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NEWS IN BRIEF

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A Case of Insecurity? Jurisdiction Under Section 103(5) of the English Arbitration Act of 1996

UK Supreme Court explains the limits to orders for security when resisting enforcement of a foreign award under the New York Convention

By Philip Clifford, Robert Price and Eleanor Scogings

On 1 March 2017 the UK Supreme Court[1] overturned an order of the Court of Appeal and decided that Nigerian National Petroleum Corporation (NNPC) could not be required to provide monetary security as a condition for resisting enforcement of a Nigerian arbitral award made in favor of IPCO (Nigeria) Limited (IPCO). The UK Supreme Court confirmed that the English courts do not have jurisdiction under section 103(5) of the English Arbitration Act 1996 (the Act) to compel a party to provide security as a condition for resisting enforcement of an award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), unless an adjournment of the English enforcement proceedings is sought pending resolution of an application to set aside or suspend the award in the courts of the seat.

Background Facts

Following an arbitration in Nigeria, NNPC sought to resist enforcement of the award under section 103(2)(f) of the Act (asserting that the award had not yet become binding or had been set aside or suspended by the Nigerian courts) and section 103(3) (asserting that enforcement should be refused as it would be contrary to public policy). Alternatively, NNPC requested that the enforcement proceedings be adjourned under section 103(5) of the Act pending resolution of the issues before the Nigerian courts. The Commercial Court adjourned enforcement proceedings on the condition that NNPC provided security pending resolution of the Nigerian proceedings.

Some time later, although the proceedings in Nigeria were still ongoing, IPCO renewed its application to enforce the award in England. The Commercial Court dismissed IPCO's application on the grounds that NNPC had a good *prima facie* case on fraud and that the Nigerian proceedings should be permitted to run their course.

On appeal, the Court of Appeal overturned the Commercial Court's decision, holding that:

- The proceedings should be remitted to the Commercial Court to decide, pursuant to section 103(3) of the Act, whether enforcement should be refused on grounds of public policy.
- Any further enforcement of the award should be adjourned pursuant to section 103(5) of the Act pending determination of NNPC's public policy defence to enforcement.
- As a condition of this further adjournment, NNPC must provide further security, failing which enforcement could proceed.

The Supreme Court judgment

NNPC appealed on the basis that the Court of Appeal's order for further security was issued without jurisdiction or, alternatively, was manifestly wrong.

The UK Supreme Court agreed that the Court of Appeal had erred:

1. The English courts have no jurisdiction to make the provision of security a condition of resisting enforcement under section 103(2) or (3) of the Act. There is nothing in section 103(2) or (3) to that effect.

2. Section 103(5) of the Act provides for security to be ordered, but only if the English court adjourns its decision on enforcement *while* an application for setting aside or suspension of the award is pending before the court of the seat of arbitration. Once the Court of Appeal had decided that there should be no further adjournment, and that NNPC's fraud-based public policy challenge should be decided by the Commercial Court, there was no basis for ordering security as the fraud issue was no longer before the Nigerian courts.

3. Security cannot be ordered as the price of deciding a challenge to enforcement under section 103(3) of the Act. Under section 103(5), the security is the price paid by the resisting party for an adjournment due to proceedings in the seat. In this instance, the Court of Appeal was considering whether or not to lift the existing adjournment that had been ordered by the Commercial Court and allow a challenge to enforcement to proceed.

4. General rules of English procedure cannot be used to justify a requirement for security. The Supreme Court rejected IPCO's attempt to rely on CPR 3.1(3)(a), which gives the court the power to issue conditional orders, and section 70(7) of the Act, which provides that the court may order a party challenging an award to provide security for the amount payable under the award. There are no grounds for importing English procedural provisions which would undermine the operation of section 103 of the Act and the provisions of the New York Convention on which it is based. The Act is a complete code and, had provision for security been intended, such a provision would have been explicitly stated.

Comment

The UK Supreme Court's decision is an important authority on an aspect of the New York Convention that has received little attention. Given that section 103(5) of the Act gives effect to Article VI of the New York Convention and largely mirrors its wording, courts in other jurisdictions dealing with enforcement applications will undoubtedly consider this decision very carefully.

The UK Supreme Court clarified that Article VI of the New York Convention was not designed to assist an award creditor in obtaining payment. Rather, it was designed to balance one party's right to enforce an award with another party's right, in limited circumstances, to have enforcement refused.

It will be interesting to see if this decision impacts the strategies of parties seeking to resist the enforcement of awards, both in terms of making challenges at the seat of arbitration and as regards the grounds parties rely upon during enforcement proceedings in England.

The UK Supreme Court judgment can be found here.

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NEWS IN BRIEF

Southern African Development Community Amends Limit on Investment Protection

Amended Finance and Investment Protocol removes Investor-State Dispute Settlement and decreases substantial protections. Investors should consider bringing potential claims now.

By Jan Erik Spangenberg

According to recent news reports, the Southern African Development Community (SADC) adopted a significant amendment to Annex 1 of the SADC Finance and Investment Protocol. The current Member States of the SADC are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, the United Republic of Tanzania, Zambia and Zimbabwe.

Annex 1 of the SADC Finance and Investment Protocol in its unamended version contains broad protections for foreign investors in SADC Member States in line with the standards of protection offered in bilateral investment treaties. These protections include *inter alia* provisions on expropriation (Article 5), fair and equitable treatment (Article 6(1)) and most favored nation requirements (Article 6(2)). For the settlement of disputes between investors and SADC Member States, Article 28 of the current Annex provides for international arbitration by agreement at either the SADC Tribunal, the International Centre for Settlement of Investment Disputes (ICSID), or, by default if no agreement can be reached, under UNCITRAL Arbitration Rules. A fuller review of the substantive and procedural protections of the SADC Financial and Investment Protocol can be found here.

