Bird & Bird

Arbcall: International Arbitration

September 2016

Arbcall: A digest of recent International Arbitration News and Case Law updates from Bird & Bird's International Dispute Resolution team

Welcome to Arbcall – September 2016

Arbcall is a regular digest of news and case law updates from the world of international arbitration which we believe will be of interest to our clients. The aim is to highlight key developments from around the globe in the jurisdictions in which we practice. We hope that you find it interesting and we welcome your feedback. If you would like any further information about any of the matters covered in this issue please email any of the contacts listed at the end of this digest.

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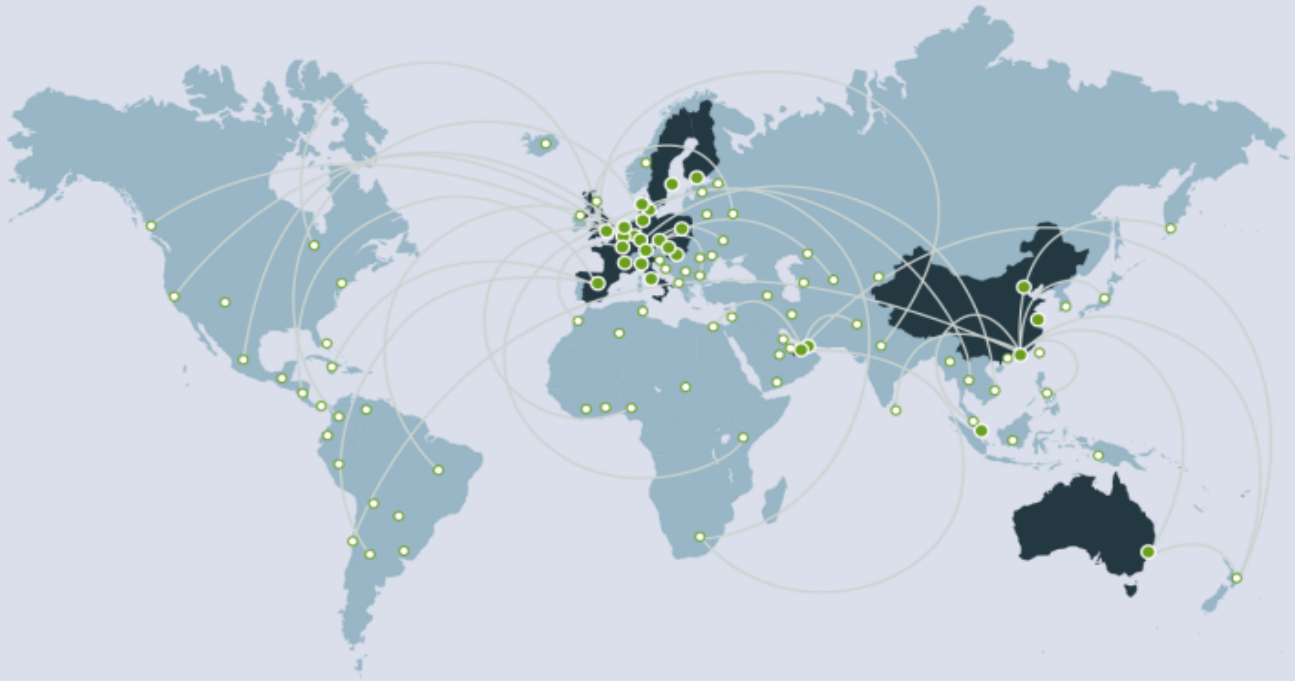

News - General

China International Economic and Trade Arbitration Commission (CIETAC) unveils its new guidelines on third-party funding with input from Bird & Bird's Robert Rhoda

On 19 May, CIETAC Hong Kong unveiled its new guidelines on third-party funding following developments in Hong Kong towards relaxing existing restrictions in this area. Robert Rhoda, a Bird & Bird Dispute Resolution partner, based in Hong Kong, is a member of CIETAC's working group which drafted the guidelines and is responsible for keeping them up to date.

