

## McNAIR CHAMBERS – QUARTERLY UPDATE – WINTER 2015/2016

Welcome to the fourth 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 Autumn update there have been several significant developments concerning the Joint Comprehensive Plan of Action (JCPOA) for lifting sanctions against Iran. Also concerning Iran, the English courts granted permission for claims to be served on Iran by claimants seeking compensation for injuries suffered as a result of acts of terrorism.

Oman defeated an expropriation claim brought against it for US\$560 million. An ICSID tribunal rejected the claim against Oman on its merits and ordered the claimant to pay 75% of Oman's costs.

In the UK, the Supreme Court gave an important judgment setting out the test for unfair contractual penalties. The High Court also heard significant matters concerning aspects of public international law, including state immunity.

### Recent Developments

- The dispute between the majority shareholders of Yukos and the Russian Federation continues following the July 2014 arbitral award against Russia worth in excess of US\$50 billion. Property thought to belong to Russia in France and Belgium has been attached in order to enforce the award. In December 2015, the Paris Court of Appeal refused Russia's application to suspend enforcement of the award in France pending the hearing of Russia's challenges to the award's recognition (a decision on which is expected in late 2016). Enforcement proceedings are also underway in the US District Court of Columbia.
- On 29 October 2015, an arbitral tribunal constituted under the auspices of the Permanent Court of Arbitration in The Hague issued an Award on Jurisdiction and Admissibility holding that it had jurisdiction over aspects of the Philippines v China dispute concerning maritime boundaries in the South China Sea. China has not appointed an agent in the arbitration and has refused to participate.
- In January 2016, the ICC announced new measures aimed at increasing transparency (the publication of the names and nationalities of arbitrators sitting in ICC cases, applicable to cases registered on or after 1 January 2016) and efficiency (discretionary linking of arbitrator's remuneration to the timely production of awards).

### Iran Sanctions

- In *Ben-Rafael v Iran* (unreported) (8 October 2015), the English High Court gave permission for personal injury claims to be served out of the jurisdiction on Iran following a judgment by the US courts granting the claimants damages in respect of personal injuries suffered as a result of acts of terrorism.

- Since our last Quarterly Update, there have been a number of developments concerning the lifting of sanctions against Iran and the JCPOA signed in July 2015. The JCPOA was formally adopted by Iran on 18 October 2015 and the US Secretary of State issued contingent waivers of certain statutory sanctions in preparation for the implementation of US commitments under the JCPOA. Should there be any concerns as to whether sanctions are engaged in particular transactions or business relationships, parties should consult the appropriate government guidance.

## Arbitration

- In October 2015, the ***IBA Subcommittee*** on Recognition and Enforcement of Arbitral Awards published the results of a comparative study on how Article V(2)(b) of the New York Convention (the public policy exception to the recognition and enforcement of arbitral awards) is applied in different jurisdictions. The Subcommittee published jurisdiction-specific reports from 40 different jurisdictions plus the European Union.
- On 3 November 2015, an ***ICSID tribunal*** rejected a US\$560 million expropriation claim brought pursuant to the US-Oman Free Trade Agreement against Oman by a US citizen born in the UAE. Having decided that it had jurisdiction, the tribunal rejected the claim on the merits – finding that the investments had not been lost as a result of sovereign expropriation but as the result of a contractual dispute with a private commercial actor. The claimant was ordered to pay 75% of Oman’s costs in the arbitration.

## English Law

- In ***Pearl Petroleum Company Ltd & Ors v The Kurdistan Regional Government of Iraq*** [2015] EWHC 3361 (Comm), the English Commercial Court declined to grant state immunity to the Kurdistan Regional Government of Iraq (KRG). Instead the Commercial Court ordered compliance with a peremptory order given by an arbitral tribunal that KRG pay to the Claimants US\$100 million in disputes arising out of the claimants’ rights to exploit two gas fields. A previous judgment in this case considered the application of the service requirements of the State Immunity Act 1978 and the duty to raise state immunity before the English court (see *PCL & ors v The Y Regional Government of X* [2015] EWHC 68 (Comm)).
- In November 2015, the UK Supreme Court handed down an important judgment in ***Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis*** [2015] UKSC 67, in which it set out the test applicable for determining unfair contractual penalties. Lord Neuberger and Lord Sumption held that the “true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation”.

## International Law

- In ***R (Western Sahara Campaign UK) v (1) Revenue and Customs Commissioners; (2) Secretary of State for the Environment and Rural Affairs*** [2015] EWHC 2898 (Admin), the English Administrative Court considered an application for a preliminary reference to the Court of Justice of the European Union of questions concerning allegations that the EU and Morocco had entered into unlawful agreements (allowing the export of goods arising in the disputed Western Sahara territory). Allowing the application, the English court held

that the controversial nature of the relevant agreements was sufficient to make it necessary for the CJEU's opinion to be ascertained.

19 January 2016