A draft agreement amending Annex 1 to the SADC Protocol on Finance and Investment was previously adopted at the 36th ordinary meeting of the summit of the SADC Heads of State and Government in August 2016. While the text of the amendment has not been officially published, the amendment reportedly removes investor-state dispute settlement, defines protected investments and investors more narrowly, deletes the fair and equitable treatment requirement, and limits compensation in cases of expropriation for considerations of public interest.

Pursuant to Articles 26 and 28 of the Finance and Investment Protocol, the amendment still requires the ratification of three quarters of the SADC Member States, after which it will enter into force within 30 days. The current status of the ratification process is unclear. Investors in SADC Member States should be aware that the protocol may come into force with no notice or only short notice. Investors with current or potential disputes should also note that the current Annex 1 to the Finance and Investment Protocol does not offer any explicit protections extending to the time after its termination or amendment. Subject to the individual circumstances, investors may be prudent to seek legal advice and to trigger the still existing investor-state dispute settlement process by initiating arbitration proceedings before the amendment comes into force — at which point arbitration may no longer be available.

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Angola Accedes to 1958 New York Convention

Angola brings its procedures for the recognition and enforcement of international arbitral awards in line with international standards

By Jan Erik Spangenberg

On 6 March 2017, Angola acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and thereby became the 157th Contracting State. Pursuant to Article XII(2) of the New York Convention the convention will enter into force on the 90th day after the deposit of Angola's instrument of accession, *i.e.* on 4 June 2017.

Angola's accession to the New York Convention will bring Angola's recognition and enforcement of arbitral awards rendered by tribunals seated outside of Angola in line with international standards. In particular, Article V of the New York Convention only allows national courts to refuse the recognition and enforcement of foreign arbitral awards on limited grounds, *e.g.* invalidity of the arbitral agreement, lack of arbitrability or reasons of public policy. Most importantly, the New York Convention does not allow a general *de novo* review of the arbitral tribunal's decision on the merits. Angola's accession to the New York Convention therefore provides assurance to international investors and businesses trading with Angola that arbitral awards will be respected and enforced in Angola in line with the New York Convention's international standard.

However, the New York Convention is not directly applicable but needs to be implemented in national legislation and court practice. Before Angola's accession to the New York Convention, the country's domestic arbitration and civil procedure laws did not provide for a specific mechanism for the enforcement of foreign arbitral awards. Therefore, uncertainty remains over whether and how the Angolan legislature will amend the domestic arbitration laws to implement the obligations resulting from the New York Convention, as well as how Angolan courts will interpret the current domestic framework in view of Angola's new international obligations.

Irrespective of Angola's domestic implementation of the New York Convention, Angola's accession to the convention may also positively impact the protection of investments under bilateral investment treaties (BITs), which Angola has in place with a number of countries, including France, Germany, Italy, Portugal, Spain and the United Kingdom. Foreign arbitral awards may be protected under these treaties and a refusal to properly enforce them may result in a treaty claim for damages against Angola itself.

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English Courts Stay Enforcement of ICSID Award

Judgment addresses the intersection of a State's public international law obligations in investment treaty arbitration and its obligations under European Union law

By Catriona E. Paterson

In his judgment of 20 January 2017, in Micula & Ors v. Romania,[2] Mr Justice Blair of the English Commercial Court stayed enforcement of an ICSID arbitration award on the basis that the court could not, under its EU law obligations, enforce an award in circumstances where (1) the European Commission had prohibited Romania from making any payment under that award to the claimants, and (2) a challenge to that decision was pending before the EU courts.

Background

The underlying dispute concerned Romania's premature withdrawal of tax incentives that had been introduced to attract investment into certain disadvantaged regions. Romania withdrew the incentives as part of the country's preparations for accession to the EU, on the basis that the incentives were deemed incompatible with EU rules on State aid. The Micula brothers and their associated companies (the Claimants) — who had invested heavily in Romania in reliance on the tax incentives — alleged that the scheme's premature termination and other conduct of the State amounted to a breach of Romania's obligation to treat investors fairly and equitably as required by the Sweden-Romania bilateral investment treaty. On 11 December 2013, an arbitral tribunal established in accordance with the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) agreed and awarded the Claimants in excess of Romanian Leu 750 million in damages and pre-award interest.[3]

The European Commission (EC) has, from the outset, taken the view that the payment of damages to the Claimants would constitute new, unlawful State aid as a matter of EU law.[4] Following the 2013 ICSID award in the Claimants' favour, the EC issued an injunction obliging Romania to suspend any enforcement action. This injunction was followed in March 2015 by a Final Decision of the EC that concluded that execution of the ICSID award, including payment of damages, would constitute new (unlawful) State aid.[5] The Claimants have challenged that Decision in annulment proceedings before the General Court of the European Union (the GCEU). As of the date of this article, that challenge is pending.

Enforcing ICSID Awards in England and Wales

ICSID Member States are obliged to recognize and enforce a pecuniary award rendered pursuant to the ICSID Convention "as if it were a final judgment of a court in that State" (Article 54(1) of the ICSID Convention). This international obligation has been incorporated into domestic law in the United Kingdom by virtue of the Arbitration (International Investment Disputes) Act 1966 (the Act).[6] Importantly, the court does not have any discretion to refuse to recognize (*i.e.*, register) or enforce an ICSID award if all formal, procedural requirements for its registration have been met.