As a result, Robert and Bird & Bird are referred to in the guidelines (which can be accessed here) and in a GAR article reporting on the new guidelines.

Arbitral Institutions

The German Institute of Arbitration – DIS – announces revision of its rules

The current rules date back to 1998. Click here to access them. A rules committee is being put together to help draft the new rules. It is not clear when the new rules will become active but we are monitoring the drafting process and we will keep you updated.

New SIAC Arbitration Rules in force from 1 August and new Investment Arbitration rules announced

The new SIAC rules are now in force and include a procedure for summary disposal. Jonathan Choo, a **Bird & Bird Dispute Resolution partner**, based in Singapore, has analysed the new rules noting that they are bold and innovative. To read his views click here.

The SIAC has also announced that it will launch brand new Investment Arbitration Rules in September 2016.For more details please click: http://www.siac.org.sg/

ICC continues to make changes in response to calls for greater transparency

Over the last few months the ICC has made a number of procedural and administrative changes in response to criticisms that its machinery is opaque and procedures outdated. These changes include publishing information on its website regarding the configuration of ICC tribunals once constituted, the names and nationalities of arbitrators sitting on all ICC cases and who made the appointment. However, confidentiality is still preserved as parties may opt-out of this limited disclosure. Other changes made by the ICC include greater transparency over the calculation of fees and agreeing to cut its own fees if delays are the responsibility of the arbitrators rather than the parties involved.

Arbitral Agreements

English patent court considers the correct approach to reconciling an exclusive jurisdiction clause and an arbitration clause in conflict with each other.

In an arbitration agreement where the disputes clauses appeared to contradict each other, the court looked at the intention of the parties and interpreted the meaning of the agreement in accordance with those intentions. A dispute arose in relation to a licence agreement. The agreement provided for the exclusive jurisdiction of the English courts but at the same time also stated that the parties agreed to arbitrate should a dispute arise between them.

The court considered the correct approach to adopt when faced with conflicting clauses. The court considered the parties intentions and decided that it was likely that they wanted the English courts to have jurisdiction over disputes arising out of the licence agreement and as a result the arbitration clause was 'permissive'. It allowed the parties to jointly elect to arbitrate but did not allow either party to insist on it or start, if the court was already seised.

(1)OOO Bbbott (2) Godfrey Victor Chasmer v Econowall UK Ltd & othrs **[2016] EWHC 660 (IPEC)**

Hong Kong Court confirms the doctrine of separability of arbitration agreements

In accordance with the long-standing doctrine of the separability of contracts, the Hong Kong Court of First Instance has confirmed that even in circumstances where the underlying contract may not have been validly formed, the agreement to arbitrate was valid and binding.

Chee Cheung Hing & Co Ltd v Zhong Rong International (Group) Ltd (HCA 1454/2015) **(Hong Kong Court of First Instance).**

Italian Supreme Court states that arbitration clauses must be construed in accordance with the laws in force at the time they were agreed between the parties.

The clause in issue was agreed between the parties in 2001. In 2006 Italian law was amended to state that arbitral awards may only be challenged on a point of law if the parties have agreed or if the law otherwise provides.

The case turned on the fact that the claimant wanted to challenge the award made on a question of law. The Milan Court of Appeal would not allow the appeal because it stated that the relevant arbitration clause did not permit the parties to challenge the award on a point of law; it was silent. The Supreme Court overturned this ruling and stated that the challenge should be allowed. It said that arbitration clauses should be interpreted in accordance with the law in force at the time they were made.

Case: Decision no. 9341/2016 (9 May 2016).

Arbitral Awards

In the UAE the DIFC Court of First Instance orders winding up of company so that an arbitral award made against it can be satisfied

The defendant company refused to satisfy a DIAC arbitration award made against it. The defendant was unable to show that it was able to pay its debts as they fell due and so the DIFC Court of First Instance made an order winding the company up. The defendant said it was intending to apply to have the award annulled but the court rejected that argument as a consideration following English law principles.

