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A. Legislation and rules

A.1 Legislation

International arbitration in England and Wales[5] continues to be governed by the Arbitration Act 1996 (the Arbitration Act). There have been no amendments to the Arbitration Act since those amendments made to reflect the consequential references to the Consumer Rights Act 2015. Despite various speeches and other commentary[6] suggesting potential reform of the Arbitration Act in support of litigation in the jurisdiction, no suggested amendments to the Arbitration Act have been put out for consultation or tabled in parliament.

Looking ahead, the Arbitration Act will not be impacted by the UK leaving the EU (Brexit) as the legislation is not a matter of EU law. In addition, a key advantage of arbitration is the relative ease with which awards may be enforced globally under the New York Convention (to which all EU member states are currently party). As the New York Convention does not depend on EU membership, Brexit will have no

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[5] England and Wales are two of the four countries that make up the United Kingdom. They have a common legal system, whereas the other two countries in the United Kingdom (Scotland and Northern Ireland) have separate systems. For the purposes of the current publication we intend only to refer to the laws of England and Wales. Any reference to "England" or "English" in this section should also be taken to include "Wales" or "Welsh."
[6] The Arbitration and Mediation Services (Equality) Bill, which had its first reading in the House of Lords in May 2016, did not become law before the 2016-2017 session of parliament ended. It has not been reintroduced into the current parliamentary session. See https://services.parliament.uk/bills/2016-17/arbitrationandmediationservicesequality.html.

impact on the ability of parties to enforce arbitral awards under its provisions in the EU or elsewhere.

Further, under EU law, courts of EU member states are currently prohibited from granting anti-suit injunctions which seek to restrain court proceedings in other member states. Following the UK's exit from the EU, it is foreseeable that this prohibition will no longer be applicable to UK courts. However, even if a UK court might be able to issue such an injunction, it should still be considered that it may not be enforced by an EU court.

A.2 Institutions, rules and infrastructure

The leading arbitral institution in the jurisdiction remains the LCIA. There have been no changes to the LCIA Rules since the 2014 Rules came into force. The LCIA has reported that it received 285 arbitration referrals in 2017, 233 of which were under the LCIA Rules.[7] The key industry sectors for arbitration under the LCIA Rules in 2017 were Banking and Finance (24%), Energy and Resources (24%) and Transport and Commodities (11%). 46% of referrals were for over USD 5 million, with 19% being over USD 50 million. Three-member tribunals remain the preferred tribunal size, with 62% of appointments made in 2017 being for three-member tribunals. In 2017 the LCIA released statistics for the first time on the appointment of tribunal secretaries, reporting that 38 tribunal secretary appointments were made that year. The LCIA also released statistics for applications for interim relief for the first time, with 68 applications in 2017 made for interim and conservatory measures of which 25% were granted.

The LCIA has released this year a database of anonymized challenge decisions containing digests of 32 challenge decisions between 2010 and 2017 as part of "its ongoing commitment to transparency."[8] This will be updated periodically when new decisions are issued. In 2017 only six challenges were made to arbitrators appointed under the

[7] http://www.lcia.org/News/lcia-releases-2017-casework-report.aspx
[8] http://www.lcia.org/News/lcia-releases-challenge-decisions-online.aspx

LCIA Rules, of which three were rejected, one arbitrator resigned and two decisions remained pending as at 31 December 2017.

The LCIA was one of the first arbitral institutions to publish detailed statistics on gender diversity. The LCIA reported that "[f]emale arbitrators were appointed at record rates" in 2017, with women being appointed 24% of the time (2016 - 21%, 2015 - 16%). The LCIA selected women in 34% of appointments (double the rate of both parties and co-arbitrators). The LCIA did, however, report an increase in the proportion of female candidates selected by the parties in 2017, with parties selecting women as arbitrator 17% of the time. In 2016, this figure was only 4%.