The Judgment

The Claimants registered their ICSID Award in the High Court in accordance with the Act in October 2014;[7] following the Final Decision of the EC, Romania applied to have that registration set aside or enforcement stayed pending the outcome of the GCEU proceedings.[8]

The application *prima facie* presented a conflict between two obligations: under the Act and the ICSID Convention, the court is obliged to recognize and enforce an ICSID award as if it were a judgment of the High Court.[9] However, as a matter of EU law, the EC has exclusive responsibility for assessing the compatibility of measures with EU rules on State aid,[10] and "the national courts must refrain from taking decisions which conflict with a decision of the Commission"[11] or stay proceedings where there is a risk of conflict with a decision of a European Court.[12]

In light of the clear obligation on the court articulated in the Act to register ICSID awards, Blair J refused Romania's application to have registration of the ICSID award set aside. He reasoned that registration of the award was in this instance a precursor to, and distinct from, its enforcement and not prohibited by the Final Decision. Accordingly, registration of the award did not create a risk of conflict between the domestic and EU institutions.[13]

However, in order to prevent a risk of conflict between a judgment of the English court and a European court, Blair J stayed enforcement of the ICSID award pending resolution of the GCEU proceedings. In reaching this decision, Blair J further attempted to resolve the apparent conflict between the UK's international law obligations as articulated in the Act and its EU law obligations. In his view, no conflict existed as the Act required only that the Claimants be in the same position as if a judgment of the High Court had been made in their favor,[14] and a purely domestic judgment would similarly be subject to the determination of related proceedings of the GCEU.[15]

The decision to stay enforcement seems to lay the foundation for the English courts to refuse to enforce ICSID awards if execution would place the UK in breach of its EU law obligations; however, this decision is unlikely to be the last word on the subject. The court may have to tackle the issue head on following a final decision by the GCEU. It also remains to be seen how the court would approach the same question following the UK's exit from the EU, when presumably the UK will no longer be bound by EU law obligations.

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SIAC Releases New Investment Arbitration Rules

New SIAC rules seeking to attract Investor-State Disputes regulate emergency arbitrator proceedings and third party funding

By Jonathan Hew

On 1 January 2017, the Investment Arbitration Rules of the Singapore International Arbitration Centre (the SIAC Investment Rules) came into force. The SIAC Investment Rules, which are based on SIAC's commercial arbitration rules, aim to provide a specialized set of procedures when settling disputes involving a State, a State-controlled entity or an intergovernmental organization arising out of a contract, treaty, statute or other instrument.

A growing number of arbitral rules have been amended in recent years to include specific provisions for accomodating disputes between or against States. SIAC has, however, gone one step further by crafting a discrete set of rules specifically for investment disputes. The following provisions of the SIAC Rules are particularly notable:

1. **Emergency arbitrators** – Rule 27.4 provides that, if parties expressly agree on the application of the emergency arbitrator mechanism in Schedule 1, an emergency arbitrator may make an order or award for interim relief prior to the constitution of the tribunal.

2. **Early dismissal** – Rule 26 allows a party to apply for the early dismissal of a claim or defense that is manifestly without legal merit, outside the tribunal's jurisdiction or inadmissible. If the tribunal allows the application for dismissal to proceed, parties will have an opportunity to be heard. The tribunal will generally make a decision within 90 days of the date of the application.

3. **Third-party funding** – The SIAC Rules expressly contemplate the use of third-party funding, which Singapore has permitted since the start of this year. Rule 24(l) empowers the tribunal to order the disclosure of a party's third-party funding arrangement; meanwhile, Rules 33 and 35 empower the tribunal to take into account any such arrangement when making its costs awards.

4. **Third-party submissions** – Rule 29 enables third parties to make submissions under certain circumstances. A non-disputing contracting party to a *treaty* that is the subject of the dispute may make written submissions to the tribunal on questions of treaty interpretation that are directly relevant to the issues in dispute. In all other circumstances, a non-disputing party may apply to the tribunal to make written submissions regarding a matter within the scope of the dispute. The tribunal must take into account a number of factors when considering whether to allow the submission, including the disputing parties' views, the applicant's interest in the dispute, the usefulness of the written submissions and confidentiality. The tribunal must further ensure that any written submissions are not unreasonably disruptive to the arbitration or unduly burdensome or prejudicial to any of the parties. In addition, the tribunal may invite a non-disputing party to make written submissions. Additional commentary on the issue of third-party submissions in investment arbitration can be found here.

5. **Procedural tweaks** – The SIAC Investment Rules contain a number of provisions aimed at ensuring the efficiency of proceedings. For example, the SIAC Investment Rules include time limits for the appointment of the tribunal, challenges to arbitrators, responses to the notice of arbitration and jurisdictional objections. The SIAC Investment Rules also set time limits for the transmission of orders or awards on strike-out applications and for the drafting, correction and interpretation of final awards.

Singapore is already well-recognized as a hub for international commercial arbitration. With the SIAC Rules, the city-state is set to also become a more attractive center for the resolution of international investment arbitration.

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International Chamber of Commerce (ICC) Issues Revised Note to Parties and Arbitrators

Note gives arbitrators and parties guidance for conducting arbitrations under the new ICC arbitration rules effective as of 1 March 2017

By Jan Erik Spangenberg

On 1 March 2017, the ICC issued an updated version of its Note to Parties and arbitral tribunals on the conduct of arbitrations under the ICC Rules. The updated note reflects the changes to the revised ICC arbitration rules, which became effective on 1 March 2017.

The updated note includes detailed guidance on the new expedited procedure provisions introduced with the revised arbitration rules. The expedited procedure provisions apply if: (i) the arbitration agreement was concluded after 1 March 2017, (ii) the amount in dispute does not exceed US$2 million, and (iii) the parties have not opted out of the expedited procedure rules. The note explains *inter alia* the determination of the amount in dispute for the purposes of determining whether the US$2 million million threshold has been exceeded. The note clarifies that the expedited procedure provisions shall not apply in cases of declaratory or non-monetary claims for which the value cannot be estimated, unless such claims merely support a monetary claim, or unless they do not add significantly to the complexity of the dispute.

The new note also explains the ICC's expectations for arbitral tribunals to render awards in a timely and efficient manner. It sets out penalties in the form of a reduction of the arbitrators' fees if a draft award is submitted for scrutiny to the ICC later than 7 months after the last substantive hearing or written submissions (excluding costs submissions).