CFI 013/2016 Oger Dubai LLC v Daman Real Estate Capital Partners Limited

German Federal Court upholds award even though arbitrator also an active judge

According to German law, if a current judge wishes to also act as an arbitrator, the judge must obtain permission from both parties and seek official authorisation from the relevant judicial administration. The judge in this case had not done so, yet he was a member of the arbitral panel which had made an award. However, the Federal Court did not set aside the award as in its view, the lack of judicial authorisation only affected the relationship between the judge and the judicial administration rather than the judge (arbitrator) and the parties to the arbitration.

Docket No I ZB 99/14 (German Federal Court of Justice).

Following a reference from the Paris Court of Appeal, the ECJ has ruled that EU competition law is not infringed by the ICC award in favour of Sanofi

US company Genetech is trying to get the ICC award made against it set aside because it contends it was made in respect of royalties regarding a revoked patent, payable to Sanofi. The US company stated that the award breached EU competition law because it was paying royalties 'without cause' and this was giving Sanofi a competitive advantage.

The ECJ disagreed, finding in favour of Sanofi. However the ECJ did not deal with Sanofi's point that a reference to the ECJ should not be allowed in relation to a matter of French arbitration law, as international awards should not be reviewed on their merits. The ECJ only said that if a reference is made to it, it is obliged to answer.

Bird & Bird's Dispute Resolution partners Annet von Hooft and Marion Barbier are representing Sanofi.

For a copy of the ECJ's decision please click here.

UNCITRAL tribunal states that Italian football club Juventus breached its sponsorship deal with Nike but awards only €1.5 million

The dispute arose out of the match fixing scandal surrounding the Italian football leagues in 2006. Nike considered terminating its 12 year agreement with the club at this point but decided to continue albeit under revised terms. From 2011 onwards, the tribunal was told that Juventus repeatedly breached the terms of the agreement by not wearing Nike clothing at designated events or failing to mention Nike during kit launches.

Nike sought to recover €40 million and a further €26-39 million for loss of brand exposure. The tribunal agreed that Juventus had breached its contract but considered that not only was Nike trying to double recover, it had also only suffered losses in the last few years of the deal, prior to this it had received its expected 'brand exposure'. The tribunal therefore awarded Nike €1.5 million, which is 5% of the compensation over a two year period and held that Juventus should pay €500,000 towards the costs of the arbitration and Nike's legal fees.

Nike European Operations Netherlands BV v Juventus Football Club SPA

Arbitral Process

England & Wales

Setting aside an award under s.72 of the Arbitration Act 1996; no ratification of award by mere silence and inaction

In this case the English Commercial Court set aside an award under s.72 of the Arbitration Act 1996 as it held that the notice of arbitration had not been validly served on the claimant, the tribunal was not properly constituted and therefore, the award was made by the arbitrator who did not have the necessary jurisdiction.

It is important that a notice of arbitration should be served on a party who is authorised to accept service and that there is a risk of challenge to any award if it is made against a party who has not participated in the arbitration. Whilst a party may have operational authority for day to day decision making in relation to a contract, as was the case here, it may not have the requisite authority to accept legal notices and documents. The court found the party did not have the requisite authority, and therefore service of the notice of arbitration was not properly effected.

The defendant had also appointed a sole arbitrator and the arbitration went ahead in the absence of the claimant. The arbitrator made an award in the defendant's favour and the claimant applied to set the award aside.

The Court held that the claimant could not ratify an award by its mere silence and inaction. As a result the arbitral tribunal was not validly constituted and the award was made without appropriate jurisdiction. The award was set aside.

Sino Channel Asia Ltd v Dana Shipping and Trading PTE Singapore & Another [2016] EWHC 1118 (Comm)

The time for challenging an award under the Arbitration Act 1996 runs from the date the award is made

The statutory time limit for challenging an arbitration award under s.80 of the Arbitration Act 1996 is 28 days after the award is made, not from when the parties have sight of the award, even if the tribunal has not released the award. In this case, the tribunal did not release the award until its outstanding fees had been paid. The claimant applied to challenge the award under both s.68 and s.69 but was 74 days over the time-limit for doing so

and therefore needed a retrospective extension of time.

