which alternative service initiated the connection between the party served and the court determining the dispute.

iii) The Award has been outstanding for two years.

iv) The effect of a lengthy delay in service would be to increase the period during which the s.66(1) order made by Cockerill J remains stayed, and the period during which any challenge to that order might be made. That state of affairs is inimical to the policy of speedy finality.

v) The method of service was likely to be (and has been) effective to bring the order and application to N's attention (as is clear from the fact that N's solicitors came on the record for N on 16 December 2020).

vi) M had a contractual right to serve at least some of the relevant documents in the jurisdiction in any event.

Accordingly the application would be dismissed.

QFC COURT CONFIRMS OPT IN JURISDICTION FOR ARBITRATION CLAIMS

C v D [2021] QIC (F) 8 (17 March 2021)

Background

The Qatari Law No 2 of 2017 issuing the Arbitration Law in Civil and Commercial Matters (an English translation of which is available here) provides parties with an option to agree on the "Competent Court" of the arbitration, which can be either the Civil and Commercial Arbitral Disputes Circuit in the Court of Appeals, or the First Instance Circuit of the Civil and Commercial Court of the Qatar Financial Centre pursuant to the agreement of the Parties.

Subject to the agreement between the Parties, where the Court has been chosen as the Competent Court of the arbitration, it has jurisdiction over matters relating to:

- The appointment and removal of arbitrators
- Determining challenges to jurisdiction
- Assisting with the taking of evidence
- Correcting awards
- Hearing appeals against awards
- Determining challenges in relation to enforcement decisions

In addition, the Enforcement Judge of the Competent Court will consider applications relating to:

- Interim measures and their enforcement
- Enforcement of awards

C v D

To date, only one arbitration case has been considered by the QFC Civil and Commercial Court. Given the Court's policy to protect the confidentiality of arbitration and the fact that no point of general interest arose from that case other than the jurisdiction point outlined the below, the Court, in a departure from its normal practice, issued only a Note on the decision rather than its full judgment.

In C v D, the Court was required to consider an application for an injunction in connection with an arbitration.

C and D, who were both non-QFC companies, had entered into a contract which, in the event of a dispute, provided for LCIA arbitration with the seat of arbitration being "the Qatar International Court and Dispute Resolution Centre (QICDRC) in the Qatar Financial Centre, Qatar (QFC) and the venue of the arbitration shall be Qatar".

Prior to the filing of a request for arbitration by C, C applied to the Court for interim relief/precautionary measures in relation to the contract by way of an injunction maintaining the status quo pending determination of the dispute.

As the court of the seat of the arbitration, and the Competent Court under Law No. 2 of 2017 issuing the Law of Arbitration in Civil and Commercial Matters, the Court was satisfied that it had jurisdiction to deal with the application, in circumstances in which an arbitral tribunal could not yet act, or act effectively. However, the Court declined to grant such relief on the facts before it.

This decision is an important decision, confirming the ability of parties to "opt in" to the jurisdiction of the Court for the purposes of arbitration.

The decision is available here.