Quadrant CHAMBERS

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International Arbitration News

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Editorial by Simon Rainey QC

An excellent start to the New Normal

On 30 March I wrote an article '[Arbitration Hearings and the Corona New Normal: Ten Golden Rules or your Easy Path to a Virtual Hearing]". How long ago that seems. Long dreary months of lockdown have at last given way to patchy and fragile promises of some ghostly resemblance of aspects of life pre-COVID, But the future in terms of difficulties of air travel, undesirability of large gatherings in close quarters, and the ever changing kaleidoscope of countries on the 'safe, unsafe, and who knows' quarantine lists means that the medium term future for how we used to conduct international arbitration is unchanged. The New Normal is now and will, for the foreseeable future, be the only Normal.

We predicted back in March that arbitration could and would rise to the challenge and that the initial gloomy reservations voiced in early Webinars about the disadvantages of virtual hearings would be proved wrong and out-dated. We were right. Since March, the arbitration community as a whole and the institutions in particular have mapped out in surprising detail and with commendable speed the landscape of the brave new world. There have been many initiatives, protocols and guidance statements. Three perhaps stand out.

First, a Joint Statement on COVID-19 which was issued by the leading arbitration institutions on 16 April. While in high-level terms, it demonstrated the resolve to take a global and cross-institutional approach to the challenges faced by different sets of rules and different institutional structures.

Second, in June VIAC published the "Vienna Protocol: A Practical Checklist for Remote Hearings": guidance and practice notes which are specifically tailored for the age of fully virtual or virtually virtual hearings. It has the advantage of taking up where the Seoul Protocol on Video-Conferencing (in the old world) leaves off and is a protocol which can apply universally and is not tailored to any particular institution or rules framework. This deserves to be a go-to document.

Third, and turning to the practical side, in May three major venue providers (Maxwell; IDRC; Arbitration Place) formed The International Arbitration Centre Alliance to promote and facilitate the rapidly emerging 'hybrid' hearing, with participants grouped in different locations. Expect more venues to join.

The future may not look encouraging for 'the way things were' (in any sphere). But the dynamism and drive of international arbitration in the face of crisis, make the future for arbitration, at least, look an interesting and exciting one (in the good sense).

Intra-EU Treaty Termination – A New Chapter in Legitimate Expectations and European Relations

Author: Gaurav Sharma

The COVID-19 lockdown has not dented the European Union's ambitions to put an end to intra-EU bilateral investment treaties ("Intra-EU BITs"). Following their Declaration of 15 January 2019, the majority of the Member States of the European Union agreed on 5 May 2020 to terminate the 124 bilateral investment treaties that exist between them and render their arbitration clauses of no effect (the "Termination Agreement"). The Termination Agreement will take effect upon the completion of the ratification process, which is currently underway.

The Declaration, and now the Termination Agreement, "implement" the ECJ's 6 March 2018 decision, which was not without controversy, in ***Slovak Republic v. Achmea B.V.*** (CJEU Case C-284/16). There, the ECJ determined that arbitration provisions in Intra-EU BITs are inconsistent with EU law as they deprive EU courts of jurisdiction to issue binding determinations of EU law when these arise in arbitration proceedings between investors and EU Member States.

The Termination Agreement adds a further layer of controversy by preventing investors from relying on international law obligations assumed by host states which were in effect at the time of making their investments. It does this, firstly, by providing that in the case of arbitral proceedings either initiated, or awaiting an award, after the date of the ***Achmea*** judgment, the EU Member States party to the Intra-EU BIT in question must "inform [the relevant] arbitral tribunals about the legal consequence of the ***Achmea*** judgment". They,

NEWS

Energy and International Arbitration specialist Gaurav Sharma joins Quadrant Chambers

In February we were very pleased to welcome energy and international arbitration specialist Gaurav Sharma as a new member of chambers.

Gaurav is a highly experienced international arbitration practitioner, having appeared as an advocate in many dozens of investment and commercial arbitrations whilst Counsel at Three Crowns, and previously as an associate at Debevoise & Plimpton. He is dual-qualified, having passed the Paris bar exams in 2008 to become admitted as an avocat.

Gaurav has particular experience in energy arbitration, having also spent several years as a Senior Legal Counsel in Shell's Global Litigation Group, where he acted as lead counsel in many of the group's upstream oil and gas disputes, gas and LNG pricing arbitrations, and directed Shell's multi-disciplinary investment protection working group. Between 2014-2016, Gaurav was a member of the IBA Subcommittee on Investment Treaty Arbitration. He featured in The Legal 500 as a 'Next Generation Lawyer' in the field of international arbitration (2018, 2019).

Simon Rainey QC was named **International Arbitration Silk of the Year** at the Legal 500 Awards 2020.

Quadrant was short-listed for **International Arbitration Set of the Year** at the same awards.

In June 2020 Gaurav Sharma was appointed to the ICC's UK Selections Sub-Committee.

TOP RANKED Chambers UK BAR 2020

The Legal 500 UK Awards 2020 WINNER

together with the other signatory Member States, must also require their local courts to refrain from recognising or enforcing awards issued in such proceedings. Secondly, Article 3 of the Termination Agreement renders so-called "sunset clauses" in terminated Intra-EU BITs of no "legal effect". In other words, even where an Intra-EU BIT expressly permits investors to bring claims within a certain period following its termination – so long as the investment itself was made during the term of the BIT – the Termination Agreement renders this obligation of no effect.