The extension was refused for a variety of reasons including the length of the delay, the amount of outstanding fees was not large and the fact the claimant had been slack in chasing the respondent for payment. In his judgment Sir Bernard Eder suggested that the CPR principles of relief as set out in the *Mitchell* and *Denton* cases may also apply to this area of law rather than the principles set out in *Terna Bahrain*.

S v A and B [2016] EWHC 846 (Comm)

Singapore

Singapore High Court orders stay of two different but related court proceedings where one claim should have been commenced by way of arbitration

A claimant bought two separate claims against two separate defendants but which were for the same amount and for essentially the same losses. The claims were subject to different dispute resolution clauses; one to be arbitrated and one subject to the jurisdiction of the Singapore courts. The court held that commencement of the first action in the Singapore court was in breach of the arbitration clause in that contract. The court held that this action should be stayed pending the outcome of arbitration proceedings which should be commenced and that the court had power to use its case management powers in this scenario, even though the matter was one of arbitration. The court also ordered a stay of the court proceedings against the second defendant until the resolution of the arbitration against the first defendant as both claims dealt with the same losses.

Hong Kong

Where the applicant had delayed making the application until the end of the arbitration limitation period the Court of Appeal refused to grant an anti-suit injunction against the foreign proceedings

The case is a reminder that anti-suit injunctions must be sought promptly. In this case the injunction was refused even though there was a clear agreement between the parties to arbitrate. The court said that it will look at each case on its facts and here the relevant factors contributing to the court's decision included:

- How far advanced the foreign proceedings were – proceedings were already underway in mainland China and a couple of interim decisions had already been made in that matter. The CA was conscious of intruding into Chinese sovereignty.
- The contractual limitation period for bringing a claim in the agreed forum – the CA held that the delay and comity were related. In any event, the delay in making the application for an injunction meant that the limitation period had expired both in the litigation and in the arbitration and therefore, if the injunction was granted the defendant would be left without a remedy.
- Whether there was any tactical reason for the delay, for instance, to deprive the opposing party of a remedy – see above.

Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Limited [2016] HKEC 1150 (Hong Kong Court of Appeal).

Investment Treaty Arbitration

Guidance requested from the ECJ on whether intra-EU bilateral investment treaties (BITs) are compatible with EU law

The guidance relates to arbitration clauses contained in BITs entered into between member states before they acceded to the EU, but where the arbitration proceedings are commenced after the member state has joined the EU. It is not clear whether these arbitration clauses are compatible with EU law.

The BIT in question was made between Slovakia and the Netherlands and relates to a dispute dating back to 1991 between a Dutch insurance group, Achmea and Slovakia regarding the health insurance market. Slovakia applied before the German Federal Court of Justice to have the €22million award in favour of Achmea set aside. The German Federal Court has stayed the proceedings and made the reference to the ECJ.

The EU has been seeking to abolish arbitrations under intra-EU BITs but in the reference it is clear that the German Federal Court does not want to take this path and that investment arbitration should be seen as a good alternative to state courts.

Docket No. I ZB 2/15 (German Federal Court of Justice).

ICSID tribunal grants request to stop party from talking to the media

The dispute relates to a claim between United Utilities, its Estonian subsidiary and Estonia. The companies are claiming €90 million in damages from Estonia for the state's refusal to grant an application for tariff increases, under competition legislation passed six years ago. Estonia sought an order banning the publication of information about the case in January after the Estonian subsidiary of United Utilities proposed to publish extracts from the claimants' memorial on jurisdiction and merits on its website as part of a shareholders' report.

ICSID Convention and ICSID Arbitration Rules restrain the publication of documents by a claimant generated in arbitration. However the tribunal stated that there were no general duties of confidentiality or transparency in ICSID arbitration and that this issue must be approached on a case by cases basis.