B. Cases

B.1 Enforcement

This year, the English courts have considered some significant cases regarding the enforcement of awards rendered under BITs. In *PAO Tatneft v Ukraine*,[9] the English Commercial Court confirmed the enforcement of a Russia-Ukraine BIT award against Ukraine. By way of background, Russian oil producer Tatneft, the Republic of Tartastan, and Ukraine held shareholdings in the operator of the largest Ukrainian oil refinery ("Ukrtatnafta"). A US company ("Seagroup") and a Swiss Company ("Amruz") later acquired a small shareholding in Ukrtatnafta, which was eventually declared invalid by a Ukrainian court. Soon after, Tatneft bought shares in the Swiss and US companies. Following this, and pursuant to Ukrainian law, Tatneft's shares in Ukrtatnefta were also declared invalid. Its shareholding was, therefore, returned to the company and sold to a third party.

Tatneft sought to commence UNCITRAL arbitration proceedings pursuant to a BIT existing between Russia and Ukraine on the grounds that (i) Ukraine was complicit in depriving it of its shareholding in

[9] [2018] EWHC 1797 (Comm).

Ukrtatnafta; and (ii) Ukraine had breached its obligation under the BIT to treat investors fairly and equitably. In its final award, the arbitral tribunal found in favor of Tatneft and Ukraine subsequently applied to set aside enforcement of the order on the grounds that the court lacked jurisdiction by virtue of Ukraine's state immunity. Whilst the English courts dismissed Ukraine's application, Butcher J did agree with Ukraine on a number of points. Most significantly, he concurred that Ukraine was permitted to raise a jurisdictional challenge at this stage and the courts should give effect to state immunity (under section 1 of the State Immunity Act 1978) unless it found that the state had agreed in writing to submit a dispute to arbitration (section 9). However, on this same point, Butcher J acknowledged that the BIT could give rise to such an agreement. It, therefore, appears that this case opens up opportunities for states to raise jurisdictional issues at a later stage even where such issues were not raised before the original arbitration tribunal. This may provide states with a route to a second chance before enforcement courts where they have been unsuccessful before a tribunal.

In *Viorel Micula and others v Romania and European Commissioner (intervener)*,[10] the Court of Appeal also considered enforcement of an arbitral award obtained under a BIT. In this instance, however, the court decided to stay enforcement of the ICSID award (obtained by Swedish investors against Romania under the Sweden-Romania BIT) pending the General Court of the European Union's decision on the application of the claimant to annul a decision of the European Commission. Following the issuance of the award, the European Commission prohibited enforcement on the grounds that it constituted new state aid under article 107(1) of the Treaty on the Functioning of the European Union (TFEU). This decision was appealed to the General Court of the European Union. In the interim, the award had been registered in England, which led the High Court to stay enforcement until the General Court issued its judgment. On appeal,

[10] [2018] EWCA Civ 1801.

the Court of Appeal maintained the High Court's decision to stay enforcement considering issues of *res judicata*.

The court's decision considered the Arbitration (International Investment Disputes) Act 1966 and the rationale that, at the time of the award, it is deemed to be a final judgment of the High Court for the purpose of enforcement and, under the English Civil Procedure Rules, a judgment takes effect on the date on which it is given. It was also acknowledged that, if the court enforced the award as a judgment (in line with the 1966 Act) this would not only contravene the Commission's decision but may also lead to a decision inconsistent with that of the General Court. As a result, it was held that the court could not take a decision (on an ICSID award) which conflicted with a Commission decision, effectively making ICSID awards subject to EU law. As a result, the case demonstrates the interplay between the courts' UK, EU and international obligations and separately clarifies that ICSID awards are *res judicata* from the date of the award and not the conclusion of annulment proceedings.

B.2 Challenges to arbitral awards

Challenging an arbitral award under the Arbitration Act is difficult, marked by a general reluctance on the part of the English courts to intervene in arbitration unless a high threshold is made out. While this remains the case, there have been a few rare examples this year of successful applications made under section 68 of the Arbitration Act, providing useful illustrations of the seriousness of the irregularity that must be established in order to succeed in a challenge brought on these grounds.