Finally, the new note also incorporates the formerly separate note on the appointment, duties and remuneration of administrative secretaries. The new note explains the ICC's new practice of publishing certain information about arbitrator appointments on its website. In addition, the new note encourages parties and tribunals to draw inspiration from and, when appropriate, adopt the IBA Guidelines on Party Representation in International Arbitration.

Parties and counsel are well-advised to consult the new ICC note, which contains helpful guidance on the ICC's practices, whenever dealing with any of the issues that the content addresses.

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German Institution of Arbitration (DIS) Provides Model Arbitration Clause for Use With ISDA Master Agreement

New clause gives financial institutions the option to arbitrate under the auspices of the German Institution of Arbitration in Frankfurt/Main

By Jan Erik Spangenberg

At the beginning of the year, the DIS published a model arbitration clause for the 2002 ISDA Master Agreement. The model arbitration clause allows for settlement of disputes arising under transactions governed by the ISDA Master Agreement in arbitration under the auspices of the DIS and seated in Frankfurt/Main.

The ISDA Master Agreement, developed and published by the International Swaps and Derivatices Association (ISDA), is a commonly used framework for over-the-counter derivatives transactions. In 2013, the ISDA published a guide for the inclusion of arbitration as a means of dispute resolution under the ISDA Master Agreement. However, the model clauses that the ISDA provided did not include arbitration under the DIS Arbitration Rules, nor arbitration seated in Germany. The new model clause published by the DIS closes this gap.

Under the new model clause, the governing law remains English law or New York law, whereas the arbitration clause is governed by German law. This avoids any ambiguities possibly resulting from German arbitration law's lack of a specific provision regarding the law governing the arbitration agreement.

The model clause also provides the option for the arbitral tribunal to include one or three arbitrators. In addition, the model clause provides for either the co-arbitrators or the DIS Appointing Committee to appoint the chair.

The new model clause allows market participants to easily select DIS arbitration seated in Germany as a means of dispute resolution with their customers. It remains to be seen how successful DIS arbitration will be in this area. German market participants — and particularly the financial institutions based in Germany's banking capital Frankfurt/Main — will certainly welcome having the option of resorting to DIS arbitration.

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Asymmetry of Jurisdiction Clause No Bar to Exclusivity Under Recast Brussels Regulation

English High Court renders decision of considerable commercial significance given the use of asymmetric jurisdiction clauses in international financial agreements

By Oliver Browne and Jonathan Hew

In *Commerzbank AG v Pauline Shipping and Liquimar Tankers* [2017] EWHC 161 (Comm), the English High Court confirmed that a party relying on an asymmetric jurisdiction clause can avail itself of the protections against abusive litigation tactics that the Recast Brussels Regulation affords to exclusive jurisdiction clauses.

Asymmetric jurisdiction clauses

Asymmetric jurisdiction clauses typically require one party to bring proceedings in a specific jurisdiction, while permitting the other to bring proceedings in any court of competent jurisdiction. This asymmetry is attractive to lenders in cross-border financings — borrowers and guarantors are prevented from making claims against the lender in multiple jurisdictions, but the lender can seek enforcement in whichever jurisdiction the borrowers' or guarantors' assets are situated.

Exclusive jurisdiction clauses and the Recast Brussels Regulation question

The Recast Brussels Regulation (Regulation (EU) No. 1215/2012 (recast)) came into force in January 2015. It contains provisions aimed at enhancing the effectiveness of clauses that confer exclusive jurisdiction upon the court of an EU Member State.

The impetus for these provisions was the desire to address the problem of abusive "*torpedo*" actions through which a party would deliberately bring a claim in a slow-moving Member State court in breach of an exclusive jurisdiction clause. This claim would delay subsequent proceedings by the other party in the Member State court designated in the jurisdiction clause because, under the *lis pendens* rules in the original Brussels Regulation / the Brussels Convention, the designated court would be obligated to stay its proceedings pending the first seized court's determination on jurisdiction.

The Recast Brussels Regulation also contains *lis pendens* rules. Article 29(1) provides that:

> *"Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established."*

However, Article 31(2) further provides that:

> *"[…] where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised [i.e., an exclusive jurisdiction clause], any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement."*

The Recast Brussels Regulation does not state expressly whether its provisions apply to asymmetric jurisdiction clauses. In other words, the Recast Brussels Regulation does not clarify whether asymmetric jurisdiction clauses are the same as exclusive jurisdiction clauses. Given the difficult treatment that asymmetric jurisdiction clauses have faced in the French and Luxembourg courts (for example), where the clauses were held to be unenforceable and/or to conflict with the Brussels Regulation regime, the lack of clarity caused some justifiable concerns.

The decision in *Commerzbank*

Commerzbank addressed this issue head-on. Between 2006 and 2008, a bank provided loans to various companies in a shipping group, each of which was either a borrower or guarantor. The arrangements between the parties contained asymmetrical jurisdiction clauses that limited the shipping companies to initiating proceedings in England only, whereas the lender could bring a claim in any other court of competent jurisdiction.

The shipping companies were unable to repay the entirety of the loans, which in June 2015 led the lender to warn of its intention to commence proceedings in England against the shipping companies. Later that year, the shipping companies issued proceedings against the lender in Greece. In 2016, the lender responded by suing the shipping companies in England.

The shipping companies applied to stay the English proceedings. While a number of issues were addressed before the High Court, the shipping companies' core argument was that asymmetric jurisdiction clauses are not exclusive jurisdiction clauses for the purposes of Article 31(2) of the Regulation, and therefore that the *lis pendens* rule under Article 29(1) should apply.

