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Litigation & Arbitration Group Alert: A Brief Summary of Recent Developments

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Since our last update in May 2018 (here), there have been a number of further notable developments in the London arbitration market. These include an important decision by the Court of Justice of the European Union (the "CJEU") that threatens the future of investment arbitration as between EU Member States, as well as a number of decisions in the English courts that demonstrate the robust and pro-arbitration approach that the English courts continue to adopt.

1. INVESTMENT ARBITRATION IN THE EU

On 15 January 2019, the 28 EU Member States issued a political declaration setting out their intention to terminate all bilateral investment treaties as between EU Member States.[1] The declaration also refers to requests being made to Member State courts in pending actions to set aside (or not to enforce) awards rendered pursuant to those investment treaties.

The basis for this declaration is the decision of the CJEU last year in Slovakia v Achmea BV C-284/16. In that case, an investment tribunal constituted under the UNCITRAL Rules found that Slovakia had violated the bilateral investment treaty between Slovakia and the Netherlands (the BIT), and Slovakia subsequently brought proceedings in Germany to have the award set aside. The German courts referred the case to the CJEU for a preliminary ruling on whether the arbitration agreement in the BIT was compatible with EU law.

The CJEU held, in broad overview (and contrary to the opinion of the Advocate-General), that the arbitration agreement in the BIT was incompatible with EU law. In short, the CJEU reasoned that a tribunal constituted under the BIT is not a court or tribunal of a Member State and cannot therefore make a reference to the CJEU for a preliminary ruling on questions of EU law (which the tribunal would have to interpret because the terms of the BIT incorporated EU law). Therefore, as the tribunal's decision was subject to limited judicial review, this, according to the CJEU, means that the

[1] The declaration provides that the Member States will use their "*best efforts*" to do this by 6 December 2019.

arbitration agreement has an adverse effect on the autonomy of EU law and is incompatible with a number of key principles of EU law.

The CJEU's decision, coupled with the EU Member States' declaration on 15 January 2019, appears to spell the end for investment arbitration arising from intra-EU bilateral investment treaties. However, the impact on multilateral investment treaties (most notably the Energy Charter Treaty (the "ECT")) is less clear as 6 Member States expressly excluded the ECT from the scope of the political declaration.[2] These developments will also have a very real impact on existing intra-EU investment arbitration cases, and we can expect significant satellite litigation before Member State courts as a result.

Given the current uncertainty around Brexit, it is difficult to say what the long-term implications are for investments through the UK into other Member States. However, if the UK leaves the EU, many of the existing bilateral investment treaties may well survive/revive, which, ironically, could perhaps make investments into Europe through the UK a more attractive option.

2. DISMISSAL ON GROUNDS OF INORDINATE AND INEXCUSABLE DELAY

In July 2018, the English Commercial Court (in a rare case on this issue) upheld a tribunal's decision to dismiss a claim for want of prosecution pursuant to s.41(3) of the Arbitration Act 1996.

In Dera Commercial Estate v Derya Inc [2018] Bus LR 2105, the claimant in a shipping dispute had commenced arbitration proceedings in late 2011, but failed to take any formal procedural steps for a further three and a half years (at which time it served its Statement of Case). Relying on s.41(3), the tribunal dismissed the claim on the basis that there had been an *"inordinate and inexcusable delay"* in prosecuting the claim and the delay (i) gave rise to a substantial risk that a fair resolution of the issues in the claim would be impossible, and/or (ii) had caused serious prejudice to the Respondent.[3]

On appeal, the Commercial Court agreed with the tribunal's decision and confirmed that the contractual limitation period for bringing claims (which the parties had agreed to be one year, rather than the usual six years under the Limitation Act 1980) was an important consideration in determining whether a delay was "*inordinate*" (albeit this was not the only relevant consideration and the question will always be fact-dependent).

[2] These were Finland, Luxembourg, Malta, Slovenia, Sweden and Hungary. Their position is largely on the basis that the extent to which the ECT falls within the scope of the Achmea judgment is currently a matter for determination in pending proceedings, and they consider that it would be "*inappropriate, in the absence of a specific judgment on this matter, to express views*".
[3] s.41(3) Arbitration Act 1996.

3. APPLICATIONS FOR EXTENSIONS OF TIME TO COMMENCE ARBITRATION PROCEEDINGS

Pursuant to s.12 of the Arbitration Act 1996, the court can extend the time for commencing arbitral proceedings beyond any limit set out in the arbitration agreement, if the claimant has exhausted any available arbitral process for obtaining an extension.[4] However, the court must first be satisfied that either (a) "*the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time*", or (b) "*that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question*".

- In P v Q and others [2018] EWHC 1399 (Comm), the Commercial Court held that whether it was just to grant an extension of time pursuant to ground (a) above would be dependent on an applicant having acted *"expeditiously and in a commercially appropriate fashion"*.[5] In that case, both parties were in a chain of back-to-back voyage charterparties (with the claimant (P) as the disponent owner to a charter with Q, and Q the disponent owner to a further charter with a third party). Both parties received notice of a claim (in turn) on the day after the date on which the contractual limitation period for commencing proceedings expired. Whilst Q, on the same day, then served a notice of arbitration on the charterparty down the chain, P waited a further week before serving its notice of arbitration on Q. As a result, Q was granted an extension of time, but P was not, on the basis that Q had acted expeditiously but P had not.