Cancelling an investor's rights in this way undoubtedly has a substantial impact on the legitimate expectation it had when it made its investment that it would benefit both from the substantive protections accorded to it by any Intra-EU BIT, as well as the procedural protection of access to arbitration of disputes by a neutral tribunal in the event of a dispute arising with the host state. International law does not take the retroactive deletion of such obligations lightly. Article 28 of the Vienna Convention on the Law of Treaties articulates the customary rule of non-retroactivity, providing that: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party". Further, Article 30 states that in the case of any inconsistency between the two treaties, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

It may come as a surprise that the Termination Agreement's Member State signatories have elected to adopt such an extreme position by their newest treaty, but based on the express language of the Termination Agreement there should be no doubt that such was their intention. For better or worse, the Termination Agreement has teeth and is intended to bite - hard.

Of course recognition and enforcement can take place outside the Member State signatories' jurisdictions. It therefore remains to be seen whether arbitral tribunals will agree with the ECJ's reasoning and logic in the *Achmea* judgment or depart from it; and whether non-contracting state courts around the world will take heed of the Termination Agreement in any way when it comes to the recognition and enforcement of any awards issued in "New Arbitration Proceedings" absent any legal obligation requiring them to do so.

It's not easy being green: sustainable arbitration in the spotlight

Author: Stephanie Barrett

In recent years climate change and sustainability issues have frequently been in the media and this is unlikely to change any time soon. Much attention has been focussed on the ecological impact of the industries that use arbitration. However, the impact of arbitrations themselves also merits consideration.

To this end, the arbitrator Lucy Greenwood has devised a "Green Pledge" which practitioners can sign up to. The full text is available at www.greenwoodarbitration.com/greenpledge. In summary, it asks arbitrators and other practitioners to, wherever possible:

(a) Consider and question the need to fly/travel rather than use screen-sharing/video technology.

(b) Offset carbon emissions of any flights taken.

(c) Give consideration to witnesses giving evidence at hearings via video-link.

(d) Not request hard copies of documents and discourage the use of hard copy bundles. Correspondence should be electronic unless hard copies are expressly required.

The Pledge is to be welcomed and, indeed, won the 2020 Best Development GAR Award. There is already progress in some quarters e.g. email communication regarding procedural matters is almost ubiquitous. However, there is much room for improvement, especially as regards unnecessary flights and hard-copy documentation.

As the Pledge recognises, there will always remain occasions when flights or hard copy documents are necessary. Anyone who has ever witnessed e.g. cross-examination via video-link will recognise the potential for technological problems or confusion. However, such problems can be overstated and, given modern technology, the starting point should now be as set out in the Pledge.

While focused on sustainability, the Pledge raises general issues of efficiency and cost-effectiveness. Unnecessary documents and lengthy witness evidence should be avoided where possible in any event. Furthermore, in these times of COVID-19, remote/electronic working methods and technology have proved vital. Even with many countries in lockdown conditions, some arbitrations continue to take place using electronic bundles and/or video-link. As practitioners become more familiar with this technology, the Pledge requirements may come to represent the usual way of proceeding.

Stephanie Barrett has extensive experience of commercial arbitrations under LMAA terms and substantial experience of arbitrations conducted under other terms such as LCIA and HKIAC, as well as arbitration applications in the High Court under the 1996 Act. She is often instructed to provide advisory and advocacy work in relation to arbitration. She has experience of a range of issues relating to arbitration procedure, including disputes concerning appointment, disclosure, jurisdiction and appeals under sections 67, 68 and 69.

Upcoming Events

In the autumn we will be holding two international arbitration events and our annual energy disputes event.

Once the long-awaited Supreme Court judgment in ***Halliburton*** is released, we will be delighted to welcome to the panel Jacomijn van Haersolte-van Hof, Director General of the LCIA and Phillipa Charles, Head of International Arbitration at Stewarts, who join Quadrant's Simon Rainey QC and Gaurav Sharma.

One Contract, Two Arbitrations – Res Judicata in Long Term Contracts

The panel will discuss second arbitrations under long-term contracts. It will touch on issues such as res judicata, good faith and how a tribunal might deal with issues of construction.

Quadrant Annual Energy Disputes Event

This year we will be holding our annual energy disputes event online. Our speaker panel includes Russell King, Legal Counsel at RWE Supply & Trading GmbH, Katy Hanks, Legal Counsel at Trafigura and Louise Woods, Partner at Vinson & Elkins.

Dates for the above are to be confirmed, contact: marketing@quadrantchambers.com

GAR Live Energy Conference

Quadrant are very pleased to be sponsoring and participating in the GAR Live Energy Conference taking place on 2 December in London.

Previous Events

On 14 July, the Eversheds Sutherland team of Kimeya Baker, Kate Lomas, Michael Armstrong, Dan Younger and Quadrant's Joe Sullivan, Ben Gardner and Tom Nixon won our **Annual International Arbitration Quiz Night** for the second consecutive year.

To challenge next year... contact marketing@quadrantchambers.com

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