The High Court rejected this argument, confirming that asymmetric jurisdiction clauses can indeed be enforceable and qualify as exclusive jurisdiction clauses for the purposes of the Recast Brussels Regulation. In particular, the High Court relied on *Nikolaus Meeth v Glacetal Sarl* [1979] CMLR 520 in which the European Court of Justice found that a clause conferring jurisdiction upon the French court only where one party sued, and the German court only where the other sued, was nevertheless an exclusive jurisdiction clause under the Brussels Convention (a predecessor to the Recast Brussels Regulation). That case supported the view that "*where a clause confers exclusive jurisdiction on the court or courts of a Member State when one party sues, the clause will still be an exclusive jurisdiction clause for the purposes of Article 31(2) even where, if the other party to the clause sues, the clause shows the parties to have agreed that jurisdiction is to be conferred differently, or allowed to engage differently.*" The High Court also referred to Recital 22 of the Recast Brussels Regulation, which provided the background for Article 31(2) and clearly stated the need for "*an exception to the general lis pendens rule to enhance the effectiveness of exclusive choice of court agreements and to avoid abusive tactics*."

In addition, the High Court addressed the shipping companies' alternative argument that the English proceedings should be stayed on the basis of Article 30 of the Regulation. Under Article 30, Member State courts other than the court first seized have discretion to stay their proceedings when "*related actions*" are pending (the shipping companies in *Commerzbank* alleged that the English and Greek proceedings were related). In the High Court's view, this argument did not outweigh the fact that the parties agreed to an exclusive jurisdiction clause in favor of the English court, which was a "*powerful factor*" against granting a stay.

Conclusion

The High Court's decision in *Commerzbank* provides much-needed clarity to the status of asymmetric jurisdiction clauses under the Recast Brussels Regulation, which should in turn dissuade attempts to undermine these clauses and/or "*torpedo*" litigation that could arise under such clauses.

However, the issue has not been completely clarified just yet. The respondents have applied for permission to appeal the decision to the Court of Appeal. Furthermore, it remains unclear as to whether the courts of other Member States — and, more importantly, the ECJ — will adopt the same position as the English courts (whatever that may be eventually). This uncertainty gives rise to understandable worries given the treatment such clauses have faced elsewhere in Europe.

On a more substantive note, it is not entirely clear how future cases will treat the "*anomaly*" in relation to asymmetric jurisdiction clauses and Article 32(1), whereby: (i) the party with the benefit of the clause elects to sue in the court of a Member State other than the court to which the other party is restricted, and (ii) the other party subsequently brings a claim in the court to which it is restricted in accordance with the clause. The suggestion in *Commerzbank* is that, under Article 32(1), the former proceedings would be stayed in favor of the latter notwithstanding that this outcome would in effect deprive the party whom the clause was meant to benefit of the freedom to sue in whichever Member State jurisdiction it pleases.

Lastly, readers should keep in mind that Article 31(2) is relevant to intra-EU proceedings only. Non-Member State courts are not required to stay actions that torpedo proceedings in breach of an exclusive jurisdiction clause in favor of a Member State court. At the same time, Member State courts are not required to stay actions that torpedo proceedings where exclusive jurisdiction has been conferred on a non-Member State court.

Interested in delving deeper into the Recast Brussels Regulation and jurisdiction clauses? See further Latham & Watkins coverage in: Reform of the Brussels Regulation: Development in Questions of Jurisdiction and the Recognition and Enforcement of Judgments Across the European Union, Reform of the Brussels Regulation – Latest Developments and the "Arbitration Exception", Preparing for Brussels I recast — reversing Gasser and Thwarting Torpedoes and Other Clarifications: Recast Brussels Regulation in Force From 10 January 2015.

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ICSID Tribunal Refuses to Order Stay of Domestic Criminal Proceedings Against Witness

Tribunal in Italba Corporation v. Oriental Republic of Uruguay (ICSID Case No. ARB/16/19) addresses delicate issue of parallel criminal proceedings and confirms States' sovereign right and duty to investigate criminal actions

By Jan Erik Spangenberg

In early 2016, Italba Corporation brought a claim relating to the revocation of rights for wireless communications frequencies against the Oriental Republic of Uruguay under the United States-Uruguay Bilateral Investment Treaty and the ICSID Convention.

While the arbitration was pending, the claimant, Italba Corporation, alleged that Uruguay had initiated criminal proceedings against two of the claimant's witnesses in the arbitration based solely on documents and testimony submitted in the arbitration. Specifically, according to the claimant, the witnesses were accused of forging documents submitted in the arbitration for the purpose of "defrauding" the tribunal and "embarrassing Uruguay." The criminal proceedings against the witnesses in relation to these documents were characterized by the claimant as "an attempt by Uruguay to ursurp the tribunal's fact-finding role in evaluating the evidence before it."

In its subsequent Application for Provisional Measures and Temporary Relief, the claimant requested that Uruguay be ordered to either end or suspend the criminal proceedings until the tribunal issued a final award in the arbitration. The claimant also requested that Urugay be ordered to refrain from initiating any other criminal proceedings related to the arbitration or to take any further "measure of intimidation" against persons connected to the claimant's local subsidiary.

In response, Uruguay maintained there was "overwhelming evidence that signatures had been forged," that the witnesses in question were also material witnesses in regard to the commission of the criminal offenses, and that there was no reason or evidence to suspect that the criminal investigation was conducted in bad faith to retaliate against witnesses or to hamper the claimant in the presentation of its case. Moreover, Uruguay submitted a guarantee that its investigation into the circumstances of the forged signatures, regardless of the investigation's course, will not prevent the witnesses from participating in the preparation or presentation of the claimant's case. At the same time, "in the interest of full transparency," Uruguay informed the tribunal that its "judiciary is independent, as part of its democratic and republican government system" and that "[w]hatever transpires as a result of this criminal investigation is within the exclusive competence of the juidicial authorities of Uruguay." In response to the claimant's submission that Uruguay's investigation would usurp the tribunal's fact finding role, Uruguay argued that the tribunal had the exclusive competence to evaluate the evidence for the purpose of ruling in the claims presented in the arbitration.