- In Haven Insurance Company Ltd v EUI Ltd (t/a Elephant Insurance) [2018] EWCA Civ 2494, the Court of Appeal held that a unilateral mistake as to the relevant contractual limitation date was not necessarily a bar to granting an extension of time for commencing arbitral proceedings. In that case, EUI had wrongly believed that the time period for commencing proceedings started on the date that certain minutes of a meeting were finalized (which was the custom and practice of the relevant governing body), rather than the date that EUI was actually notified of a decision taken in that meeting (which was the test in the arbitration agreement). The Court of Appeal held that this was an exceptional circumstance, given the custom and practice of the governing body that gave rise to EUI's mistake, which justified the granting of an extension pursuant to s.12 of the Arbitration Act.[6]

[4] Section 12(2) also requires that "*a claim has arisen*" before a party can apply for an order to extend time.
[5] [2018] EWHC 1399 (Comm), at [65], [66] and [70].
[6] [2018] EWCA Civ 2494, at [58].

4. CHALLENGING AN ARBITRAL AWARD ON GROUNDS OF SERIOUS IRREGULARITY

As highlighted in our earlier update (available here), the English courts are generally reluctant to interfere with arbitral awards on the grounds of serious irregularity pursuant to s.68 of the Arbitration Act. However, a rare example of the courts doing so occurred in October 2018.

In RJ and another v HB [2018] EWHC 2833 (Comm), the sole arbitrator was requested to determine a dispute relating to a purported share transfer between RJ and HB. The arbitrator rendered an award that held RJ to be the beneficial owner of those shares, despite neither party making submissions to that effect and without putting the argument to the parties for their consideration. As a result, the Commercial Court held that there had been a serious procedural irregularity that had caused substantial injustice. The court confirmed that its ruling did not mean that tribunals are precluded from raising points which have not been argued by the parties; rather, it means that any such points should be put to the parties so that they have a "*proper opportunity*" to respond to them.

5. DELAYED APPLICATIONS FOR INTERIM ANTI-SUIT INJUNCTIONS

In June 2018, as summarized in our note here, the Commercial Court confirmed (in Nori Holdings Ltd v Bank Otkritie Financial Corp [2018] EWHC 1343) that the English courts are still prepared to grant anti-suit relief in order to give effect to arbitration agreements (save in relation to court proceedings commenced in EU Member States which have been brought in contravention of an arbitration agreement). In that case, the Commercial Court granted anti-suit relief in relation to proceedings commenced in Russia, but not proceedings commenced in Cyprus.

In September 2018, in Qingdao Huiquan Shipping Company v Shanghai Dong He Xin Industry Group Co Ltd [2018] EWHC 3009 (Comm), the Commercial Court demonstrated again its willingness to grant anti-suit relief in aid of arbitration, by restraining Chinese court proceedings brought in breach of an English-seated arbitration agreement.

The anti-suit relief was ordered notwithstanding that (i) the Chinese proceedings had been ongoing, at that stage, for more than a year, and (ii) the Chinese court had already ruled on its own jurisdiction. The Commercial Court held that this did not prevent it from granting the anti-suit injunction because the Chinese court had dealt with matters relating to its own internal jurisdiction rather than the arbitration clause, and there had been no decision on the merits. The Commercial Court ruled that the delay in seeking anti-suit relief was also not prohibitive because it had been reasonable for the relevant party to wait for the Chinese court to resolve a preliminary issue.

6. INSTITUTIONAL UPDATES

We referred to a number of institutional updates and publications in our May 2018 briefing (here), including the guidance published by the ICC that confirmed a tribunal's power to "*dismiss manifestly unmeritorious claims or defences*" on an expedited basis. In November 2018, the updated HKIAC Rules came into force. These rules also now include a new summary procedure that will expressly enable tribunals to determine points of fact and/or law on a summary determination basis. They also require disclosure of third party funding arrangements. The rules can be accessed here.

In August 2018, ICSID released a draft set of amended rules for investment arbitrations (for the first time in 12 years) that propose default electronic filing of documents, new time limits and an optional expedited procedure. The draft rules also propose mandatory disclosure of third party funding arrangements, and provide that awards will be made public unless an objection is raised by a party within 60 days (as opposed to the current regime of requiring parties' consent). The draft amendments require the approval of two-thirds of ICSID's Member States, and so it remains to be seen how many of the draft amendments are ultimately made.

In December 2018, the Rules on the Efficient Conduct of Proceedings in International Arbitration (known as the "Prague Rules") were launched. These are intended to provide parties with a more civil law based alternative to the non-mandatory IBA Rules on the Taking of Evidence in International Arbitration 2010 (which are regularly used in arbitration proceedings but which are considered to reflect a common law approach to the taking of evidence). The Prague Rules reflect the civil law approach of providing a tribunal with more inquisitorial and proactive powers than in common law regimes, and seek to limit the extent of document production and witness evidence.[7] Whilst there is no guarantee that parties (particularly in common law jurisdictions) will now incorporate the Prague Rules as a default option in their proceedings, at the very least the Rules are a welcome development in providing parties with more options to cater for their particular requirements/circumstances. The rules are available here.

[7] See Article 4.2.

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