RJ and another v HB[11] saw the Commercial Court set aside parts of an award for serious irregularity under section 68. The case involved a challenge to an ICC award on the grounds that the relief that was ordered by the tribunal was never sought by the parties and ordered without notice, depriving the claimants of an opportunity to address

[11] [2018] EWHC 2833 (Comm).

the case. The court found that the award was affected by serious irregularity as the parties did not have a reasonable opportunity to address the relief that was granted and set aside the affected parts of the award. The court, however, refused to remove the arbitrator (who it considered would be able to consider relevant matters afresh), engaging in an interesting *obiter* consideration of the interplay between sections 24 and 68. The court noted that the removal of an arbitrator requires an application to be made under section 24, and does not fall within the scope of power under section 68, illustrating the unwillingness of the court to overreach its powers under the Arbitration Act.

In *Reliance Industries Limited & Ors v The Union of India*[12] the claimants made nine challenges to parts of a final partial award under the provisions of sections 67, 68 and 69. The challenges related to the amount of development costs that claimants could recover under two product sharing contracts granting the exclusive right to exploit petroleum resources off the west coast of India, which were capped by the "Cost Recovery Limit." All challenges bar one challenge were dismissed. In the challenge that succeeded, the claimants argued that some categories of development costs fell outside the scope of the Cost Recovery Limit on the basis that the Union of India (referred to as the government) had specifically agreed that they should do so. The tribunal considered that this issue had fallen away based on their decision that the claimants were estopped from relying on a point of interpretation in an earlier award. The court found that the parties had not consistently proceeded on the basis that this issue would fall away if the government succeeded on the estoppel argument and therefore upheld the challenge. The court throughout the judgment provided some interesting commentary on the principles governing section 68. For example, one of the challenges argued that the conclusion reached by the tribunal on the construction of "[d]evelopment costs" was reached on the basis of an entirely new point which had never been advanced by or put to the parties. In dismissing this challenge, the

[12] [2018] EWHC 822 (Comm).

court noted that on points of construction it is enough if the point, as it was here, is in play even if it has not been precisely articulated. The threshold under section 68 is "deliberately high" to "reduce drastically the extent of intervention by the courts in the arbitral process."

Another case of interest is *SCM Financial Overseas Ltd v Raga Establishment Ltd*,[13] which discussed the non-interventional approach of the English courts when it comes to arbitration. The case involved a challenge to an award on the grounds of serious irregularity under section 68. The claimant argued that the arbitrators, in proceeding to an award instead of awaiting the outcome of court proceedings in Ukraine which would or might have had a significant impact on the decisions they had to make, caused substantial injustice to the claimant, as the court proceedings came to conclusions which were irreconcilable with those of the arbitrators. The court dismissed the challenge. The court emphasized that arbitrators are given extensive powers, through the parties' choice of arbitration as the means to settle their dispute, to decide all matters of procedure and evidence. The court stated that it has "a strictly limited power to intervene" and to do so high thresholds need to be crossed and high hurdles jumped. The court noted that, while a decision not to defer the issue of an award until further evidence is available is capable of amounting to a breach of arbitrators' section 33 duties, in the circumstances the tribunal was entitled to decide not to defer the award.

B.3 Removal of arbitrators

This relief remains difficult to obtain from the English courts which impose a high threshold for removal under section 24 of the Arbitration Act, as illustrated by the following Court of Appeal cases. *Halliburton Company v Chubb Bermuda Insurance Ltd & others*[14] involved an application to have the chairman of an arbitral tribunal removed on the grounds that their appointment had given rise to an appearance of bias. The arbitrator had accepted appointment in two

[13] [2018] EWHC 1008.
[14] [2018] EWCA Civ 817.

other arbitrations for the first respondent which concerned overlapping subject matters and had failed to disclose the appointments to the claimant. The application was dismissed in the Commercial Court. On appeal, the Court of Appeal agreed with the conclusion of the Commercial Court. The Court of Appeal found that the mere acceptance of appointments in multiple references concerning the same or overlapping subject matter with only one common party does not in itself give rise to an appearance of bias. There must be something more, something of substance. The test is objective, that is, whether a fair-minded and informed observer, having considered the facts, would conclude there was a real possibility that the tribunal was biased.