In its decision on15 February 2017, the tribunal rejected the claimant's application based on the following reasoning:

- First, despite the Respondent's jurisdictional objection in relation to the standing of the claimant, the tribunal was satisfied that it held *prima facie* jurisdiction over the parties and the dispute submitted to it. The tribunal reasoned that its *prima facie* jurisdiction was based on the fact that the Respondent had not requested to bifurcate the proceedings and deal with the jurisdictional objection in a preliminary phase of the arbitration, but instead argued that the objection should be determined at the same time as the merits, in a final award. In these circumstances the tribunal considered that the Respondent had accepted that the tribunal is vested with the necessary adjudicative powers to conduct the arbitration.

- Second, the tribunal confirmed that Uruguay has an internationally recognized and protected sovereign right and duty to investigate alleged criminal actions that have taken place in the country's territory. The tribunal therefore does not have the power to order or recommend the cessation of a criminal investigation that the relevant authorities of Uruguay are conducting. Moreover, the tribunal found no evidence to support the claimant's contention that the criminal investigation had been brought in bad faith or any substantive and compelling evidence of a serious risk that the claimant would suffer irreparable harm as a result of the investigation.

Finally, the tribunal noted that Uruguay had accepted that the tribunal is in no way bound by the findings of the Uruguayan courts in relation to the authenticity of the documents in question and that the tribunal's functions would therefore not be usurped. The tribunal also noted that absent any evidence that the criminal investigation had indeed affected the witnesses' participation in the arbitration, the tribunal must accept that the commitments made by Uruguay to respect the claimant's rights in the arbitration were given in good faith and would be adhered to.

The tribunal's clear affirmation of a State's sovereign right to conduct criminal investigations in relation to and irrespective of a pending international arbitration against the State is noteworthy. In the past, other tribunals (see *Hydro S.r.l. and others v. Republic of Albania*, ICSID Case. No. ARB/15/28, Order on provisional measures, 3 March 2016) have been less reluctant to order a State to suspend criminal proceedings. However, in that case, the criminal proceedings had advanced to a more serious stage and arrest warrants had already been issued. On the other hand, the tribunal's decision in *Italba v. Uruguay* may also have been influenced by the claimant's failure to submit any evidence of bad faith on the part of Uruguay and any evidence of actual harm caused by the investigation.

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Tribunal Issues First Decision on Counterclaims in *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina* (ICSID Case No. ARB/07/26)

Tribunal accepts jurisdiction over a counterclaim seeking damages for the claimants' failure to comply with their concession obligations and consequent breach of the human right to water, but ultimately dismisses the counterclaim on the merits

By Laila Hamzi and Samuel Pape

The Facts

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa (the Claimants) were Spanish nationals who, together with other investors, established Aguas Del Gran Buenos Aires S.A. (AGBA). In early 2000, AGBA was granted a concession for water supply and sewage services in Buenos Aires.

The concession was already facing difficulties when the Argentinian crisis struck in mid-2001 and the State consequently adopted emergency measures in January 2002. Such measures included the "pesification" of public service tariffs, which were denominated in US dollars, at a conversion rate of 1:1, at a time when the Peso had depreciated by more than two thirds. This led to an immediate reduction in the value of the tariffs by two thirds. Between 2003 and 2005, AGBA and Argentina sought to renegotiate the concession contract, but those negotiations failed and Argentina terminated the concession.

The Claimants commenced ICSID proceedings seeking damages for breach of the fair and equitable treatment (FET) standard, expropriation, and discriminatory and unjustified measures. Argentina argued that the investors' mismanagement had caused the difficulties that the concession faced. Argentina also counterclaimed, arguing that the Claimants had failed to make the investment required under the terms of the concession and thereby violated the population's human right to water.

The Tribunal's Findings

Fair and equitable treatment (FET)

The Claimants argued that Argentina had breached the FET standard by adopting emergency measures, engaging in renegotiations having decided these efforts would not succeed, and wrongfully terminating the concession. The tribunal held that the investor's legitimate expectations must be determined in the light of the broader legal, social and economic framework prevailing over the concession, with particular regard to international law and Argentinian constitutional law, including the government's responsibility to "ensure the population's health and access to water."

The tribunal found that while the emergency measures had made matters worse for the concession and resulted in a loss of income, the concession was already facing difficulties before the crisis began and that AGBA would have been in breach of its obligations even if the crisis had not materialized. Accordingly, the adoption of emergency measures did not amount to a breach of the FET standard.[16] The tribunal held that even if the emergency measures had breached the FET standards, the customary international law defense of necessity would have applied.

The tribunal did find that the Respondent breached the FET standard in relation to the concession's renegotiation between 2003 and 2005. The tribunal considered that a policy shift at the Federal level (to re-nationalize water concessions) likely caused the renegotiation to end. By requiring AGBA to continue to participate in the renegotiation without informing AGBA of the policy shift, the Respondent, through the Greater Buenos Aires Province, breached the "transparent treatment" requirement contained within the FET standard.[17] The tribunal did not award damages for this breach as it found that the termination was entirely based on the failure of AGBA and AGBA's shareholders to fulfill their obligations rather than any failure on the part of the State to accord FET.

Regarding the termination of the concession, the tribunal found that the Claimants had breached the concession contract such that the Respondent was entitled to terminate. Since the Respondent clearly did not base the termination solely on political reasons, the FET standard had not been breached.

Expropriation

The Claimants argued that they were victims of indirect expropriation as a result of the emergency measures implemented over the course of the concession, and that the termination of the concession amounted to direct expropriation. The tribunal rejected both arguments. It found that the emergency measures came with an undertaking to renegotiate the concession contract, which meant that they resulted in only a temporary reduction in the Claimants' income and did not amount to an indirect expropriation. Moreover, the concession could not have been directly expropriated because it was already running at a loss due to the concessionaire's conduct.

