

McNAIR CHAMBERS - QUARTERLY UPDATE - SPRING 2015

Welcome to the first 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

In the field of international arbitration there have been a number of recent decisions that emphasise the importance of considering a claimant's steps prior to commencing arbitration. In *Forminster Enterprises Ltd (Cyprus) v The Czech Republic*, an UNCITRAL tribunal awarded the Czech Republic its costs after the claimant attempted to unilaterally terminate the arbitration proceedings which it had commenced, while in the ICSID case of *Levy v Peru*, a tribunal dismissed a claimant's claims on the basis that a restructuring undertaken for the sole purpose of bringing the dispute within the ICSID framework was an abuse of process which prevented the tribunal from having jurisdiction.

Meanwhile, the English courts have continued to demonstrate their willingness to support the arbitral process, provided that process is carried out in a fair and impartial manner which leads to a result untainted by substantial injustice.

Further, in *High Commissioner for Pakistan in the United Kingdom v National Westminster Bank & Ors* [2015] EWHC 55 (Ch), the English courts considered the issue of sovereign immunity, and in particular the waiver of such immunity.

International Arbitration

- **Forminster Enterprises Ltd (Cyprus) v The Czech Republic**, UNCITRAL Arbitration, Geneva - On 15 December 2014, an UNCITRAL Tribunal awarded the Czech Republic its costs of the arbitration after the Claimant purported to unilaterally terminate the proceedings. The decision demonstrates the importance of ensuring that arbitration is the appropriate and advantageous forum in which to bring a claim, as the consequences of a wrong decision in this respect can be both time-consuming and costly.
- **Renée Rose Levy de Levi and Grencitel v. Republic of Peru**, ICSID Case No. ARB/10/17 - In a decision handed down on 9 January 2015, an ICSID tribunal declined jurisdiction over a treaty claim on the basis that the Claimants' transfer of shares was undertaken to obtain access to the ICSID arbitration process and thus constituted an abuse of process. Investors should be aware that restructurings undertaken solely for the purpose of bringing claims within the ICSID framework are unlikely to be looked at favourably, and sound commercial reasons should exist for such restructurings.
- **Micula & Ors v Romania**, ICSID Case No. ARB/05/20 (European Commission decision 26/5/14) - By way of a letter dated 26 May 2014, the European Commission informed Romania of its decision to issue a suspension injunction obliging Romania to suspend payment of outstanding damages for which Romania was liable as a result of an ICSID arbitral award. This is the first time the Commission has intervened to restrain the

enforcement of an Arbitration Award on the grounds that its implementation would breach the EU's rules on State aid. It remains to be seen whether the eventual enforcement of the Award (within and outside the EU) is impaired or prevented by this measure.

Arbitration

- **Lorand Shipping Ltd v Davof Trading (Africa) BV (The Ocean Glory)** [2014] EWHC 3521 (Comm) (30 October 2014) - the English High Court decided that the decision of the arbitral tribunal to adopt a course not advocated by either party, without allowing the parties to make representations on that course, was likely to cause substantial injustice to the parties, and partially set aside the award under Section 68 of the Arbitration Act 1996. Successful challenges under Section 68 are comparatively rare, and although the challenge in this case was permitted, the High Court's decision reaffirmed the very high threshold for applications under Section 68 and demonstrates the importance of understanding that arbitral awards are in general unlikely to be successfully challenged.
- **Sierra Fishing Company & Ors v Hasan Said Farran & Ors** [2015] EWHC 140 (Comm) - On 30 January 2015, the English High Court granted an application for the removal of an arbitrator on the grounds that circumstances existed which gave rise to justifiable doubts as to his impartiality. The decision highlights that all parties to arbitration proceedings must have regard to the provisions of national procedural law and international legal guidelines concerning the appointment of arbitrators that are free from conflicts of interest.

International Commercial Litigation

- **JSC Mezhdunarodniy Promyshlenniy Bank & Anor v Pugachev & Ors** [2014] EWHC 3547 (Ch) – In a decision handed down on 30 October 2014, the English High Court dismissed an application by the trustees of five discretionary trusts to discharge or vary an order for disclosure of information relating to the trusts that was part of a worldwide freezing order against one of the discretionary beneficiaries of the trusts granted in support of proceedings in Russia. The decision is a demonstration of the power and effectiveness of a worldwide freezing order granted by the English High Court and, in particular, demonstrates the ability of the English courts to lend assistance to proceedings outside of its jurisdiction through the granting of interim relief.

Public international law

- **High Commissioner for Pakistan in the United Kingdom v National Westminster Bank & Ors** [2015] EWHC 55 (Ch) - On 16 January 2015 the English High Court refused permission for the Claimant High Commissioner to discontinue proceedings instituted to recover funds (now amounting to approximately £35 million held by the Defendant bank since the 1950s) in an attempt to preserve its sovereign immunity. The decision demonstrates that it is important for governments and state entities, when considering whether to commence a claim in another state, to be aware of the possibility that by so doing they will be viewed as having submitted to the jurisdiction of that state and, as a consequence, their state immunity will have been waived

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