The tribunal agreed to the order in part prohibiting the claimants from publishing documents filed in the arbitration, including "written submissions, witness statements, expert reports and documents produced within the framework of document production, or any excerpt or extract thereof." But it declined to grant Estonia's request to ban the claimants from any public discussion of the substance of the case. It stated that such "general discussion" is permissible provided it does not "antagonise any party, exacerbate the parties' differences, aggravate the dispute, disrupt the proceedings or unduly pressure any party". In this case the order sought was urgent and proportionate.

https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/14/24&tab=DOC

PCA clarifies the test to decide when a corporate reorganisation will be considered an abuse if its sole purpose is to gain the benefit of BIT protection

The claim concerned Phillip Morris Asia (PM Asia) against Australia regarding its tobacco plain packaging legislation. The Permanent Court of Arbitration (PCA) published, in a redacted form, the UNCITRAL award on jurisdiction and admissibility finding that the reorganisation of PM Asia under the sole ownership of a Hong Kong umbrella company was an abuse of process. The PCA found that the sole purpose of the restructuring was to enable PM Asia to bring a treaty claim. The dispute was already foreseeable at the time of the reorganisation and therefore the claim was inadmissible. For the dispute to have been permissible, the restructuring should have occurred before any claim was in contemplation. This seems a difficult hurdle but could be overcome if the restructuring had occurred as soon as the BIT became available or very early on in the investment covered by the BIT.

Philip Morris Asia Limited v The Commonwealth of Australia (PCA Case No. 2012-12)

ICSID tribunal states that ECT arbitration provisions would trump EU law in the event of a conflict

Spain has made a number of reforms to its renewable energy sector which has resulted in over 30 claims being lodged in response under the Energy Charter Treaty (ECT). Two of these claims were launched by RREEF, the real estate arm of Deutsch Bank. The funds are registered in Jersey and Luxembourg, and Spain contended that the Luxembourg fund had no standing to bring a claim because the ECT did not apply to intra-EU investment disputes.

The ICSID tribunal stated that there was no evidence to say that the ECT signatories had agreed to exclude intra-EU investment from its scope and that in the event of a conflict between the ECT's arbitration provisions and EU law, the ECT would prevail.

RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/30)

SCC emergency arbitrator appointed in dispute under the Russia- Moldova BIT, relief requested denied, yet another investor under the same BIT is successful two weeks later

In the first action, the claimant, a Russian shareholder of a Moldovan bank, issued a Notice of Dispute in May 2016 and this triggered a 6 month cooling–off period before the arbitration could begin. The Moldovans responded by saying that they were not authorised to enter into any negotiations. The claimant, as a result, sought interim measures and requested the appointment of an emergency arbitrator (EA) under the SCC's Arbitration Rules 2010.

The SCC appointed the EA and designated the seat of the arbitration as Stockholm, as the parties had not decided this between them. Moldova did not participate in the proceedings. The EA declined to grant the interim measures requested on the basis that the interim measures sought by the claimant were to prevent an event occurring in the future which was economic in nature. The EA considered that this could be dealt with by way of damages, if the event did indeed occur. So any resulting harm could be repaired, and the granting of interim measures was simply not necessary.

Evrobalt LLC v The Republic of Moldova SCC 2016/082 (EA)

However, a second Russian investor has won emergency relief from the SCC, requiring Moldova to halt the cancellation of its shares in a local bank – two weeks after another investor's request for similar relief was denied (see above).

In an emergency award a different EA ruled that Russian company Kompozit would suffer irreparable harm should Moldova proceed with the cancellation of its shares in one of the country's largest commercial banks, Moldova Agroindbank.

To read the judgment in the second application click here.

Enforcement

Read Bird & Bird's views on The Hague Court's refusal to enforce the Yukos arbitration award.

Please click here.

Since the decision referred to above, the former majority Yukos shareholders have sought to appeal against the Dutch court decision to set aside their multi-million dollar award against Russia.

The grounds of appeal are not known yet but to read more click here.

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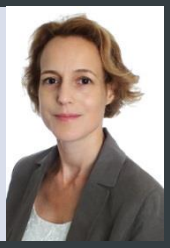

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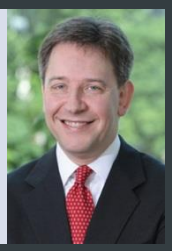

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