Discriminatory and unjustified measures

The tribunal rejected the argument that the State's measures were discriminatory and unjustified, finding that the Claimants had sought to draw comparisons with other concessionaries who were not at all in similar circumstances.[18] The tribunal rejected the argument that measures taken were unjustified given that: (i) the measures were in fact justified under the Contract, and (ii) the Claimants were precluded from arguing that certain regulatory measures were unjustified when they themselves had failed to comply with their contractual obligations.[19]

Argentina's Counterclaim

Argentina alleged that by failing to make the investments required under the concession contract, the Claimants had violated the fundamental right to water of thousands of people.[20] The Claimants objected to the tribunal's jurisdiction. They argued that the asymmetric nature of BITs prevents a host State from invoking rights under a BIT, including by submitting counterclaims. Moreover, the claimants argued that their consent to arbitrate was limited to disputes arising as a result of damage to their investments in Argentina, and that the counterclaim "did not relate to a dispute in connection with an investment, within the meaning of the BIT"[21] because all of the Respondent's claims were grounded in domestic law.

The tribunal rejected the Claimants' arguments and accepted jurisdiction over the counterclaim. First, it found that the dispute resolution provision of the BIT was broad enough to enable the Respondent to submit a counterclaim. In particular, the tribunal found that Article X(1) of the Spain-Argentina BIT was "neutral as to the identity of the claimant or respondent in an investment dispute arising 'between parties'" and that, together with Articles X(2) and X(3), it was clear that "either the investor or the host State can be a party submitting a dispute in connection with an investment to arbitration." The tribunal also observed that the cases relied upon by the Claimants, to argue that counterclaims are generally dismissed, were all based "on more narrowly drafted arbitration clauses, or on a lack of connection of counterclaims based on domestic law".[22]

The tribunal further found the "factual link" between the principal claim and the counterclaim to be "manifest," observing that "both the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession."[23]

Dismissing the counterclaim on its merits, the tribunal found that the human right to water "entails an obligation of compliance on the part of the State, but it does not contain an obligation for performance on the part of any company providing the contractually required service."[24]

Comment

The tribunal's decision to take jurisdiction over the counterclaim alleging violations of human rights on the basis of a "*factual connection*" between the principal claim and the counterclaim is the first reported decision of its kind from an investment treaty tribunal. The decision is also significant in light of the tribunal's willingness to consider broader principles of international law and to see the investment as sitting within a more open system, such that the "possible scope of claims to be submitted to arbitration [was]…not limited to rights directly based on the application…of the BIT".[25]

Together with *Perenco v Ecuador, Antoine Goetz v The Republic of Burundi, Zeevi Holdings v. Republic of Bulgaria and the Privatization Agency of Bulgaria* and *Burlington v. Ecuador*, among other matters, the decision in *Urbaser v. Argentina* forms part of a nascent group of cases in which tribunals have accepted jurisdiction over counterclaims brought by States.

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ICSID Tribunal Rules on Venezuela's Denunciation of the ICSID Convention

Award rendered in Tenaris S.A. and Talta-Trading e Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/12/23) sheds light on important consent and procedural issues

By Diego Romero

On 12 December 2016, an ICSID arbitral tribunal awarded more than US$137 million in compensation for the unlawful expropriation of Tenaris and Talta-Trading's (the Claimants) investments in the Venezuelan steel industry. The award, the second in a series of ICSID disputes between the Claimants and Venezuela, is particularly noteworthy for its assessment of the effects of Venezuela's 2012 denunciation of the ICSID Convention, as well as for its treatment of "cooling-off" periods (*i.e.*, negotiation and consultation periods) as procedural requirements (as opposed to jurisdictional ones).

Tenaris and Talta-Trading were companies incorporated under the laws of Luxembourg and Portugal respectively. The Claimants held indirect shareholdings in Tavsa, a Venezuelan producer of steel tubes (70%), and Comsigua, a Venezuelan producer of hot briquetted iron, also known as HBI (7.58%). Through a series of measures beginning in 2009 and concluding in 2011, the Venezuelan government nationalized and took possession of Tavsa and Comsigua. As a result, in 2012, the Claimants instituted ICSID arbitration proceedings against Venezuela, claiming that the nationalization and subsequent takeover of their companies amounted to an unlawful expropriation under the Luxembourg-Venezuela and Portugal-Venezuela BITs.

Venezuela raised three separate jurisdictional objections based on its denunciation of the ICSID Convention, and offered an expert opinion by Professor August Reinisch to support its allegations. In turn, the Claimants produced an expert opinion by Professor Christoph Schreuer.

First, in respect of Tenaris' investments in Comsigua, Venezuela argued that the parties never consented to ICSID jurisdiction, because such consent could only arise after the six-month cooling-off period provided in Article 9 of the Luxembourg-Venezuela BIT had passed. In addition to a six-month cooling-off period, Article 9 of the Luxembourg-Venezuela BIT included a fork-in-the-road provision, according to which the investor could choose whether to bring its claim before a competent national court or to international arbitration. On 2 December 2011, Tenaris notified Venezuela of the existence of a dispute. The notice of dispute expressed Tenaris' intention to submit the claim before ICSID. In turn, Venezuela denounced the ICSID Convention before the end of the six-month cooling-off period, on 24 January 2012. Thus, Venezuela was of the view that it never consented to ICSID arbitration, because said forum was no longer available for Tenaris when the negotiation period expired (*i.e.*, 2 May 2012).

Second, Venezuela argued that consent was never "perfected" because the Claimants did not comply with the six-month cooling-off period provided in Article 9 of the Luxembourg-Venezuela BIT and Article VIII.2 of the Portugal-Venezuela BIT.

Third, in respect of Tenaris' investments in Tavsa, Venezuela argued that Tenaris S.A.'s offer to negotiate — in which Tenaris' reserved its right to commence arbitration proceedings before the six-month cooling-off period ended if the negotiations proved futile — did not match the conditions set in Venezuela's offer to arbitrate in Article 9 of the Luxembourg-Venezuela BIT. Thus, according to Venezuela, Tenaris' offer to arbitrate did not perfect the parties' consent to ICSID arbitration.