In *Allianz Insurance Plc & Anor v Tonicstar Ltd*[15] the Court of Appeal allowed an appeal against a Commercial Court decision which had removed an arbitrator applying an earlier decision of that court on the grounds that the arbitrator was not qualified to act within the meaning of the arbitration clause. The arbitration agreement provided that "unless the parties otherwise agree, the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance." The appellants had appointed a QC who had practiced as a barrister in the field of insurance and reinsurance for more than 10 years. The Respondent took the view that the clause referred to the experience of insurance or reinsurance and not the experience of insurance and reinsurance law, and that there was no evidence that the arbitrator had experience of insurance or reinsurance itself. The court rejected this argument stating that insurance and reinsurance is not separate and distinct from insurance and reinsurance law and that if the parties wanted to restrict the clause such that lawyers with experience of this field would be excluded, clear express intention of that would be needed. It allowed the appeal on this basis.

[15] [2018] EWCA Civ 434.

B.4 Interim relief

There have been a number of cases this year which have demonstrated how interim measures can serve as a useful tool in the arbitration process. The cases below highlight, in particular, the way in which interim injunctions can act as a procedural safeguard in concurrent arbitrations and court proceedings.

In *Sabbagh v Khoury and others*[16] the claimant applied for an interim injunction against the fifth and sixth defendants (the claimant's siblings) and the eighth and tenth defendants. The claimant's father had founded a group of companies of which the eighth defendant was the Lebanese holding company and the tenth defendant was a subsidiary. The claimant commenced proceedings in the English courts (under article 6(1) of the Brussels Regulation) in which she claimed that the defendants had conspired to misappropriate funds belonging to her father and to deprive her to her entitlement to shares in the group.

Following commencement of the proceedings, several of the defendants commenced Lebanese arbitration proceedings against the claimant on the basis that the parent company's articles of association provided for disputes between shareholders or shareholders and the company to be resolved through arbitration. The arbitral tribunal was subsequently constituted and ruled that it had jurisdiction over the dispute. The defendants applied for a mandatory stay of the English court proceedings in favor of the arbitration.

The Court of Appeal refused to grant the stay on the grounds that the claimant was not bound by the dispute resolution provision of the articles of association as (i) under Lebanese law, her claims were not founded on the articles; and (ii) she was suing in her own capacity and not on behalf of her father, a shareholder. As a result, the claimant applied for, and was granted, an interim anti-arbitration injunction. In the judgment, Knowles J distinguished the case as being exceptional

[16] [2018] EWHC 1330 (Comm).

in many respects, not least because of the oppressive and vexatious way in which the defendants sought to continue with the arbitration following the court's decision. Further, the case demonstrates a rare instance in which the English court has granted an interim anti-arbitration injunction preventing a party to proceedings from pursuing an overseas arbitration where the seat of arbitration is not in England and the English court is not the supervisory court.

Another case involving the English court's powers to grant injunctions in relation to concurrent arbitrations is *Atlas Power Ltd & Others v National Transmission and Despatch Company Ltd*.[17] In this case, the parties entered into agreements which were governed by Pakistani law and contained an LCIA arbitration clause. The arbitration clause provided that arbitration was to be conducted in Lahore (save for certain circumstances where either party could require arbitration to be conducted in London).

When a dispute arose, the parties commenced arbitration but were unable to agree on whether London was the seat of arbitration. By way of a partial final award, the arbitrator held that London was the seat. However, the defendant argued that, as the agreements were governed by Pakistani law, the arbitration clause should be construed in accordance with Pakistani law with the result that either the Pakistani courts had concurrent jurisdiction or Lahore was the seat.

The defendant sought to challenge the award in the Pakistani courts and the claimant then sought an anti-suit injunction in the English courts. In the English courts, it was held that it is irrelevant whether English law is the governing law of the underlying contracts. The seat determines the curial law and the curial law determines the validity of awards and challenges to them. Therefore, as London was determined by the arbitrator to be the seat, challenges to the award will only be those permitted under English law. The injunction was therefore granted.

[17] [2018] EWHC 1052 (Comm).