In its analysis of Venezuela's jurisdictional objections, the arbitral tribunal began by recalling that the denunciation of the ICSID Convention affects all rights and obligations arising from consent to ICSID jurisdiction, unless said consent is given before the notice of denunciation. The arbitral tribunal went on to state that consent to ICSID jurisdiction is "perfected" when an investor accepts a State's offer to arbitrate. In this case, the arbitral tribunal explained that consent to ICSID arbitration could have been "perfected" at any time between the date of entry into force of the applicable BIT and 24 January 2012.

The arbitral tribunal then turned to Venezuela's first jurisdictional objection, concerning the issue whether consent under Article 9 of the Luxembourg-Venezuela BIT could only be "perfected" after the six-month cooling-off period had elapsed. The arbitral tribunal began by noting that the Luxembourg-Venezuela BIT did not explicitly prohibit the investor from expressing its consent — by choosing to submit its claim before one of the two fora provided in Article 9 of the Luxembourg-Venezuela BIT — when it notified the existence of a dispute. Furthermore, the arbitral tribunal stated that there was no evidence in the BIT that the negotiation requirement was set as a condition precedent to consent. The arbitral tribunal thus held that, under Article 9 of the Luxembourg-Venezuela BIT, an investor can make three distinct declarations through a single act (*i.e.*, notify the existence of a dispute, express its consent and choose to submit the claim before ICSID). As a result, the arbitral tribunal concluded that Tenaris' notice of dispute — which also expressed Tenaris' choice to submit the claim before ICSID — "perfected" consent to ICSID arbitration. In essence, and contrary to Professor Reinisch's opinion, the arbitral tribunal portrayed the cooling-off period as a mere procedural requirement with no actual bearing on ICSID jurisdiction.

Further, the arbitral tribunal considered the irrevocable nature of the investor's choice in Article 9 of the Luxembourg-Venezuela BIT as a strong indication of the possibility of perfecting consent in advance. In the eyes of the arbitral tribunal, the BIT would have not provided that the investor's choice was irrevocable, had it not been possible to perfect consent before the actual filing of a claim. In addition, endorsing Professor Schreuer's view, the arbitral tribunal held that a contrary interpretation of Article 9 of the Luxembourg-Venezuela BIT would encourage States to elude arbitration by denouncing the ICSID Convention the moment they receive a notice of dispute.

On the other hand, regarding Venezuela's second jurisdictional objection, the arbitral tribunal noted that Tenaris had filed its notice of dispute concerning its investments in Tavsa in November 2009, and had attempted to reach an amicable solution to the dispute for the following two years. The arbitral tribunal accordingly found that the cooling-off requirement in Article 9 of the Luxembourg-Venezuela BIT had been met years before Venezuela's denunciation of the ICSID Convention. Similarly, the arbitral tribunal found that Talta-Trading had complied with the cooling-off period in Article VIII.2 of the Portugal-Venezuela BIT, because it had engaged in negotiations for a period of one and a half years, which concluded in December 2011.

Lastly, the arbitral tribunal dismissed Venezuela's third jurisdictional objection by noting that Tenaris did not make use of its reservation of rights because it de facto complied with the six-month cooling-off period. Moreover, the arbitral tribunal found no mismatch between Tenaris' offer to negotiate and Venezuela's offer to arbitrate under the Luxembourg-Venezuela BIT. Indeed, the arbitral tribunal found that Tenaris' reservation of rights simply adhered to a widely recognized principle of international investment law: an investor need not engage in negotiations if they are futile.

The Tenaris award thus follows the trend in international investment arbitration that views cooling-off periods as requirements of mere procedural nature. Also, the award helps clarify the determination of the critical date on which the denunciation of the ICSID Convention becomes effective regarding the rights and obligations arising from consent to ICSID jurisdiction.

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Endnotes

[1] *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2017] UKSC 16.

[2] [2017] EWHC 31 (Comm).

[3] *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award dated 11 December 2013. See Romania's EU Catch-22 by Tom Lane for further details of the underlying dispute.

[4] *Supra* note 1, para. 28, noting the EC's participation as amicus curiae in the ICSID proceedings. See also Romania's EU Catch-22 by Tom Lane for further details of the underlying dispute and the EC's response.

[5] Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania — Arbitral Award Micula v Romania of 11 December 2013.

[6] Article 2(1) of the Act. The Act applies to England & Wales, Scotland and Northern Ireland (Articles 7 and 8), and has been extended by Statutory Instrument to Guernsey (SI No. 1199 dated 26 July 1968), Jersey (SI No. 572 dated 23 May 1979), Bermuda, the British Virgin Islands, the Falkland Islands and their dependencies, Gibraltar, Islands of Alderney, Island or Sark, Monserrat, Anguillan, St Helena and its dependencies and the Turks and Caicos Islands (SI No. 159 dated 10 February 1967). In the Isle of Man, the State's international obligations are incorporated into domestic law by virtue of the Arbitration (International Investment Disputes) Act 1983 (an Act of Tynwald).

[7] *Supra* note 1, para. 37.

[8] *Supra* note 1, para. 9.

[9] *Supra* note 1, para. 119.

[10] *Supra* note 1, paras. 62-67.

[11] *Supra* note 1, para. 68, citing in particular the principle of sincere cooperation enshrined in Article 4(3) of the Treaty on European Union.

[12] *Supra* note 1, paras. 71-76 and 109-111.

[13] *Supra* note 1, para. 126.

[14] *Supra* note 1, para. 54.

[15] *Supra* note 1, paras. 135, 152 and 160.

[16] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa*, ICSID Case No. ARB/07/26, Award dated 8 December 2016, paras. 680-683.

[17] Ibid., paras. 843-845.

[18] Ibid., para. 1096.

[19] Ibid., para. 1106.

[20] Ibid., paras. 1128 and 1151.

[21] Ibid., para. 1127.

[22] Ibid., para. 1143.

[23] Ibid., para. 1151.

[24] Ibid., para. 1208.

[25] Ibid., para. 1191.

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